

## NOTICE OF INTENT TO ADOPT ADMINISTRATIVE RULES

TAKE NOTICE the North Dakota Department of Environmental Quality ("Department"), will hold a public hearing to address several proposed new articles to be located in Department of Environmental Quality, N.D. Admin. Code Title 33.1, on February 6, 2020 at the Environmental Training Center, 2639 East Main Avenue, Bismarck, ND.

The following shall be the hearing times: Article 33.1-12 at 10:30 a.m. to 11:30 a.m., Article 33.1-14 at 1 p.m. to 2 p.m., and Article 33.1-23 at 2:15 to 3:15 p.m. Articles 33.1-12 and 33.1-14 proposed rules are expected to have an impact on the regulated community in excess of \$50,000. Article 33.1-23 proposed rules are not expected to have an impact on the regulated community in excess of \$50,000. Some of the rules and other documents that are the subject of this public notice will be submitted to the United States Environmental Protection Agency (U.S. EPA).

The purpose of the proposed articles is to implement S.L. 2019, ch. 24 (H.B. 1024), moving the Boiler Inspection program to the Department from the Insurance Department; to implement S.L. 2019, ch. 24 (H.B. 1024), moving the Petroleum Tank Release Compensation Fund to the Department from the Insurance Department; and to implement S.L. 2019, ch. 217 (S.B. 2107) establishing and administering the Department's certification program for environmental laboratories.

In this rulemaking, the Department is proposing to adopt:

- Article 33.1-12, relating to petroleum tank release compensation fund
- Article 33.1-14, relating to boiler rules
- Article 33.1-23, relating to environmental laboratory certification program rules

The proposed rules may be reviewed at the Department, 918 East Divide Ave. Bismarck, ND 58501-1947 or on the Department's website at [deq.nd.gov/PublicNotice.aspx](http://deq.nd.gov/PublicNotice.aspx). A copy of the proposed rules may be obtained by writing to the above address or by calling 701.328.5150. The proposed rules and additional related information are also available on the Department of Environmental Quality website at [deq.nd.gov/PublicNotice.aspx](http://deq.nd.gov/PublicNotice.aspx). Written or oral comments on the proposed rules sent to the above address, email or telephone number and received by February 18, 2020 will be fully considered.

If you plan to attend the public hearing and will need special facilities or assistance relating to a disability, please contact the Department at the above telephone number or address at least two days prior to the public hearing.

Dated this 25<sup>th</sup> day of November, 2019.



L. David Glatt, P.E.  
Director  
North Dakota Department of Environmental Quality

**ARTICLE 33.1-12**  
**PETROLEUM TANK RELEASE COMPENSATION FUND**  
**CHAPTER 33.1-12-01**  
**GENERAL FUND PROVISIONS**

Section

<u>33.1-12-01-01</u>	<u>Definitions</u>
<u>33.1-12-01-02</u>	<u>Tank Registration</u>
<u>33.1-12-01-03</u>	<u>Registration Fee</u>
<u>33.1-12-01-04</u>	<u>Notification of Release Procedures</u>
<u>33.1-12-01-05</u>	<u>Procedures for Investigation of Claims</u>
<u>33.1-12-01-06</u>	<u>Reimbursement</u>
<u>33.1-12-01-06.1</u>	<u>Reimbursement Disputes</u>
<u>33.1-12-01-07</u>	<u>Third-Party Claims</u>

**33.1-12-01-01. Definitions**

For the purposes of this chapter, the following definitions apply in addition to the definitions set forth in North Dakota Century Code chapter 23.1-12:

1. "Petroleum" as defined in North Dakota century Code section 23.1-12-02(10). Antifreeze is not included.
2. "Annual base registration fee" means the rate set by the department.
3. "Total annual registration fee" means the annual base registration fee plus additional classification system matrix fees.
4. "Classification system matrix fee" means the fees charged based on the department's matrix system with respect to the degree of hazard associated with the tank type and risk of each classification.
5. "Farm tank" means a tank located on a tract of land devoted to the production of crops or for raising animals and associated residences and improvements. A farm tank must be located on the farm property.
6. "Portable tank" means any storage tank, along with its piping and wiring, that is not stationary or affixed including, but not limited to, tanks which are on skids.
7. "Properly registered tanks" means tanks having the current registration fee paid with an up-to-date signed and dated tank data sheet on file with the department.
8. "PTRCF" means Petroleum Tank Release Compensation Fund program
9. "Residential tank" means a tank located on property used primarily for dwelling purposes.
10. "Surface impoundment" means a natural topographic depression, manmade excavation, or diked area formed primarily of earthen materials.

**History:** Effective July 1, 2020.

**General Authority:** NDCC 23.1-12-05.

**Law Implemented:** NDCC 23.1-12-05

### **33.1-12-01-02. Tank registration**

Tank owners and operators in North Dakota are required to register their tanks with the fund on an annual basis (fiscal year runs July first through June thirtieth). The department will notify electronically or by mail, all prior North Dakota fund registrants and known tank owners and operators, a registration letter and billing notice. The letter will explain the function of the fund and the requirement that the tank owner or operator must have all tanks owned or operated registered and all fees paid prior to a petroleum release in order to be eligible for reimbursement. In the event of a petroleum release, no payment will be made to an owner or operator of a registered tank unless the owner or operator has complied with all state and federal regulations applicable to the tanks. For example, underground storage tank regulations can be found in the North Dakota Century Code section 23.1-04-06 and chapter 33.1-24-08, and facilities with aboveground storage tanks may be subject to U.S. EPA's Spill Prevention, Control, and Countermeasure (SPCC) regulation (Title 40, Code of Federal Regulations, Part 112).

**History:** Effective July 1, 2020.

**General Authority:** NDCC 23.1-12-05, 28-32-02

**Law Implemented:** NDCC 23.1-12-17; 23.1-12-17.1

### **33.1-12-01-03. Registration fee**

1. An annual registration fee is due and payable on July 1, 1991, and on July first of each successive year thereafter or from the date a new tank was installed if it was after April 1991, to be in compliance with this section. The period of registration must run from July first to June thirtieth to coincide with the fiscal year of North Dakota.
2. No reregistration or fee modification will be made during any registration year when an owner or operator removes a tank or replaces an underground tank with an aboveground tank within a registration year. The renewal billing will reflect the tank status change.
3. The department has established an annual base registration fee of seventy-five dollars for each aboveground or underground tank owned or operated by the tank owner or operator. 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 base registration fee of seventy-five 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 seven million dollars or more and the annual base registration fee has been increased to one hundred dollars, the annual base registration fee must be reduced to seventy-five 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 base fee must be reduced to a flat total annual fee of fifty dollars without regard to the additional classification system matrix outlined in subsections 4 – 9. The total annual fee must continue at fifty dollars until the fund balance does not exceed nine million dollars.
4. An additional classification system matrix fee is calculated in addition to the annual base registration fee to determine the total annual fee due from an owner or operator of an aboveground or underground tank. The classification system matrix is developed by the department with respect to the degree of hazard associated with the tank type and risk of each classification. The classification system matrix uses multipliers applied to the annual base registration fee for each tank based on the degree of hazards associated with tank's classification. Tank classifications are described in subsection 5.
5. Under the classification system matrix each tank is classified based on the following risks with respect to degree of hazard:
  - a. type of the tank system

- b. age of the tank system
- c. volume of the tank
- d. best management practices (BMPs) in place at the location of tank system may receive a discounted matrix multiplier to the annual base registration fee. For example, an impermeable berm around an aboveground storage tank system and leak detection in an underground storage tank system.
- e. if the registered site of the tank has an active claim for corrective action, the tank will have a higher matrix multiplier to the annual base registration fee

6. Under the classification system matrix, each tank risk classification is assigned a multiplier. The total annual fee charged for each tank is determined by multiplying the multiplier value of each tank risk classification to the annual base registration fee. The total annual fee is computed by the following equation:

$$X = (Y)(a)(b)(c)(d)(e)$$

Where:

X = total annual fee applied to each tank

Y = annual base registration fee for each tank

a = multiplier assigned to the type of the tank system (see table 1)

b = multiplier assigned to the age of the tank system (see table 2)

c = multiplier assigned to the volume of the tank (see table 3)

d = multiplier assigned to the BMPs in place at the tank location (see table 4a and 4b)

e = multiplier assigned to the registered site with a claim for corrective action (see table 5)

- 7. The department determines the multipliers assigned to each risk classification based on the fund's annual claim reimbursements, fund reserve requirements, and operating expenses.
- 8. The multiplier is based on the risk factors with respect to the degree of hazard listed in subsection 5 above. Each risk factor multiplier is listed below in a table format. See subsection 9.
- 9. The tables below are based on the following risk factors:

Table 1

Type of Tank System (underground = UST aboveground = AST )

Tank type designation	UST multiplier
UST post 2009 double wall with leak detection	0.80
UST double wall with interstitial monitoring or single wall with corrosion protection	0.90
AST	1.00

Table 2

Age of Tank System (Note: If the site has not provided a tank installation date, point value 7 is used as the default multiplier.)

Age in years since installation date	Multiplier
less than 5	1.00
5 - 10	1.25
11 - 15	1.50
16 - 20	1.75
21 - 25	2.00

26 - 30	2.13
greater than 30	2.25

Table 3  
Volume of the Tank

Volume in gallons	Multiplier
0 - 1999	0.75
2000 - 5000	1.00
5001 - 10000	1.25
10001 - 15000	1.50
15001 - 20000	1.75
greater than 20000	2.00

Table 4a  
BMPs for Tank System (underground = UST)

UST BMPs description	UST multiplier
Double walled with leak detection or interstitial monitoring	0.75
Single walled with corrosion prevention	0.85

Table 4b  
BMPs for Tank System (aboveground = AST)

AST BMPs description	AST multiplier
SPCC plan with secondary containment	0.75
An SPCC plan only	0.90

Table 5  
Active Claim for Corrective Action at Registered Site

Does the site have an active claim	Claim multiplier
1 = no	1.00
2 = yes	1.30

Example of maximum Total Annual Fee for a UST with an active claim:

$$X = (Y)(a)(b)(c)(d)(e)$$

$$X = (\$100)(0.90)(2.25)(2.00)(0.85)(1.30)$$

$$X = \$447.50$$

Example of minimum Total Annual Fee for a UST with no active claim:

$$X = (Y)(a)(b)(c)(d)(e)$$

$$X = (\$100)(0.80)(1.00)(0.75)(0.75)(1.00)$$

$$X = \$45.00$$

Example of maximum Total Annual Fee for an AST with an active claim:

$$\begin{aligned} X &= (Y)(a)(b)(c)(d)(e) \\ X &= (\$100)(1.00)(2.25)(2.00)(0.90)(1.30) \\ X &= \$526.50 \end{aligned}$$

Example of minimum Total Annual Fee for an AST with no active claim:

$$\begin{aligned} X &= (Y)(a)(b)(c)(d)(e) \\ X &= (\$100)(1.00)(1.00)(0.75)(0.75)(1.00) \\ X &= \$56.25 \end{aligned}$$

10. Additional fees may apply, as specified in North Dakota Century Code section 23.1-12-17.

**History:** Effective July 1, 2020.

**General Authority:** NDCC 23.1-12-05, 28-32-02

**Law Implemented:** NDCC 23.1-12-17;

### **33.1-12-01-04. Notification of release procedures**

Upon receiving notice of a release, the PTRCF shall:

1. Verify that the tank and all other tanks owned or operated by the operator are registered with the fund.
2. Record the release information in the registration file for the location.
3. Verify that the department has received notice of the release.
4. If the owner or operator has not registered all the tanks owned and operated by the operator at the location of the release, the PTRCF shall send a denial letter to the owner or operator. A copy will be sent to the department's Division of Waste Management, Underground Storage Tank (UST) program.
5. Obtain verification from the owner or operator that the affected tank, equipment, components, material, and dispenser are in compliance with state and federal regulations for the petroleum product stored and dispensed. If the previously mentioned tank, equipment, components, material, and dispenser are non-compliant with state and federal regulations, the PTRCF shall send a denial letter to the owner or operator. A copy of the denial letter will be sent to the department's Division of Waste Management, UST program.
6. If all tanks are registered and the affected tank, piping, fitting, and dispenser are in compliance with state and federal regulations for the petroleum product stored and dispensed, the PTRCF shall send the registered owner or operator of the site an application packet, tank removal and cleanup guidelines, and a letter outlining the procedure for filing a claim for reimbursement of corrective action.

**History:** Effective July 1, 2020.

**General Authority:** NDCC 23.1-12-05, 28-32-02

**Law Implemented:** NDCC 23.1-12-10, 23.1-12-19

### **33.1-12-01-05. Procedures for investigation of claims**

In each release investigation, the PTRCF shall:

1. Investigate the location and cause of the release.
2. Interview persons with knowledge of the release.
3. Examine records and documentation concerning the release, including documentation of the corrective action taken and expenses incurred.
4. Prepare a written report determining the validity of the claim and the eligible cleanup expenses.
5. Complete other claims related tasks as required.

**History:** Effective July 1, 2020.

**General Authority:** NDCC 23.1-12-05, 28-32-02

**Law Implemented:** NDCC 23.1-12-18, 23.1-12-20, 23.1-12-23

### **33.1-12-01-06. Reimbursement**

1. The fund will reimburse only reasonable and necessary eligible cleanup expenses. The PTRCF tank removal and cleanup guidelines will be used to determine reasonable environmental consultant, contractor, and excavation expenses. The PTRCF in consultation with the department's division assigned to the cleanup will evaluate each claim site prior to dispersing reimbursement for cleanup expenses. Reimbursement is made only if all tanks are properly registered prior to the discovery of the release.
2. No payments for reimbursement will be made from the fund unless a completed claim application form has been received and approved by the PTRCF.
3. Eligible expenses for corrective action include the following:
  - a. Labor
  - b. Testing
  - c. Use of machinery
  - d. Materials and supplies
  - e. Professional services
  - f. Remediation, monitoring, or cleanup expenses incurred with the oversight and direction of the department's division assigned to the cleanup.
  - g. Any other expenses the department and the board deem to be reasonable and necessary to remedy cleanup of the release and satisfy liability to any third party.
  - h. Consultant fees if authorized by the department's division assigned to the cleanup.
4. The following will not be considered eligible expenses:
  - a. The cost of replacement, repair, and maintenance of affected tanks, associated piping, and system.
  - b. Pumping out of any product, including water, from any tanks which need to be removed.
  - c. The cost of upgrading existing affected tanks, associated piping, and system.
  - d. The loss of income, profits, or petroleum product.

- e. Decreases in property value.
  - f. Bodily injuries or property damages except for injuries or damages suffered by third parties as stated in North Dakota Century Code section 23.1-12-26.(4).
  - g. Attorney's fees.
  - h. Costs associated with preparing, filing, and prosecuting an application for reimbursement or assistance under this regulation.
  - i. The costs of making improvements to the facility beyond those that are required for corrective action, including replacing concrete, asphalt, equipment, or buildings.
  - j. Any cleanup costs resulting from negligence or misconduct on the part of the owner or operator.
  - k. Consultant marked-up costs.
  - l. Costs in excess of those considered reasonable by the fund.
  - m. Fines or penalties imposed by order of federal, state, or local government.
  - n. Finance charges, interest charges, or late payment charges.
5. To determine what expenses are reasonable and necessary, the owner, operator, or landowner must bid the excavation and consultant work. The owner, operator, or landowner is required to obtain a minimum of three bids. The bid that meets the cost effectiveness, technical, and environmental requirements of the department will be deemed by the PTRCF to be the reasonable cost for that project. The bid must be submitted according to the fund's excavation and consultant worksheets. Additional work over and above the original bid will be reimbursed according to unit costs on the original bid.
  6. The PTRCF may provide partial payments prior to the final determination of the amount of the loss, if it is determined that the cleanup is proceeding according to the proposed workplan of the department's division assigned to the site assessment. The payment may be made to the owner, operator, or landowner or that person's assigned representative if the appropriate assignment form is submitted to the PTRCF with appropriate documentation verifying that the work has been completed by the assignee.
  7. All claims for payment are subject to the availability of funds in the petroleum tank release compensation fund and must be submitted no later than one year after the work has been completed to be eligible.
  8. Prior to payment for any loss, the owner, operator, or landowner shall subrogate to the PTRCF all rights, claims, and interest which the owner, operator, or landowner has or may have against any party, person, persons, property, corporation, or other entity liable for the subject loss, and shall authorize the fund to sue, compromise, or settle in the name of the owner, operator, or landowner or otherwise, all such claims. The subrogation agreement required by this section must be prescribed and produced by the PTRCF.
  9. Reimbursement will be considered when the owner, operator, or landowner has submitted complete excavation or consultant worksheets along with legible copies of all invoices and a description of the work performed.
  10. The owner, operator, or landowner must submit, prior to any payment, evidence that the amounts shown on the invoices for which the payment is requested were either paid in full by the owner, operator, or landowner or, if the owner, operator, or landowner has assigned the right to receive payment from the fund, that a contractor hired has expended time and materials for which payment must be made. This must include documentation that the work



has been completed by the assignee.

11. Prior to payment, the department must be satisfied that the corrective action taken has met all state and federal regulations and that the corrective action has satisfied public health, welfare, and environmental concerns.

**History:** Effective July 1, 2020.

**General Authority:** NDCC 23.1-12-05, 28-32-02

**Law Implemented:** NDCC 23.1-12-18, 23.1-12-20, 23.1-12-23, 23.1-12-24

### **33.1-12-01-06.1. Reimbursement disputes**

If a reimbursement is denied or payment is reduced to a tank owner, operator, or landowner, the tank owner, operator, or landowner may request a review by the board by filing a written request and supporting documentation with both the department and the board within thirty days of receiving a 'sworn statement in proof of loss' regarding a denial of reimbursement or a payment reduction notification.

**History:** Effective July 1, 2020.

**General Authority:** NDCC 23.1-12-05, 28-32-02;

**Law Implemented:** NDCC 23.1-12-18

### **33.1-12-01-07. Third-party damages**

No reimbursement may be made for damage to employees as defined by the North Dakota Workers' Compensation Act or agents of the owner or operator.

**History:** Effective July 1, 2020.

**General Authority:** NDCC 23.1-12-05, 28-32-02

**Law Implemented:** NDCC 23.1-12-26, 23.1-12-27