



## Common Sense Initiative

Mike DeWine, Governor  
Jon Husted, Lt. Governor

Sean McCullough, Director

### Business Impact Analysis (REVISED)

Agency, Board, or Commission Name: Petroleum UST Release Compensation Board

Rule Contact Name and Contact Information: Starr Richmond (614) 752-8963

4151 Executive Parkway, Suite 350, Westerville, Ohio 43081

Regulation/Package Title (a general description of the rules' substantive content):

Requirements to obtain, maintain, and transfer a certificate of coverage.

Rule Number(s): 3737-1-04

Date of Submission for CSI Review: December 7, 2022

Public Comment Period End Date: December 21, 2022

Rule Type/Number of Rules:

☐ New /      rules

☐ No Change /      rules (FYR?     )

☒ Amended /   1   rules (FYR? No)

☐ No Change /      rules (FYR?     )

The Common Sense Initiative is established in R.C. 107.61 to eliminate excessive and duplicative rules and regulations that stand in the way of job creation. Under the Common Sense Initiative, agencies must balance the critical objectives of regulations that have an adverse impact on business with the costs of compliance by the regulated parties. Agencies should promote transparency, responsiveness, predictability, and flexibility while developing regulations that are fair and easy to follow. Agencies should prioritize compliance over punishment, and to that end, should utilize plain language in the development of regulations.

#### Reason for Submission

1. R.C. 106.03 and 106.031 require agencies, when reviewing a rule, to determine whether the rule has an adverse impact on businesses as defined by R.C. 107.52. If the agency determines that it does, it must complete a business impact analysis and submit the rule for CSI review.

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**Which adverse impact(s) to businesses has the agency determined the rule(s) create?**

**The rule(s):**

- ☐ a. Requires a license, permit, or any other prior authorization to engage in or operate a line of business.
- ☐ b. Imposes a criminal penalty, a civil penalty, or another sanction, or creates a cause of action for failure to comply with its terms.
- ☒ c. Requires specific expenditures or the report of information as a condition of compliance.
- ☒ d. Is likely to directly reduce the revenue or increase the expenses of the lines of business to which it will apply or applies.

### **Regulatory Intent**

#### **2. Please briefly describe the draft regulation in plain language.**

This rule prescribes the annual requirements of petroleum underground storage tank (UST) owners and operators (responsible persons) for establishing coverage with the Financial Assurance Fund (Fund), including the payment of the annual per-tank financial assurance fee, demonstration of financial responsibility for the deductible amount of coverage with the Fund, certification of compliance with applicable rules for USTs adopted by the fire marshal, and, if applicable, compliance with the coverage reinstatement requirements of rule 3737-1-04.1. The rule further requires the responsible person to provide notice to the director when a newly installed UST is placed in service or when a UST has been transferred and establishes the process for transferring the certificate of coverage to the new responsible person as well as the criteria for the issuance of the certificate of coverage when no certificate was in effect at the time of transfer. The rule sets forth the notification requirements to the responsible person and to the fire marshal when a responsible person fails to timely remit payment of the annual per-tank fees or fails to meet the criteria for the issuance of the certificate of coverage. A late payment fee is imposed when the annual per-tank fee is not timely remitted. The rule also provides the responsible person with the right to file an objection to an order to pay fees or a determination denying or revoking a certificate of coverage.

The Board is proposing to amend rule 3737-1-04 to address concerns raised by stakeholders regarding the issuance of a certificate of coverage for a newly installed UST system and the timeframe for transferring a certificate of coverage to a new responsible person. The Board is recommending to change paragraph (F)(1) of rule 3737-1-04 to establish that a responsible person must notify the director immediately upon introducing a regulated petroleum product into a newly installed UST rather than at the time a newly installed UST system is placed in service, which could result in a certificate of coverage being issued with an earlier effective date. In addition, language was added to the paragraph to clarify that the responsible person is only assessed annual fees for the fiscal year in

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which a regulated petroleum product was first introduced into the UST system on July 1, 1989, whichever is later, and any subsequent fiscal years.

The Board is also proposing to amend paragraph (F)(2)(a) of rule 3737-1-04 to clarify that a transfer of a UST occurs when ownership of the UST transfers to a new responsible, i.e. owner. An existing certificate of coverage will be transferred to the new responsible person with no lapse in coverage, provided the director is timely notified of the transfer and the new responsible person takes the actions necessary to establish a certificate of coverage within 30 days of the assessment of any applicable fees.

**Statement concerning division (E) of section 121.82 of the Revised Code.**

***Does the draft rule package require insurance and/or surety products as a condition of compliance?***

As a condition to receiving a certificate of coverage with the Fund, owners and operators of USTs must demonstrate financial responsibility for the Fund deductible or reduced deductible amount in compliance with rule 1301:7-9-05 of the Administrative Code, which is adopted and administered by the State Fire Marshal. In program year 2021, more than 2,800 of Ohio's public and private UST owners and operators indicated on a Board-prescribed form that they maintained one or more of the ten financial responsibility mechanisms required by the State Fire Marshal's rule. A list of known insurance providers published by the U.S. EPA (EPA 510-B-17-002) is an example of the availability of the insurance mechanism.

**3. Please list the Ohio statute(s) that authorize the agency, board or commission to adopt the rule(s) and the statute(s) that amplify that authority.**

Statutory Authority: R.C. 3737.90

Rule Amplifies: R.C. 3737.91 and 3737.92

**4. Does the regulation implement a federal requirement? Is the proposed regulation being adopted or amended to enable the state to obtain or maintain approval to administer and enforce a federal law or to participate in a federal program?**

***If yes, please briefly explain the source and substance of the federal requirement.***

While Ohio Administrative Code 3737-1-04 itself is not a regulation, the Board and the Fund it manages were created to satisfy federal EPA regulations requiring all U.S. petroleum UST owners to demonstrate \$1 million of financial responsibility for taking corrective action and compensating third parties for bodily and property damage caused by accidental releases from petroleum UST systems [40 CFR Part 280, Subpart H].

**5. If the regulation includes provisions not specifically required by the federal government, please explain the rationale for exceeding the federal requirement.**

Not Applicable.

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**6. What is the public purpose for this regulation (i.e., why does the Agency feel that there needs to be any regulation in this area at all)?**

The Fund serves three vitally important public functions. First, the Fund provides an affordable mechanism necessary to fulfill the federal and state regulations that require all petroleum UST owners and operators to demonstrate financial responsibility of \$1 million for corrective action costs and compensation to be paid to a third party for bodily injury or property damage resulting from an accidental release of petroleum from their UST systems. Second, it protects Ohio's businesses and individuals from financial insolvency by reimbursing responsible persons for the costs incurred to investigate and remediate any releases as well as to compensate affected third-parties. Lastly, it serves to protect the welfare of the general public through the protection of Ohio's land and water resources, thereby reducing health risks associated with petroleum releases.

Since the Fund was established by the Ohio General Assembly in 1989, the Fund has proven to be a viable financial assurance mechanism for Ohio's petroleum tank owners. To date, more than \$291 million has been reimbursed to Ohio's tank owners and operators to clean up more than 3,300 petroleum contaminated sites.

**7. How will the Agency measure the success of this regulation in terms of outputs and/or outcomes?**

Success of the rule will be measured by the overall effectiveness and efficiency of the agency's mission of providing financial assistance to remediate contamination caused by releases from assured petroleum USTs.

**8. Are any of the proposed rules contained in this rule package being submitted pursuant to R.C. 101.352, 101.353, 106.032, 121.93, or 121.931?**

*If yes, please specify the rule number(s), the specific R.C. section requiring this submission, and a detailed explanation.*

<u>No</u>	<b>R.C. 101.352</b>	Request for appearance before joint committee regarding agency's reliance on principle of law or policy.
<u>No</u>	<b>R.C. 101.353</b>	Request for appearance before joint committee regarding agency's failure to adopt rule.
<u>No</u>	<b>R.C. 106.032</b>	Authority of chairperson to submit rule for review.
<u>No</u>	<b>R.C. 121.93</b>	Review of agency operations.
<u>No</u>	<b>R.C. 121.931</b>	Petition to restate a principle of law or policy in a rule.

**Development of the Regulation**

**9. Please list the stakeholders included by the Agency in the development or initial review of the draft regulation.**

*If applicable, please include the date and medium by which the stakeholders were initially contacted.*

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The Board's Rules Committee held open meetings on January 12 and March 16, 2022, and drafted changes to rule 3737-1-04 to address concerns raised by stakeholders. To address comments submitted on behalf of the Ohio Energy and Convenience Association (OECA) during the CSI Office's review of the proposed rule amendment and public comment period, additional Rules Committee meetings were held on June 8 and September 14, 2022.

The Committee consists of Board Chair, James Rocco, representing petroleum refiners; Vice-Chair, John Hull and Steve Bergman representing engineers with geology experience and not associated with the petroleum industry; Scott Fleming, representing businesses that own petroleum USTs; and Steven Krichbaum (retired) and Scott King, representing the Ohio Department of Commerce.

Agency stakeholders were notified of the Rules Committee meetings by email on December 13, 2021, and February 23, May 17, and August 16, 2022. Information to access the March 16, and June 8, 2022 meetings held by video conference was provided by email on March 14 and June 6, 2022, respectively. The emails and current stakeholder distribution list are attached as Exhibit A. Meeting notices were also published on the Board's website, posted at the Board's office, and sent to Gongwer News Service.

The following stakeholders were in attendance at one or more of the Rules Committee meetings: Alex Boehnke and Ryan Elliot, representing OECA; Claire Linkhart, representing API Ohio; Dan Adams, representing Atlas Technical Consultants; Doug Darrah, representing ECS Midwest, LLC; Jeremy Fultz, representing Evergreen Resources Group, LLC; Michael Baker, representing BJAAM Environmental, Inc.; and Board member, Larry Burks, representing businesses that own petroleum USTs.

The following Board staff were also in attendance at one or more of the meetings: Starr Richmond, Executive Director; Madelin Esquivel, Assistant Director; and Jonathan Maneval, Executive Assistant. The Board's former Assistant Attorney General, Natasha Natale, attended the March 16 and June 8, 2022 meetings.

**10. What input was provided by the stakeholders, and how did that input affect the draft regulation being proposed by the Agency?**

The proposed changes to the rule are a direct result of concerns stakeholders brought to the attention of the Board's staff.

Specifically, the change to section (F)(1) of rule 3737-1-04 is to address an issue of no certificate of coverage existing for a UST if a petroleum release were to occur prior to a UST being placed in service. Generally, responsible persons have interpreted "placed in service" to mean the UST system is in use for purposes of dispensing fuel. Initially, the Board proposed amending the rule to require the responsible person to notify the director immediately upon installing a UST, which would facilitate the fee notification and application for certificate of coverage being mailed to the responsible person as early as possible. The intent was to allow for the responsible person to submit the payment and paperwork in time for a certificate of coverage to be effective the date petroleum was introduced into the UST. Based upon the comments submitted by OECA during the CSI review period, the proposed

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wording was changed to require the responsible person to notify the director at the time petroleum is first introduced into the UST, rather than at the time of installation. The OECA representative indicated this change satisfactorily addressed the association's concerns of fees being assessed for a UST system that has never contained petroleum.

The proposed amendment to section (F)(2) of rule 3737-1-04 arose following discussions with stakeholders concerning the requirements to transfer a certificate of coverage. In its current form, the rule requires a new responsible person to notify the director of a UST transfer, pay the transfer fee, demonstrate financial responsibility, and certify compliance with the fire marshal's rules within 30 days of the transfer in order for a transferred certificate of coverage to be effective the date of the transfer. Stakeholders noted that once notification of a transfer is provided, the new responsible person must await receipt of the transfer fee assessment and the appropriate paperwork needed to demonstrate financial responsibility and certify compliance with the fire marshal's rules. Stakeholders pointed out that any delay by the Board's staff to process the transfer and send the necessary paperwork or any delay of the U.S. Postal Service delivery of the mail could result in the responsible person being unable to complete all requirements for the transfer of the certificate of coverage within the 30 day timeframe currently set in the rule. The proposed change will provide the new responsible person with 30 days from the mailing of the transfer fee assessment to pay the applicable fees, demonstrate financial responsibility, and certify compliance with the fire marshal's rules.

Other minor editorial changes to the rule are being proposed. These changes to the rule are to make the rule's language more consistent, easier to read and understand, and includes the removal of duplicative language the Rules Committee felt was not needed. These editorial changes do not alter the substantive content of the rule.

**11. What scientific data was used to develop the rule or the measurable outcomes of the rule?  
How does this data support the regulation being proposed?**

Not Applicable.

**12. What alternative regulations (or specific provisions within the regulation) did the Agency consider, and why did it determine that these alternatives were not appropriate? If none, why didn't the Agency consider regulatory alternatives?**

Not Applicable.

**13. Did the Agency specifically consider a performance-based regulation? Please explain.  
*Performance-based regulations define the required outcome, but don't dictate the process the regulated stakeholders must use to achieve compliance.***

Not Applicable. The rule does not affect regulation of UST systems.

**14. What measures did the Agency take to ensure that this regulation does not duplicate an existing Ohio regulation?**

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The Petroleum UST Release Compensation Board is the only State agency that exists to provide Ohio's petroleum UST owners with \$1 million of financial responsibility to pay for potential damages caused by releases from their UST systems.

**15. Please describe the Agency's plan for implementation of the regulation, including any measures to ensure that the regulation is applied consistently and predictably for the regulated community.**

The Board notifies Ohio's petroleum UST owners and operators and agency stakeholders of its rule filings through email and its website. In addition, agency correspondence is written to clearly explain the requirements of the Board's rules to the reader. Constituents are encouraged to contact the Board's office to discuss any questions or concerns regarding the Board's rules with trained agency personnel.

**Adverse Impact to Business**

**16. Provide a summary of the estimated cost of compliance with the rule. Specifically, please do the following:**

**a. Identify the scope of the impacted business community;**

Ohio's petroleum UST owners and operators will be impacted by the proposed amended rule.

**b. Identify the nature of all adverse impact (e.g., fees, fines, employer time for compliance,);**

Rule 3737-1-04 requires both an expenditure and the reporting of information as a condition of compliance. All tank owners must remit an annual per-tank fee. An owner that does not timely remit the annual fee may also be subject late payment fees, collection costs, and interest charges. The purchaser of a UST system is also subject to a per-facility transfer fee. Each year all tank owners must also submit a completed application for a certificate of coverage. In addition, owners must provide information concerning the installation and acquisition of petroleum UST systems.

The proposed amended rule is not expected to increase the rule's adverse impact on business. The rule as proposed will allow a responsible person to obtain Fund coverage immediately upon introducing fuel into a newly installed tank and it provides additional time for a responsible person acquiring a UST system to fulfill the criteria for transferring the certificate of coverage.

**c. Quantify the expected adverse impact from the regulation.**

*The adverse impact can be quantified in terms of dollars, hours to comply, or other factors; and may be estimated for the entire regulated population or for a "representative business." Please include the source for your information/estimated impact.*

The annual per-tank fee is currently \$350. A late fee of up to \$1,000 per tank is assessed for untimely payment. Delinquent accounts may be referred to the Attorney General's Office for collection, and as a result, collection costs and interests charges may also be assessed. Upon

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the transfer of an UST system, the new responsible person is subject to a transfer fee of \$500 per facility. The annual application for a certificate of coverage, including the certification of compliance with the fire marshal's rules and the statement of financial responsibility for the deductible amount of coverage with the Fund that are required by the rule, is typically three pages and requires minimal time to complete. It is not necessary to hire an accountant, consultant, or other professional to complete the application. A tank owner that wishes to appeal a determination or an order issued by the director may file an objection via email, fax, or mail. An attorney is not necessary for the filing an objection. Additional notifications required by the rule, including the notification of tank installation or transfer, may similarly be provided via email, fax, or mail. As a convenience, single-page notification forms are available on the Board's website.

**17. Why did the Agency determine that the regulatory intent justifies the adverse impact to the regulated business community?**

The Rules Committee members, industry representatives, constituent stakeholders and agency staff recognize that this rule could potentially adversely impact the business community, specifically Ohio's tank owners and operators. However, the rule is necessary to implement sections 3737.90, 3737.91 and 3737.92 of the Revised Code, and is an essential tool to ensure the long-term financial soundness and continued success of the Fund. Any potential adverse impacts that result from this rule is offset by the benefit to Ohio's tank owner community as a whole.

The annual per-tank fees assessed by rule 3737-1-04 serve as the primary revenue source underwriting the Fund. Without these fees, there would be no funding source available to Ohio's tank owners and operators to underwrite the costs necessary to remediate the environment or pay for third-party bodily injury or property damage in the event of a petroleum release. Late payment fees are assessed in accordance with section 3737.91 of the Revised Code and are intended to encourage timely payment of the annual fees. In addition, where delinquent fees are referred to the Attorney General's Office for collection, the tank owner is also responsible for the payment of any and all fees associated with collection. Again, this serves to encourage the timely payment of the annual fees and ensures that the cost to collect a responsible person's delinquent fees are borne solely by the responsible person and not the tank owner community as a whole. Lastly, the Board determined that the \$500 transfer fee is justified due to the administrative costs incurred to process a transfer of the certificate of coverage to the new responsible person of the UST system. The required application for certificate of coverage, along with the notification requirements of the rule, are necessary to implement the program.

**Regulatory Flexibility**

**18. Does the regulation provide any exemptions or alternative means of compliance for small businesses? Please explain.**

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In Ohio, as in many other states, the only mechanism available to petroleum UST owners and operators to demonstrate \$1 million of financial responsibility for taking corrective actions and compensating third parties as required by both federal and state law is the Financial Assurance Fund.

**19. How will the agency apply Ohio Revised Code section 119.14 (waiver of fines and penalties for paperwork violations and first-time offenders) into implementation of the regulation?**

There are no administrative fines or civil penalties associated with these rules.

**20. What resources are available to assist small businesses with compliance of the regulation?**

The Board's staff is available during customer service hours to answer questions tank owners and operators may have concerning the Board's rules. In addition, information is published on the Board's website and periodically emailed to stakeholders through a listserv.

Contact Information:

Petroleum UST Release Compensation Board

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