

**STATE OF MINNESOTA  
PETROLEUM TANK RELEASE COMPENSATION BOARD**

IN THE MATTER OF THE PROPOSED )  
RULES GOVERNING THE PETROLEUM )  
TANK RELEASE COMPENSATION FUND )

**STATEMENT OF NEED  
AND REASONABLENESS**

**I. INTRODUCTION.**

In 1992, the Office of the Legislative Auditor evaluated the Petrofund in order to address the increasing cost of the program. Among other suggestions for improving the program's efficiency, the Auditor recommended that the Petroleum Tank Release Compensation Board (hereinafter the "Board") "promulgate a standard schedule of prices for reimbursement of specific cleanup services," noting that a fee schedule "would provide a basis for staff reimbursement decisions and could help to reduce expenses to the Petrofund by strongly encouraging tank owners to select economical contractors." This would help ensure that claims for reimbursement meet the standard of reasonableness required by Minn. Stat. §115C.09, subd. 3. In addition, a fee schedule would provide applicants for reimbursement with a guide to necessary cleanup work and a framework for determining reasonable costs.

The remediation, or cleanup, of petroleum releases typically requires tank owners to enlist the professional services of environmental consultants (to determine the extent of the actual or potential threat to human health or the environment posed by the petroleum release) and contractors (to perform any excavation, trucking, soil disposal, or other service necessary to address the threat and clean up the site). Consultants also usually prepare and submit required reports and cleanup plans to the Minnesota Pollution Control Agency. Costs for these consulting and contracting services are reimbursable if they meet the standard of eligibility established under Minn. Stat. Ch. 115C, and the standard of reasonableness required by Minn. Stat. §115C.09, subd. 3. In addition, Minn. Rule



2890.0075 currently stipulates that applicants for reimbursement must prove the reasonableness of all incurred eligible costs by soliciting written competitive bids for each contractor service and written proposals for consultant services. Rule 2890.0075 also requires the applicant to make a good faith effort to ensure that the costs in the proposal selected are reasonable considering the qualifications of the consultant and the services to be performed.

The majority of applicants, however, do not possess the specialized knowledge and training required to make such determinations. The need for the fee schedule is also evident from the current disparity in costs submitted for Petrofund reimbursement. Due to the nature of the environmental remediation industry and the presence of a reimbursement-driven market, substantially identical services command widely divergent rates of compensation. The proposed amendments address these concerns by specifying the type of personnel needed for effective site assessment and remediation, and a range of costs considered reasonable for remediation of petroleum contaminated sites. Any deviation from these specifications must be set forth and justified by the consultant or contractor in the proposal or bid. These rules are designed to elicit the most cost-effective approach to remediating the petroleum contamination.

Finally, to ensure that the rules do not impose an unreasonable burden on the regulated community, the proposed amendments were developed with the assistance of a Task Force comprised of representatives of environmental engineering firms, independent contractors, the petroleum industry, the Petroleum Marketers Association, the Minnesota Pollution Control Agency, and the Department of Commerce. The first draft was presented for preliminary public comment in January, 1994. After members of the regulated community and the public offered their comments and suggestions for changes, additional meetings of the Task Force were held to refine the document. On July 20, 1994, the rules were presented to the Petrofund Board. After the Board suggested revisions, members of the regulated community again responded to the opportunity to

offer their comments and suggestions, many of which were incorporated into the final version. This version was approved by the Petrofund Board on August 25, 1994.

## **II. STATEMENT OF AUTHORITY.**

Minnesota Statutes Ch. 115C, the Petroleum Tank Release Cleanup Act, provides a mechanism for persons who take corrective action in response to petroleum tank releases to receive partial reimbursement for the costs of corrective action. Minn. Stat. §115C.07, subd. 3 (a) stipulates that the Board shall adopt rules regarding its practices and procedures, the form and procedure for applications for compensation from the fund, and procedures for investigation of claims, and specifying the costs that are eligible for reimbursement from the fund. Additionally, Minn. Stat. §115C.07, subd. 3 (e) stipulates that the Board shall publish proposed rules establishing a fee schedule of costs or criteria for evaluating the reasonableness of costs submitted for reimbursement, and Minn. Stat. §115C.07, subd. 3 (g) stipulates that the Board may adopt other rules necessary to implement the petroleum tank release cleanup act.

The rules as proposed amend Minnesota Rule 2890 by establishing a schedule of reasonable costs and staff requirements, delineating consulting and contracting services costs that are prima facie unreasonable during various phases of remediation, reforming currently required bidding procedures, and listing in greater detail the costs not eligible for reimbursement.

## **III. STATEMENT OF NEED AND REASONABLENESS.**

### **Part 2890.0010 DEFINITIONS.**

Part 2890.0010 defines terms used in the rules governing Petrofund reimbursements for petroleum tank releases.

**Subpart 2b. Clear and convincing evidence.** Subpart 2b is needed to clarify a technical term used in the body of the rules which presents the secondary standard of proof of the reasonableness of incurred costs. This standard allows the applicant the opportunity to account for variance from the established schedule of standard tasks and maximum costs and the competitive bidding requirements in circumstances which require a high evidentiary standard but do not require proof beyond a reasonable doubt.

**Subpart 5a. Prima facie unreasonable.** Subpart 5a is needed to clarify a technical term used in the body of the rules which presents the primary standard of proof of the reasonableness of incurred costs. This standard allows the applicant the opportunity to account for any variance from the established fee schedule in compelling circumstances.

**Subpart 5b. Reasonable evidence.** Subpart 5b is needed to clarify a technical term used in the body of the rules which presents the tertiary standard of proof of the reasonableness of incurred costs. This standard allows the applicant the opportunity to account for variance from the established schedule of standard tasks and the competitive bidding requirements in circumstances which involve costs related to an alternative technology or unforeseen drilling conditions and therefore do not require a higher evidentiary standard.

**Part 2890.0070 ELIGIBLE COSTS.**

**Subpart 3. Documentation of eligible costs.** This subpart conforms the rule to the requirement of Minn. Stat. §115C.09, subd. 3 (b), which stipulates that the Board must determine that costs are reasonable before reimbursement can be made. Furthermore, the subpart alerts applicants that the Board shall hold them, not contractors or consultants, ultimately responsible for controlling costs. This subpart also emphasizes the necessity for

the applicant to ensure that all costs are properly documented and kept as low as reasonably possible throughout the entire cleanup.

**Part 2890.0071 INELIGIBLE COSTS.**

This part replaces the current part 2890.0080 by specifying in greater detail tasks which are commonly associated with petroleum tank release sites but which do not minimize, eliminate, or clean up a release to protect the public health and welfare or the environment. It is necessary to specify that these costs are ineligible so that applicants will not inadvertently claim and expect reimbursement for them.

It is necessary and reasonable to declare costs for the following tasks ineligible for the reasons stated below.

- A.** This item adds "abandonment of tanks in place" to the language of the current rule. The costs incurred to abandon tanks in place, like other costs associated with the tanks themselves rather than a petroleum release, are not costs associated with actions which minimize, eliminate, or clean up a release to protect the public health and welfare or the environment.
- Items **B.**, **C.**, **D.**, **E.**, and **F.** are retained from the current rule.
- G.** Aesthetic and site improvements are not the result of actions which minimize, eliminate, or clean up a release to protect the public health and welfare or the environment.
- H.** This item is retained from the current rule.
- I.** In the absence of a declaration of emergency, overtime hours are not necessary for effective remediation of any petroleum contamination.
- J.** It is reasonable to assume that consultants and contractors located 60 miles or less from a site need not incur per diem expenses.
- K.** If the damage results from negligence on the part of the contractor performing corrective action services, it should be covered by the contractor's liability insurance or

other applicable insurance. In other circumstances, unless the damage is necessary to access the petroleum contaminated soil, it is not associated with actions which minimize, eliminate, or clean up a release to protect the public health and welfare or the environment.

**L.** The specified site restoration costs are attributable to the tank removal itself and therefore are not eligible costs.

**M.** If the removal of water from the excavation basin minimizes, eliminates, or cleans up a release to protect the public health and welfare or the environment, reasonable costs incurred to remove the water are eligible for reimbursement. In order to document that the removal does, in fact, constitute a remedial action, the applicant must secure Minnesota Pollution Control Agency approval.

**N.** Clean fill in excess of the agency-approved amount of contaminated soil removed for disposal replaces a void left by removed tank(s); costs for it therefore are attributable to the tank removal itself and not eligible for reimbursement.

**O.** Mark-up charges represent undocumented charges added to the actual cost to perform a task. They therefore are not associated with actions which minimize, eliminate, or clean up a release to protect the public health and welfare or the environment.

**P.** Obtaining reimbursement from the Board does not require specialized knowledge, and the reimbursement application includes detailed directions on the proper way to complete it. It is therefore reasonable to expect that the applicant may fill out the form without incurring costs for a consultant's assistance.

## **CONSULTANT SERVICES REIMBURSEMENT**

### **Part 2890.0072 OVERVIEW OF RULES GOVERNING REASONABLENESS OF COSTS FOR CONSULTANT SERVICES.**

This part serves as a table of contents for the consultant services rules and provides applicants and members of the regulated community with a guide to the major topics covered in the ensuing parts.

### **Part 2890.0073 DEFINITIONS RELATED TO CONSULTANT SERVICES.**

**Subpart 1. Scope.** Part 2890.0073, subparts 2-68, define terms used in these rules.

These definitions are necessary for proper interpretation and application of the rules. The terms are commonly used in the environmental remediation industry and relate to aspects of the process of cleaning up petroleum tank releases, from methods used to determine the extent of the release and its potential threat to human health and the environment to various strategies for remediating any petroleum contamination. The list of terms includes the currently foreseeable elements of the process of environmental consulting which are regulated by the subsequent schedule of maximum costs for consultant services. It is therefore essential that applicants understand these terms. To ensure that the definitions are reasonably clear and understandable by laypersons and other actual and potential applicants for reimbursement, members of the Task Force, other members of the regulated community, and technical experts at the Minnesota Pollution Control Agency assisted in drafting the definitions.

**Subpart 2. Air emission testing.** This term denotes a method used to ensure that the cleanup system is operating within regulatory guidelines.



**Subpart 3. Aquifer test.** This term denotes a method used to determine the most cost-effective cleanup alternative.

**Subpart 4. Background review.** This term denotes an activity intended to help determine the most cost-effective cleanup alternative.

**Subpart 5. CAD installation notification worksheet.** This term denotes a document which must be submitted to the Minnesota Pollution Control Agency as part of the overall cleanup procedure.

**Subpart 6. CAD system monitoring worksheet.** This term denotes a document which must be submitted to the Minnesota Pollution Control Agency as part of the overall cleanup procedure.

**Subpart 7. Contaminated soil stockpile sampling.** This term denotes an activity which must be performed in order to comply with Minnesota Pollution Control Agency regulations.

**Subpart 8. Corrective action alternative.** This term denotes an activity which comprises part of a cleanup system.

**Subpart 9. Data reduction.** This term denotes an activity which comprises part of a cleanup system and a method used to determine the most cost-effective cleanup alternative.

**Subpart 10. Delineation decision/work plan.** This term denotes an activity which comprises part of a cleanup system and an activity used to determine the most cost-effective cleanup alternative.

**Subpart 11. Draftsperson.** It is necessary and reasonable to define this term in order to standardize the meaning of this professional title as it relates to consulting services performed for Petrofund reimbursement.

**Subpart 12. Entry level professional.** It is necessary and reasonable to define this term in order to standardize the meaning of this professional title as it relates to consulting services performed for Petrofund reimbursement.

**Subpart 13. Equipment.** This term is defined in order to standardize its meaning as it is used in reference to a petroleum tank release cleanup site.

**Subpart 14. Excavation basin soil sampling.** This term denotes an activity which must be performed in order to comply with Minnesota Pollution Control Agency regulations.

**Subpart 15. Excavation report.** This term denotes a document which must be submitted to the Minnesota Pollution Control Agency as part of the overall cleanup procedure.

**Subpart 16. Field technician.** It is necessary and reasonable to define this term in order to standardize the meaning of this professional title as it relates to consulting services performed for Petrofund reimbursement.

**Subpart 17. Groundwater pump and treat system design.** This term denotes an activity which comprises part of a cleanup system.

**Subpart 18. Groundwater receptor survey.** This term denotes a method used to determine the most cost-effective cleanup alternative.

**Subpart 19. Groundwater sampling.** This term denotes an activity which must be performed in order to comply with Minnesota Pollution Control Agency regulations.

**Subpart 20. Health and safety plan.** This term denotes an activity which must be performed in order to comply with state regulations.

**Subpart 21. Hydraulic conductivity estimate.** This term denotes a method used to determine the most cost-effective cleanup alternative.

**Subpart 22. Infiltration test.** This term denotes a method used to determine the most cost-effective cleanup alternative.

**Subpart 23. Midlevel professional.** It is necessary and reasonable to define this term in order to standardize the meaning of this professional title as it relates to consulting services performed for Petrofund reimbursement.

**Subpart 24. Mileage.** This term is defined in order to standardize its meaning as it is used in reference to a petroleum tank release cleanup site.

**Subpart 25. Monitoring well.** This term denotes a part of a cleanup system used to determine the most cost-effective cleanup alternative.

**Subpart 26. MPCA conference call.** This term refers to an activity which commonly comprises a necessary part of the remediation strategy. It allows the applicant and the consultant to keep the Minnesota Pollution Control Agency informed about the progress of the cleanup, and it allows the agency to issue any necessary additional directives.

**Subpart 27. Offsite Access.** This term denotes an activity which must be performed in order to comply with property regulations.

**Subpart 28. Passive bioremediation risk assessment.** This term denotes a method used to determine the most cost-effective cleanup alternative.

**Subpart 29. Per diem.** This term is defined in order to standardize its meaning as it is used in reference to a petroleum tank release cleanup site.

**Subpart 30. Piezometer installation.** This term denotes an activity which comprises part of a cleanup system.

**Subpart 31. Piezometer installation oversight.** This term denotes an activity which comprises part of a cleanup system.

**Subpart 32. Project management and administration.** This term is defined in order to standardize its meaning as it is used in reference to a petroleum tank release cleanup site and to specify the tasks it may include.

**Subpart 33. Remedial action decision.** This term denotes an activity which comprises part of a cleanup system and a method used to determine the most cost-effective cleanup alternative.

**Subpart 34. RI/CAD report.** This term denotes a document which must be submitted to the Minnesota Pollution Control Agency as part of the overall cleanup procedure.

**Subpart 35. Senior level professional.** It is necessary and reasonable to define this term in order to standardize the meaning of this professional title as it relates to consulting services performed for Petrofund reimbursement.

**Subpart 36. Site monitoring worksheet.** This term denotes a document which must be submitted to the Minnesota Pollution Control Agency as part of the overall cleanup procedure.

**Subpart 37. Soil boring drilling.** This term denotes a method used to determine the most cost-effective cleanup alternative.

**Subpart 38. Soil boring oversight.** This term denotes an activity which comprises part of a cleanup system.

**Subpart 39. Soil borings.** This term denotes a method used to determine the most cost-effective cleanup alternative.

**Subpart 40. Soil excavation corrective action plan.** This term denotes an activity which comprises part of a cleanup system.

**Subpart 41. Soil field screening and sampling.** This term denotes an activity which comprises part of a cleanup system.

**Subpart 42. Soil sampling.** This term denotes an activity which comprises part of a cleanup system.

**Subpart 43. Soil test pit oversight.** This term denotes an activity which comprises part of a cleanup system.

**Subpart 44. Soil treatment permitting.** This term denotes an activity which must be performed in order to comply with Minnesota Pollution Control Agency regulations.

**Subpart 45. Soil vapor extraction system design.** This term denotes an activity which comprises part of a cleanup system.

**Subpart 46. Soil vapor extraction system with groundwater sparging design.** This term denotes an activity which comprises part of a cleanup system.

**Subpart 47. Sparging test.** This term denotes a method used to determine the most cost-effective cleanup alternative.

**Subpart 48. Surveying.** This term is defined in order to standardize its meaning as it is used in reference to a petroleum tank release cleanup site.

**Subpart 49. System installation oversight.** This term denotes an activity which comprises part of a cleanup system.

**Subpart 50. System operation and maintenance.** This term denotes an activity which comprises part of a cleanup system.

**Subpart 51. System startup/initial discharge sampling.** This term denotes an activity which comprises part of a cleanup system.

**Subpart 52. Travel time.** This term is defined in order to standardize its meaning as it is used in reference to a petroleum tank release cleanup site.

**Subpart 53. Vacuum enhanced groundwater extraction system design.** This term denotes an activity which comprises part of a cleanup system.

**Subpart 54. Vapor risk assessment and survey.** This term denotes a method used to determine the most cost-effective cleanup alternative.

**Subpart 55. Vehicle cost.** This term is defined in order to standardize its meaning as it is used in reference to a petroleum tank release cleanup site.

**Subpart 56. Vent point.** This term denotes a part of a cleanup system used to determine the most cost-effective cleanup alternative.

**Subpart 57. Vent point installation.** This term denotes an activity which comprises part of a cleanup system.

**Subpart 58. Vent point installation oversight.** This term denotes an activity which comprises part of a cleanup system.

**Subpart 59. Venting test.** This term denotes a method used to determine the most cost-effective cleanup alternative.

**Subpart 60. Waste disposal.** This term is defined in order to standardize its meaning as it is used in reference to a petroleum tank release cleanup site.

**Subpart 61. Water discharge compliance permitting.** This term denotes an activity which must be performed in order to comply with Minnesota Pollution Control Agency regulations.

**Subpart 62. Water level measurement.** This term denotes a method used to determine the most cost-effective cleanup alternative.

**Subpart 63. Well abandonment.** This term denotes an activity which comprises part of a cleanup system.

**Subpart 64. Well abandonment oversight.** This term denotes an activity which comprises part of a cleanup system.

**Subpart 65. Well installation.** This term denotes an activity which comprises part of a cleanup system.

**Subpart 66. Well oversight and development.** This term denotes an activity which comprises part of a cleanup system.

**Subpart 67. Well permitting.** This term denotes an activity which must be performed in order to comply with Minnesota Pollution Control Agency regulations.



**Subpart 68. Word processor.** This term is defined in order to standardize its meaning as it is used in reference to a petroleum tank release cleanup site.

**Part 2890.0074 WRITTEN PROPOSAL AND INVOICE REQUIRED FOR CONSULTANT SERVICES.**

**Subpart 1. Written proposal.** This subpart specifies a necessary and reasonable approach to a primary component of cost containment. The applicant will have several opportunities to examine the costs to be incurred because the consultant must submit a proposal at each step of the clean-up process prior to performing the work. At any of these stages, the applicant may choose the most cost-effective work plan by soliciting competitive proposals from additional consulting firms.

**Subpart 2. Invoice.** This subpart conforms the rules to the statutory requirements of Minn. Stat. 115C.07, subd. 3 (c), which stipulates that the invoice format must be consistent with the bid format and with the application for reimbursement. This consistency will simplify the billing and reimbursement processes and allow applicants to understand and manage their incurred costs more efficiently.

**Part 2890.0075 REASONABLENESS OF WORK PERFORMED; STANDARD TASKS FOR EACH STEP OF CONSULTANT SERVICES.**

**Subpart 1. Generally.** Part 2890.0075 establishes the limits on which consultant services are considered reasonable for purposes of reimbursement and categorizes the tasks by phases which are meant to be generally compatible with the reimbursement steps found in Minn. Stat. 115C.09, subd. 2 (a). It also identifies which tasks are necessary and which are unnecessary in an effort to conform with Minn. Stat. §115C.09, subd. 3 (b), which stipulates that a reimbursement may not be made until the Board has determined that the costs for which reimbursement is requested were reasonable. In order to ensure

that the lists in this part include every foreseeable necessary task and therefore are not unreasonable or improperly restrictive, the Task Force solicited and incorporated comments from the regulated community. Any necessary and reasonable tasks brought to light through this process were included in the list for the appropriate step of consultant services.

**Subpart 2. Underground storage tank removal assessment.** This subpart specifies the conditions under which costs for an underground storage tank removal assessment may be reimbursed. Unless petroleum contamination is discovered to be present, Minn. Stat. §115C.09, subd. 1 does not allow for reimbursement for this assessment because its costs are not corrective action costs incurred in response to a release. At sites where petroleum contamination exists, however, it is economically sensible to take soil samples contemporaneously with the tank removal. It is necessary to specify these conditions because costs solely associated with tank removal are defined as ineligible for reimbursement by Minn. Stat. §115C.09, subd. 1 (b) (1).

**Subpart 3. Initial site assessment.** This subpart specifies the conditions under which costs for an initial site assessment may be reimbursed. The vertical and horizontal extent of petroleum contamination in the soil and the degree of groundwater contamination must be established in order to determine the most effective method of remediation. At a typical petroleum tank release cleanup site, a maximum of five properly placed soil borings with up to three completed as monitoring wells will adequately delineate the extent of the petroleum contamination. Items A-W are the tasks typically performed in order to advance the borings and install the wells.

**Subpart 4. Additional site assessment.** This subpart specifies the conditions under which costs for an additional site assessment may be reimbursed. Due to unforeseeable

circumstances, the petroleum contamination at some sites will be discovered to extend beyond the area delineated in the initial site assessment. In such cases, further investigation is necessary to determine the extent of contamination. Because this determination is critical to a cost-effective cleanup, it is reasonable to allow the additional investigation costs. Items A-S are the tasks typically performed in order to advance additional borings and install additional wells.

**Subpart 5. Remedial investigation/corrective action design report.** The Remedial Investigation/Corrective Action Design report (RI/CAD) constitutes an important form of communication between the Minnesota Pollution Control Agency and the consulting firm(s) doing work at a site. It allows the agency to evaluate the proposed work and to recommend modifications in the workplan. The RI/CAD also allows the agency to stipulate which proposed alternative best fulfills the standard of reasonable costs required by Minn Stat. §115C.09, subd. 3 (b). Items A-Q are the tasks typically performed in order to complete a remedial investigation/corrective action report.

**Subpart 6. Remedial design/maintenance.** This subpart ensures that the Minnesota Pollution Control Agency will have the opportunity to determine whether the cleanup activities being conducted at a site are appropriate and cost-effective. Items A-U are the tasks typically performed in order to complete remedial design/maintenance.

**Part 2890.0076 MAXIMUM COSTS FOR CONSULTANT SERVICES.**

**Subpart 1. Maximum labor charges.** Items A-VV regulate the costs for consulting labor associated with remediating petroleum tank releases. It is necessary to specify maximum costs for these activities because previously, without such controls, unnecessary and excessive costs were incurred by applicants and submitted for Petrofund reimbursement. To ensure that these maximum costs constitute reasonable controls on the

affected industries, respected representatives of those industries were involved in developing and setting the fee schedule based on the standards of their industry. The costs represent maximums derived from an examination of fee schedules and other cost information supplied by members of the industry. These maximums allow applicants to know before the work is done what services may be reimbursed and what costs will be considered prima facie unreasonable by the board. The desire for this sort of guidance has repeatedly been expressed by members of the public and by members of the Board.

**Subpart 2. Maximum hourly rates.** This subpart regulates the hourly rates charged for consultant services. It is necessary to specify maximum costs for these services because previously, without such controls, unnecessary and excessive costs for them were incurred by applicants and submitted for Petrofund reimbursement. To ensure that these maximum rates constitute reasonable controls on the affected industry, they were developed by the Task Force and finalized after public comment was received. The rates represent maximums generally accepted as reasonable by members of the industry.

**Subpart 3. Allowable level of expertise.** It is necessary to specify allowable levels of expertise because consultants charge hourly rates which vary according to the professional qualifications of the person performing the task. This subpart ensures (a) that a person performing environmental consulting tasks is appropriately qualified to perform those tasks, and (b) that the charged hourly rates result in reasonable costs based on the actual level of expertise necessary to perform the task. These regulations constitute reasonable controls because they do not prevent a person with greater expertise from performing lower-level tasks; a task may be performed by someone with a level of expertise higher than that allowed, but the task will be reimbursed at the level specified in the rule. To ensure that the allowable levels of expertise listed in items A-E constitute reasonable

controls on the affected industry, representatives of the industry were involved in determining the minimum expertise required for each task.

**Subpart 4. Maximum drilling and well charges.** Because soil boring drilling, piezometer installation, vent point installation, well abandonment, and well installation are tasks which vary according to the specific characteristics of each leaksite, their costs differ greatly from site to site and cannot reasonably be standardized. As a result, it is necessary to allow consultants to estimate the amount of time and materials which will be needed to install necessary borings, wells, piezometers, or vent points, or to abandon wells. The costs for these tasks will be limited to the amounts specified in the consultant's proposal and will be required to meet the statutory standard of reasonableness.

**Subpart 5. Maximum nonlabor charges.** It is necessary to specify maximum costs for items A-D because previously, without such controls, unnecessary and excessive costs for them were incurred by applicants and submitted for Petrofund reimbursement. To ensure that the specified maximums are reasonable, the Task Force and other members of the public and the regulated community were consulted.

(A) The maximum cost for mileage is based on comparable maximums for mileage specified in federal and state tax guidelines.

(B) The maximum cost for vehicle cost allows adequate reimbursement to be made for instances when a specialized vehicle is driven to a site near the consultant's place of business and a straight mileage charge would constitute an unreasonable maximum.

(C) The maximum cost for per diem is based on reasonable rates for meals and lodging actually charged throughout the state.

(D) The maximum cost for equipment reflects the fact that consulting equipment consists of items whose actual costs, although they fluctuate, are demonstrably

quantifiable at the time they are incurred, whether the item is disposable or reusable, rented or purchased.

**Part 2890.0077 COMPETITIVE BIDDING REQUIREMENTS FOR CONSULTANT SERVICES.**

**Subpart 1. Generally.** The language proposed under Part 2890.0077 replaces the current Part 2890.0075 as it relates to competitive bidding of consultant services. The new language is needed in order to address the schedule of allowable tasks for consultant services properly. The previous rule did not set forth the specific tasks deemed to be necessary for each step of consultant services.

**Subpart 2. Underground storage tank removal assessment.** It is reasonable not to require competitive proposals for underground storage tank removal assessment because prior to the time of the assessment, the presence of a release has not been confirmed. If no petroleum contamination is discovered during this assessment, no costs eligible for Petrofund reimbursement will be incurred.

**Subpart 3. Initial site assessment.** It is reasonable to require competitive proposals for an initial site assessment because this assessment is done after a release has been confirmed and will involve work eligible for Petrofund reimbursement. In order for an applicant to be able to make a reasonable choice between competitive proposals, the proposals must be based on assumptions which are as near to identical as possible. It therefore is necessary that the proposals required by this subpart be in accord with Parts 2890.0072 to 2890.0079, which specify the number, type, and depth of soil borings, the maximum costs for these services, and the allowable levels of expertise.

**Subpart 4. Subsequent steps.** It is reasonable not to require the applicant to seek competitive proposals in the circumstances specified in this subpart because the subsequent services will be charged at rates competitively bid during the initial site assessment or prior phase of clean-up. The applicant, however, is not prohibited from seeking competitive proposals at any subsequent point if doing so helps the cleanup become more cost-effective. If the applicant seeks competitive proposals after the initial site assessment step, it is reasonable to require that the applicant follow the procedure for procuring competitive proposals outlined in 2890.0074 in order to ensure that reasonable effort is made to secure the lowest costs for these services.

**Subpart 5. Drilling costs.**

**A.** In order for an applicant to be able to make a reasonable choice between competitive proposals, it is necessary that the proposals be based on assumptions which are as near to identical as possible. Considering the standard practices of environmental drilling firms, the Task Force determined that the assumption of drilling to a depth of 30 feet in unconsolidated soil with sampling at five foot intervals is the most reasonable assumption to use as a standard for competitive proposals when the specific subsurface characteristics of the site are unknown. When more specific information is known, determined, or reasonably expected, however, it is necessary to require that the assumptions upon which the proposals are based be modified to reflect the actual site characteristics.

**B.** The Task Force stipulated that soil boring drilling be bid by cost per foot in order to reflect current market practice. This is a reasonable approach to estimating these costs because soil borings may be measured to the nearest foot without difficulty.

**Subpart 6. Lowest cost proposal.** This subpart is necessary to ensure that the applicant complies with the intent of the rules regarding the acquisition of competitive proposals by selecting the lowest cost proposal, unless the applicant determines that strict compliance

with this rule would not lead to the most cost-effective cleanup. Because some foundation is needed for this assessment to be made, it is reasonable to require that the applicant present convincing and substantial evidence that the consultant's education, experience, or similar trait convinced the applicant that selecting the consultant ultimately would lead to a more cost-effective cleanup.

**Part 2890.0078 DEVIATIONS FROM STANDARD TASKS AND MAXIMUM COSTS FOR CONSULTANT SERVICES.**

**Subpart 1. Deviations from standard tasks in proposals.**

A. Because the consultant on a given site may determine that the data which could be obtained by advancing soil borings would be obtained more easily by using an alternative method, this subpart helps contain costs by allowing the consultant to implement a technology other than soil borings if that technology is more cost-effective. This subpart also allows for the use of newly-developed technologies which would be more economical. In so doing, however, it requires the applicant to establish that the alternative technology resulted in lower costs.

B. Because site characteristics vary and may necessitate modifications to the standard workplan, it is reasonable to allow consultants to submit to the applicant proposals listing additional or different tasks. To ensure that the modifications are not arbitrarily devised, the applicant must approve them and the board must be convinced of their appropriateness and necessity by a higher evidentiary standard.

C. Because site characteristics vary and may necessitate modifications to the standard workplan, it is reasonable to allow consultants to submit to the applicant proposals stating the need for an additional number of hours to complete a task. To ensure that the



modifications are not arbitrarily devised, the applicant must approve them and the board must be convinced of their appropriateness and necessity by a high evidentiary standard.

**D.** Because site characteristics vary and may necessitate modifications to the standard workplan, it is reasonable to allow reimbursement for additional drilling costs if the additional drilling is necessitated by subsurface conditions (e.g., the presence of rock rather than unconsolidated soil) or drilling depths which differ from the stated assumptions. To ensure that the modifications are not arbitrarily devised, the applicant must approve them and the board must be convinced of their appropriateness and necessity by reasonable evidence.

**Subpart 2. Deviations from standard tasks or maximum costs after proposal approved by applicant.**

**A.** Because unforeseeable difficulties may arise at a site and necessitate unexpected modifications in the original workplan, it is reasonable to allow consultants to submit change orders to the applicant. The applicant reasonably must signify that the modifications were appropriate by approving them. A key element in approving additional or different tasks is that they resulted from circumstances beyond the control of the consultant.

**B.** Because unforeseeable difficulties may arise at a site and require that additional hours of work be performed, it is reasonable to allow consultants to submit change orders to the applicant. The applicant reasonably must signify that the modifications were appropriate by approving them. A key element in approving a higher number of hours is that they resulted from circumstances beyond the control of the consultant.

C. Because difficulties due to subsurface conditions may arise when drilling is performed at a site, it is reasonable to allow consultants to submit a change order to the applicant. The change order is limited to items (3) (a) through (3) (c) because these are the typical circumstances relating to drilling which may not be foreseen. The applicant reasonably must signify that the modifications were appropriate by approving them.

D. This item conforms the guidelines for change orders to the guidelines for reimbursement applications specified in Minn. Rule 2890.0090, which stipulates that an application for reimbursement shall be made on a form prescribed by the Board. In order to make the process of submitting and approving changes from the original proposal consistent with the original proposal process, it is necessary for the board to prescribe a form for this purpose. In order that both the applicant and the Petrofund may evaluate the proposed changes accurately and completely, the change order form must contain a detailed description of the different or additional tasks and/or higher number of hours, the reasons for the proposed changes from the original proposal, and the original proposal amount and revised proposal amount. The form should contain the signatures of the applicant and the consultant in order to establish that both parties accepted the modified terms.

**Subpart 3. Additional or different tasks approved by the agency.** Because the Minnesota Pollution Control Agency may determine that circumstances at a site require that additional or different tasks or additional hours of work be performed, it is reasonable to allow applicants to be reimbursed for reasonable costs incurred for those tasks if the agency's directive is specified in writing. The presence of a written directive will allow the applicant to establish by reasonable evidence that the additional or different tasks were necessary in order to minimize, eliminate, or clean up a release to protect the public health and welfare or the environment.

**Part 2890.0079 REASONABLE, NECESSARY AND ACTUAL CONSULTANT SERVICES COSTS.**

Part 2890.0079 makes it clear that even if higher amounts are not prima facie unreasonable under Part 2890.0076, reimbursement shall be allowed only for tasks and costs necessary for corrective action and for actual hours spent performing the tasks. This part is necessary to ensure that the board does not reimburse for maximum costs when less than the maximum was actually required or actually done in connection with the clean-up.

**CONTRACTOR SERVICES STANDARDS**

**Part 2890.0080 OVERVIEW OF RULES GOVERNING REASONABLENESS OF COSTS FOR CONTRACTOR SERVICES.**

This part serves as a table of contents for the contractor services rules and provides applicants and members of the regulated community with a guide to the major topics covered in the ensuing parts.

**2890.0081 DEFINITIONS RELATED TO CONTRACTOR SERVICES.**

**Subpart 1. Scope.** Part 2890.0081, subparts 2-16, define terms used in these rules. These definitions are necessary for proper interpretation and application of the rules. The terms are commonly used in the environmental remediation industry and relate to aspects of the process of cleaning up petroleum tank releases, from methods used to determine the extent of the release and its potential threat to human health and the environment to various strategies for remediating any petroleum contamination. The list of terms includes the currently foreseeable elements of the process of environmental contracting which are regulated by the subsequent schedule of maximum costs for contractor services. It is therefore essential that applicants understand these terms. To ensure that the definitions

are reasonably clear and understandable by laypersons and other actual and potential applicants for reimbursement, members of the Task Force, other members of the regulated community, and technical experts at the Minnesota Pollution Control Agency assisted in drafting the definitions.

**Subpart 2. Clean fill purchase, transportation, and installation.** This term is defined in order to standardize its meaning as it is used in reference to a petroleum tank release cleanup site. When contaminated soil is excavated, uncontaminated soil is used to replace it. It is often necessary that this clean backfill be purchased elsewhere and trucked to the excavation site.

**Subpart 3. Compaction.** This term denotes an aspect of contaminated soil excavation which may not be familiar to applicants for Petrofund reimbursement. When an excavation is filled with uncontaminated soil, the process requires that the clean soil be packed down in order to consolidate it.

**Subpart 4. Disking.** This term denotes an aspect of landfarming, a soil disposal method, which may not be familiar to applicants for Petrofund reimbursement.

**Subpart 5. Excavation.** This term is defined in order to standardize its meaning as it is used in reference to a petroleum tank release cleanup site and allow applicants to differentiate between reimbursable and non-reimbursable excavation activity.

**Subpart 6. Groundwater sampling analysis.** This term denotes an activity which must be performed in order to comply with Minnesota Pollution Control Agency regulations. Petroleum tank releases sometimes pollute the water table, and chemical analysis of this water indicates whether or not it has been contaminated and must be cleaned up.

**Subpart 7. Hauling.** This term is defined in order to standardize its meaning as it is used in reference to a petroleum tank release cleanup site.

**Subpart 8. Landfarmed soil sampling.** This term denotes an activity which must be performed in order to comply with Minnesota Pollution Control Agency regulations.

**Subpart 9. Landfarming.** This term denotes a method of contaminated soil disposal, and although it is commonly used by contractors and consultants working on petroleum tank release cleanups, its use in this context is unfamiliar to most applicants for Petrofund reimbursement.

**Subpart 10. Loading.** This term is defined in order to standardize its meaning as it is used in reference to a petroleum tank release cleanup site.

**Subpart 11. Mobilization.** This term is defined in order to standardize its meaning as it is used in reference to a petroleum tank release cleanup site and to specify the tasks it may include.

**Subpart 12. Off-site Stockpiling.** This term is defined in order to standardize its meaning as it is used in reference to a petroleum tank release cleanup site and to specify the tasks it may include.

**Subpart 13. Overburden.** This term is defined in order to standardize its meaning as it is used in reference to a petroleum tank release cleanup site.

**Subpart 14. Soil sampling analysis.** This term denotes an activity which must be performed in order to comply with Minnesota Pollution Control Agency regulations. Chemical analysis of the soil indicates whether or not it has been contaminated and must be cleaned up.

**Subpart 15. Soil test pits.** This term denotes an activity which comprises part of the cleanup performed at a leakesite. Chemical analysis of the soil excavated from these pits indicates whether or not it has been contaminated and must be cleaned up.

**Subpart 16. Spreading.** This term denotes an aspect of landfarming, a soil disposal method, which may not be familiar to applicants for Petrofund reimbursement.

**Subpart 17. Stockpiling.** This term is defined in order to standardize its meaning as it is used in reference to a petroleum tank release cleanup site and allow applicants to differentiate between reimbursable and non-reimbursable stockpiling.

**Subpart 18. System installation.** This term denotes an activity which comprises part of the cleanup performed at a leakesite.

**Subpart 19. Thermal treatment.** This term denotes a method of contaminated soil disposal, and although it is commonly used by contractors and consultants working on petroleum tank release cleanups, its use in this context is unfamiliar to most applicants for Petrofund reimbursement.

**Subpart 20. Treatment of petroleum contaminated water from the excavation basin.** This term denotes an activity which comprises part of the cleanup performed at a leakesite.

**Subpart 21. Utility clearance.** This term denotes an activity which must be performed in order to comply with state regulations.

**Part 2890.0082 MAXIMUM COSTS FOR CONTRACTOR SERVICES.**

**Subpart 1. Maximum costs in "Means" book.** It is necessary for the Petrofund to establish reasonable standards for costs for contractor services because virtually every leak site requires that they be performed, and virtually every application for reimbursement includes costs for them. "Means Heavy Construction Cost Data" is a reasonable guide to use to establish maximum costs because it is recognized in the construction industry as an accurate reflection of reasonable and expected costs for contractor labor and machinery. In addition, it is reasonable to use this document as a cost reference because it is updated annually and therefore will serve as a continuously current standard. It is also conveniently available to applicants, contractors, and consultants.

**Subpart 2. Maximum costs for test pits, excavation, loading, clean fill, off-site stockpiling, landfarming, and thermal treatment.** Whereas mobilization, trucking, and cutting, removal, and replacement of concrete and asphalt do not vary dependent upon the type of construction job to be performed, test pits, excavation, loading, clean fill (purchase, transportation, and installation), and offsite stockpiling tasks may involve additional costs beyond the rates specified in "Means Heavy Cost Construction Data." In addition, landfarming and thermal treatment services involve activities not included in "Means Heavy Construction Cost Data." As a result, it is necessary to establish and specify separate reasonable costs for these services, as follows:

(A) The Task Force developed the reasonable cost for soil test pits after determining that the rates for excavation specified in the "Means" book would not adequately cover the costs to provide this service.

(B) - (E) Excavation, Loading, Clean fill (purchase, transportation, and installation), and Off-site stockpiling charges are based on rates recognized as reasonable costs in Minnesota and from fee schedules used by petroleum tank release cleanup funds in neighboring states.

(F) Landfarming charges are based on an average, by counties within Minnesota Pollution Control Agency regions, of rates actually charged for this service at landfarming sites and submitted for Petrofund reimbursement over the past two years. The maximum costs for landfarming are set according to county in order to ensure reasonableness by taking into account the differing availability of landfarming sites in different regions of the state.

(G) Thermal Treatment charges are based on rates actually charged for this service at all major thermal treatment facilities throughout the state and submitted for Petrofund reimbursement over the past two years.

**Subpart 3. Maximum drilling and well charges.** Soil borings and wells are drilled by contractors, but the drilling is planned and executed under the supervision of consultants. As a result, this subpart is necessary in order to refer applicants and contractors to the relevant parts of the consultant services section.

**Subpart 4. Maximum costs for all other contractor services.** Because groundwater sampling analysis, soil sampling analysis, treatment of petroleum contaminated water from the excavation basin, and system installation are tasks which vary according to the specific characteristics of each leaksite, their costs differ greatly from site to site and cannot reasonably be standardized. As a result, it is necessary to allow the contractor to estimate the amount of time and materials which will be needed to analyze water and soil samples, treat contaminated water, and install the cleanup system. The costs for these tasks will be limited to the amounts specified in the contractor's bid and will be required to meet the statutory standard of reasonableness.



**Part 2890.0083 COMPETITIVE BIDDING REQUIREMENTS FOR CONTRACTOR SERVICES.**

**Subpart 1. Generally; competitive bidding required.** The language proposed under Part 2890.0083 replaces subpart 2 of the current Part 2890.0075. The new language is needed in order to address the schedule of costs for contractor services properly.

**Subpart 2. Cost per cubic yard bidding required.** This subpart is necessary to ensure that the specified contractor services are bid by cost per cubic yard, which will allow applicants to compare estimated costs for identical services without knowing in advance the total amount of contaminated soil or clean fill to be excavated, hauled, installed, stockpiled, or disposed. The Task Force stipulated that the specified contractor services be bid by cost per cubic yard in order to reflect current market practice. This is a reasonable approach to estimating these costs because these services may be measured to the nearest cubic yard without difficulty.

**Subpart 3. Lowest cost bid.** This subpart is necessary to ensure that the applicant complies with the intent of the rules regarding the acquisition of competitive bids by selecting the lowest cost bid.

**2890.0084 DEVIATIONS FROM MAXIMUM COSTS FOR CONTRACTOR SERVICES.**

**Subpart 1. Bids over maximum costs.** Because site characteristics vary and may necessitate modifications to the standard workplan, it is reasonable to allow contractors to submit to the applicant bids listing costs higher than the allowable maximum costs if unusual conditions exist at the applicant's site. To ensure that the higher costs are not arbitrarily charged and incurred, the applicant must approve them before the work is

performed and the board must be convinced of their appropriateness and necessity by a high evidentiary standard.

**Subpart 2. Additional costs incurred after bid approved by applicant.**

**A.** Because unforeseeable difficulties may arise at a site and require that additional or different tasks be performed, it is necessary and reasonable to allow contractors to submit change orders to the applicant. The applicant reasonably must signify that the modifications were appropriate by approving them. The key element in approving additional or different tasks is that they resulted from circumstances beyond the control of the contractor.

**B.** In order to make the process for submitting and approving changes from the original proposal consistent with the original proposal process, it is necessary for the board to prescribe a form for this purpose. In order that both the applicant and the Petrofund may evaluate the proposed changes accurately and completely, the change order form should contain a detailed description of the different or additional tasks and/or higher number of hours, the reasons for the proposed changes from the original proposal, and the original proposal amount and revised proposal amount. The form should contain the signatures of the applicant and the contractor in order to establish by evidence that both parties accepted the modified terms.

**Part 2890.0085 REASONABLE, NECESSARY AND ACTUAL COSTS.**

Part 2890.0085 makes it clear that even if higher amounts are presumed reasonable under Parts 2890.0081 to 2890.0084, reimbursement shall be allowed only for tasks and costs necessary for corrective action and for actual hours spent performing the tasks. This part is necessary to ensure that the board does not reimburse for maximum costs when less than the maximum was actually required or actually done in connection with the clean-up.

**Part 2890.0086 INVOICE.**

This Part conforms the rules to the statutory requirements of Minn. Stat. 115C.07, subd. 3 (c), which stipulates that the invoice format must be consistent with the bid format and with the application for reimbursement. This consistency will simplify the billing and reimbursement processes and allow applicants to understand and manage their incurred costs more efficiently.

**Part 2890.0089 EXEMPTIONS FROM COMPETITIVE BIDDING.**

This part retains the wording of the current part 2890.0075, subpart 4 except where a change was necessary to reflect the rule numbering changes required by these amendments to the rule.

**Part 2890.0090 APPLICATION PROCESS.**

E. It is reasonable to require the applicant to submit this documentation in order for the Board to verify that the applicant accepted the lowest competitive bids and proposals, or that the applicant was exempt from the applicable requirements.

F. It is reasonable to require the applicant to submit this documentation in order for the Board to verify that the applicant approved a proposal for each step of consultant services and any change orders.

G. It is reasonable to require the applicant to submit this documentation in order to verify that the applicant actually incurred the costs for which reimbursement is claimed and to allow the incurred costs to be compared with the bids and proposals accepted by the applicant.

## **REPEALER.**

This Part is necessary in order to specify which parts of the rules previously in force are no longer applicable to Petrofund reimbursements once these amendments are effective.

## **IV. SMALL BUSINESS CONSIDERATIONS IN RULEMAKING.**

Minnesota Statutes §14.115, subdivision 2 (1992) requires the Board, when proposing rules which may affect small businesses, to consider the following methods for reducing the impact on small businesses:

- (a) the establishment of less stringent compliance or reporting requirements for small businesses;
- (b) the establishment of less stringent schedules or deadlines for compliance or reporting requirements for small businesses;
- (c) the consolidation or simplification of compliance or reporting requirements for small businesses;
- (d) the establishment of performance standards for small businesses to replace design or operational standards required in the rule; and
- (e) the exemption of small businesses from any or all requirements of the rule.

In drafting the proposed rules, the Board has reviewed carefully the provisions of Minnesota Statutes §14.115, subdivision 2. The necessity for costs to be reasonable is mandated by statute and therefore may not be modified or ignored for small businesses. Notwithstanding this broader consideration, the Board believes that the proposed rules will have no negative effect on small businesses as defined in Minn. Stat. §14.115 (1992) and that the proposed fee schedules and requirements for proposals, bids, change orders, and invoices do not represent a burdensome compliance standard or reporting requirement for small businesses. On the contrary, by lending uniformity to the scope of remedial assessment activities and their associated costs and by stipulating the appropriate

qualifications for the tasks performed, the proposed rules encourage small businesses to compete with their larger counterparts for Petrofund-reimbursable contracts.

With respect to Minn. Stat. §14.115, subd. 2, clauses (a) through (c), it is not possible to carry out the statutory intent nor is it in the best interests of all parties concerned to establish less stringent compliance or reporting requirements or schedules for small businesses, or to consolidate or simplify such reporting requirements. With respect to clause (d) of Minn. Stat. §14.115, subd. 2, the Board has determined that the establishment of performance standards to replace design or operational standards would not apply to the proposed rules. Finally, with respect to clause (e) of Minn. Stat. §14.115, subd. 2, since the majority of entities affected by the proposed rules would fall within the definition of small business under §14.115, and in light of the need for the rules, discussed above, exemption of small businesses from the operation of the proposed rules would not be feasible or consistent with the statutory purposes furthered by the rules.

#### **V. EXPENDITURE OF PUBLIC MONEY BY LOCAL PUBLIC BODIES.**

Minnesota Statutes, section 14.11, subdivision 1 does not apply because adoption of these rules will not result in additional spending by local public bodies in excess of \$100,000 per year for the first two years following adoption of the rules.

#### **VI. IMPACT ON AGRICULTURE LANDS.**

Minnesota Statutes, section 14.11, subdivision 2 does not apply because adoption of these rules will not have an impact on agricultural land.

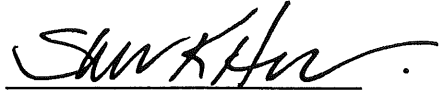
#### **VII. DEPARTMENTAL CHARGES.**

Minnesota Statutes, section 16A.1285, subdivisions 4 and 5 do not apply because the rules do not establish or adjust departmental charges.

**VIII. CONCLUSION.**

Based on the foregoing, the proposed amendments are needed and reasonable.

Dated: November 14, 1994



Shawn K. Hooper  
Executive Director