

## CHAPTER 23.1-12 PETROLEUM RELEASE REMEDIATION

### **23.1-12-01. Petroleum tank release compensation fund - Established.**

A petroleum tank release compensation fund is established.

### **23.1-12-02. Definitions.**

As used in this chapter, unless the context otherwise requires:

1. "Actually incurred" means, in the case of corrective action expenditures, the owner, operator, landowner, an insurer, or a contractor hired by the owner, operator, or the landlord has expended time and materials, and only that person is receiving reimbursement from the fund.
2. "Board" means the petroleum release compensation board.
3. "Corrective action" means an action required by the department to minimize, contain, eliminate, remediate, mitigate, or clean up a release, including any remedial emergency measures. The term does not include the repair or replacement of equipment or preconstructed property.
4. "Dealer" means a person licensed by the tax commissioner to sell motor vehicle fuel or special fuels within the state.
5. "Department" means the department of environmental quality.
6. "Fund" means the petroleum release compensation fund.
7. "Location" means a physical address or site that has contiguous properties. Noncontiguous properties within a municipality or other governmental jurisdiction are considered separate locations.
8. "Operator" means a person in control of, or having responsibility for, the daily operation of a tank under this chapter.
9. "Owner" means a person who holds title to, controls, or possesses an interest in the tank before the discontinuation of its use.
10. "Petroleum" means any of the following:
  - a. Gasoline and petroleum products as defined in chapter 23.1-13.
  - b. Constituents of gasoline and fuel oil under subdivision a.
  - c. Oil sludge and oil refuse.
11. "Portable tank" means a storage tank along with its piping and wiring that is not stationary or affixed, including a tank that is on skids.
12. "Release" means any unintentional spilling, leaking, emitting, discharging, escaping, leaching, or disposing of petroleum from a tank into the environment whether occurring before or after the effective date of this chapter, but does not include discharges or designed venting allowed under federal or state law or under adopted rules.
13. "Tank" means any one or a combination of containers, vessels, and enclosures, whether aboveground or underground, including associated piping or appurtenances used to contain an accumulation of petroleum. The term does not include:
  - a. Tanks owned by the federal government.
  - b. Tanks used for the transportation of petroleum.
  - c. A pipeline facility, including gathering lines:
    - (1) Regulated under the Natural Gas Pipeline Safety Act of 1968.
    - (2) Regulated under the Hazardous Liquid Pipeline Safety Act of 1979.
    - (3) Regulated under state laws comparable to the provisions of law in paragraph 1 or 2, if the facility is an interstate pipeline facility.
  - d. An underground farm or residential tank with a capacity of one thousand one hundred gallons [4163.94 liters] or less or an aboveground farm or residential tank of any capacity used for storing motor fuel for noncommercial purposes. However, the owner of an aboveground farm or residential tank may, upon application, register the tank and be eligible for reimbursement under this chapter.
  - e. A tank used for storing heating oil for consumptive use on the premises where stored.
  - f. A surface impoundment, pit, pond, or lagoon.

- g. A flowthrough process tank.
  - h. A liquid trap or associated gathering lines directly related to oil or gas production or gathering operations.
  - i. A storage tank situated in an underground area such as a basement, cellar, mine working, drift, shaft, or tunnel, if the storage tank is situated upon or above the surface of the floor.
  - j. A tank used for the storage of propane.
  - k. A tank used to fuel rail locomotives or surface coal mining equipment.
  - l. An aboveground tank used to feed diesel fuel generators. Upon application, the owner or operator of an aboveground tank used to feed diesel fuel generators may register the tank and is eligible for reimbursement under this chapter.
  - m. A portable tank.
  - n. A tank with a capacity under one thousand three hundred twenty gallons [4996.728 liters] used to store lubricating oil.
14. "Tank integrity test" means a test to determine that a tank is sound and not leaking. For an underground tank, the term means a certified third-party test that meets environmental protection agency leak detection requirements. For an aboveground tank, the term means a test conducted according to steel tank institute SP 001 or American petroleum institute 653.
15. "Third party" means a person who is damaged by the act of a registered owner, operator, or dealer requiring corrective action, or a person who suffers bodily injury or property damage caused by a petroleum release.

#### **23.1-12-03. Petroleum release compensation board.**

The petroleum release compensation advisory board shall review claims against the fund. The board consists of five members appointed by the governor, three of whom are active in petroleum marketing; one of whom is active in the petroleum, crude oil, or refining industry; and one of whom is active in the insurance industry. A member active in petroleum marketing must be appointed from a list of three recommended by the North Dakota retail petroleum marketers association. A member active in the petroleum, crude oil, or refining industry must be appointed from a list of three recommended by the North Dakota petroleum council. A member active in the insurance industry must be appointed from a list of three recommended by the North Dakota professional insurance agents association. Members must be appointed to terms of three years with the terms arranged so the term of at least one member, but no more than two members, expires June thirtieth of each year. A member shall hold office until a successor is duly appointed and qualified. Each member of the board is entitled to receive sixty-two dollars and fifty cents per diem for each day actually spent in the performance of official duties, plus mileage and expenses as allowed to other state officers.

#### **23.1-12-04. Administration of fund - Staff.**

The department shall administer the fund according to this chapter. The department shall convene the board as may be necessary to keep the board apprised of the fund's general operations. However, the board shall meet at least once each half of each calendar year to review and to advise the department regarding the administration of the fund, the fund's general operations, and to hear and decide denials of claims by the department which may be appealed to the board, and to discuss all claims against the fund. The department may employ any assistance and staff necessary to administer the fund within the limits of legislative appropriation. A claimant aggrieved by a decision of the department regarding a claim upon the fund may appeal the decision to the board. The board may sustain, modify, or reverse the decision of the department. The claimant or the department may appeal the board's decision under chapter 28-32.

#### **23.1-12-05. Adoption of rules.**

The department shall adopt rules regarding the practices and procedures of the fund, the form and procedure for applications for compensation from the fund, procedures for

investigation of claims, procedures for determining the amount and type of costs that are eligible for reimbursement from the fund, procedures for persons to perform services for the fund, procedures for appeals to the board by claimants aggrieved by an adverse decision of the department, and any other rules as may be appropriate to administer this chapter.

**23.1-12-06. Release discovery.**

If the department has reason to believe a release has occurred, it shall direct the owner or operator to take reasonable and necessary corrective actions as provided under federal or state law or under adopted rules.

**23.1-12-07. Owner or operator not identified.**

The department may cause legal action to be brought to compel performance of a corrective action if an identified owner or operator fails or refuses to comply with an order of the department, or the department may engage the services of qualified contractors for performance of a corrective action if an owner or operator cannot be identified.

**23.1-12-08. Imminent hazard.**

Upon receipt of information that a petroleum release has occurred which may present an imminent or substantial endangerment of health or the environment, the department may take emergency action necessary to protect health or the environment.

**23.1-12-09. Duty to notify.**

This chapter does not limit a person's duty to notify the department and to take action related to a release. However, payment for corrective actions required as a result of a petroleum release is governed by this chapter.

**23.1-12-10. Providing of information.**

A person the department has reason to believe is an owner or operator, the owner of real property where corrective action is ordered to be taken, or a person that may have information concerning a release shall, if requested by the department, or any member, employee, or agent of the department, furnish to the department any information that person has or may reasonably obtain which is relevant to the release.

**23.1-12-11. Examination of records.**

Any employee of the department may, upon presentation of official credentials:

1. Examine and copy books, papers, records, memoranda, or data of any person that has a duty to provide information to the department under section 23.1-12-10; and
2. Enter upon public or private property to take action authorized by this section, including obtaining information from a person that has a duty to provide the information under section 23.1-12-10, conducting surveys and investigations, and taking corrective action.

**23.1-12-12. Responsibility for cost.**

The owner or operator is liable for the cost of the corrective action required by the department, including the cost of investigating the releases. This chapter does not create any new cause of action for damages on behalf of third parties for release of petroleum products against the fund or licensed dealers.

**23.1-12-13. Liability avoided.**

An owner or operator may not avoid liability by means of a conveyance of any right, title, or interest in real property or by any indemnification, hold harmless agreement, or similar agreement. However, this chapter does not:

1. Prohibit a person that may be liable from entering an agreement by which the person is insured or is a member of a risk retention group, and is thereby indemnified for part or all of the liability;

2. Prohibit the enforcement of an insurance, hold harmless, or indemnification agreement; or
3. Bar a claim for relief brought by a person that may be liable or by an insurer or guarantor, whether by right of subrogation or otherwise.

**23.1-12-14. Other remedies.**

This chapter does not limit the powers of the department, or preclude the pursuit of any other administrative, civil, injunctive, or criminal remedies by the department or any other person. Administrative remedies need not be exhausted to proceed under this chapter. The remedies provided by this chapter are in addition to those provided under existing statutory or common law.

**23.1-12-15. Revenue to the fund.**

Revenue from the following sources must be deposited in the state treasury and credited to the fund:

1. Any fees collected under section 23.1-12-17;
2. Any money recovered by the fund under section 23.1-12-23, and any money paid under an agreement, stipulation, or settlement;
3. Any interest attributable to investment of money in the fund; and
4. Any money received by the department in the form of gifts, grants, reimbursements, or appropriations from any source intended to be used for the purposes of the fund.

**23.1-12-16. Penalty.**

A tank owner violating section 23.1-12-17 is guilty of a class B misdemeanor unless another penalty is specifically provided.

**23.1-12-17. Registration fee.**

1. Upon the recommendation and approval of the petroleum tank release compensation fund board, the department shall classify tanks with respect to degree of hazard, determine the risks of each classification, and fix the registration fee for each classification at a rate sufficient to provide for:
  - a. The payment of the expenses of administration of the fund;
  - b. The reimbursement for corrective action provided under this chapter; and
  - c. The maintenance by the fund of adequate reserves and surplus so the fund may be kept solvent at all times.
2. The department shall establish the schedule of registration fees by rules adopted in accordance with chapter 28-32.
3. An owner or operator of an existing tank that is discovered at a location that currently and previously has had tanks registered with the fund shall pay an additional twenty-five dollar penalty fee in addition to the registration fee for each aboveground tank and each underground tank owned or operated by that person for each previous year that the tank was required to be registered for which a fee was not paid. The payment includes the fees and the penalty for the failure to register.
4. An owner or operator of an existing tank at a location that was not previously and continuously registered with the fund, whether the registration was required by law or not must provide the fund with a phase two environmental study conducted by a qualified firm according to American society for testing materials standards. A tank integrity test must also be performed. The environmental study and tank integrity test must be reviewed by the department along with the application for registration with the fund. If the department rejects the application, the applicant is denied eligibility to the fund. However, if the site is remediated and the leaking tank is replaced, the applicant may reapply for registration with the fund. A new installation that is using a used tank must provide tank integrity test results for the used tank. Use of a synthetic liner in an aboveground dike system negates the need for a tank integrity test. The owner or operator of a new tank at a new site or a new tank at an existing site that had a tank

registered at the site previously need only pay the required fees for registration with the fund.

5. If accepted for registration with the fund, the owner or operator of the tank shall pay an additional twenty-five dollar penalty fee in addition to the registration fee for each aboveground tank and underground tank owned or operated by that person for each previous year that the tank was required to be registered for which a fee was not paid, regardless of ownership in each of those years. The payment includes the fees and the penalty for the failure to register.
6. The registration fees collected under this section must be paid to the department for deposit in the state treasury for the dedicated credit to the petroleum release compensation fund.
7. If a registration payment is not received within sixty days of July first by the department, a late fee of twenty-five dollars per tank per month must be imposed on the tank owner or operator.

**23.1-12-17.1. Registration fees before adoption of rules. (Contingent expiration date - [See note](#))**

Until the department adopts rules establishing a schedule of registration fees under section 23.1-12-17, registration fees must comply with this section. An owner or operator of a tank shall pay an annual registration fee of fifty dollars for each aboveground or underground tank owned or operated by the person. If, after the fiscal year has been closed and all expenses relating to the fiscal year have been accounted for, the fund balance is less than six million dollars, the annual registration fee of fifty dollars is increased to one hundred dollars. If, after the fiscal year has been closed and all expenses relating to the fiscal year have been accounted for, the fund balance is five million five hundred thousand dollars or more and the annual registration fee has been increased to one hundred dollars, the fee must be reduced to fifty dollars. If, after the fiscal year has been closed and all expenses relating to the fiscal year have been accounted for, the fund balance exceeds nine million dollars, the annual registration fee is reduced to five dollars. Annual registration fees must continue at five dollars until the fund balance does not exceed nine million dollars.

**23.1-12-18. Reimbursement for corrective action.**

1. The department shall reimburse an eligible owner or operator for ninety percent of the costs of corrective action, including the investigation, which are greater than five thousand dollars and less than one million dollars per occurrence and two million dollars in the aggregate. An eligible tank owner or operator may not be liable for more than twenty thousand dollars out-of-pocket expenses for any one release. A reimbursement may not be made unless the department determines that:
  - a. At the time the release was discovered the owner or operator and the tank were in compliance with state and federal rules and rules applicable to the tank, including rules relating to financial responsibility, rules relating to infrastructure compatibility, and all rules relating to health and safety which were in effect at the time of the release;
  - b. The department was given notice of the release as required by federal and state law;
  - c. The owner or operator has paid the first five thousand dollars of the cost of corrective action; and
  - d. The owner or operator, to the extent possible, fully cooperated with the department in responding to the release.
2. The fund shall compensate third parties for corrective action taken for a petroleum release if the provisions of subdivisions a, b, c, and d of subsection 1 were met at the time the release was discovered. Compensation for third-party corrective action includes compensation for costs incurred in returning the real estate to that level deemed duly remediated by the department.
3. The fund shall reimburse the tank owner, operator, or dealer for bodily injuries to a third party caused by a petroleum release if the provisions of subdivisions a, b, c, and

- d of subsection 1 were met at the time the release was discovered in an amount determined by:
- a. Findings reduced to judgment in federal or state district court or such other court having jurisdiction over the matter in a proceeding in which the fund has been made a party;
  - b. Findings by an arbitration panel agreed upon in writing by the parties in a proceeding in which the fund has been made a party; or
  - c. A written settlement entered into by the parties in which the director of the department or the department's agent has participated. The settlement must be reviewed and approved by the director of the department.
4. In any civil action against the owner, operator, or dealer for damages resulting from a petroleum release, if the pre-leak condition of real estate is an issue, and if there is no reasonable means of determining the pre-leak condition of real estate, the condition is that which exists at the time the department determines the real estate has been duly remediated.
  5. The fund may not compensate for attorney's fees of owners, operators, or dealers, nor may the fund compensate for exemplary damages, criminal fines, or administrative penalties.
  6. A third party accepting monetary compensation directly from the fund for damages due to a release caused by a tank owner, operator, or dealer covered by the fund is deemed to have waived any cause of action against the fund or against the tank owner, operator, or dealer.
  7. The fund shall reimburse the department for all costs, attorney's fees, and other legal expenses relating to administrative and adjudicative proceedings under this chapter and any subsequent legal proceeding. Any moneys reimbursed must be deposited in the department's operating fund in the state treasury and must be spent subject to appropriation by the legislative assembly.

**23.1-12-19. Application for reimbursement.**

An owner or operator that is a first-party claimant and that proposes to take corrective action or has undertaken corrective action in response to a release, the time of the release being unknown, may apply to the department for partial or full reimbursement under section 23.1-12-18. An owner or operator who is a first-party claimant may be reimbursed only for costs incurred after July 1, 1989, even if the releases were discovered before July 1, 1989, up to the maximum of twenty-five thousand dollars per location.

**23.1-12-20. Department to determine costs.**

A reimbursement for corrective actions taken by an owner, operator, or dealer may not be made from the fund until the department has determined that the costs for which reimbursement is requested were actually incurred and were reasonable. All necessary loss adjustment expenses must be included as a component of the loss and must be paid out of the fund.

**23.1-12-21. Liability of responsible person.**

The right to apply for reimbursement and the receipt of reimbursement does not limit the liability of an owner or operator for damages or costs incurred as the result of a release.

**23.1-12-22. Reimbursement not subject to attachment.**

The amount of reimbursement to be paid for corrective action that was done by a third party is not subject to legal process or attachment if actually paid to a third party that performed the corrective action.

**23.1-12-23. Recovery of expenses.**

Any reasonable and necessary expenses incurred by the fund, which exceed the coverage limits provided by section 23.1-12-18, in taking a corrective action, including costs of investigating a release, and in taking legal actions, may be recovered in a civil action in district

court brought by the department against an owner or operator. The certification of expenses by an approved agent of the fund is prima facie evidence that the expenses are reasonable and necessary. Any expenses that are recovered under this section must be deposited in the fund.

**23.1-12-24. Costs exceeding reimbursement.**

If the cost of any extraordinary authorized action under this chapter exceeds amounts awarded to the department from the federal government, the department may pay the department's corrective actions costs, including the cost of investigating a release, if the board finds that the cause was a petroleum substance, that an adequate amount exists in the fund to pay for the corrective action, that the occurrence was extraordinary in scope and size, and that a danger to the health and safety of citizens exists.

**23.1-12-25. Coordination of benefits.**

If an owner or operator has an insurance policy that provides the same coverage as the fund, the department shall pay the share of the covered loss or damage for which the fund is responsible. The share that must be paid from the fund is equal to the proportion that the applicable limit of coverage under the fund bears to the limits of insurance of all insurance coverage on the same basis.

**23.1-12-26. Third-party damages - Participation in actions and review of settlements.**

1. An owner or operator sued for damages resulting from a release shall notify the department within fourteen days of being served with a summons and complaint. The owner or operator also shall advise the department if any insurer is defending the owner or operator and provide to the department the name of that insurer.
2. An owner or operator that, before litigation, enters negotiations with a third party that claims to have been damaged by a release, or that receives a demand for payment of damages to a third party that claims to have been damaged by a release, shall notify the department within fourteen days of the demand or the negotiations.
3. The department and the board shall review the conduct of any litigation or negotiation. The department may not assume any legal costs incurred by the defendant or plaintiff, but may participate in discovery, trial proceedings, or settlement negotiations of either disputed liability or damages that bear on the determination of a plaintiff's damages.
4. The department and the board shall review any settlement negotiations to determine the dollar amount of bodily injury or property damage actually, necessarily, and reasonably incurred by third parties which, if paid by the defendant, would be considered eligible costs.

**23.1-12-27. Third-party damages - Documentation.**

1. An applicant's payments for third-party damages pursuant to a judgment entered in a court must include copies of the notice of entry of judgment and abstract of costs.
2. An applicant's payments for third-party damages made by agreement in settlement of litigation must include copies of the settlement agreement and supporting documents required by the department.
3. An applicant's payments for third-party damages made by agreement without reference to litigation must include copies of the settlement and supporting documents required by the department.
4. The department and the board may require a third party who claims bodily injury to be examined by a physician and require that the physician's report to be submitted to the department. The department may require a third party that claims property damage to permit a property appraiser or claims adjuster retained by the department to inspect the property and report to the department.
5. The fund shall pay a judgment against an owner, operator, or dealer awarded to a third party as a result of a third-party claim and property damage against an owner, operator, or dealer registered by the fund.

6. The fund shall pay for corrective action as awarded to a third party in any judgment against an owner, operator, or dealer.
7. Liability of the tank owner, operator, dealer, or fund to third parties for corrective action or personal injuries and property damage may not exceed, per person, one million dollars. Maximum liability of the fund, including all claims by third parties, may not exceed, for any release site, the maximum provided in section 23.1-12-18.
8. A third party may not bring an action against an owner, operator, or dealer more than three years after a corrective action plan has been approved by the department if the owner, operator, or dealer fully implements and complies with the corrective action plan.
9. In investigating a release site or reviewing the implementation of a corrective action plan approved by the department, the department shall determine whether the release threatens public health or the environment. The department shall require, based on science and technology appropriate for the site, any monitoring, remediation, or other appropriate corrective action that is reasonably necessary to protect public health or the environment. The department may require corrective action at a release site at any time after a release occurs.

**23.1-12-28. Matching federal funds.**

The department and the board may annually allow the department a ten percent matching grant for federal leaking underground storage tank funds to be paid out of the fund if the moneys are available and the department and the board determine the allowance appropriate.

**23.1-12-29. Fund appropriations.**

Money in the fund is continuously appropriated to the department for the purpose of making reimbursements under this chapter.

**23.1-12-30. Investment of fund.**

Investment of the fund is under the supervision of the state investment board in accordance with chapter 21-10. The department may purchase a contract for reinsurance of any risk to be paid by the fund. The department may investigate the purchase of insurance that reimburses an owner or operator for property damage claims by third parties other than claims for costs of corrective action.