

Unregulated Heating Oil Tank Program Guidance

Scope and Intent

The Unregulated Heating Oil Tank Program allows pre-qualified environmental professionals to investigate and remediate certain low risk Unregulated Heating Oil Tanks with limited DEP oversight subject to possible audit. Under the Unregulated Heating Oil Tank Program, DEP has established criteria for the pre-qualification of environmental professionals. The criteria have been designed to identify individuals whom, by virtue of education and experience, can be assumed to be sufficiently competent and trustworthy to participate in the Program.

DEP will rely on pre-qualified environmental professionals to investigate and remediate low risk unregulated underground storage tanks with limited, direct DEP oversight. By doing so, DEP case managers will be available to provide oversight for higher risk cases. By establishing and strictly enforcing the requirements of the Unregulated Heating Oil Tank Program, DEP will ensure that the remediation of contaminated sites is completed in full compliance with the Technical Requirements for Site Remediation (“Technical Requirements”) and other applicable standards. The terms “remediation” or “remediate” are defined for the purpose of this program exactly as they are defined in the Technical Requirements, at N.J.A.C. 7:26E-1.8. DEP will vigorously audit a participant's work products to ensure compliance and integrity.

DEP and the pre-qualified environmental professionals will not form an agency relationship through this program and no such relationship is to be presumed. A person pre-qualified under the Unregulated Heating Oil Tank Program is not an instrumentality of the State.

Eligibility

Environmental professionals must satisfy the following requirements to be eligible for pre-qualification to remediate Unregulated Heating Oil Tanks:

1. Hold a valid New Jersey UST Certification in Subsurface Evaluation. This certification must be maintained in full force and effect. The loss or lapse of this certification shall be grounds for immediate removal from the Unregulated Heating Oil Tank Program; and
2. Employed by a firm that holds a valid New Jersey UST certification in Subsurface Evaluation. This certification must be maintained in full force and effect. The loss or lapse of this certification shall be grounds for immediate removal from the Unregulated Heating Oil Tank Program.

Universe of Cases/Sites

Subject to the limitations below, DEP’s Unregulated Heating Oil Tank Program will apply to sites for which remediating parties are seeking an Area of Concern (AOC) No Further Action determination (“NFA”) for residential Unregulated Heating Oil Tanks, or multiple Unregulated Heating Oil Tanks on the same non-residential property with an aggregate capacity of less than 2,000 gallons. The DEP will not issue any entire site No Further Action determination (NFA-E) under the Program. Certain Unregulated Heating Oil Tanks are **excluded** from the Program or can be removed from the Program after cleanup has commenced if one of the exclusion conditions specified below is discovered.

Properties and AOCs Excluded from Unregulated Heating Oil Tank Program

The following Unregulated Heating Oil Tank cases are specifically excluded:

1. Cases with an Immediate Environmental Concern (IEC) condition, as defined by the DEP's IEC guidance document;
2. Cases with ground water contamination exceeding a Ground Water Quality Standard (GWQS) and with a potable well (on-site or off-site) within 100 feet of the contamination;
3. Cases for which the discharge results in groundwater contamination that has migrated beyond the property boundaries of the owner of the tank;
4. Cases for which the discharge from the tank requires the initiation of a vapor intrusion investigation (see update at <http://www.nj.gov/dep/srp/guidance/vaporintrusion/whatsnew.htm#20101110>);
5. Cases with a discharge to surface water and/or wetland;
6. Cases for which a non-permanent remedy requires an engineering or institutional control;
7. Cases that will be remediated to an Alternative Remediation Standard;
8. Cases for which a variance from the Technical Requirements is requested pursuant to N.J.A.C. 7:26E-1.6(d); or
9. Cases for which remediation will be conducted under NJPDES Permit by Rule authority, or On-Scene Coordinator Discharge Authorization Pursuant to the Water Pollution Control Act, N.J.S.A. 58:10A-1 et. seq., and 40 CFR Part 300, the National Oil and Hazardous Substance Pollution Contingency Plan (NCP).

Unregulated Heating Oil Tank Program Process

A party remediating a qualifying Unregulated Heating Oil Tank may apply to the DEP for participation in the Program only after the remediation has been completed. DEP will publish an Unregulated Heating Oil Tank Program Directory on the DEP Web page at <http://www.nj.gov/dep/srp/unregulatedtanks>, and the remediating party may select any pre-qualified environmental professional listed.

PLEASE NOTE that nothing in the Program creates, or may be asserted by any pre-qualified environmental professional or remediating party to create, any obligation on DEP to guarantee the quality of work performed by a pre-qualified environmental professional, to ensure payment to a pre-qualified environmental professional for work performed or to involve DEP in a private contractual relationship between a pre-qualified environmental professional and another person. Pre-qualified environmental professionals and all private parties retaining a pre-qualified environmental professional understand and agree that nothing in the Program shall affect, and shall not be asserted to affect, DEP's enforcement, oversight or other authorities at Unregulated Heating Oil Tanks being remediated under the Program.

To obtain an NFA under the Program, a pre-qualified environmental professional or remediating party shall submit the following to the DEP:

1. A completed Unregulated Heating Oil Tank Program Questionnaire (Appendix A),
2. A "Certification Statement," signed by the remediating party, stating that they have personally examined and are familiar with the information submitted therein and all attached

documents. A "Certified Statement" must also be signed by the pre-qualified environmental professional stating that all work performed up to the date of the submission has been conducted under the direct on-site supervision and oversight of the pre-qualified environmental professional and was performed in compliance with the Technical Requirements and other applicable standards, and that the property or AOC meets the eligibility criteria for the Program (Appendix B);

3. A non-refundable certified check, payable to the Treasurer - State of New Jersey, in the amount(s) currently charged to remediating parties under applicable rules for DEP's review of documents submitted with the application; and
4. A copy of all appropriate Remediation Documents prepared in accordance with the reporting requirements contained in N.J.A.C. 7:26E.

Audits

DEP has developed auditing requirements and other safeguards to ensure that public health and environmental standards are rigorously enforced in the Program. Pre-qualified environmental professionals who routinely fail to meet the highest standards will be removed by DEP from the Program promptly and may face other appropriate consequences, as specified below.

All Unregulated Heating Oil Tank Program Questionnaires and Certifications will be reviewed by DEP in all cases. Further detailed audits will be conducted on a percentage of cases prior to NFA determination issuance. Selection of cases for audit will be at the sole discretion of DEP. Audits may consist of complete document and data package reviews, as well as field audits and sampling or other data gathering, solely at the discretion of the DEP. Following a DEP audit, the auditor will issue a report detailing the results and a recommendation as to whether to issue an NFA determination, or whether further remediation is required. At the discretion of DEP, cooperative activities may be conducted to address deficiencies detected in the audit.

Departmental Review

DEP will review the Unregulated Heating Oil Tank Program Questionnaire as follows:

1. Upon receipt of what DEP determines is an administratively complete Unregulated Heating Oil Tank Program Questionnaire, including all executed certifications, if DEP determines that an audit will not be conducted for the remediation for which an NFA is sought, DEP will issue the appropriate NFA based upon the pre-qualified environmental professional's certification for the remediation conducted;
2. Upon receipt of what DEP determines is an administratively complete Unregulated Heating Oil Tank Program Questionnaire, if DEP determines that an audit will be conducted for the remediation for which an NFA determination is sought, DEP will notify the pre-qualified environmental professional and the remediating party of this fact;
3. For submittals being audited, upon receipt of a complete Unregulated Heating Oil Tank Program Questionnaire, DEP will issue either:
 - (a) An NFA determination; or
 - (b) Notification that further remediation is required for an NFA determination and the DEP's basis for that determination; or

4. If DEP determines that the Questionnaire is incomplete, DEP will notify the pre-qualified environmental professional and the remediating party of the deficiencies in the Questionnaire. DEP will provide the pre-qualified environmental professional and the remediating party a time frame for correction of Questionnaire deficiencies. This review is for administrative completeness only; additional reviews and auditing will be at the sole discretion of the DEP.

Penalty Points and Enforcement

A key guarantor of the integrity of the Unregulated Heating Oil Tank Program will be aggressive enforcement for noncompliance. DEP enforcement against a pre-qualified environmental professional shall carry no automatic implication that the pre-qualified environmental professional cannot perform site remediations under other programs. Noncompliance may be administrative or technical as described below. In addition, where a violation indicates possible criminal liability (*e.g.*, evidence of falsification of documentation submitted under the Program), the matter may be referred to the Division of Criminal Justice for appropriate action.

The imposition of the penalties referenced below shall have no impact on, and shall in no way waive, diminish or affect any other liability, relief or penalty that the State or any other party may seek with respect to the acts or omissions that resulted in the imposition of the penalties. Each type of noncompliance will be assigned a point value ("Penalty Points") as described below. Penalty points will be assigned for each deficiency for each area of concern. When the total number of Penalty Points for a pre-qualified environmental professional exceeds 100, the environmental professional will be removed from the Program. By entry into the Program, all pre-qualified environmental professionals and their employers agree to DEP's Penalty Point system.

In addition to an individual's Penalty Points, Penalty Points for firms employing pre-qualified environmental professionals will be tracked. Consequently, pre-qualified environmental professionals will be required to secure the written consent of their employers as a condition of pre-qualification. All Penalty Points accumulated by a pre-qualified environmental professional are also attributed to the environmental professional's employer. The Penalty Point Limit for each employer will be calculated in the following manner. The Limit will be determined based upon the number of pre-qualified environmental professionals that are employed. For the first pre-qualified environmental professional employed, the Penalty Point Limit will be 100 points. Fifty (50) points will be added to the Limit for each additional pre-qualified environmental professional. For example, if an employer has two pre-qualified environmental professionals in its employ, that employer's Penalty Point Limit will be 150 points. Upon reaching the applicable Penalty Point Limit, the firm and all employees will be removed from the Program.

Individual Penalty Points will "travel" with the pre-qualified environmental professional, irrespective of changes in employment. Where a pre-qualified environmental professional with individual Penalty Points changes employment, that environmental professional's Penalty Points will remain on the record of the former employer. Employer Penalty Points will not "travel" with the individuals leaving that employer for employment elsewhere if that individual did not personally incur the points.

If a firm is suspended, the suspension applies to its successors and assigns.

Where an environmental professional is removed from the Program for a reason other than the accrual of individual Penalty Points, the environmental professional may request that DEP consider,

at its discretion, an application during the next application period once that individual has reestablished the necessary criteria.

Any environmental professional who is not subject to removal from the Program may voluntarily withdraw from the Program by submitting a written request for withdrawal to the DEP.

Penalty Points shall be assigned for the following deficiencies:

Minor Administrative Deficiencies (1 Point Each)

Minor Administrative Deficiencies constitute minor violations of the administrative requirements applicable to a remediation. A pre-qualified environmental professional will receive one (1) Penalty Point for each minor administrative deficiency identified by DEP. Minor Administrative Deficiency Penalty Points will remain on pre-qualified environmental professional's record even if all Minor Administrative Deficiencies are corrected. Minor Administrative Deficiencies include the following:

1. Missing signatures and/or certifications or forms;
2. Incomplete laboratory Quality Assurance data;
3. Failure to submit electronic version of laboratory data;
4. Failure to submit waste disposal documentation;
5. Failure to submit documentation of placement of clean fill;
6. Failure to submit documentation of proper tank/piping disposal;
7. Failure to submit required oversight costs;
8. Failure to submit a site map; or
9. Improper certification of documents (*e.g.*, certification for report signed prior to report completion).

Minor Technical Deficiencies (5 Points Each)

Minor Technical Deficiencies constitute violations of the Technical Requirements applicable to a remediation. Minor Technical Deficiency Penalty Points will remain on the pre-qualified environmental professional's record even if all deficiencies are corrected. Minor Technical Deficiencies include the following:

1. Scaled, dated or otherwise incomplete or inaccurate maps submitted (hand drawings or "maps not to scale" are unacceptable);
2. Soil boring logs and/or soil description not submitted;
3. Soil borings/samples/excavations not properly screened;
4. Potentially contaminated soil reused without testing;
5. Potentially contaminated or known contaminated soil is left stockpiled on-site;
6. Improper fill used (*e.g.*, recycled crushed concrete);
7. Problems detected in the laboratory's Conformance/Non-Conformance summary, but not identified; or

8. Reports not submitted in an acceptable format as required by N.J.A.C. 7:26E.

Moderate Technical Deficiencies (10 Points Each)

Moderate Technical Deficiencies constitute more serious violations of the Technical Requirements applicable to a remediation. Moderate Technical Deficiency Penalty Points will remain on the pre-qualified environmental professional's record even if all deficiencies are corrected. Moderate Technical Deficiencies include the following:

1. A public supply well search was not conducted pursuant to N.J.A.C. 7:26E-3.7(e)3;
2. Depth to ground water and all other information required under N.J.A.C.7:26E-3.7 and/or 4.4 to determine whether an investigation of ground water is necessary is not submitted (this includes information on location of public supply wells);
3. A Baseline Environmental Evaluation was not performed pursuant to N.J.A. C. 7:26E-3.11;
4. Required analytical analysis not performed (*e.g.*, VOCs, TOCs exceed 1,000 ppm);
5. Incorrect number of soil samples;
6. Improper location of soil samples;
7. Improper depth/interval of soil samples;
8. Improper sample preservation method;
9. Improper analytical method used to evaluate a soil or ground water sample;
10. Improper sample collection method for ground water samples;
11. Laboratory not certified to perform the analytical method;
12. Failure to provide photographic documentation of the tank's condition;
13. Improper waste disposal (*i.e.*, wastes were improperly classified, taken to improper waste facilities, accompanied by incomplete or erroneous paperwork, or reused improperly); or
14. Not properly following other regulations or laws applicable to a project conducted under the Program (*e.g.*, not obtaining necessary state or local permits, etc.).

Major Technical Deficiencies (20 Points Each)

Major Technical Deficiencies constitute the most serious violations of the Technical Requirements applicable to a remediation. Twenty (20) Penalty Points will be assigned for each Major Technical Deficiency identified by DEP. Major Technical Deficiencies include the following:

1. Submitting a case that is specifically excluded from the Program;
2. Submitting a request for an NFA determination when further remediation is required pursuant to N.J.A.C. 7:26E;
3. Submitting a request for an NFA determination when a vapor intrusion investigation is required pursuant to N.J.A.C. 7:26E-4.4(h)3.viii;
4. Analytical results ignored (*e.g.*, sample results exceed Unrestricted use, Impact to Ground Water Soil Cleanup Criteria or Ground Water Quality Standards);

5. Post-excavation soil samples composited; or
6. Failure to provide direct on-site supervision of remediation activities to ensure compliance with the Technical Requirements.

Agreement by Pre-qualified Environmental Professionals

Pre-qualified environmental professionals shall hereby:

1. Agree that DEP may publish their name and contact information on the Unregulated Heating Oil Tank Program Directory.
2. Abide by the terms and conditions relating to the Program as specified by DEP; and
3. Perform all work submitted under the Program themselves and perform it to the best of their ability and in a professional manner. Each pre-qualified environmental professional also understands that approval by the DEP of reports, plans, designs, drawings, specifications, or other services furnished hereunder shall not in any way relieve a pre-qualified environmental professional of responsibility for the technical adequacy of its work.

Continued Participation in the Unregulated Heating Oil Tank Program

A pre-qualified environmental professional must maintain active status as a Subsurface Evaluator under the New Jersey UST Certification Program. **The Department is not responsible for providing notification to any pre-qualified environmental professional or employer that any certifications, training or insurance required for participation in the Program are to expire or have expired.**

Legal Compliance and Professional Conduct

A pre-qualified environmental professional warrants that in performing responsibilities under the Program, he or she will comply with all local, State and Federal laws, rules and regulations applicable to the Program and to the work to be done thereunder, as well as with any other applicable laws and regulations. Pre-qualified environmental professionals understand and agree that DEP's determination of a failure to comply with this requirement will be grounds for removal from the Program. The DEP reserves its right to remove an individual from the Program on the basis of persistent complaints respecting poor workmanship or other unsatisfactory behavior.

Disclaimer of Agency Relationship

A pre-qualified environmental professional's status shall be that of any independent principal and not as an agent, employee, or contractor of the DEP or State. Nothing relating to the Program shall be construed or asserted to create, either expressly or by implication, a contractual relationship between the State and the pre-qualified environmental professional. The DEP has no responsibility for ensuring the quality of work performed by pre-qualified environmental professionals or guaranteeing payment to pre-qualified environmental professionals by parties who retain them. Nothing in this guidance or the Program shall create rights or causes of action against the DEP or State on behalf of pre-qualified environmental professional or parties retaining pre-qualified environmental professionals.

Notification

Each pre-qualified environmental professional shall notify the DEP in writing within seven (7) working days of any change in employment or employment status, change in an employer's permission to participate in the Program, or any change in status with regard to certification under the New Jersey UST Certification Program.

Program Duration

A pre-qualified environmental professional taking part in this Program understands and acknowledges that this is a voluntary program and that approved participation is not guaranteed to any environmental professional. Moreover, a pre-qualified environmental professional acknowledges that its participation in the Program is not required in order to conduct, manage, or oversee remediation projects in New Jersey. It is also understood that the DEP may terminate the Program at any time.