

**TITLE 20 ENVIRONMENTAL PROTECTION**  
**CHAPTER 5 PETROLEUM STORAGE TANKS**  
**PART 123 CORRECTIVE ACTION FUND ADMINISTRATION**

**20.5.123.1 ISSUING AGENCY:** New Mexico Environment Department.  
[20.5.123.1 NMAC – Rp. 20.5.123.1 NMAC, 12/27/2018]

**20.5.123.2 SCOPE:** This part applies to owners and operators of storage tanks as provided in 20.5 NMAC and as provided in 20.5.101 NMAC to contractors, offerors, and designated representatives, and to all payments made by the department to or on behalf of storage tank owners and operators under the Ground Water Protection Act, Sections 74-6B-1 through 74-6B-14 NMSA 1978. If the owner and operator are separate persons, only one person is required to comply with the requirements of this part, including any notice and reporting requirements; however, both parties are liable in the event of noncompliance.  
[20.5.123.2 NMAC – Rp. 20.5.123.2 NMAC, 12/27/2018]

**20.5.123.3 STATUTORY AUTHORITY:** 20.5.123 NMAC is adopted by the Secretary of Environment pursuant to the provisions of the Department of Environment Act, Sections 9-7A-1 through 9-7A-15 NMSA 1978 and the Ground Water Protection Act, Sections 74-6B-1 through 74-6B-14 NMSA 1978.  
[20.5.123.3 NMAC – Rp. 20.5.123.3 NMAC, 12/27/2018]

**20.5.123.4 DURATION:** Permanent.  
[20.5.123.4 NMAC – Rp. 20.5.123.4 NMAC, 12/27/2018]

**20.5.123.5 EFFECTIVE DATE:** December 27, 2018, unless a later date is indicated in the rule history note at the end of a section.  
[20.5.123.5 NMAC – Rp. 20.5.123.5 NMAC, 12/27/2018]

**20.5.123.6 OBJECTIVE:** The purpose of 20.5.123 NMAC is to establish the procedures for administering and making payments from the corrective action fund (“fund”) created by the Ground Water Protection Act (“act”), Sections 74-6B-1 through 74-6B-14 NMSA 1978, including procedures for:

- A. payment of the costs of a minimum site assessment in excess of ten thousand dollars (\$10,000), or in excess of lesser amounts as permitted by the act;
- B. payment of the costs of corrective action other than the minimum site assessment;
- C. determinations of compliance with the act;
- D. determinations of eligibility of costs for payment;
- E. competitive bidding for corrective action work; and
- F. disposition of remediation equipment acquired through the fund.

[20.5.123.6 NMAC – Rp. 20.5.123.6 NMAC, 12/27/2018]

**20.5.123.7 DEFINITIONS:**

A. Terms used in this part shall have the meanings given to them in the Ground Water Protection Act and 20.5.101 NMAC except as provided in Subsection B of this section.

- B. As used in 20.5.123 NMAC:
- (1) “cost-effectiveness” means completing tasks in a manner that is economical in terms of goods or services received for the money spent;
  - (2) “major remediation equipment” means any transportable unit or system which has been acquired specifically for remediation using the corrective action fund and which the department inventories pursuant to Section 12-6-10 NMSA 1978;
  - (3) “pay for performance” means payment of a previously approved amount based on completion or achievement of previously determined criteria including, but not limited to, a given task or set of tasks, specified reductions in contaminant levels, or achievement of other measurable milestones, as approved by the department;
  - (4) “payment” means payment from the fund to a person that the owner or operator has assigned the right of reimbursement, or reimbursement from the fund to an owner or operator for the costs of corrective action;

- (5) “phase of corrective action” means any one of the following activities, required by 20.5.119 or 20.5.120 NMAC:
- (a) minimum site assessment (“MSA”), as defined in 20.5.101.7 NMAC;
  - (b) phase 1, which includes secondary investigation and report, soil-only contamination assessment, and petroleum vapor intrusion assessment;
  - (c) phase 2, which includes interim removal of non-aqueous phase liquid or contaminated soil;
  - (d) phase 3, which includes development of a conceptual and final remediation plan or a monitored natural attenuation plan;
  - (e) phase 4, which includes implementation of the remediation plan; or
  - (f) phase 5, which includes operating, monitoring, maintaining and reporting under the implemented remediation plan or monitoring and reporting under the approved monitored natural attenuation plan;
- (6) “proposal” means an offer to complete work submitted in response to given specifications issued for a responsible party-lead site, or for a state-lead site;
- (7) “resident business” means:
- (a) a business enterprise which is authorized to do and is doing business under the laws of New Mexico and maintains its principal place of business in New Mexico, or has staffed an office and has paid applicable New Mexico taxes for two years prior to the awarding of the proposal and has five or more employees who are residents of New Mexico, or is an affiliate of a business which meets either of these two requirements; as used in this paragraph, “affiliate” means an entity that directly or indirectly through one or more intermediaries controls, is controlled by, or is under common control with the qualifying business through ownership of voting securities representing a majority of the total voting power of the entity; or
  - (b) a business enterprise, including a sole proprietorship, partnership or corporation, that offers for sale or lease or other form of exchange, goods, commodities or services that are substantially manufactured, produced or assembled in New York state, or, in the case of construction services, has its principal place of business in New York state;
- (8) “responsible party” means any owner or operator of a storage tank system from which a release has occurred;
- (9) “responsible party-lead site” means a site where the owner or operator takes corrective action and applies to the fund for payment of corrective action costs, as distinct from a site where the state takes corrective action;
- (10) “specifications” means a detailed written statement of particulars prescribing corrective action to be taken, conditions to be met, materials to be used, or standards of workmanship to which something is to be built, installed, or operated, which is provided to prospective contractors on responsible party-lead sites and state-lead sites;
- (11) “state-lead site” means a site where the department takes corrective action using the fund because the owner and operator are unknown, unable or unwilling to take corrective action as described in 20.5.121.2102 NMAC or because the department determines that a single entity is necessary to lead the corrective action;
- (12) “technical merit” means those characteristics of a proposal including but not limited to strategies, expertise, methods, materials and procedures meeting the specifications included in a request for proposals.

[20.5.123.7 NMAC – Rp. 20.5.123.7 NMAC, 12/27/2018]

**20.5.123.8 to 20.5.123.2299 [RESERVED]**

**20.5.123.2300 CONSTRUCTION:** This part shall be liberally construed to effectuate the purposes of the Ground Water Protection Act and shall be construed, to the extent possible, so as not to conflict with the Hazardous Waste Act, Sections 74-4-1 through 74-4-14 NMSA 1978, or 20.5.101 through 20.5.125 NMAC.  
[20.5.123.2300 NMAC – Rp. 20.5.123.2300 NMAC, 12/27/2018]

**20.5.123.2301 SEVERABILITY:** If any section or application of this part (20.5.123 NMAC) is held invalid, the remainder of this part (20.5.123 NMAC) or its application to other persons or situations shall not be affected.  
[20.5.123.2301 NMAC – Rp. 20.5.123.2301 NMAC, 12/27/2018]

**20.5.123.2302 EFFECT ON OTHER REGULATIONS:** This part does not relieve any owner or operator of the obligation to comply with any federal or state laws or regulations, including 20.5 NMAC. [20.5.123.2302 NMAC – Rp. 20.5.123.2302, 12/27/2018]

**20.5.123.2303 COMPLIANCE DETERMINATIONS:**

A. The department shall make compliance determinations in the following circumstances:

(1) Corrective action by owner or operator. Pursuant to Section 74-6B-13 NMSA 1978, in order to be eligible for payment of corrective action costs other than those costs associated with a minimum site assessment, the owner or operator shall be in compliance with the requirements of Subsection B of Section 74-6B-8 NMSA 1978, as outlined in 20.5.123.2304 NMAC, during the owner or operator's term of ownership or operation for all storage tanks owned or operated at the site where the corrective action was or is being taken. Compliance for underground storage tanks ("USTs") shall be determined for the period from March 7, 1990 to the date the department determines that corrective action is complete. Compliance for above-ground storage tanks ("ASTs") shall be determined for the period from July 1, 2001 to the date the department determines that corrective action is complete.

(2) Corrective action by the department. Before bringing an action in district court against an owner or operator to recover expenditures from the fund incurred by the department to take corrective action at a site, the department shall determine, in accordance with 20.5.123.2304 NMAC, whether the owner or operator has complied with the requirements of Subsection B of Section 74-6B-8 NMSA 1978, during their term of ownership or operation for all storage tanks owned or operated at the site. Compliance for USTs shall be determined for the period from March 7, 1990 to the date the department determines that corrective action is complete. Compliance for ASTs shall be determined for the period from July 1, 2001 to the date the department determines that corrective action is complete.

B. The owner or operator shall request a compliance determination before submitting the initial request for payment of the costs of corrective action, other than the costs of an MSA. Once the department has completed an initial compliance determination at the owner or operator's request, the department may initiate and make separate compliance determinations at one or more phases of corrective action, other than an MSA, for which payment is requested. If the department determines that a tank owner or operator is not in compliance with 20.5.123.2304 NMAC, the tank owner or operator will be ineligible for payment of corrective action costs, other than an MSA.

C. No compliance determination is necessary when, pursuant to Section 74-6B-13 NMSA 1978, an owner or operator applies to the department for payment of MSA costs exceeding the deductible. However, prior to payment, the department shall determine that the work performed meets the definition of an MSA provided in 20.5.101.7 NMAC.

[20.5.123.2303 NMAC – Rp. 20.5.123.2303 NMAC, 12/27/2018]

**20.5.123.2304 DETERMINATION OF COMPLIANCE UNDER SECTION 74-6B-8 NMSA 1978:**

A. For sites where all USTs were removed or properly abandoned prior to March 7, 1990, and for sites where all ASTs were removed or properly abandoned prior to July 1, 2001, the determination of compliance required by Subsections B and C of 20.5.123.2303 NMAC shall include findings as to whether the owner or operator has:

(1) paid all storage tank fees required by Section 74-4-4.4 NMSA 1978, and, for all USTs removed or properly abandoned prior to March 7, 1990, and for all ASTs removed or properly abandoned prior to July 1, 2001, a two hundred (\$200) fee for each site;

(2) conducted a minimum site assessment as defined in 20.5.101.7 NMAC; and

(3) cooperated in good faith with the department and granted access to the department for investigation, cleanup, and monitoring.

B. For sites where USTs were not removed or properly abandoned prior to March 7, 1990, or where ASTs were not removed or properly abandoned prior to July 1, 2001, the determination of compliance required by Subsections B and C of 20.5.123.2303 NMAC shall include findings as to whether the owner or operator has:

(1) paid all storage tank fees required by Sections 74-4-4.4 and 74-6B-9 NMSA 1978;

(2) conducted a minimum site assessment as defined in 20.5.101.7 NMAC and, if contamination is found, taken action to prevent continuing contamination;

(3) cooperated in good faith with the department and granted access to the department for investigation, cleanup, and monitoring; and

(4) substantially complied with all requirements and provisions of regulations adopted by the environment improvement board pursuant to Subsection C of Section 74-4-4 NMSA 1978 for storage tanks at the site for which payment is sought (including installation, upgrade, operation and maintenance of storage tanks in accordance with 20.5.106 NMAC, 20.5.107 NMAC, 20.5.109 NMAC, and 20.5.110 NMAC; release detection in accordance with 20.5.108 NMAC and 20.5.111 NMAC; for any storage tanks which have been abandoned or closed at the site, proper closure in accordance with 20.5.115 NMAC; reporting, investigating, confirming and remediating the release in accordance with 20.5.118 NMAC, 20.5.119 NMAC and 20.5.120 NMAC; proof of financial responsibility in accordance with 20.5.117 NMAC; and record keeping in accordance with the record keeping provisions of 20.5.101 through 20.5.103 NMAC, 20.5.106 through 20.5.115 NMAC, 20.5.117 through 20.5.120 NMAC, 20.5.124 NMAC and 20.5.125 NMAC).

C. In determining whether the owner or operator has substantially complied with the regulations referenced in Paragraph (4) of Subsection B of this section, the department may consider, among other things, the severity of the non-compliance, the period of non-compliance, the actions taken by the owner or operator to come into compliance, and the timeliness of the owner or operator's actions in coming into compliance. [20.5.123.2304 NMAC – Rp. 20.5.123.2304 NMAC, 12/27/2018]

### **20.5.123.2305 PROCEDURES FOR DETERMINING COMPLIANCE:**

A. When the owner or operator submits a written request for a compliance determination to the department, the request shall provide the following information for all storage tanks located at the site where the owner or operator is performing corrective action:

- (1) the applicant's name, address, telephone number, and email address;
- (2) a description of the applicant's interest in the site (for example, landowner, tank owner, lending institution, operator);
- (3) the name, address, email address, and telephone number of the tank facility at the release site;
- (4) the facility ID, owner ID, and release ID numbers for the tank facility at the release site;
- (5) information on all systems that exist or that have existed at the release site during the owner or operator's term of ownership or operation, including:
  - (a) tank type (UST or AST), tank number, installation dates, tank capacity, product contained and removal date, if applicable;
  - (b) information on installation, upgrade, operation and maintenance standards, including type of tank construction, piping system, corrosion protection, spill and overfill protection, release detection for tanks and piping, operation and maintenance plans, compatibility, and secondary containment, if applicable;
  - (c) type of regulated substance(s) in each tank; and
  - (d) date(s) of permanent closure, if applicable;
- (6) proof of financial responsibility that includes:
  - (a) name and address of the facility that is the subject of the compliance determination;
  - (b) type of financial responsibility;
  - (c) name of insurance provider, policy number, and period of coverage; and
  - (d) information about insurance coverage, including: type or types of coverage for corrective action or third-party liability, amount of coverage per occurrence, and amount of annual aggregate coverage for sudden accidental releases, non-sudden accidental releases, and accidental releases;
- (7) corrective action information for each release that includes:
  - (a) date(s) the release was reported to the department;
  - (b) methods of preventing further release; and
  - (c) completion of the MSA report;
- (8) certification on oath or affirmation of the truthfulness of all matters and facts contained in the request.

B. When the department initiates a compliance determination pursuant to Subsection B of 20.5.123.2303 NMAC:

- (1) the department shall, in writing, notify the owner or operator of the reason(s) for the compliance determination and explain that if the department determines that the owner or operator is not in compliance with 20.5.123.2304 NMAC, the owner or operator will be ineligible for payment of corrective action costs other than for an MSA; and

(2) the owner or operator shall submit in writing all information requested by the department by a date specified by the department; the department may request any of the information required for an MSA pursuant to subsection A of this section and shall establish a deadline for submission of this information that is reasonable under the circumstances.

C. The department shall review all written submissions in the order received and shall, within 30 days of receipt, notify the owner or operator in writing of any inadequacies in the submittal. The owner or operator may then correct any inadequacies and resubmit the application. Submissions shall be determined “complete” by the department when the submissions are adequately documented or inadequacies identified by the department have been corrected.

D. The owner or operator has the burden of establishing each point of fact relevant to such a determination. For such purpose, the submissions shall state specific facts which demonstrate compliance with Subsection B of 20.5.123.2304 NMAC.

E. The department shall make a compliance determination within 45 days following the department's determination that a submission is complete and shall promptly notify the owner or operator of its determination. For good cause, the director may permit additional time in which to make a compliance determination. If the department finds an owner or operator to be out of compliance, the department shall also notify the owner or operator in writing of the manner in which the owner or operator has failed to comply with 20.5.123.2304 NMAC and inform the owner or operator that he or she is ineligible for payment of corrective action costs, other than the costs of an MSA.

[20.5.123.2305 NMAC – Rp. 20.5.123.2305 NMAC, 12/27/2018]

[The department provides a form that may be used to request a compliance determination. The form is available on the petroleum storage tank bureau’s pages on the department website or by contacting the petroleum storage tank bureau at 505-476-4397 or 2905 Rodeo Park Drive East, Building 1, Santa Fe, New Mexico 87505.]

#### **20.5.123.2306 COMPETITIVE CONTRACTOR SELECTION FOR REMEDIATION AT RESPONSIBLE PARTY-LEAD SITES:**

A. Payments made from the fund shall be made in accordance with 20.5.123.2309 NMAC and only for work performed by contractors that were selected using a competitive procedure based upon technical merit and cost-effectiveness, as defined in this part except as provided in Subsections C and D of this section. The solicitation and evaluation of proposals are required prior to workplan approval.

B. At a minimum, the department and the owner or operator shall obtain proposals and select contractors competitively for remediation activities under 20.5.119.1922 through 20.5.119.1928 NMAC and under 20.5.120.2019 through 20.5.120.2025 NMAC, including conceptual and final remediation plans, design, construction, installation, operation and maintenance, and monitoring.

C. Competitive contractor selection is not required for the following activities:

(1) initial abatement or emergency response under 20.5.119.1902 NMAC or 20.5.120.2002 NMAC;

(2) 72 hour and 14 day reports under 20.5.119.1903 NMAC or 20.5.120.2003 NMAC;

(3) interim removal of non-aqueous phase liquid (“NAPL”), directed or approved by the department under 20.5.119.1905 or 12.5.120.2005 NMAC;

(4) interim removal of contaminated soil, directed or approved by the department under 20.5.119.1906 NMAC or 12.5.120.2006 NMAC;

(5) investigation activities under 20.5.118.1801 NMAC and 20.5.119.1907 through 20.5.119.1913 NMAC or 20.5.120.2007 through 20.5.120.2011 NMAC;

(6) development of and monitoring and reporting under a monitored natural attenuation plan under 20.5.119.1915 through 20.5.119.1921 NMAC or 20.5.120.2012 through 20.5.120.2018 NMAC;

(7) work at sites for which the owner or operator is not seeking payment, including but not limited to federal facilities and sites determined to be out of compliance pursuant to 20.5.123.2304 NMAC; or

(8) work at sites under contract as described in subsection D of this section.

D. Work at sites with releases from USTs where the owner or operator and a contractor entered into a contract approved by the department and initiated remediation prior to October 1, 1995, shall be exempt from competitive contractor selection requirements. Work at sites with releases from ASTs at which the owner or operator and a contractor entered into a contract for and initiated remediation prior to June 14, 2002, shall be exempt from competitive contractor selection requirements. The owner or operator shall obtain a contractor for any subsequent site through the competitive contractor selection process in accordance with the requirements of 20.5.123.2306 through 20.5.123.2307 NMAC.

**20.5.123.2307 PROCEDURES AND REQUIREMENTS FOR SELECTION OF REMEDIATION CONTRACTORS AT RESPONSIBLE PARTY-LEAD SITES:**

A. Within 15 days of written notification from the department that remediation is required, the owner or operator shall provide to the department either a written list with a minimum of five names of consultants from which the department and the owner or operator shall solicit proposals for remediation or a written request that the department solicit proposals for remediation on its website. The department and the owner or operator shall follow the procedures outlined in subsections B through E of this section where site evaluation, remediation selection and justification, and design may be required. The department and the owner or operator shall follow the procedures outlined in subsection F for bids at sites where limited remediation is such that no additional infrastructure is needed, plans and specifications that require a professional engineer signature and stamp are not required, the cost is less than \$80,000 (not including NM gross receipt tax), and the proposed activities can be accomplished within two years. Limited remediation includes but is not limited to the injection of contaminant-reducing agents and the use of portable units for soil vapor extraction (“SVE”). The department shall follow the procedures outlined in subsection G for proposals at sites where the owner or operator is the state of New Mexico or a subdivision thereof.

B. Specifications.

(1) The department and the owner or operator shall develop specifications for remediation, which shall state which sections of 20.5.119 NMAC or 20.5.120 NMAC the work is intended to fulfill.

(2) The department and the owner or operator may require that specifications including primary responsibility for operation or maintenance of remediation systems with electrical or mechanical components contain the requirement that winning proposals shall include pay-for-performance criteria as defined in this part.

(3) Proposals shall meet all requirements outlined in the specifications.

(4) Costs for all tasks outlined in the specifications shall be submitted by short-listed firms only and shall be submitted under separate, sealed cover from the technical portion of the proposal.

C. Solicitation of proposals.

(1) If the owner or operator provides a list of contractors, the department shall mail the specifications to those contractors. However, if the owner or operator, within 15 days of receiving written notification from the department that remediation is required, fails to provide the department with the names of five contractors, fails to respond to the department’s notice that remediation is required, or chooses to allow the department to solicit proposals on behalf of the owner or operator, the department may solicit proposals from and make specifications available to any interested contractor using the department’s webpage.

(2) Any questions concerning the solicitation, including any requests for clarification of the specifications, shall be submitted in writing to the department and the owner or operator, within two weeks prior to the deadline for submission of proposals. Any response from the department and the owner or operator shall be provided promptly to all contractors through a posting on the department’s webpage.

(3) Each proposal shall contain a notarized affidavit signed by the contractor certifying under oath that the contractor has participated and will continue to participate in the competitive contractor selection process as described in this section and Section 74-6B-7C NMSA 1978 without misrepresentation and without collusion with other contractors during the entire solicitation, evaluation and selection process.

D. Evaluation of proposals and contractor selection.

(1) Once the department and the owner or operator have received a proposal, they shall not discuss the solicitation or any proposal received in response to the solicitation with anyone other than department staff or the owner or operator.

(2) If fewer than three responsive proposals are obtained by the deadline in the solicitation, the department shall consult with the owner or operator and solicit additional proposals pursuant to subsection A of this section or paragraph (1) of subsection C of this section.

(3) If fewer than three responsive proposals are obtained after two attempts, the department and the owner or operator may select a proposal following the procedures in this section, provided the technical merit is acceptable for the proposed work.

(4) The department shall, and the owner or operator may, evaluate proposals based on technical merit as defined in this part. The technical merit score shall be based on an understanding of site-specific conditions and the appropriateness of proposed remediation technology.

(a) A team approved by the department shall evaluate the proposals in a timely manner. The owner or operator or their representative is encouraged to participate as a part of the evaluation team.

Each team member shall independently evaluate each proposal for technical merit. After discussion, the team shall determine the preliminary technical merit score for each proposal.

(b) The team shall prepare a short list of proposals for further consideration. The short list shall consist of the names of the firms that have submitted proposals with the highest preliminary technical merit scores.

(c) The team shall present the short list of firms to a department task force for a discussion of proposals to ensure consistency among team evaluation and scoring. The department task force shall consist of senior department technical staff. After discussion with the department task force, the team shall assign the technical merit scores.

(5) The department and the owner or operator may request all firms selected for the short list to conduct an oral presentation outlining their proposals for the department task force, the team and the owner or operator. The owner or operator's attendance during the oral presentations is encouraged, but not required. During the oral presentations, members of the department task force, the team and the owner or operator may ask questions. Only the team shall assign the scores to each proposal on the short list.

(a) Any firm that is requested by the department and the owner or operator to conduct an oral presentation and chooses not to do so, shall be eliminated from the short list.

(b) All short-listed firms shall submit a sealed cost proposal to the department and the owner or operator no later than two days prior to the oral presentations. The team shall open and review the sealed cost information submitted for each proposal on the short list.

(c) Prior to or during the oral presentations, contractors on the short list may withdraw the original cost submission and substitute a best and final offer for the cost portion of the proposal.

(6) Following the oral presentations, the team may adjust the technical merit score, based on demonstrated general expertise, site-specific knowledge and application, or information clarified or provided.

(7) At any point in the evaluation process, when, in the team's opinion, a proposal does not substantially meet the technical merit or cost effectiveness standards set forth in the solicitation, the team may reject the proposal.

(8) The team shall assign a final score for each proposal on the short list, which shall be the cost effectiveness score plus the technical merit score.

(a) The technical merit score, with a maximum of 700 points, shall be assigned pursuant to the procedure described in this subsection.

(b) The cost effectiveness score is the technical weight factor times the cost weight factor times 300, where the technical weight factor is the proposal's technical merit score divided by the highest technical merit score of proposals on the short list; the cost weight factor is the lowest cost of proposals on the short list divided by the proposal's cost; 300 is the maximum cost effectiveness score.

(9) The department shall notify the owner or operator and all submitting firms of the highest scoring proposal. The owner or operator shall enter into a contract with the selected firm not less than 10 days or more than 30 days after the notification. If, for any reason, the selected firm cannot complete the project, the department and the owner or operator shall either select the firm with the second highest scoring proposal, provided the technical merit is acceptable for the proposed work, or repeat the contractor selection process in accordance with this section. In order for the work to qualify for payment from the fund, the owner or operator shall use the firm selected in accordance with this part.

(10) After the department has notified the owner or operator of the highest scoring proposal, the department and the owner or operator shall make available to the contractors and the public all proposals submitted and the evaluation team's scores.

(11) An owner or operator aggrieved by the department's selection may request administrative review pursuant to 20.5.123.2320 NMAC within 15 days of the post mark on the notification.

(12) An offeror aggrieved by the department's selection may request administrative review pursuant to 20.5.123.2320 NMAC within 10 days of the post mark date on the notification.

(13) For purposes of owner and operator participation in the process set forth in this subsection, the owner or operator may appoint a representative who is not affiliated with any individual who submitted a proposal. Any owner or operator representative may not later work for the contractor, the owner, or the operator on any work generated by the proposal.

E. When proposals are received from nonresident businesses and resident businesses, and the proposal with the highest evaluation is from a nonresident business, the contract shall be awarded to the resident business whose technical merit is comparable and whose cost is nearest to the cost of the high-scoring nonresident

business proposal if the cost of the resident proposal is made lower than the cost of the nonresident business when multiplied by a factor of 0.95.

F. The department and the owner or operator shall follow the procedures outlined in this section at sites where limited remediation is such that no additional infrastructure is needed, plans and specifications that require a professional engineer signature and stamp are not required, the cost is less than \$80,000 (not including NM gross receipt tax), and the proposed activities can be accomplished within two years.

(1) Specifications.

(a) The department and the owner or operator shall develop specifications for limited remediation, which shall state which sections of 20.5.119 NMAC or 20.5.120 NMAC the work is intended to fulfill.

(b) Bids shall meet all requirements and include costs for all tasks outlined in the specifications.

(2) Request for bids.

(a) The owner or operator shall provide to the department either a written list with a minimum of three names of consultants from which the department shall request bids for the limited remediation or a written request that the department request bids on its website.

(b) Any questions concerning the request for bids, including any requests for clarification of the specifications, shall be submitted in writing to the department and the owner or operator within one week prior to the deadline for submission of bids. Any response from the department and the owner or operator shall be provided promptly to all contractors identified by the owner or operator or by posting the responses on the department's webpage consistent with the method that the bids were requested.

(3) Bid content and specifications. The request for bids shall include but not be limited to:

(a) the scope of work including a list of tasks,

(b) a request for costs associated with each task and a total project cost;

(c) a request for a description of the technical approach; and

(d) the schedule for implementing the limited remedial strategy.

(4) Evaluation of the bids and contractor selection.

(a) Once the department and the owner or operator have received a bid, they shall not discuss the request for bids or any responses to the request for bids received with anyone other than department staff and the owner or operator.

(b) Only one responsive bid is required for evaluation, provided the technical merit is acceptable for the proposed work.

(c) The department shall, and the owner or operator may, evaluate the bids based on technical responsiveness to the limited remediation strategy and cost. The responsive bids shall be evaluated by a team approved by the department, and owner or operator if requested. The team shall make a recommendation to a department task force for approval.

(d) The department shall notify the owner or operator and all submitting firms of the selected bid. The owner or operator shall enter into a contract with the selected firm not less than 10 days or more than 30 days after the notification.

(e) After the department has notified the owner or operator of the selected bid, the department and the owner or operator shall make available to the contractors and the public all bids submitted and the evaluation team's scores.

(f) An owner or operator aggrieved by the department's selection may request administrative review pursuant to 20.5.123.2320 NMAC within 15 days of the post mark on the notification.

(g) An offeror aggrieved by the department's selection may request administrative review pursuant to 20.5.123.2320 NMAC within 10 days of the post mark date on the notification.

(h) For purposes of owner and operator participation in the process set forth in this subsection, the owner or operator may appoint a representative who is not affiliated with any individual who submitted a bid. Any owner or operator representative may not later work for the contractor, the owner, or the operator on any work generated by the bid.

G. For responsible party-lead sites where the owner or operator is the state of New Mexico or any subdivision thereof, including but not limited to municipalities, counties, school districts, or other political subdivisions and their agencies, the department shall accept the use of the state procurement code, provided the department is involved in the development of the specifications and the evaluation of the submitted proposals. [20.5.123.2307 NMAC – Rp. 20.5.123.2307 NMAC, 12/27/2018]



**20.5.123.2308 PROCEDURES AND REQUIREMENTS FOR SELECTION OF REMEDIATION**

**CONTRACTORS AT STATE-LEAD SITES:** When selecting remediation contractors for state-lead sites, the department shall comply with the Procurement Code, Sections 13-1-21 through 13-1-199 NMSA 1978, 1.4.1 NMAC and the request for proposals procurement guide, which is incorporated by reference.  
[20.5.123.2308 NMAC – Rp. 20.5.123.2308 NMAC, 12/27/2018]

**20.5.123.2309 WORKPLAN APPROVAL, CHANGE ORDERS FOR CORRECTIVE ACTION AND APPROVAL OF DELIVERABLES:**

A. Except as provided in Subsection C of 20.5.123.2310 NMAC, a written workplan and budget to complete any phase of corrective action shall be approved in writing by the department prior to any corrective action work being done in order for that work to be eligible for payment under this part.

B. For responsible party-lead sites, the owner or operator shall submit the corrective action workplan and cost in a fixed-fee format unless the department determines that a time-and-materials format is appropriate. Any fixed-fee approvals which require reallocation of approved amounts from one deliverable to another deliverable shall be approved in advance by the department in writing. If the department approves a time-and-materials format, any increase in approved amounts for specific tasks, categories or subcategories or any reallocation of an amount from one task to another task, one category to another category or within categories shall be approved in advance by the department in writing.

C. If required by Paragraph (2) of Subsection B of 20.5.123.2307 NMAC, a workplan including the operation and maintenance of a remediation system that includes mechanical or electrical installations shall list the performance criteria required for payment and amount of payment.

D. If a workplan is rejected after two attempts to receive approval by the department, the department may select the contractor who received the second highest evaluation, repeat the contractor selection process in accordance with subsection B of 20.5.123.2307 NMAC, or, in the case of activities which do not require competitive contractor selection under Subsection D of 20.5.123.2306 NMAC, require the owner or operator to submit a workplan from a different contractor.

E. Changes to the technical approach or increases in costs beyond the approved workplan shall not be eligible for payment unless approved in writing by the department prior to implementation.

F. The department may increase or reduce payments for work based on pay-for-performance criteria because of *force majeure* or unforeseen changes in site conditions.

G. After receiving a deliverable, the department shall assess whether the deliverable is satisfactory. If the department finds that the deliverable is satisfactory, it shall issue a written notice of approval to the owner, operator or contractor. The notice of approval shall explain that any application for payment of costs associated with the approved deliverable must be received by the department within 90 days of the date the owner, operator or contractor received the certification of approval and that no extensions of this deadline shall be granted except extensions for good cause pursuant to 20.5.123.2318 NMAC. If the department finds the deliverable to be unsatisfactory, it shall, within 30 days of receiving a deliverable, provide to the owner, operator or contractor a written notice of exception explaining the defect in the deliverable and any steps the owner, operator or contractor may take to remedy the defect.

[20.5.123.2309 NMAC – Rp. 20.5.123.2309 NMAC, 12/27/2018]

**20.5.123.2310 CORRECTIVE ACTION ELIGIBLE AND INELIGIBLE COSTS AND EXPENDITURES FOR STATE-LEAD AND RESPONSIBLE PARTY-LEAD SITES:**

A. Payments shall be made only for corrective action conducted by firms qualified under 20.5.122 NMAC or in accordance with Subsection H of 20.5.119.1900 NMAC.

B. No expenditures from the fund shall be paid to or on behalf of owners or operators for corrective action, other than the minimum site assessment or any sampling done for purposes of Paragraph (3) of Subsection A of 20.5.119.1921 or 20.5.119.1929 NMAC or Paragraph (2) of Subsection A of 20.5.120.2018 or 20.5.120.2026 NMAC, where the corrective action was conducted by firms or entities that are subsidiaries, parents or otherwise affiliate firms or entities of the owner or operator.

C. Payments shall be made for only those deliverables that the department has approved as satisfactory in writing, as required by 20.5.123.2309 NMAC.

D. For USTs, payment shall not be made for corrective action performed on or after September 22, 1992, if the owner or operator does not obtain department approval of workplans and costs prior to work being performed or costs incurred, exclusive of initial response or initial abatement measures performed in accordance with 20.5.119.1901 or 20.5.119.1902 NMAC or 20.5.120.2001 or 20.5.120.2002 NMAC. For ASTs, payment shall

not be made for corrective action performed on or after June 14, 2002, if the owner or operator does not obtain department approval of workplans and costs prior to work being performed or costs incurred, exclusive of initial response or initial abatement measures performed in accordance with 20.5.119.1901 or 20.5.119.1902 NMAC.

E. Costs eligible for payment from the fund are all costs, except those excluded by Subsections H and I of this section, that are reasonable and necessary to confirm releases in accordance with 20.5.118 NMAC, to complete the minimum site assessment in excess of the deductible, and to complete corrective action beyond the minimum site assessment, in accordance with 20.5.119 NMAC or 20.5.120 NMAC, the department's fee schedule, and any workplan required by 20.5.123.2309 NMAC and approved by the department.

F. Before making payments, the department shall determine that the owner or operator has reimbursed the department for all federal leaking underground storage tank (LUST) trust funds expended for contractual services at the site.

G. Unpaid invoices are eligible for payment on an assignment basis from the applicant to the party who rendered the invoiced services or goods, or the party who made payment. Invoices resulting from assignments as described in this subsection are not contractual between the department and the party who rendered the service or the party who made payment. Payments of such invoices are made pursuant to provisions of Section 74-6B-13 NMSA 1978, including being subject to the availability of funds in the corrective action fund.

H. For USTs, costs ineligible for payment include, but are not limited to, the following:

- (1) costs incurred prior to March 7, 1990;
- (2) costs incurred on or after September 22, 1992, that exceed those in the department fee schedule in effect at the time the work was performed;
- (3) costs paid or reimbursed by insurance companies or any other third party as described in 20.5.123.2319 NMAC;
- (4) unpaid invoices, unless allowed under Subsection F of this section;
- (5) costs of removing, repairing, retrofitting or replacing any USTs;
- (6) costs of destroying, repairing, relocating or constructing any utility line unless required for cost-effective remediation or in response to a threat to public health, safety or welfare, or the environment, as determined by the department;
- (7) costs of destroying any structure unless required for cost-effective remediation or in response to a threat to public health, safety or welfare, or the environment, as determined by the department;
- (8) costs of repairing or replacing any remediation equipment or groundwater monitoring wells negligently or intentionally damaged or destroyed by the owner or operator;
- (9) insurance premiums, the loss of interest on funds used to pay for a minimum site assessment, or loss of business;
- (10) attorneys' fees or other legal costs;
- (11) costs of monitoring a contractor and the owner's, operator's and designated representative's participation in the contractor selection process;
- (12) costs associated with real estate transactions;
- (13) rush charges for laboratory or other services, unless required by the department;
- (14) payment made to property owners for property access to install or place monitoring wells or other investigation-related or remediation-related equipment;
- (15) economic losses and liability to third parties;
- (16) any markup on costs, to include subcontractor costs;
- (17) costs associated with corrective action that fails to conform with the preapproved workplan or with the requirements of 20.5.119 NMAC or 20.5.120 NMAC;
- (18) costs associated with releases from ASTs with capacities 55,000 gallons and greater that are part of airport hydrant fuel distribution systems, USTs with field constructed tanks, or hybrid storage tank systems;
- (19) costs associated with releases from piping attached to an AST with a capacity of 55,000 gallons or greater;
- (20) costs associated with releases from piping attached to a hybrid storage tank system; and
- (21) costs associated with releases from piping attached to unregulated storage tank systems.

I. For ASTs, costs ineligible for payment include but are not limited to the following:

- (1) costs incurred prior to July 1, 2001;
- (2) costs incurred that exceed those in the department fee schedule in effect at the time the work was performed;

- (3) costs paid or reimbursed by insurance companies or any other third party described in 20.5.123.2319 NMAC;
  - (4) unpaid invoices, unless allowed under subsection F of this section;
  - (5) costs of removing, repairing, retrofitting or replacing any ASTs;
  - (6) costs of destroying, repairing, relocating or constructing any utility line unless required for cost-effective remediation or in response to a threat to public health, safety or welfare, or the environment, as determined by the department;
  - (7) costs of destroying any structure unless required for cost-effective remediation or in response to a threat to public health, safety or welfare, or the environment, as determined by the department;
  - (8) costs of repairing or replacing any remediation equipment or groundwater monitoring wells negligently or intentionally damaged or destroyed by the owner or operator;
  - (9) insurance premiums, the loss of interest on funds used to pay for a minimum site assessment, or loss of business;
  - (10) attorneys' fees or other legal costs;
  - (11) costs of monitoring a contractor and the owner's, operator's and designated representative's participation in the contractor selection process;
  - (12) costs associated with real estate transactions;
  - (13) rush charges for laboratory or other services, unless required by the department;
  - (14) payment made to property owners for property access to install or place monitoring wells or other investigation-related or remediation-related equipment;
  - (15) economic losses and liability to third parties;
  - (16) any markup on costs, to include subcontractor costs;
  - (17) costs associated with corrective action that fails to conform with the preapproved workplan or with the requirements of 20.5.119 NMAC or 20.5.120 NMAC;
  - (18) costs associated with releases from ASTs with capacities 55,000 gallons and greater that are part of airport hydrant fuel distribution systems, USTs with field constructed tanks, or hybrid storage tank systems;
  - (19) costs associated with releases from piping attached to an AST with a capacity of 55,000 gallons or greater;
  - (20) costs associated with releases from piping attached to a hybrid storage tank system; and
  - (21) costs associated with releases from piping attached to unregulated storage tank systems.
- [20.5.123.2310 NMAC – Rp. 20.5.123.2310 NMAC, 12/27/2018]

**20.5.123.2311 DESIGNATED REPRESENTATIVES:**

A. Subject to approval by the department, an owner or operator may designate a representative to facilitate compliance with 20.5.118 NMAC, 20.5.119 NMAC, 20.5.120 NMAC, 20.5.120 NMAC, 20.5.121 NMAC, 20.5.122 NMAC, and 20.5.123 NMAC. Designation of a representative shall include assignment to the designated representative of any rights the owner or operator may have to payment from the corrective action fund.

B. In the event an owner or operator is incapable of both directing required corrective action and assigning rights to a designated representative, a person may request in writing to be designated as a representative by the department and to be assigned any rights the owner or operator may have had to payment from the corrective action fund.

C. Anyone requesting to designate or be designated as a representative pursuant to this section shall submit a written request to the department that includes the:

- (1) owner ID number;
- (2) facility ID number;
- (3) release ID;
- (4) reason for the requested designation (for example: sale of property or change of ownership, out-of-state move, operator illness, age, or death); and
- (5) proposed representative's name, mailing address, email address, and telephone number.

D. When determining whether to approve or designate a person as a representative pursuant to subsection A or B of this section, the department shall consider: the reason or reasons a designated representative may be necessary; the nature of the proposed representative's relationship to the owner or operator, if any; the proposed representative's interest in the facility or real property where corrective action is being or shall be performed; and the proposed representative's ability to direct corrective action activities. The department shall

approve or deny the request for designation of a representative in writing, which explains the department's decision, to the requesting party and the owner or operator.

E. Requests for payment from the fund resulting from assignments described in subsection A or B of this section are not contractual between the department and the designated representative. Payments of such requests are made pursuant to the provisions of Section 74-6B-13 NMSA 1978, and are subject to the availability of funds in the corrective action fund.

F. Designation of a representative does not waive owner or operator responsibility or liability. Regardless of appointment of a designated representative, or assignment to the designated representative of rights to the corrective action fund, owners and operators remain responsible for compliance with the provisions of this chapter. The designation of a representative shall not affect the department's right to seek compliance at any time from the owner or operator or both. The designation of a representative is intended to facilitate compliance with corrective action requirements only and shall not relieve the owner and operator of their legal responsibilities or liabilities under this chapter.

[20.5.123.2311 NMAC – Rp. 20.5.123.2311 NMAC, 12/27/2018]

#### **20.5.123.2312 MEANS TEST TO DETERMINE DEDUCTIBLE:**

A. An owner or operator otherwise responsible for paying the first ten thousand dollars (\$10,000) of minimum site assessment costs under Section 74-6B-13 NMSA 1978 may request that the first ten thousand dollars (\$10,000) be paid from the Fund (a "zero deductible") if the owner or operator proves to the department an inability to pay the deductible.

B. An owner or operator otherwise responsible for a ten thousand dollar (\$10,000) deductible is allowed a five thousand dollar (\$5,000) deductible if the owner or operator proves to the department an inability to pay the full deductible.

C. The owner or operator shall submit an application for a zero or reduced deductible before or with submission of the MSA workplan, pursuant to 20.5.119 NMAC or 20.5.120 NMAC. The application shall include the following:

- (1) a letter explaining why the owner or operator is unable to afford to pay all or a portion of the initial ten thousand dollar (\$10,000) cost of an MSA;
- (2) copies of the owner's or operator's federal tax returns for the immediately preceding two years; and
- (3) any additional financial documentation (for example, copies of bankruptcy filings or medical bills) that will assist the department in determining the owner or operator's inability to pay.

D. The department shall determine inability or reduced ability to pay by using one of the environmental protection agency's published computer analysis programs, and by considering the owner's or operator's ability to maintain basic business operations if required to pay the full or reduced deductible, including consideration of the overall financial condition of the owner or operator and demonstrable constraints on the ability of the owner or operator to raise revenues.

E. Notwithstanding the provisions of subsections A and B of this section, an owner or operator otherwise responsible for paying a deductible shall be allowed a zero deductible if the owner or operator has proven to the department that the owner or operator is a municipality or county.

[20.5.123.2312 NMAC – Rp. 20.5.123.2312 NMAC, 12/27/2018]

#### **20.5.123.2313 OWNERSHIP AND DISPOSITION OF MAJOR REMEDIATION EQUIPMENT:**

A. The department shall be the owner of all major remediation equipment paid for by the fund, unless the equipment is leased as a more cost-effective approach, and shall be responsible for disposition of all major remediation equipment. No owner or operator shall dispose of any major remediation equipment without the written permission of the department. Disposition by the department shall be in accordance with all applicable laws and regulations, and by any of the following means:

- (1) relocation to another fund remediation site, as provided in subsections C through E of this section;
- (2) interim rental to a non-fund remediation site, subject to subsection F of this section;
- (3) sale or salvage, subject to subsection G of this section; or
- (4) when options in paragraphs (1) through (3) of this subsection are not available, any other form of disposal consistent with federal and state law.

B. Any major remediation equipment shall be installed, maintained and disposed of in accordance with subsections A through G of this section.

C. An owner or operator requiring the use of major remediation equipment for corrective action paid for with fund money shall use equipment on the department's reuse list, if available, and provided such equipment can be refurbished to the manufacturer's operating specifications for a cost not to exceed one-half of the replacement cost of the equipment.

D. For all major remediation equipment, new or used, the owner or operator shall enter into a written installation and maintenance agreement with a company qualified to install and maintain the equipment, and shall furnish a copy of the agreement, executed by the company, to the department. Installation and maintenance shall be performed by factory-authorized personnel or a contractor specified by the manufacturer, or as otherwise approved by the department. Complete and proper installation shall be verified by both the manufacturer or its designated representative, and the installation personnel or company. Installation and maintenance contract costs shall be stated together with the purchase price of the equipment quoted to the department in proposals, workplans and applications for payment from the fund.

E. For all new major remediation equipment and for all used major remediation equipment under warranty when acquired, the owner or operator shall also furnish a copy of the manufacturer's warranty to the department.

F. If major remediation equipment is rented to a non-fund remediation site, a reasonable rental fee shall be paid into the fund. The department shall determine the reasonable rental fee based on the lowest price quote from three equipment renters.

G. Major remediation equipment shall be depreciated over its useful life and have a salvage value, method and schedule as approved by the department. If the equipment is sold or salvaged, the proceeds from the sale or salvage value shall be paid into the fund. Gain or loss shall be calculated based on the net book value or salvage value in accordance with generally accepted accounting principles.

H. The department shall remove all major remediation equipment from a site within 90 days after issuing a "no further action" letter for that site.

[20.5.123.2313 NMAC – Rp. 20.5.123.2313 NMAC, 12/27/2018]

**20.5.123.2314 FUND APPLICATION, PAYMENT AND SUBROGATION:**

A. Nothing in 20.5.123 NMAC establishes or creates any liability or responsibility on the part of the department or the state to pay corrective action costs from any source other than the fund, nor shall the department or the state have any liability or responsibility to make any payments of corrective action costs if the balance in the fund is insufficient to cover those costs.

B. Payment shall be made only for work that has been performed in accordance with 20.5.118 NMAC, 20.5.119 NMAC or 20.5.120 NMAC and 20.5.123 NMAC, subject to the provisions of 20.5.121.2105 NMAC.

[20.5.123.2314 NMAC – Rp. 20.5.123.2314 NMAC, 12/27/2018]

**20.5.123.2315 OBTAINING FACILITY AND OWNER ID NUMBERS FOR PURPOSES OF CORRECTIVE ACTION:**

A. An owner or operator who is exempt from registration and tank fee requirements pursuant to 20.5.101.7 NMAC (because the owner had a UST taken out of operation on or before January 1, 1974, had a UST taken out of operation after January 1, 1974 and removed from the ground prior to November 8, 1984, or had an AST taken out of operation on or before July 1, 2001) remains responsible for all corrective action requirements otherwise imposed on all owners and operators.

B. To access the fund, an owner or operator shall apply for and receive from the department a facility ID number and owner ID number upon submitting the following information:

(1) the owner's or operator's name, mailing address, email address, and telephone number;  
and

(2) the physical address of the UST, AST or site that requires corrective action but that is exempt from registration and tank fee requirements pursuant to 20.5.101.7 NMAC.

[20.5.123.2315 NMAC – Rp. 20.5.123.2315 NMAC, 12/27/2018]

**20.5.123.2316 CONTENTS OF APPLICATION FOR PAYMENT AT RESPONSIBLE PARTY-LEAD SITES:**

A. When a deliverable is completed and the department has determined in writing that the work for which payment is sought is satisfactory, the owner or operator shall submit one original and one copy of the application for payment to the department. The application shall include:

- (1) information about the applicant, including: the owner's or operator's name, mailing address, email address, telephone number, owner ID number and the name of an individual to contact regarding the claim;
- (2) the name of the owner at the time of the release;
- (3) the name of the operator at the time of the release;
- (4) the name of the responsible party at the time of the release;
- (5) information about the facility, including: the name, address, release ID, and facility ID number for which payment is sought; the phase of corrective action being claimed; the type of tank (UST or AST); the workplan approval date and workplan identification number; the amount approved for the deliverable and the amount of the claim; the invoice number; the deliverable identification; and the exact name and date of the deliverable;
- (6) references to all work products or deliverables for which payment is sought;
- (7) the date or dates of the department's compliance determination or determinations under 20.5.123.2303 NMAC;
- (8) information about the payee if the owner or operator has assigned payment to another person, including: name, mailing address, telephone number, email address, and the nature of the payee's interest in the site;
- (9) a copy of any claim or claims the owner or operator has filed against any third party who caused or contributed to the release;
- (10) copies of invoices showing the work performed for the minimum site assessment or other required corrective action for which payment is sought;
- (11) a copy of the letter from the department determining the owner's or operator's eligibility for a zero or reduced deductible, if applicable, as determined in accordance with 20.5.123.2312 NMAC;
- (12) a statement that requirements to use a qualified firm in accordance with 20.5.122 NMAC have been met;
- (13) a signed and notarized statement of an officer or agent of the qualified firm performing the corrective action:
  - (a) consenting to an audit of time sheets, payroll and bank records, tax records, purchase orders, manifests and bills of lading, internal expense records and any other documents required to verify the costs claimed in the application; and
  - (b) agreeing to return to the department, upon demand, any and all amounts paid from the fund if the department determines that the owner or operator misrepresented or omitted any relevant facts;
- (14) copies of the workplan approval letter and any subsequent amendments to the workplan covering work for which payment is requested;
- (15) a copy of any and all notices from the department approving as satisfactory the deliverable for which payment is requested;
- (16) information about the contractor, including: the contractor's name, address and telephone number; and the name of the contractor's project manager for the site; and
- (17) if payment has been assigned by the owner or operator to a contractor, proof that the contractor has paid all subcontractor invoices.

B. When work is performed on a fixed fee basis, the owner or operator shall also submit the following as part of the application:

- (1) a description of the deliverable and the date delivered;
- (2) verification that any performance criteria required for payment were achieved; and
- (3) any other requirements of the workplan approval.

C. When work is performed on a time-and-materials basis, the owner or operator shall also submit the following as part of the application:

- (1) detailed billings of labor and equipment for each task performed; contractor staff shall be identified by name and hourly rate; equipment shall be identified as owned or rented, with the hourly or daily rate; laboratory and subcontractor charges shall be clearly explained;
- (2) timesheets, invoices, or statements with staff name, labor category, and description and date of work performed;
- (3) copies of receipts for all equipment and supplies;
- (4) travel and expense logs;
- (5) if work is billed on an hourly basis, timesheets, invoices or statements which include the hourly rate and number of hours billed to the nearest one-quarter hour; and

(6) any other requirements of the workplan approval.

D. Upon the department's request, the owner or operator shall submit copies of all subcontractor invoices and an accounting of the amount paid and any remaining balance on each invoice.

E. In the first application for payment of corrective action costs for each workplan, the owner or operator shall submit one original and one copy of:

(1) an original, signed oath or affirmation in accordance with Sections 14-13-1 and 14-13-2

NMSA 1978:

(a) certifying that the owner or operator has read the approved workplan and understands that the corrective action described in the workplan shall be completed at the identified facility;

(b) certifying that all matters and facts contained in that application, and in any subsequent applications for payment for the same workplan, are and will be truthful and that all invoices reflect actual costs paid or otherwise incurred;

(c) consenting to an audit of financial records pertaining to the current and any future claims for the same workplan; and

(d) agreeing to return to the department, upon demand, any and all amounts paid from the fund if the department determines that the owner or operator misrepresented or omitted any relevant facts in this or any future application for payment for the same workplan;

(2) a signed, dated, and notarized disclosure statement indicating the site name and number where the release occurred; the type of tank (UST or AST); the facility ID number; the name, address, and telephone number of the entity that performed the work for which payment is claimed; the full name of all owners and operators of the tank for which payment is claimed; the name of each individual and business entity that owns or controls the entity that performed the work for which payment is claimed; and the name of every business concern that is a partner or subsidiary of the entity that performed the work for which payment is claimed;

(3) a completed internal revenue service W-9 form (request for taxpayer identification number and certification form);

(4) information about insurance coverage, including: whether the owner or operator has insurance for releases of regulated substances at the site of the release for which a claim is being made; the name, address, and telephone number of the insurance company; the name, address, and telephone number of a contact person within the insurance company; the amount of coverage; whether the applicant has filed an insurance claim for this release, and if so, the amount sought; and the amount the insurance company has paid; and

(5) copies of any insurance policies in effect on the date of the report or at the time of the release that may insure the owner or operator against all or part of the costs of corrective action.

F. After the first application for payment of corrective action costs for each workplan, an owner or operator who has properly submitted the documents required by subsection E of this section and received a payment need not submit these documents with future applications for payment unless any information provided in the first application has changed or the department has modified the scope of the work or the budget of the workplan.

G. The owner or operator shall not submit costs of any portion of a minimum site assessment in the same application for payment of costs of other required corrective action.

H. Documents submitted as part of an application for payment of corrective action costs shall not contain alterations, corrections, or erasures.

[20.5.123.2316 NMAC – Rp. 20.5.123.2316 NMAC, 12/27/2018]

[The department provides forms that may be used to comply with this section. The forms are available on the petroleum storage tank bureau's pages on the department website or by contacting the petroleum storage tank bureau at 505-476-4397 or 2905 Rodeo Park Drive East, Building 1, Santa Fe, New Mexico 87505.]

**20.5.123.2317 CONTENTS OF APPLICATION FOR PAYMENT AT STATE-LEAD SITES:** When a deliverable is completed and the department has determined in writing that the work for which payment is sought is satisfactory, the contractor shall submit one original and one copy of the application for payment to the department. All applications shall include:

A. the payee's name, mailing address, email address and telephone number;

B. the contractor's name, mailing address, email address and telephone number;

C. information about the workplan, including: the date the workplan was approved, the workplan identification number, the deliverable identification numbers and the date or dates each deliverable was delivered;

D. information about the facility, including: the name, physical address, release ID, and facility ID number of the facility for which payment is sought; the phase of corrective action being claimed; the contract number; and the expiration date of the contract;

- E. the invoice number or numbers and the amount of each invoice for which payment is sought;
- F. copies of each invoice for which payment is sought; and
- G. copies of the workplan approval letter and any subsequent amendments to the workplan.

[20.5.123.2317 NMAC – Rp. 20.5.123.2317 NMAC, 12/27/2018]

[The department provides a form on the petroleum storage tank bureau’s pages on the department website that may be used to comply with this section. The form may also be obtained by contacting the bureau at 505-476-4397 or 2905 Rodeo Park Drive East, Building 1, Santa Fe, New Mexico 87505.]

**20.5.123.2318 APPLICATION AND PAYMENT PROCESS:**

A. All applications for payment shall be received by the department within 90 days of the date upon which the owner, operator or contractor received a notice of approval of the deliverable from the department, pursuant to 20.5.123.2309 NMAC. The department shall not grant extensions of the deadline for applications for payment except for good cause shown, in which case the department shall grant a 30-day extension. For purposes of this section, “good cause” means unavoidable circumstances beyond the owner’s, operator’s, or contractor’s control. All requests for an extension shall describe the reason or reasons an extension is necessary and shall be submitted to the department in writing within the 90-day period for submitting an application for payment.

B. Applications for payment shall be sent to the New Mexico environment department, petroleum storage tank bureau, reimbursement section.

C. The department shall review all applications for payment in the order received and shall, within 60 days of receipt, either:

- (1) pay the owner, operator or contractor for all eligible costs or as required by 20.5.121.2105 NMAC; or
- (2) reject the application and notify the owner, operator or contractor in writing of the inadequacies in the application that caused the rejection.

D. The department may reject an application for payment:

- (1) of the cost of any deliverable if:
  - (a) the application is received after the deadlines imposed by this section;
  - (b) the application does not contain all of the information or documents required by 20.5.123.2316 or 20.5.123.2317 NMAC (including but not limited to, all required disclosures, affirmations, timesheets, receipts, logs, and invoices);
  - (c) the application itself or the attached documents are incomplete, inaccurate or unclear;
  - (d) the application contains information that is intentionally misleading or false;
  - (e) the application seeks payment for work that was not pre-approved by the department;
  - (f) the application seeks payment for work that was not approved by the department as satisfactory; or
  - (g) the application seeks payment of costs that exceed the amount approved in the workplan; and
- (2) of the cost of any deliverable other than an MSA if:
  - (a) the department has not made a compliance determination; or
  - (b) tank fees are past due.

E. The owner, operator or contractor may correct any inadequacies in the application and resubmit one completed original application and one copy within 30 days of the date of the notice of inadequacies.

F. Upon receiving a resubmitted application, the department shall follow the procedures in subsections C, D and H of this section for reviewing and accepting or rejecting applications for payment.

G. The owner, operator or contractor may submit a total of three applications (an initial application and two resubmitted applications) for any deliverable. After the owner, operator or contractor submits a total of three inadequate applications, the department may decline to review additional applications for the same deliverable.

H. Payment for eligible costs shall occur no later than 60 days, or in accordance with 20.5.121.2105 NMAC, after the department determines the application is complete and approves the technical adequacy of the application. The department shall mail the check for payment to the person designated as payee in the application.

I. Payment under this section shall not foreclose the department’s right to recover excessive or illegal payments.

[20.5.123.2318 NMAC – Rp. 20.5.123.2318 NMAC, 12/27/2018]



[The address of the department's petroleum storage tank bureau, reimbursement section, is: 2905 Rodeo Park Drive East, Building 1, Santa Fe, New Mexico 87505.]

**20.5.123.2319 SUBROGATION:**

A. The department has a right of subrogation to any insurance policies in existence at the time of the release to the extent of any rights the owner or operator of a site may have had under that policy, pursuant to Subsection D of Section 74-6B-8 NMSA 1978. The department's subrogation rights are limited to the extent of the department's expenditures from the corrective action fund or other sources. The owner or operator shall include in the first application for payment a copy of any insurance policies which were in effect on the date of the report, as well as any policies which were in existence at the time the release may have occurred and which may insure the owner or operator against all or part of the costs of taking corrective action. The owner or operator shall also report to the department any claims filed against any policy identified in accordance with this section or Subsection G of 20.5.123.2310 NMAC.

B. The department has a right of subrogation against any third party who caused or also contributed to the release, pursuant to Subsection D of Section 74-6B-8 NMSA 1978. This right of subrogation shall apply regardless of any applications for payment the owner or operator may have made or intends to make for payment from the fund. The owner or operator shall report to the department the identity of any third party against whom a claim is filed and provide a copy of any claim filed against that party.

[20.5.123.2319 NMAC – Rp. 20.5.123.2319 NMAC, 12/27/2018]

**20.5.123.2320 ADMINISTRATIVE REVIEW:**

A. With the exception of compliance determinations under 20.5.123.2303 through 20.5.123.2305 NMAC, an owner, operator or contractor aggrieved by a decision made by the department under 20.5 NMAC may obtain review of the decision using the procedures and subject to the limitations set forth in 20.5.125 NMAC.

B. An offeror aggrieved by a selection decision made by the department and the owner or operator pursuant to 20.5.123.2306 through 20.5.123.2307 NMAC may obtain review of the decision from the secretary by submitting a written request for hearing.

(1) Timelines. The request must be made in writing to the secretary by the offeror within 10 days after the department has notified the owner or operator and all submitting firms of the highest scoring proposal. If an appeal is received within the 10-day time limit, the secretary shall hold a hearing within 15 days after receipt of the request, unless the parties agree to an alternate timeframe. The secretary shall notify the person who requested the hearing of the date, time and place of the hearing by certified mail.

(2) Burden of proof. In the appeal hearing, the burden of proof is on the person who requested the hearing.

(3) Procedures.

(a) Appeal hearings shall be held at a place designated by the secretary, unless other mutually agreed upon arrangements are made. The secretary may designate a person to conduct the hearing and make a final decision or make recommendations for a final decision. The secretary's hearing notice shall indicate who will conduct the hearing and make the final decision.

(b) The department shall make an audio recording of the hearing. If either party wants the hearing transcribed, that party shall bear the costs of transcription.

(c) In appeal hearings, the rules governing civil procedure and evidence in district court shall not apply. Hearings shall be conducted so that all relevant views, arguments, and testimony are amply and fairly presented without undue repetition. The secretary shall allow department staff and the hearing requestor to call and examine witnesses, to submit written and oral evidence and arguments, to introduce exhibits, and to cross-examine persons who testify. All testimony shall be taken under oath. At the end of the hearing, the secretary shall decide and announce if the hearing record will remain open, for how long, and for what reason(s) it will be left open.

(4) Secretary's decision. Based upon the evidence presented at the hearing, the secretary or designee shall sustain, modify, or reverse the action of the department. The secretary or designee's decision shall be by written final order within five business days following the close of the hearing record. The order shall include the reason(s) on which the decision is based, and shall be sent by certified mail to the hearing requestor and any other affected person who requests notice.

(5) Stay of action. The filing of an administrative appeal shall stay execution of the contract by the owner or operator until the secretary or designee issues a final order on the appeal.

(6) Judicial review. Judicial review of the secretary or designee's final order shall be as provided by law. The filing of a judicial appeal shall not stay the execution of the contract, corrective action, compliance with the regulations, or any other action required by the secretary.

C. An individual denied designation by the department as a representative pursuant to 20.5.123.2311 NMAC may obtain review of the department's decision using the procedures and subject to the limitations set forth in 20.5.125 NMAC.

D. Compliance determinations shall be appealed as provided in 20.5.123.2321 and 20.5.123.2322 NMAC.

[20.5.123.2320 NMAC – Rp. 20.5.123.2320 NMAC, 12/27/2018]

**20.5.123.2321 REVIEW OF DETERMINATIONS OF COMPLIANCE:**

A. Any owner or operator aggrieved by a decision made by the department regarding determinations of compliance in accordance with 20.5.123.2303 through 20.5.123.2305 NMAC may appeal the decision by submitting a request for reconsideration of the decision to the director. Any owner or operator aggrieved by a decision made under these regulations by the director may appeal the decision by submitting a request for reconsideration to the director. The reconsideration will be based on written submittals. Any such request for reconsideration shall be in writing and shall specify the grounds upon which the petitioner objects to the decision. The request shall be accompanied by any and all written material and argument which the owner or operator wishes the director to consider upon reconsideration. The request for reconsideration shall be postmarked within 15 days of the date of the determination.

B. Department staff shall respond to the request for reconsideration within 15 days of receipt of the complete submittal of the owner or operator's request for reconsideration. The response of the department staff shall be sent to both the director and the owner or operator and shall be accompanied by any and all written materials and argument in support of the position of the staff on the issues raised by the owner or operator.

C. For good cause shown, the director may permit either party additional time in which to submit the supporting written materials or argument pursuant to subsections A and B of this section. Any request for additional time and all evidence for good cause shall be submitted in writing prior to the end of the 15-day period described in subsection A of this section. The department shall act on the request for additional time within a reasonable period of time.

D. The director's action on the request for reconsideration shall be based on the written materials and argument submitted pursuant to this section unless the director, in the director's discretion, schedules a conference on the request for reconsideration.

E. The director's action on the request for reconsideration shall be by written decision and shall state the reason therefor. The director shall send a copy of the decision to the owner or operator and furnish a copy to department staff promptly after the decision is rendered.

F. The owner or operator may appeal the decision of the director made under subsection E of this section by requesting a hearing in accordance with 20.5.123.2322 NMAC.

[20.5.123.2321 NMAC – Rp. 20.5.123.2321 NMAC, 12/27/2018]

**20.5.123.2322 REQUEST FOR HEARING ON DETERMINATIONS OF COMPLIANCE:**

A. An owner or operator may obtain review by the secretary of a decision by the director made pursuant to subsection E of 20.5.123.2321 NMAC by filing a written request for a hearing as provided in the environment department adjudicatory procedures, 20.1.5 NMAC, within 30 days after the date the owner or operator receives the director's decision pursuant to Subsection E of 20.5.123.2321 NMAC. The procedures set forth in the environment department adjudicatory procedures, 20.1.5 NMAC, shall govern the proceeding.

B. The complainant shall attach to the request for hearing a copy of the determination for which review is sought.

C. With the request for hearing, the complainant shall file a reply to the determination. The reply shall address each of the findings in the determination, including any facts which support the complainant's position that the complainant has complied with the requirements of subsection B of Section 74-6B-8 NMSA 1978.

D. The secretary shall schedule the hearing for no later than 90 days after service of the notice of docketing.

[20.5.123.2322 NMAC – Rp. 20.5.123.2322 NMAC, 12/27/2018]

**20.5.123.2323 EFFECT OF APPEAL ON PAYMENT, ENFORCEMENT:** A request for hearing or other administrative review shall not delay payment for any phase of corrective action, other than that which is being

contested. A request for hearing shall not affect the secretary’s authority to issue compliance orders or otherwise seek enforcement of 20.5 NMAC under the provisions of the Hazardous Waste Act or relieve an owner or operator of any responsibility under 20.5 NMAC.

[20.5.123.2323 NMAC – Rp. 20.5.123.2323 NMAC, 12/27/2018]

**20.5.123.2324 CONTRACTOR FEE SCHEDULE:**

A. Hourly billing rates listed in subsection C below shall conform to the Professional Services categories defined in subsection B of this section. Payment will be based on task(s) performed. Professional services not explicitly listed in this fee schedule may not be billed without prior negotiation and pre-approval by the department. The department may require justification.

B. The professional services categories are defined as follows:

- (1) Principal scientist – Administrative or professional head of organization. Directs professional staff. Charges a very limited number of hours per site, as in review of project documents.
- (2) Senior scientist – Senior technical leader. Develops technical and budgetary approach to work orders. Duties include aquifer characterization, review of technical reports and remedial action plans. Supervises work activities of lower level professional staff. Coordinates and communicates with agency personnel and client regarding contracts, general direction and problems at work site. Generally, performs limited field work. Performs design and investigation work in technically complex situations often requiring innovative applications.
- (3) Project scientist/engineer-manager – Identifies problems and develops investigative and remedial solutions to work site situations. Consults with higher-level professional staff. Prepares workplans, cost estimates and reports. Performs modeling. Analyzes and interprets field data. Supervises lower level technical personnel during on-site drilling, sampling, or remediation activities. Frequently communicates with agency personnel and client.
- (4) Staff scientist/engineer – Implements field work for on-site investigation and remediation activities including site characterization, drilling supervision, and monitoring well installation and sampling activities. Assists in modeling, hydrogeologic data analysis, and report preparation. Consults with higher level professional staff.
- (5) Field technician – Supervises installation, maintenance, and repair of investigative and remediation machinery and equipment. Conducts sampling and monitoring. Maintains machinery and equipment. Assists with field supervision of subcontractors.
- (6) Draftsperson – Technically familiar with basic engineering principles and construction methodologies. Works independently; work product reviewed by Professional Engineer. Proficient with computer aided design drafting.
- (7) Administrator – Tracks workplan costs, prepares and processes invoices, administers leasing and ordering of equipment, and performs general administrative work for report and workplan preparation.
- (8) Secretary – Performs word processing and spreadsheet entry. Assists technical and senior personnel with report production, correspondence preparation and data entry.
- (9) Clerk – Performs general office work, typing, filing, and document reproduction.

C. Professional Service Rates:

<b>Professional services</b>	<b>Hourly rate</b>
Principal scientist	\$175.00
Senior scientist	\$145.00
Project scientist/engineer-manager	\$115.00
Staff scientist/engineer	\$95.00
Field technician	\$85.00
Draftsperson	\$85.00
Administrator	\$80.00
Secretary	\$50.00
Clerk	\$45.00

D. Field Equipment Costs:

<b>Field equipment</b>	<b>Cost per day</b>
Carbon monoxide, sulphur dioxide oxide and oxygen meters	\$50.00
Water quality meter	\$50.00
Dissolved oxygen meter (water)	\$37.50
Electroconductivity meter	\$47.50

Explosimeter	\$42.50
Fluid field detector	\$30.00
Interface probe	\$65.00
Organic vapor meter	\$70.00
Photoionization detector	\$70.00
Flame ionization detector	\$75.00
pH Meter	\$22.50
Other. Costs shall be pre-approved by the department. The department may require justification.	

E. Per diem and mileage will be paid in accordance with 2.42.2 NMAC, Regulations Governing the Per Diem and Mileage Act. The department shall only approve mileage reimbursement for travel within New Mexico.

F. Earth-moving equipment. Costs shall be pre-approved by the department. The department may require justification:

- (1) backhoe, light duty (12 feet-19 feet);
- (2) backhoe, medium duty (14 feet-19 feet);
- (3) trackhoe, light duty;
- (4) trackhoe, medium duty;
- (5) trackhoe, heavy duty; and
- (6) Other. Costs shall be pre-approved by the department. The department may require

justification.

G. Well Supplies. Costs shall be pre-approved by the department. The department may require justification:

- (1) two-inch blank;
- (2) four-inch blank;
- (3) two-inch screen PVC 10 feet;
- (4) four-inch screen PVC 10 feet;
- (5) filter pack, per 100 pounds;
- (6) bentonite pellets, per 50 pounds;
- (7) bentonite chips, per 50 pounds;
- (8) bentonite gel, per 100 pounds;
- (9) grout, per 50 pounds.;
- (10) eight-inch manhole;
- (11) 12-inch manhole; and
- (12) Other. Costs shall be pre-approved by the department. The department may require

justification.

H. Drilling. Costs shall be pre-approved by the department. The department may require justification:

- (1) mobilization/demobilization;
- (2) hollow stem auger;
- (3) air rotary;
- (4) Sonic drilling;
- (5) other drilling methods;
- (6) plug and abandon; and
- (7) Other. Costs shall be pre-approved by the department. The department may require

justification.

I. Lab services. Costs shall be pre-approved by the department. The department may require justification:

- (1) EPA methods.
  - (a) 8310;
  - (b) 601/8010, 602/8020;
  - (c) Modified 8015;
  - (d) 418.1;
  - (e) 610/8100;
  - (f) 624/8240;
  - (g) 625/8270;

- (h) 8260; and
- (i) RCRA 8 metals.
- (2) benzene, toluene, ethyl benzene, and xylenes; methyl tertiary-butyl ether;
- (3) pH;
- (4) total organic carbon;
- (5) Geotechnical soil analyses:
  - (a) sieve analysis;
  - (b) soil moisture;
  - (c) density;
  - (d) porosity;
  - (e) fraction organic carbon; and
- (6) Other. Costs shall be pre-approved by the department. The department may require justification.

J. The contractor shall provide justification or documentation upon request of the department for proposed costs subject to this part.

K. Subcontractor costs shall be billed at cost. The department may require three bids for subcontracted services.

[20.5.123.2324 NMAC – Rp. 20.5.123.2324 NMAC, 12/27/2018]

**HISTORY OF 20.5.123 NMAC:**

**History of Repealed Material:**

20.5.123 NMAC, Corrective Action Fund Administration (filed 7/31/2018) emergency rule, effective 12/27/18.

**Other History:**

20.5.17 NMAC, Corrective Action Fund Administration was renumbered, reformatted, and replaced by 20.5.123 NMAC, Corrective Action Fund Administration (filed 7/31/2018) emergency rule, effective 7/24/18.