



# Petroleum Tank Release Compensation Board

## STATE OF MONTANA

P.O. Box 200902 • Helena, MT 59620-0902 • (406) 444-9710  
Website: <https://deq.mt.gov/cleanupandrec/programs/ptrcb>

**To:** Legislative Audit Committee Members

**From:** Petroleum Tank Release Compensation Board

**Cc:** David Singer, AMPA, Legislative Audit Division  
Christopher Dorrington, Director, Department of Environmental Quality  
Amy Steinmetz, Administrator, WMRD-DEQ

**Date:** January 23, 2024

**Re:** Performance Audit Follow-Up: Administration of the Petroleum Tank Release Fund (20P-01)

The Petroleum Tank Release Compensation Board (Board) has reviewed the Performance Audit Follow-Up Submitted by David Singer. Overall, we support the Audit Committee's objective to improve the function and use of the Petroleum Tank Release Cleanup Fund (Fund), the desire to close petroleum contaminated sites and transition the Fund to private insurance. The Board has taken the audit seriously and has analyzed all of the recommendations contained in the audit. The Board has several significant comments on the recommendations that we believe the Committee should consider while assessing the audit. Our significant comments are contained in the following sections of this communication. Additionally, the appendix to this letter provides several examples of our concerns relating to transitioning the program to insurance. It is important to recognize that the audit report clearly indicates that any delays in cleaning up the historic releases are not due to actions or inactions by the Board. Therefore, it is the Board's belief that our focus should remain on aiding the eligible parties in remediation efforts that lead to release closure, assisting citizens with new discoveries of old contamination, keeping the legislature informed of Montana's backlog of releases and providing the legislature with the information necessary for proper planning of future program options.

### **Audit Recommendation #1**

*We recommend the Petroleum Tank Release Compensation Board work with the Department of Environmental Quality to collaborate during corrective action plan development to verify eligibility, assure fund availability and provide any other relevant input for consideration prior to final plan approval by the department.*

The Board has been working with Department of Environmental Quality (Department) staff and stakeholders to improve the work plan review process and to ensure that information regarding eligibility, fund availability, and other relevant information is readily available for consideration prior to final plan approval by the department. The department has included Board staff as copy recipients on letters addressed to responsible parties for work plan requests, approvals, modifications, and extensions. The Board staff meet regularly with Department staff to strategize on business process changes that will improve availability of eligibility, funding, and

other information. The Board is committed to working collaboratively with the Department to explore options to move sites to closure in a timely and efficient manner.

The Board has implemented requirements associated with the passage of SB 334 that require the owner, a representative of the owner, the department, the Board, and Board staff to hold a meeting to discuss releases for which costs are expected to exceed \$100,000. The first meeting after bill passage was conducted as part of the regularly scheduled Board meetings and continues on as an integrated part of the Board's agenda for each meeting, where there are sites that meet the qualifier of expecting to exceed \$100,000 in costs. Thus, the Board believes that this recommendation has been implemented.

## **Audit Recommendation #2**

*We recommend the Montana legislature clarify statute by making amendments as needed to clarify the Petroleum Tank Release Compensation Board does not have a role in approving or basing reimbursement on the specific methods prescribed with approved correction plans that bring eligible petroleum release to closure.*

Recommendation #2 was made to the legislature. The legislature, through Senator Esp, sought to implement the audit recommendation with Senate Bill 334 (2023). The audit committee worked with legislative services and Senator Esp to construct the bill. That bill came before the 2023 legislature. The bill was heard, was discussed with stakeholders, and was revamped based on testimony and in its final iteration, assisted with audit recommendation #1. The Board was one of the entities that provided testimony regarding both the intent of the legislation and the language of the bill. The Board encourages the audit committee to consider the amount of testimony provided in opposition of SB 334 and specifically would ask your review and consideration of the attached document from the Board attorney (Exhibit A). The information provided by the Board's attorney to the legislative committee describes the interrelation of the laws and how the recommendation impacts those program governing laws.

The Board believes that Recommendation #2 is inconsistent with the objectives established in the statutory framework of the program. It also appears to be inconsistent with insurance models, which the auditors have recommended the Board move to per audit Recommendation #4 that references transitioning this program to insurance. The more the Board's program imitates an insurance model, the easier it will be for a future transition to insurance to take place. In business areas where insurance is being used for risk management the regulatory agency does not conduct the technical assessment. As an example, the insurance commissioner does not do the technical assessment of hail damage, collision damage or fire damage. Rather, the insurance commissioner, the regulatory agency for all types of insurance, establishes state requirements and ensures compliance with those state standards. Similarly, the enforcement division of the Department does not conduct the technical assessment for release from petroleum truck roll overs. The Department's enforcement does not dictate the method of cleanup, only the protection of human health and the environment. The insurance company works with the trucking company and their consultant to select a method of cleanup that is acceptable to the Department. The Petro-Fund should not function any differently. The Board, and the Fund the Board manages, is the "owner's insurance company". Therefore, the recommendation contained in Audit Recommendation #2 is not in keeping with the current state of insurance laws, and current statutory constructs.

Based on recommendation #2, the organization providing reimbursement would have no say in how things are done. The costs controls implemented as a result of the Board Audit performed in 2003 has ensured that the most expensive cleanup alternative is not paid for by the citizens, rather the oversight of the Board can safeguard the Fund from bearing costs it shouldn't bear. Audit Recommendation #2 takes away the Board's voice in deciding what is appropriate for reimbursement, when they are the entity responsible for cost oversight and reimbursement of remediation work. The comparison to the business process for an insurance company is that they have a say in how repairs are done for a claim for damages and how much will be reimbursed for that activity, much like the Board as they oversee the Fund. As an example, if a shed that was part of a petroleum remediation site and was originally paid for by the Fund is damaged by a vehicle, it wouldn't be appropriate for the costs of repairs to be considered a liability for the Fund. It would be most appropriate for the vehicle driver's insurance to bear the costs of repair as they are the liable party for the damages. If the repair of that shed is contained within a Department approved corrective action plan, Audit Recommendation #2 would require the Fund to reimburse for that repair, even though the damages and claim are not their liability. In order for the Fund to be properly used, in accordance with the statutory framework in place, the Board would have to cost recover from the vehicle owner's insurance in order to recover the costs that were inappropriately expended. Properly allocating liability is part of the Board's ability to ensure the Fund, which is a citizen's fund, is only paying for actions that belong to actual, reasonable and necessary costs of remediation that bring a site to closure, not for actions that are the result of negligence or costs more appropriately allocated to a different source of reimbursement. This oversight is a good use of state funds as a whole and is in keeping with the way Montana operates.

### **Audit Recommendation #3**

We recommend the Petroleum Tank Release Compensation Board work with Department of Environmental Quality to develop a process, seeking legislation, if necessary, whereby remediation projects are competitively bid to bring release to closure, in accordance with existing state procurement laws.

The premise of Audit Recommendation #3 is that a competitive bid model will save staff resources, be a more effective cost control mechanism and will bring more sites to closure. The Board has conducted research, and the premise of saving staff resources or resulting in more effective cost control or bringing more sites to closure has not yet been proven to be true. Implementing the recommendation as stated in the audit report creates significant complications. This recommendation has three parts: 1) in accordance with state procurement laws, 2) cost control via competitive bid, and 3) that implementation of a bid process would more readily bring releases to closure.

The requirement to be "in accordance with state procurement laws" would require the state (via the Board) to be procuring the work and the state does not procure the work (Exhibit C). This program was established as a reimbursement program and as such, the way the statutes are currently written, the owner is the contracting party, not the Board nor the Department. Therefore, whatever process Montana uses would have to avoid the state having a role in selecting contracts without significant statutory overhaul. The statutory scheme demonstrates that the Legislature felt that an owner's ability to contract was important, as opposed to other

statutory schemes that provide for the Board, Department, or other agencies conducting the cleanup themselves. The Board understands the audit recommendation is to develop a competitive bidding process, but that process wouldn't be subject to state procurement laws unless the statutes are overhauled to make the Board a party to the contract. Overhauling the program statutes to make the Board a party to the contract requires taking away owner's rights that exist with the current program statutory structure. Taking away owner's rights and transferring those rights to a state agency conflicts with the spirit of Montana's Constitution.

Our research has shown that the states used by the auditors in formulating the recommendation are states that have been granted the authority to procure the cleanup, in other words they are a party to the cleanup contract. For those states that have the rights to establish procurement, there are significant advantages to using a competitive bid model that are not available to those states that leave the procurement rights with the owner. As an example, those states with authority can solicit competitive bids to conduct common field activities for a group of sites, resulting in savings in mobilization to sites in a common area rather than mobilization to individual sites. The states with procurement authority can solicit competitive bids to construct dozens of a single type of remediation equipment that can then be deployed to dozens of sites and can choose to reuse the equipment on other sites if it is determined to be cost effective to do so. Because Montana leaves the procurement authority with the owner, the savings for these types of consolidated projects are not available to the Montana Petroleum Tank Release Cleanup Fund.

The research that has been conducted doesn't show a cost benefit that would provide significant time or money savings and when weighed against taking away the rights of a Montana citizen, is not something the Board is choosing to support. The Board has implemented many business practices to assist in controlling costs, which other states control by competitive bid. The Board has instituted business practices where mobilization is limited in both distance and cost, encouraging consultants to combine work to minimize costs, and the Board has requirements to competitively bid subcontracted work. The Board is researching those states that require competitive bid where the procurement authority remains the right of the owner. Their cost control process has not yet been shown to reduce staff resources nor has it been shown to be a more effective cost control mechanism. Many of those states have reached out to Montana to find solutions to the challenges that they are experiencing.

Finally, the research has not shown that a bid process would speed up the time it takes to bring a release to closure. It may do just the opposite. The current business model has less time constraints to see the implementation of an approved work plan through to the submission and payment of claims, thus moving work through remediation phases towards closure. The addition of a bid process for Fund obligation would significantly increase the time it would take before a work plan could be implemented. So, in addition to not fitting the statutory constructs in place, it would not provide a time element that leads to quicker site closures because implementation of work would be further delayed.

The Board is committed to conducting the research necessary to see if there are ways to minimize staff resource needs or establish a more effective cost control model, but it is important to recognize the rights of Montana citizens in any method that is researched or proposed.

Montana is unique in its constitution and its statutory structure. That uniqueness translates into why Montana's program differs from the other states in the union.

#### **Audit Recommendation #4**

*We recommend the Petroleum Tank Release Compensation Board work with Department of Environmental Quality to seek legislation that prepares the fund for eventual closure of all historic underground tank release in Montana.*

The Board agrees that the historic backlog of petroleum releases should be addressed. The Department is the agency statutorily responsible for determining if corrective action is required, if a corrective action plan needs to be prepared for a release, and determining if the owner or operator is failing to properly implement a corrective action plan. The Department is also responsible for determining if a release is resolved or closed (see Roles Table in Exhibit D).

The Board believes that the owners should be inspired to timely start and complete any approved activity and the Department should place a priority on those sites that pose the largest danger to the health and safety of the public. The Board has encouraged the Department to develop an overarching strategic plan of timely assessing all currently active releases, to have a cleanup remedy identified, a schedule for the remedy as well as any subsequent activity and establish an anticipated date of categorizing the site as resolved, as required in §75-11-521, MCA. The Board desires to have cleanup activity balanced with the available funding in an effort to close as many sites as possible while ensuring the use of the Fund will continue to provide for ongoing work.

The audit recognizes Montana's backlog of releases will eventually be depleted and that the legislature should be presented with options to consider as it weighs whether to maintain a state fund model or transition to insurance. It recognizes that the Board can provide the legislature with expertise needed to consider options for the future of the Fund. The audit also mentions that the Fund could be transitioned to mandatory private insurance for underground storage tank owners. Based on this information the auditors recommend that the Board work with the Department to seek legislation that prepares the Fund for eventual closure of all historic underground tank releases in Montana.

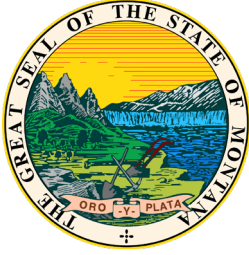
The Board is providing information in their biennial report on recommendations for the future of the program and will continue to improve the information that is provided. This program assists owners of underground storage tanks as well as above ground storage tanks. Transition to insurance should then also examine coverage for both types of storage tanks, not just underground. Also, this program assists current property owners with releases that occurred from prior existing underground storage tanks or with release from unknown (found) underground storage tanks, so the transition to insurance should also relate to assessing the availability of insurance for those types of release.

Attached is a list of releases (Exhibit B) that would not have had insurance for which this program is either assisting or will be expected to assist. One of the significant issues with these releases is understanding that many of these property owners do not know that petroleum storage tanks were ever at their property and there is no reasonable expectation that they would be able

to procure insurance in these situations. Thus, it is difficult to seek appropriate legislation for the closure of all historic underground storage tank releases in Montana. There are sites that are still having active releases from both underground and above ground storage tanks, there are owners with unknown subsurface contamination that was from an underground or above ground storage tanks, and there are owners that are discovering releases from tanks that they don't know about. Until such time as those historic releases have been closed or there is an assessment of potential outstanding, undiscovered releases for which insurance would still not be available, it would be a challenge to provide a good faith legislative recommendation.

Transitioning the program to insurance is not yet timely. There are a number of interconnected matters that are part of the petroleum storage and petroleum cleanup that have a bearing on the value of this program to citizens of Montana. A few have been mentioned above, but there are a number of others. An example of one of the connected matters is the Federal Petroleum Brownfields Program. The Brownfields Program has the potential to identify old subsurface contamination that may have otherwise gone undiscovered. As the Brownfields Program identifies subsurface contamination, the Board assists the owner with cleaning up the contamination.

The Board is tracking all of the related matters surrounding Audit Recommendation #4 and is reporting many of the issues in their biennial report. The Board believes that the existing statutes have adequate authority to allow as much cleanup work as can be accomplish with the available funding and due to all the constraints mentioned, there is not yet a good faith recommendation for legislation that can be made.



**STATE OF MONTANA  
DEPARTMENT OF JUSTICE  
AGENCY LEGAL SERVICES BUREAU**  
1712 Ninth Avenue—P.O. Box 201440—Helena, MT 59620-1440

February 21, 2023

TO Senate Public Health, Welfare, and Safety Committee  
*via e-mail & mail to Committee Members*

**Re: SB 334**

Dear Chair and Members of the Senate Public Health, Welfare, and Safety Committee:

I am the attorney for the Petroleum Tank Release Compensation Board, and the Chair of the Board has asked that I share my legal assessment of the potential impact of Senate Bill 334 on the Board's operations. Enclosed please find a copy of that memorandum.

I anticipate being available at the February 24, 2023 hearing for any questions you may have.

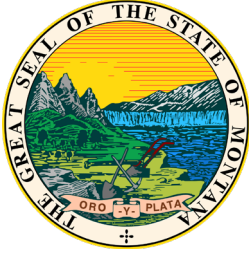
Sincerely,

AGENCY LEGAL SERVICES BUREAU

A handwritten signature in blue ink, appearing to read "Aislinn W. Brown".

AISLINN W. BROWN  
Bureau Chief

c: John Monahan  
Terry Wadsworth  
Trudy Burke  
Madelyn Krezowksi



**STATE OF MONTANA  
DEPARTMENT OF JUSTICE  
AGENCY LEGAL SERVICES BUREAU**  
1712 Ninth Avenue—P.O. Box 201440—Helena, MT 59620-1440

February 15, 2023

TO Terry Wadsworth  
Executive Director  
Petroleum Tank Release Compensation Board  
*via e-mail*

**Re: DEQ's Proposed Regulatory and Statutory Changes**

Dear Mr. Wadsworth:

This is an update to my September 20, 2022 memorandum regarding legislative changes proposed by the Montana Department of Environmental Quality (DEQ). The bill has now been drafted, and contains the following changes:

- A definition of “actual cost” is added. Section 1(2).
- A definition of “necessary cost” is added. Section 1(18).
- A definition of “reasonable cost” is added. Section 1(26).
- A reference to “actual” and “necessary costs” is removed from multiple places. Sections 2(2)(j), 3(1)(h)(ii) and (iii), 3(3)(a)(ii),
- The ability of the board to request a petroleum mixing zone is removed. Section 3(1)(f).

While there are fewer changes than in the earlier draft bill, the changes that are proposed could significantly curb the Petroleum Tank Release Compensation Board's ability to control spending on cleanup of petroleum releases. The changes would impact the Board's ability to allocate funding and potentially make it so that the fund is no longer actuarially sound. Most of the statutory changes are geared toward removing the Board's ability to determine whether costs are actual, necessary, and reasonable, and thereby giving carte blanche to any cost approved by DEQ in the corrective action plan.

**I. Definitions (Mont. Code Ann. § 75-11-302)**

DEQ proposes to add three new definitions: actual cost, necessary cost, and reasonable cost. The definitions of “actual,” “necessary,” and “reasonable” currently are in regulation, which the Board has authority to amend. If they become part of statute, only the Legislature can change them.



DEQ's proposed definition of "actual cost" is limited to a cost of preparation and implementation of a corrective action plan supported by a receipt, invoice, or contractor statement, and compensation to a third party. The contractor statement is new and has not previously appeared as a method for demonstrating actual costs. DEQ's proposal would remove significant authority by the Board to determine whether costs are eligible for reimbursement.

DEQ's proposed definition of "necessary cost" to mean "a cost associated with an action approved by the Department to prepare or implement an approved corrective action plan" likewise takes authority to determine what costs are necessary away from the Board and gives it to DEQ. In other words, the Board would be unable to determine a cost is not necessarily incurred if it was approved by DEQ.

DEQ likewise seeks to remove authority from the Board with its definition of "reasonable cost," to mean an actual cost that:

- (a) falls within the range of allowable costs established by the board;
- (b) has been submitted after an approved competitive bidding process;
- (c) has been approved by the department in writing to respond to an emergency at the site of a release in order to prevent more extensive damage or injury that would have occurred without such approval; or
- (d) has been approved by the department in writing, details the number of hours needed to complete a task, and has been submitted with an approved hourly rate.

This eliminates the Board's discretion to determine what is reasonable and gives it to DEQ since any work required by DEQ in writing would have to be reimbursed. Additionally, the current administrative rules require that necessary costs be less than or equal to the costs in the corrective action plan budget, which does not appear in the proposed statutory language.

The change in reference from "actual, reasonable, and necessary" cost to "reasonable cost" throughout the statute further limits the Board's authority as it can no longer determine what costs were actually or necessary incurred.

## II. Procedures for reimbursement of eligible costs – corrective action plans (Mont. Code Ann. § 75-11-309)

Under this proposed statutory change, DEQ seeks to remove the Board's ability to request the corrective action plan be amended to include a petroleum mixing zone. I'm not familiar with the science of why this is an important change, but it does appear to be a substantive change to the Board's authority.

In sum, these changes, if adopted, will impact how the Board utilizes the fund and what authority it has in making reimbursement determinations. If the Board does not have the ability to make these decisions, there could be an actuarial impact to the fund.

Sincerely,

AGENCY LEGAL SERVICES BUREAU

A handwritten signature in blue ink, appearing to read "Aislinn W. Brown". The signature is fluid and cursive, with the first name being more prominent.

AISLINN W. BROWN  
Bureau Chief

**Janet Martinson residence, Whitefish - Release 5215**

Discovered April 4, 2017

The owner had owned the house for 30 years. Had purchased the home in 1987. At the time of purchase the house had a gas furnace. The owner did not know that there was a tank on the property that contained heating oil. So, the underground storage tank was unknown to the owner and the fill pipe was hidden behind bushes at the house. When the furnace was swapped out by the prior owner, from heating oil to natural gas, the underground storage tank did not get pumped out nor did it get removed from the ground. The owner was not told about the tank when the house was purchased. The tank rusted and resulted in a heating oil release. The release has resulted in a \$155,500 in cleanup costs so far, and the cleanup is not done. This homeowner would not have had insurance because she did not know the underground storage tank existed at the house. Without the Petro-fund, this owner would have lost their equity in their home and the release would not likely have gotten cleaned up.

**Coulter automotive in Charlo, Montana - Release 6505**

Discovered September 26, 2022

The facility is an active gas station in Charlo, Montana. They were conducting a phase II environmental site assessment associated with a property transfer. Contamination was discovered in the OLD underground Storage Tank basin. Therefore, the contamination that was discovered was not from the active underground storage tanks, but rather from underground storage tanks that had been removed in 1995. This owner would 've had no insurance coverage for this clean up because the insurance companies only ensure active fuel tanks.

**Eslick Property, Glendive, - Release 6254**

Discovered November 9, 2020

The old fueling facility became a Taco Johns in 1995 and served the community in that capacity until 2014. The facility became a jewelry store in 2014. Federal Brownfields funding was being used to investigate the old fuel station in November 2020 and discovered contamination. Piping is associated with tanks that were last used in 1975, a decade before the underground storage tank regulations went into place in 1986. The release has resulted in \$60,000 in cleanup costs so far, and the cleanup is not done.

**Stumptown Snowboards, Whitefish - Release 6302**

Discovered July 23, 2021

Tanks that had fuel in it were found during a building expansion. The owner would not have had insurance because those tanks were unknown to the property owner.

**Central Bike and Key, Great Falls - Release 5367**

Discovered October 4, 2019

Found unknown underground storage tanks during a phase II environmental site assessment conducted as part of a property transfer. The release would not have been covered by insurance because the underground storage tanks were unknown to the owner.

**Auto Lot Former Gasamat #564, Great Fall- Release 6619**

Discovered October 12, 2023

During a Phase II environmental site assessment there was evidence of strong petroleum odors when investigating and contamination was found. The site has not had tanks or piping since 1996. As such, there is no reasonable expectation that the current property owner would be able to obtain insurance coverage for pollution when there are no active tanks at his site.

STATE OF MONTANA  
DEPARTMENT OF JUSTICE  
AGENCY LEGAL SERVICES BUREAU

Austin Knudsen  
Attorney General



1712 Ninth Avenue  
P.O. Box 201440  
Helena, MT 59620-1440

August 5, 2022

TO: Petroleum Tank Release Compensation Board  
1225 Cedar Street  
Helena, MT 59620  
*via packet for August 22, 2022 meeting*

**Re: Legislative Audit Recommendation No. 3**

Dear Chairman and Members of the Petroleum Tank Release Compensation Board:

The following is a summary of research that staff at the Agency Legal Services Bureau (ALSB) of the Montana Department of Justice has conducted, which was prompted by the Legislative Audit Recommendation No. 3:

We recommend the Petroleum Tank Release Compensation Board work with the department of Environmental Quality to develop a process, seeking legislation if necessary, whereby remediation projects are competitively bid to bring releases to closure, in accordance with existing state procurement laws.

As a threshold matter, Montana procurement laws (the Mini Brooks Act (qualification-based selection, or QBS)) and the Montana Procurement Act (MPA)) only apply to contracts between the State and third parties. Mont. Code Ann. § 18-4-132; Admin. R. Mont. 2.5.202. This is different from the Board's statutory reimbursement mandate because the Board is not a contracting party. It's my understanding that, even under a competitive bidding process, the State would not be a party to the contract. However, the provisions of these Acts may be helpful to the Board and DEQ as guidance in creating a competitive bidding process for site cleanup.

The purposes of the Montana Procurement Act are found at MCA § 18-4-122, and are to:

- (1) simplify, clarify, and modernize the law governing procurement by the state of Montana;

- (2) permit the continued development of procurement policies and practices;
- (3) make as consistent as possible the procurement laws among the various jurisdictions;
- (4) provide for increased public confidence in the procedures followed in public procurement;
- (5) ensure the fair and equitable treatment of all persons who deal with the procurement system of the state;
- (6) provide increased economy in state procurement activities and maximize to the fullest extent practicable the purchasing value of public funds of the state;
- (7) foster effective, broad-based competition within the free enterprise system;
- (8) provide safeguards for the maintenance of a procurement system of quality and integrity; and
- (9) provide the exclusive remedies for unlawful bid solicitations or contract awards.

We have assessed the following possibilities, considerations, and concerns with request to how to implement Audit Recommendation #3, using current state procurement laws as guideposts:

- Possibilities:
  - QBS (Mini Brooks Act)—Qualification Based Selection v. competitive bidding (lowest bid)
  - ARM 2.5.507 allows for the prequalification of vendors:  
**2.5.507 PREQUALIFICATION OF VENDORS**
    - (1) Vendors may be prequalified for particular types of supplies and services under the following conditions:
      - (a) a need exists to limit a solicitation to those vendors who meet statutory or licensing requirements applicable to the solicitation; or
      - (b) a need exists to minimize the time necessary to verify vendor qualifications which otherwise would jeopardize the timely award of contracts.
    - (2) The documentation for vendor prequalification must reflect the capability of the selected vendor(s) to adequately perform the contract. The criteria for prequalification include, but are not limited

to, technical expertise, experience, quality of performance, location, availability, rates, prices, financial stability, past performance, catalogs, or other criteria relevant to a particular procurement.

(3) Prequalification must be approved by the division.

(4) Prequalification of a prospective vendor does not necessarily represent supply or service acceptability or a finding of responsibility.

- QBS maintains the integrity of the costs upon negotiation of the costs allowing the State to maintain cost control while adopting measures to ensure Montana's interests are protected by ensuring qualified firms are awarded contracts
- Considerations:
  - Professional procurement is covered by MCA § 18-8-201 through -212 and only includes the following professional services: Architectural, Engineering, and Land Surveying Services. This statute may be a good guide for determining how the Board and DEQ might want a bidding-like process to work for site cleanup.
    - It may be helpful for the Board/DEQ to work together to adopt provisions relevant environmental specialists qualified to assist in release closures via legislative action—this could likely occur through rulemaking
  - QBS limits the competitive nature of the MPA
  - The request for procurement (RFP) process promotes competition and considers more than cost (ie complexity of need, evaluates the skills and expertise of firms)
  - QBS is a faster process than RFP
- Concerns:
  - QBS limits bidding to qualified firms, which conflicts with the competitive bidding process and purpose of the MPA
  - Costs remain unknown until after the most qualified firm is chosen whereupon cost negotiations may begin. If an agreement is not reached re: costs then the process starts again with the 2nd most qualified firm.
    - One potential impact may be delayed release closure.

Lastly, a potential objective of the Board's is to adopt a model similar to what insurance companies use to pay claims (3 bids & pay based on the bid amounts). ALSB did not find

anything that necessarily regulates insurance companies to follow that model. In fact, insurance companies are moving away from that model by using adjusters to assess damage and what work needs to be done. Consumers then take the adjuster's report to a repair place to complete the work whereupon the repair shop and insurance company engage in further negotiations regarding repair. This may be the least favorable solution because it still makes cost the primary component of closures in which status quo seems like the most obvious solution.

We will continue to research how a competitive bidding process could be incorporated into relevant statutes and administrative rules that are administrated by the Board. Please consider this an initial update with the sole purpose of prompting further discussion or questions the Board may have.

Sincerely,

A handwritten signature in blue ink, appearing to be 'C. J. Smith', written in a cursive style.

AGENCY LEGAL SERVICES BUREAU



## Duties By Agency

Duties	DEQ's Role	PTRCB's Role	Reference
Declare/Confirm Release	X		75-11-309
Request work plan	X		75-11-309(c)
Review work plan	X	X	75-11-309
Approve work plan	X		75-11-309(d)
Establish Guidance for Investigation and Cleanup	X		75-11-501et.
Establish Cost Control Measures		X	75-11-318
Determine Fund Eligibility of a Release		X	75-11-308
Obligate Funds for Proposed Corrective Action		X	75-11-309(5)
Ensure Fund is used in most cost-efficient manner		X	75-11-312
Reimburse Claims		X	75-11-307
Issue a No Further Corrective Action Letter	X		75-11-508
Close Releases	X		75-11-508
Re-Open a previously closed Release	X		75-11-307

Legislatively Promulgated, 1989 - 2023