

Pollution Control and Ecology Commission # 014.00-012

**ARKANSAS POLLUTION CONTROL
and ECOLOGY COMMISSION**

**REGULATION NO. 12
STORAGE TANKS**



INITIAL DRAFT

Submitted to the PC&E Commission in August, 2005

CHAPTER ONE: GENERAL PROVISIONS

Reg.12.101 Purpose and Title

The purpose of Arkansas Pollution Control and Ecology Commission Regulation Number 12 (Storage Tanks), which is referred to herein as "Regulation" and which may be cited as "Department of Environmental Quality Regulation 12 (Storage Tanks)," is to regulate underground storage tank systems and certain aboveground storage tank systems in order to protect the public health and the lands and waters of the State of Arkansas.

Reg.12.102 Authority

This Regulation is promulgated pursuant to the authority of Arkansas Code Annotated (A.C.A.) §8-7-801 et seq. and the Petroleum Storage Tank Trust Fund Act (A.C.A. §8-7-901 et seq.).

Reg.12.103 Definitions

(A) Except for the definitions of "Owner," "Person," and "Release" found at 40 CFR 280.12, the definitions set forth in 40 CFR 280.12 and 280.92 are all adopted by reference herein.

(B) As used in this Regulation, unless the context otherwise requires:

(1) (a) "Aboveground storage tank" means any one or a combination of containers, vessels, and enclosures located aboveground, including structures and appurtenances connected to them, whose capacity is greater than one thousand three hundred twenty (1,320) gallons and not more than forty thousand (40,000) gallons and that is used to contain or dispense motor fuels, distillate special fuels, or other refined petroleum products. Such term does not include mobile storage tanks used to transport petroleum from one location to another or those used in the production of petroleum or natural gas.

(b) "Aboveground storage tank" shall not include any such containers, vessels, or enclosures used to contain or dispense refined petroleum substances listed under 101(14) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 USCS Section 9601 (14)).

(2) "Advisory Committee" means the Advisory Committee on Petroleum Storage Tanks as established by state law.

~~(3) "Certificate of Eligibility" means a certificate issued by the Department to (1) an owner or operator of an underground storage tank who has chosen to use the trust fund as a mechanism to partially satisfy the financial responsibility requirements of 40 CFR 280, Subpart H, or (2) to an owner or operator of an aboveground storage tank who has chosen to participate in the trust fund; who has~~

~~(a) Registered his or her storage tank(s) with the Department;~~

~~(b) Paid the applicable storage tank fees; and~~

~~(c) Certified in writing to the Department that he or she has completed and submitted an annual self-inspection audit form to the Department and that he or she has financial responsibility for the trust fund deductibles.~~

~~(4)~~ (3) "Certificate of Registration" means a certificate issued by the Department to an owner or operator who has paid the applicable storage tank fees and registered his or her storage tank(s) with the Department.

~~(5)~~ (4) "Combination," for purposes of implementation of this Regulation on aboveground storage tanks only, means containers, vessels, and enclosures located aboveground which are joined by common piping and located in tandem.

~~(6)~~ (5) "Commission," unless indicated otherwise by the context, means the Arkansas Pollution Control & Ecology Commission.

~~(7)~~ (6) "Compensatory damages" means all damages for which an owner or operator may be liable including, without limitation, bodily injury or property damage. This term does not include punitive damages or the costs of litigation, which shall not be limited to attorney or expert witness fees. This definition shall apply to any pending third-party claim which has not been reduced to judgment as of April 7, 2003.

~~(8)~~ (7) "Corrective action" means those actions which may be necessary to protect human health and the environment as a result of an accidental release, sudden or nonsudden.

~~(9)~~(8) "Department" means the Arkansas Department of Environmental Quality.

~~(10)~~(9) "Director" means the Director of the Arkansas Department of Environmental Quality.

~~(11)~~(10) "Operator," in addition to having the meaning given in the definition found at 40 CFR 280.12, means, unless the context dictates otherwise, any person in control of, or having responsibility for, the daily operation of an aboveground storage tank system; provided, however, that "operator" as it is used in Chapters Five and Six and Subsection 12.104(A) shall not include such persons.

~~(12)~~(11) "Owner" means:

(a) In the case of any underground storage tank system in use on November 8, 1984, or brought into use after that date, any person who owns an underground storage tank system used for the storage, use, or dispensing of regulated substances;

(b) In the case of any underground storage tank system in use before November 8, 1984, but no longer in use on that date, any person who owned such tank system immediately before the discontinuation of its use. The term "Owner" does not include any person who, without participation in the management of an underground storage tank system, holds indicia of ownership primarily to protect a security interest in the tank system; and

(c) Unless the context dictates otherwise, any person who owns an aboveground storage tank; provided, however, that "owner" as it is used in Chapters Five and Six and Subsection 12.104(A) shall not include such persons.

~~(13)~~(12) "Person" means any individual; corporation; company; firm; partnership; association; trust; joint-stock company or trust; venture; municipal, state, or federal government or agency; or any other legal entity, however organized.

~~(14)~~(13) "Release" means any spilling, leaking, emitting, discharging, escaping, leaching or disposing from a storage tank into the groundwater, surface water or subsurface soils of the state.

~~(15)~~(14) "Storage tank" means an aboveground storage

tank or underground storage tank as defined by this Regulation.

~~(16)~~(15) "Storage tank self-inspection audit" means a checklist or form issued by the department addressing the compliance status of a storage tank that the owner or operator completes on an annual basis.

~~(17)~~(16) "Trust fund" means the Petroleum Storage Tank Trust Fund created by the Petroleum Storage Tank Trust Fund Act.

~~(18)~~(17) "Unknown petroleum storage tank" means a petroleum storage tank as defined by state law whose existence on a property or at a facility at the time of discovery of a release was not known or should not have been reasonably known by the owner or operator. An owner or operator is deemed to have known of the existence of an unknown petroleum storage tank if there was surficial evidence of such tank in the form of visible vent pipes, fill caps, or lines protruding from such tank.

Reg.12.104 Incorporation of Federal Regulations

(A) The following regulations promulgated on or before Date To Be Inserted, by the United States Environmental Protection Agency are hereby adopted as provisions of this Regulation as though set forth herein line for line and word for word, except that unless the context otherwise dictates, all references therein to "Implementing Agency" shall be considered references to "Arkansas Department of Environmental Quality," and all references to "Administrator," "Regional Administrator," "Director" or "State Director" shall be considered references to the "Director of the Arkansas Department of Environmental Quality," and all references to the "U. S. Environmental Protection Agency" or "EPA" shall be considered references to the "Arkansas Department of Environmental Quality," and all references elsewhere in this Regulation to any of the following regulations shall constitute a reference to the regulation as herein adopted; and provided that the effective date of the provisions adopted herein by reference as provisions of this Regulation shall be the date such provisions are specified as being effective by the Commission in its rulemaking and the effective date of the federal regulations adopted herein shall have no bearing on the effective date of any provisions of this Regulation:

Code of Federal Regulations (CFR), Title 40

(1) 280.10 through 280.74

(2) 280.90 through 280.116

(3) 280.200 through 280.230

(B) The Commission shall conduct rulemaking as necessary to incorporate into this Regulation any new or revised federal regulations.

Reg.12.105 Records

(A) In addition to any other records required to be maintained under the Regulated Substance Storage Tanks program, the Petroleum Storage Tank Trust Fund Act, or this Regulation, all owners or operators shall maintain, and submit or, upon request make available for review and copying by the Department at all reasonable times, any records which may reasonably be required by the Department, the Commission, or the Advisory Committee in the performance of their duties under law.

(B) Any owner or operator of an underground storage tank shall grant the Department access to all records concerning the storage of regulated substances.

Reg.12.106 Entry and Inspection of Underground Storage Tank Facilities

Any owner or operator of an underground storage tank system shall, upon request of a duly authorized representative of the Department, permit the representative to enter the property at all reasonable times to inspect the facilities and equipment or to conduct monitoring and sampling activities.

Reg.12.107 Entry and Inspection of Aboveground Storage Tank Facilities

The Department shall have the authority to enter upon the property of any owner or operator of an aboveground storage tank to obtain information, conduct surveys, or review records for the purpose of determining compliance with the requirements of the Petroleum Storage Tank Trust Fund Act, relating to aboveground storage tanks prior to approval of a claim for reimbursement from the Petroleum Storage Tank Trust Fund.

Reg.12.108 Notice Requirements

(A) The Department must be given timely notice of any release as required by 40 CFR 280, Subpart E.

(B) (1) The requirement for giving timely notice of a release from an aboveground storage tank system shall be the same as that for underground storage tank systems.

(2) An owner or operator is required to give notice of a release from an aboveground storage tank system if the amount of the release equals or exceeds existing reporting limits in any other applicable federal or state statutes or regulations.

(C) (1) To ensure timely notice of a release or suspected release from a storage tank system is received by the Department, an owner or operator must follow up a verbal notice to the Department with written notice of the release or suspected release within three (3) business days following the date of the initial verbal notice.

(2) Written notice may be submitted in, but is not limited to, the following forms: facsimile, electronic mail, U. S. mail, hand-written correspondence or by another form as may be provided by the department.

CHAPTER TWO: REGISTRATION OF STORAGE TANKS

Reg.12.201 Registration Requirement

(A) As provided by state and federal law, all owners and operators of storage tanks must register their tanks in accordance with this Regulation.

(B) (1) No owner or operator shall receive any regulated substance into any storage tank for which current and proper proof of registration, as provided by Subsection 12.202(A), has not been furnished to the person selling the regulated substance.

(2) No person selling any regulated substance shall deliver, or cause to be delivered, a regulated substance into any storage tank for which he or she has not obtained current and proper proof of registration, as provided by Subsection 12.202(A), from the owner or operator.

(C) The provisions of this Regulation shall not apply to aboveground storage tanks located on farms, the contents of which are used for agricultural purposes and not held for resale.

Reg.12.202 Certificate of Registration

(A) Proper proof of registration shall be in the form of a Certificate of Registration.

(B) Each year the Department shall issue or renew a Certificate of Registration for each storage tank facility meeting the following requirements:

(1) All storage tanks at the facility must be registered in accordance with this Regulation; and

(2) The registration fees required by Section 12.203 must be paid.

(C) A Certificate of Registration must be posted in a conspicuous place at each registered facility.

Reg.12.203 Storage Tank Registration Fees

(A) (1) An annual registration fee for each storage tank shall be paid by the tank owner or operator to the Department for each year or portion of a year that the tank is in use.

(2) A storage tank shall be deemed "in use" until it has been removed or otherwise permanently closed in accordance with the procedures mandated by this Regulation and the Department has been given written notice of the change in status of the tank.

(B) The annual registration fee for a storage tank newly placed into service shall be paid within thirty (30) days after the tank is placed into service.

(C) The annual registration fee for all storage tanks shall be ~~fifty~~ seventy-five dollars ~~(\$50)~~ (\$75) per tank.

(D) The annual registration fees shall be allocated to the Regulated Substance Storage Tank Program Fund and the Department of Arkansas State Police.

(E) If the annual registration fee required by this Chapter is not paid within thirty (30) days of the billing date of the applicable fee invoice from the Department, a late fee shall be imposed in the amount of five dollars (\$5) per storage tank.

(F) Nonpayment of any fee required by this Chapter shall constitute grounds for legal action by the Department, and may result in assessment of civil penalties as provided in Chapter

Eight.

(G) No fees required by this Chapter shall be refundable.

CHAPTER THREE: PETROLEUM STORAGE TANK TRUST FUND CORRECTIVE ACTION REIMBURSEMENT PROCEDURES

Reg.12.301 Purpose

In accordance with the Petroleum Storage Tank Trust Fund Act, eligible owners or operators may obtain partial reimbursement for costs of corrective action taken in response to accidental releases from qualified petroleum storage tank systems. This Chapter establishes the procedures to be followed and documentation required to receive such reimbursement from the trust fund.

Reg.12.302 Trust Fund Eligibility

(A) (1) Every owner or operator of an underground petroleum storage tank system is required by 40 CFR 280.93 to demonstrate financial responsibility for taking corrective action in response to accidental releases from underground petroleum storage tank systems. One mechanism which may be used to partially satisfy this requirement is the Petroleum Storage Tank Trust Fund.

(2) Every owner or operator choosing to use the trust fund as a mechanism to partially satisfy the financial responsibility requirements described in 12.302(A)(1) must also utilize an additional financial responsibility mechanism, as described in 12.302(D)(2), for the first seven thousand five hundred dollars (\$7,500) of the costs of corrective action.

(B) In accordance with the Petroleum Storage Tank Trust Fund Act, owners or operators of certain aboveground petroleum storage tank systems may also qualify for and access the trust fund.

(C) The trust fund shall not be accessed for storage tank systems storing substances for which payment of the environmental assurance fee is not required.

(D) In order to be eligible for the trust fund, the owner or operator must:

(1) Register each petroleum storage tank and pay the annual storage tank fees required by this Regulation for each tank until such time as the permanent closure requirements of this

Regulation are satisfied;

(2) Maintain financial responsibility in the amount of seven thousand five hundred dollars (\$7,500) per occurrence for corrective action costs, by any one or combination of the following: insurance, guaranty, surety bond, letter of credit, insurance pool or any other mechanism allowed by 40 CFR 280; and

(3) For each petroleum storage tank for which trust fund eligibility is sought, certify on forms supplied by the Department that he or she has completed and submitted an annual self-inspection audit form to the Department.

~~(E) The Department shall issue a Certificate of Eligibility to any owner or operator who meets the requirements of Section 12.302.~~

Reg.12.303 Trust Fund Coverage for a Release

(A) In order for an owner or operator to obtain any coverage by the trust fund for corrective action necessary to address an accidental release, all of the following requirements must be met:

(1) At the time of the discovery of the release, the owner or operator must have met each of the requirements for trust fund eligibility as set forth in Subsection 12.302(D);

(2) The release must have occurred after February 22, 1989;

(3) The Department must have been given timely notice of the release as required by Section 12.305;

(4) At the time of the occurrence, the owner or operator must have a completed current annual self-inspection audit form on file with the Department;

(5) The owner or operator must cooperate fully with the Department in conducting corrective action to address the release; and

(6) The owner or operator must have expended seven thousand five hundred dollars (\$7,500) in reasonable, allowable, and necessary corrective action costs for the occurrence.

(B) Payment for corrective action may be denied if the storage tank owner or operator submits an inaccurate storage tank self-inspection audit form which results in a delay in the

corrective action of a release, and the delay contributes to an adverse impact to the environment.

(C) Upon request by the Department, the owner or operator shall submit proof of compliance with the requirements for trust fund coverage.

Reg.12.304 Trust Fund Coverage for Unknown Petroleum Storage Tanks

(A) Unknown petroleum storage tanks that have satisfied the requirements of Section 12.303 shall be eligible for reimbursement for corrective action as provided by this section if:

(1) The unknown petroleum storage tank is discovered while removing, upgrading, or replacing a petroleum storage tank meeting the requirements of Section 12.303, or while performing petroleum investigation or corrective action activities required by federal or state laws, and the petroleum storage tank meeting the requirements of Section 12.303 is located on the same property or facility; or

(2) The unknown petroleum storage tank is located on a right-of-way purchased by a city, county, or state governmental agency or entity and is discovered during construction in such right-of-way.

(3) Eligibility for reimbursement of an unknown petroleum storage tank will be conditioned on the payment of three hundred and seventy-five dollars (\$375) to the Department.

Reg.12.305 Notice Requirements

(A) The Department must be given timely notice of any release as required by 40 CFR 280, Subpart E.

(B) (1) The requirement for giving timely notice of a release from an aboveground storage tank system shall be the same as that for underground storage tank systems.

(2) An owner or operator is required to give notice of a release from an aboveground storage tank system if the amount of the release equals or exceeds existing reporting limits in any other applicable federal or state statutes or regulations.

(C) (1) To ensure timely notice of a release or suspected release from a storage tank system is received by the

Department, an owner or operator must follow up a verbal notice to the Department with written notice of the release or suspected release within three (3) business days following the date of the initial verbal notice.

(2) Written notice may be submitted in, but is not limited to, the following forms: facsimile, electronic mail, U. S. mail, hand-written correspondence or by another form as may be provided by the department.

(D) If the Department is not given the required timely notice of a release, and the failure to report the release causes a delay in the corrective action that contributes to an adverse impact to the environment, no reimbursement shall be made under this Chapter for the costs of corrective action incurred in response to the release.

Reg.12.306 Amount of Reimbursement

(A) The trust fund will provide reimbursement to eligible owners or operators of storage tanks for corrective action costs required to address accidental releases in an amount not to exceed one million four hundred ninety-two thousand five hundred dollars (\$1,492,500) per occurrence.

(B) The owner or operator shall be responsible for the first seven thousand five hundred dollars (\$7,500) of corrective action costs per occurrence.

Reg.12.307 Deductible

(A) The first seven thousand five hundred dollars (\$7,500) of corrective action costs incurred by the owner or operator shall be considered a deductible and is not eligible for reimbursement from the trust fund.

(B) (1) No reimbursement for corrective action costs shall be made from the trust fund until the deductible for the occurrence has been expended by the owner or operator.

(2) No owner or operator may submit an application for reimbursement for corrective action costs until he or she has expended the deductible.

(3) Proof of payment of the deductible must be provided to the Department prior to approval of reimbursement for any corrective action costs.

(4) For purposes of meeting the deductible, proof of payment shall consist of a receipt, a copy of a money order, or a canceled check. An IOU, a discharge in bankruptcy, a conditional payment, an installment payment, or a down payment shall not be considered proof of payment.

(C) The only corrective action costs which shall be credited toward the deductible are costs which are:

(1) Incurred in response to a release that has been timely reported to the Department; and

(2) Found to be reasonable, allowable, and necessary.

Reg.12.308 Applying for Reimbursement of Corrective Action Costs

(A) In order to apply for reimbursement of corrective action costs, an owner or operator must meet the requirements for coverage set forth in Section 12.303 and meet the requirements of this Chapter for reimbursement applications.

(B) No application shall contain a request for reimbursement, nor shall reimbursement be made, in advance of the reimbursable services being rendered or reimbursable costs being incurred.

(C) Any applications for reimbursement of corrective action costs must be submitted on forms provided by the Department and shall include an accounting of all charges itemized by labor hours and rates, analytical charges, equipment charges and other categories which may be identified by the Department. The application shall also contain the following:

(1) The name, address and telephone number of the applicant;

(2) The name, address and telephone number of each owner and operator of each storage tank and the facility owner, if different from the applicant;

(3) The location of the facility at which the corrective action was performed or is being performed, identified with sufficient clarity and detail to enable a person unfamiliar with the site to locate it;

(4) A legible copy of all invoices for which

reimbursement is requested, providing a description of the work performed, where the work was performed, the dates the work was performed, the unit costs, and the total amount paid;

(5) Evidence that the amounts shown on the invoices for which reimbursement is requested have been paid in full by the applicant. The evidence must be accompanied by a copy of any of the following:

(a) Business receipts, indicating all payments received;

(b) Canceled checks (front and back);

(c) The certification of a certified public accountant that the costs for which reimbursement is requested have been paid in full; or

(d) An affidavit signed by the person who performed the corrective action, affirming that the amounts which the applicant represents as being paid to that person have been paid in full; and

(6) Any other information which the Department may reasonably require.

(D) An application must be signed as follows:

(1) For a corporation -

(a) By a principal executive officer of at least the level of vice-president;

(b) By a duly authorized representative or agent of the executive officer named in 12.308(D)(1)(a), provided that the representative or agent is responsible for the overall operation of the facility that is the subject of the application; or

(c) By a person whom the board of directors designates by means of a corporate resolution;

(2) For a partnership, sole proprietorship or individual, by a general partner, the proprietor, or individual, respectively; or

(3) For a municipality, state, federal, or other public agency, by either a principal, executive officer, or ranking elected official.

(E) A person who signs an application for reimbursement shall make the following certification:

I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate and complete. I also certify that the amounts for which reimbursement is requested under this application have been paid in full and that I have the authority to submit this application on behalf of _____.

Reg.12.309 Interim Payments

(A) The Director may provide for interim payments, provided the investigation or corrective action is being conducted in accordance with an approved workplan or corrective action plan. Payment will only be made at the following times:

(1) After the completion of a phase, as approved by the Department; or

(2) At points during the corrective action process agreed to by the Department and the applicant.

(B) The applicant must update his or her application with any information not yet submitted to the Department before review of the reimbursement application will commence.

(C) For purposes of Section 12.309, the following are the phases of corrective action:

(1) Completion of site stabilization activities;

(2) Completion and submittal of a report for a preliminary investigation;

(3) Implementation of a free product removal system;

(4) Completion and submittal of a report for a secondary investigation and development of a corrective action plan;

(5) Implementation of a corrective action plan; and

(6) Provision of an alternate water supply.

(D) (1) Applications for payments for the implementation of a phase may be submitted ninety (90) days following initiation of work to implement the phase and at ninety (90)-day intervals thereafter until completion of the authorized activities.

(2) Upon request, the Director may approve interim payments at more frequent intervals.

(E) Interim payments ~~may~~ shall consist of payment of an amount not to exceed ninety percent (90%) of ~~reimbursable expenditures to date~~ one million five hundred thousand dollars (\$1,500,000). The remaining ten percent (10%) shall be released only upon final payment for corrective action concerning the occurrence.

Reg.12.310 Reimbursement Application Review

(A) (1) Before commencing a substantive review of an application for reimbursement of corrective action costs, the Department shall determine whether the release meets the requirements of Section 12.303 for trust fund coverage for corrective action.

(2) Any person aggrieved by the Department's determination of whether a release is eligible for trust fund coverage for corrective action may request that the Advisory Committee, and, if necessary thereafter, the Director, review the Department's determination.

(B) The Department is not required to commence substantive review of an application until it has received a completed application form containing all of the information required by Section 12.308. If, during the course of the substantive review, the Department finds that additional information is needed to evaluate the application, the Department may require that the information be provided before review of the application may be completed.

(C) The Department and the Advisory Committee shall not recommend, and the Director shall not approve, reimbursement of corrective action costs unless they are reasonable, allowable, and necessary.

(D) (1) After a reimbursement application is complete, the Department shall make a written recommendation to the Advisory Committee as to whether the applicant has met the trust fund

eligibility requirements and, if so, which of the costs specified in the application are reasonable, allowable, and necessary.

(2) The Advisory Committee in its sole discretion may allow supplemental information explaining the application to be presented orally. It may establish a fair and reasonable limit on time allowed for oral presentation.

(3) The Advisory Committee may consider, but is not bound by, the recommendation prepared by the Department pursuant to 12.310(D)(1). It shall make a written recommendation to the Director as to whether the applicant has met the trust fund eligibility requirements and, if so, which of the costs for which reimbursement is requested are reasonable, allowable, and necessary and should therefore be paid.

(E) (1) The Director shall consider, but is not bound by, the recommendations made by the Department pursuant to 12.310(D)(1) and by the Advisory Committee pursuant to 12.310(D)(3).

(2) The Director shall decide whether the applicant has met the trust fund eligibility requirements and, if so, which of the costs for which reimbursement is requested are reasonable, allowable, and necessary and should therefore be paid.

(3) If the decision of the Director is contrary to the recommendation of the Advisory Committee, the Director shall provide in writing his or her reasons for declining to follow the Advisory Committee's recommendation.

(F) (1) The decision of the Director shall be the final decision of the Department.

(2) The decision of the Director may be appealed to the Commission. An owner or operator who considers himself or herself injured in his or her business, person or property by a final decision of the director or his designee, may, within thirty (30) days after the date of the final decision of the director or his designee, appeal the decision to the Commission.

Reg.12.311 Reasonable Costs

(A) "Reasonable costs" means costs or a range of costs commensurate with the level of corrective action necessary to assess or remediate (or both) the petroleum storage tank system release, based on an evaluation of typical costs expected for the particular corrective action under review, with respect to the necessary or required scope and complexity of the action.

(B) Hourly charges for equipment may be established in the cost proposal submitted for each major phase of work. Hourly rates must be competitive with similar charges by other contractors and may be rejected if they are determined to represent unreasonable costs.

(C) No cost is reasonable unless it is also an allowable cost pursuant to this Chapter.

Reg.12.312 Allowable Costs

(A) Only those costs which are allowable costs pursuant to the terms of this Chapter shall be reimbursable.

(B) (1) (a) Allowable costs are those costs which are approved by the Department and arise directly from the performance of corrective action in accordance with the requirements of this Regulation.

(b) Approval of costs by the Department shall not be construed to be a contract with the State to pay the costs.

(2) The cost of repairing damages caused by the performance of the corrective action shall be allowable unless otherwise prohibited by this Regulation or by other law; provided, however, that the cost of repairing damages resulting from contractor negligence, error, or other wrongful action shall not be allowable.

(C) No reimbursement shall be made under this Chapter for any costs incurred prior to the discovery of a release.

(D) If the Department is not given timely notice of a release as required by Section 12.305, no reimbursement shall be made under this Chapter for the costs of corrective action incurred in response to the release.

(E) Reimbursement shall be made under this Chapter only for costs incurred for corrective action which is approved by the Department.

(F) The determination as to which costs are allowable will be made on a case-by-case basis. However, costs for the following types of activities or items will generally be considered reimbursable:

(1) Site investigation, testing and monitoring necessary for the preparation of an approved corrective action plan;

- plan;
- (2) Preparation of an approved corrective action plan;
 - (3) Recovery and disposal of contaminated soils;
 - (4) Cleanup and disposal of contaminated soils;
 - (5) Installation and operation of monitoring wells;
 - (6) Analysis of soils and water;
 - (7) Removal of leaking storage tanks if required by the Department as necessary to the corrective action;
 - (8) Provision of an alternate water supply;
 - (9) Treatment and disposal of contaminated groundwater;
 - (10) Equipment, such as bailers and sample containers, which can be charged to a specific site; and
 - (11) Travel costs which are necessary for corrective action and which present the least-cost alternative for the required corrective action.

(G) The following types of costs are those which will not be considered allowable costs of corrective action:

- (1) Retrofitting, repairing or replacing petroleum storage tanks systems or piping;
- (2) Loss of revenue;
- (3) Profit for the responsible party or for any entity in which the responsible party has an ownership interest of five per cent (5%) or more unless payment of such profit is the least-cost alternative for the required corrective action, as determined by the Department's review of reasonable costs;
- (4) Rental of temporary petroleum storage tanks not necessary for corrective action;
- (5) (a) Rental of real estate or buildings owned in part or in total by the responsible party or by any entity in which the responsible party has an ownership interest of five per cent (5%) or more unless such rental is the least-cost alternative for the required corrective action, as determined by the Department;

(b) Rental of real estate or buildings in which the responsible party, or any entity in which the responsible party has an ownership interest of five per cent (5%) or more, has a leasehold interest for any reason other than to facilitate the corrective action;

(6) The value of lost trees, shrubs, grass or signs on the owner's or operator's property, or other fixtures, appurtenances or personal property;

(7) The value of lost petroleum or petroleum products;

(8) The cost of sample analysis performed by a laboratory which is not certified by the Department;

(9) Duplicative charges for travel time and mileage for any trip to multiple job sites where such costs are billed in total to multiple corrective action projects rather than allocated between the separate projects (i.e., only charges based on actual miles traveled for all corrective action projects charged to the trust fund shall be eligible for reimbursement);

(10) Excess charges for travel time and mileage if visits to multiple sites are not scheduled economically so that the costs can be allocated between the projects, if possible;

(11) Corrective action taken in violation of state or federal laws or regulations; and

(12) The costs of equipment purchases; provided, however, that costs of routinely required supplies which are expended at a given site, or equipment which must be installed at a site to implement a corrective action plan, are allowable. Equipment which cannot be charged to a specific site includes, but is not limited to, the following:

(a) Drilling rigs;

(b) Earth-moving equipment;

(c) Tools of the trade, such as hand tools, safety or traffic control equipment, personal protective equipment, surveying equipment, etc.

(d) Field analytical and measuring devices, such as groundwater sampling pumps, photoionization detectors, organic vapor meters, infrared analyzers, portable gas chromatographs, dataloggers, soil gas

probes, etc.

(H) (1) No reimbursement shall be made pursuant to this Chapter for any item for which payment is made under a third-party claim for the same occurrence pursuant to Chapter Four.

(2) No third-party claim reimbursement shall be made pursuant to Chapter Four for any item which is included in an approved corrective action plan and is reimbursable under this Chapter.

Reg.12.313 Necessary Costs

Only costs which are necessary, as determined by the Department, for conducting approved corrective action shall be reimbursable under this Chapter.

Reg.12.314 Records

(A) Any owner or operator participating in the trust fund shall maintain the following records and submit them or make them available to the Department upon request:

(1) Evidence of current financial responsibility for seven thousand five hundred dollars (\$7,500) per occurrence; and

(2) Any other records as may reasonably be required by the Department or the Advisory Committee in the performance of their duties under law.

(B) All records necessary to demonstrate that the trust fund eligibility requirements of Section 12.302 have been fulfilled shall be retained by the owner or operator until one of the following is accomplished:

(1) Closure requirements of this Regulation, if applicable, are satisfied;

(2) Responsibility for meeting the financial assurance requirements of this Regulation is legally transferred; or

(3) The owner or operator is otherwise instructed in writing by the Department.

(C) For auditing purposes, all records necessary to demonstrate that the trust fund coverage requirements of Section 12.303 have been fulfilled shall be retained by the owner or

operator for a minimum of three (3) years from the date of closure of the corrective action project.

Reg.12.315 Audits

(A) The Director may cause audits to be performed as necessary to ensure that costs, for which reimbursement is sought or has been paid, were in fact incurred and necessary, that the work was in fact performed and necessary, and that reimbursement would be, or is, in fact reasonable and allowable.

(B) The audits may be performed by the Department or by any qualified person at the direction of the Director.

(C) Monies in the trust fund may be expended by the Director as necessary to pay the cost of audits performed by persons other than the Department.

Reg.12.316 Cost Recovery

(A) The Department may initiate proceedings against any owner or operator of a petroleum storage tank system for recovery of monies that were solicited and received from the trust fund, regardless of whether it was approved by the Advisory Committee or the Director, if:

~~(A)~~ (1) The funds were solicited or received through willful or accidental utilization of incorrect information;

~~(B)~~ (2) The costs were not incurred or were unnecessary;

~~(C)~~ (3) The work was not performed or was unnecessary;
or

~~(D)~~ (4) The amount of reimbursement is found to be unreasonable or not allowable.

(B) The Department has the right of subrogation which shall apply to sites where corrective action is taken by owners, operators, or the Department. The right of subrogation extends to:

(1) Any insurance policies in existence at the time of the occurrence to the extent of any rights the owner or operator of a site may have had under that policy; and

(2) Any third party who caused or contributed to

the occurrence.

(C) For purposes of subrogation, "third party" does not include a former owner or operator of the site where corrective action is taken.

Reg.12.317 Trust Fund Availability

(A) (1) All claims for reimbursement submitted under the provisions of this Chapter are subject to the availability of monies in the trust fund.

(2) Nothing in this Regulation shall be construed to create a permanent entitlement to monies in the trust fund.

(3) The Commission reserves the right to amend the provisions of this Chapter, including the provisions regarding coverage and eligibility, and reasonable, allowable and necessary costs.

(B) (1) If the monies in the trust fund prove insufficient to cover all trust fund claims for reimbursement, the Advisory Committee shall recommend to the Director a priority system based upon whatever factors it deems appropriate.

(2) The Director may adopt a priority system for reimbursement based upon any factors he or she deems appropriate.

Reg.12.318 Obligation to Comply

(A) Eligibility of an owner or operator for the trust fund shall not preclude the Department's taking any appropriate enforcement action.

(B) Nothing in this Chapter shall affect the liability or responsibility of an owner or operator of a petroleum storage tank system for taking corrective action, as required by this Regulation or any other law, in response to a release.

CHAPTER FOUR: PETROLEUM STORAGE TANK TRUST FUND THIRD-PARTY PAYMENT PROCEDURES

Reg.12.401 Purpose

In accordance with the Petroleum Storage Tank Trust Fund Act,

eligible owners, operators, or third parties may obtain partial payment for valid compensatory damage claims caused by accidental releases from qualified petroleum storage tank systems. This Chapter establishes the procedures to be followed and documentation required to receive such payment from the trust fund.

Reg.12.402 Trust Fund Eligibility

(A) (1) Every owner or operator of an underground petroleum storage tank system is required by 40 CFR 280.93 to demonstrate financial responsibility for compensating third parties for bodily injury and property damage caused by accidental releases from underground petroleum storage tank systems. One mechanism which may be used to partially satisfy this requirement is the Petroleum Storage Tank Trust Fund.

(2) Every owner or operator choosing to use the trust fund as a mechanism to partially satisfy the financial responsibility requirements described in 12.402(A)(1) must also utilize an additional financial responsibility mechanism, as described in 12.402(C)(1), for the first seven thousand five hundred dollars (\$7,500) of the costs of third-party claims.

(B) In accordance with the Petroleum Storage Tank Trust Fund Act, owners or operators of certain aboveground petroleum storage tank systems may also qualify for and access the trust fund.

(C) In order to be eligible for the trust fund, the owner or operator must:

(1) Register each petroleum storage tank and pay the annual storage tank fee required by this Regulation for each tank until such time as the permanent closure requirements of this Regulation are satisfied;

(2) Maintain financial responsibility in the amount of seven thousand five hundred dollars (\$7,500) per occurrence for third-party claims, by any one or combination of the following: insurance, guaranty, surety bond, letter of credit, insurance pool or any other mechanism allowed by 40 CFR 280; and

(3) For each petroleum storage tank for which trust fund eligibility is sought, certify, on forms supplied by the Department, that he or she is in substantial compliance, as defined by Subsection 12.403(B).

Reg.12.403 Trust Fund Coverage for a Release

(A) In order for an owner or operator to obtain third-party coverage by the trust fund for a release, the following requirements must be met:

(1) At the time of the discovery of the release the owner or operator must have met each of the requirements for trust fund eligibility as set forth in Subsection 12.402(C);

(2) The release must have occurred after February 22, 1989.

(3) The Department must have been given timely notice of the third-party claim as required by Section 12.405;

(4) The owner or operator must have expended seven thousand five hundred dollars (\$7,500) on reasonable and allowable third-party claims for the occurrence; and

(5) At the time of the release, the owner or operator must have been in substantial compliance, as defined in Subsection 12.403(B).

(B) (1) For purposes of this Chapter only, "substantial compliance" means compliance with the requirement for the owner or operator to maintain financial responsibility in the amount of seven thousand five hundred dollars (\$7,500) per occurrence for third-party claims, by any one or combination of the following: insurance, guaranty, surety bond, letter of credit, insurance pool or any other mechanism allowed by 40 CFR 280.

(2) An owner or operator who in fact expends seven thousand five hundred dollars (\$7,500) on reasonable and allowable third-party claims for the occurrence shall be deemed to be in substantial compliance.

(C) Upon request by the Department, the owner or operator shall submit proof of compliance with the requirements for trust fund coverage.

Reg.12.404 Trust Fund Coverage for Unknown Petroleum Storage Tanks

(A) Unknown petroleum storage tanks that have satisfied the requirements of Subsection 12.408(C) of this Chapter shall be eligible for reimbursement for third-party claims as provided by this section if:

(1) The unknown petroleum storage tank is discovered while removing, upgrading, or replacing a petroleum storage tank meeting the requirements of Subsection 12.402(C) or while performing petroleum investigation or corrective action activities required by federal or state laws, and the petroleum storage tank meeting the requirements of Subsection 12.402(C) is located on the same property or facility; or

(2) The unknown petroleum storage tank is located on a right-of-way purchased by a city, county, or state governmental agency or entity and is discovered during construction in such right-of-way.

(3) Eligibility for reimbursement of an unknown petroleum storage tank will be conditioned on the payment of three hundred seventy-five dollars (\$375) to the Department.

Reg.12.405 Notice Requirements

(A) (1) The owner or operator shall give written notice to the Department of any potential third-party claim within thirty (30) days of his or her knowledge of the potential claim.

(2) The notice required by 12.405(A)(1) shall provide the names and addresses of all persons and properties alleged to be injured, as well as the time, place, and circumstances of the release.

(B) (1) Any owner or operator against whom a third-party claim is filed in court or in the Arkansas State Claims Commission shall provide a copy of the complaint to the Department no later than twenty (20) days after service of summons or receipt of notification of the claim from the Arkansas State Claims Commission.

(2) Upon receipt of notice pursuant to 12.405(B)(1), the Department shall immediately notify the Attorney General, who shall have the right to intervene in any such lawsuit or proceeding.

(3) Payment of third-party claims from the fund may be denied for any owner or operator who fails to give the Department notice as required in Subsection 12.405(B).

Reg.12.406 Amount of Payment

(A) The trust fund will reimburse eligible owners or operators of storage tanks for compensating third parties, or will

provide payment to third parties, for compensatory damages caused by accidental releases in an amount not to exceed nine hundred ninety-two thousand five hundred dollars (\$992,500) per occurrence.

(B) The owner or operator shall be responsible for the first seven thousand five hundred dollars (\$7,500) of third-party compensatory damage claims per occurrence.

Reg.12.407 Deductible

(A) The first seven thousand five hundred dollars (\$7,500) of costs incurred by the owner or operator for third-party compensatory damage claims for an occurrence shall be considered a deductible and is not eligible for reimbursement from the trust fund.

(B) (1) No payment to any third-party or to any owner or operator against whom a third-party claim is brought for compensatory damages shall be made from the trust fund until the owner or operator has expended the deductible amount on third-party claims for the occurrence, unless the owner or operator has been discharged under the United States Bankruptcy Code or is determined by a court to be insolvent.

(2) Proof of payment of the deductible must be provided to the Department prior to approval of a third-party claim for payment.

(3) For purposes of meeting the deductible, proof of payment shall consist of a receipt, a copy of a money order, or a canceled check. An IOU, a conditional payment, an installment payment, or a down payment shall not be considered proof of payment.

(C) Only third-party claims found to be reasonable and allowable shall be credited toward the deductible.

Reg.12.408 Applying for Payment of Third-Party Claims

(A) In order to apply for payment of a third-party claim, an owner or operator must meet the requirements for coverage set forth in Section 12.403 and meet the application requirements of either Subsection 12.408(C) for judgments or Subsection 12.408(E) for settlements.

(B) Unless otherwise stated in writing, any items which are contained in any information submitted to support a third-party claim and which are presented for payment shall be considered

satisfied or compensated if the claim is approved and paid. No such items shall be reimbursable as corrective action under Chapter Three, unless otherwise agreed in writing before the third-party claim is approved for payment.

(C) An owner or operator against whom a judgment has been entered, by either a valid final court order or valid final order of the Arkansas Claims Commission, for compensatory damages caused by an accidental release from a qualified petroleum storage tank system, must submit:

- (1) A copy of the order;
- (2) Proof that the judgment, or a portion of the judgment, is for compensatory damages, if such is not clearly shown on the face of the order; and
- (3) Before payment is made from the trust fund, proof of payment of the deductible of seven thousand five hundred dollars (\$7,500).

(D) (1) An owner or operator shall cooperate with and assist the Department and, if applicable, the Attorney General's Office in connection with the third-party claim. At a minimum, such cooperation shall include active participation by the owner or operator throughout the litigation and providing assistance as required by the Department or the Attorney General's Office during resolution of a third-party claim.

(2) Reimbursement or payment of a third-party claim may be denied if an owner or operator fails to comply with the requirements of 12.408(D) (1).

(E) (1) An owner or operator who has entered into a settlement agreement with a third-party resolving a claim for compensatory damages caused by an accidental release from a qualified petroleum storage tank system must submit to the Department:

(a) A copy of the legally binding settlement agreement, including a dismissal with prejudice of the third-party's cause of action in accordance with the Arkansas or federal rules of civil procedure, which releases the owner or operator from all future liability to the third-party claimant for the occurrence;

(b) Documentation supporting each claim for which payment is sought;

(c) A notarized certification from the owner or operator and the third-party claimant that the third-party claim should rightfully be paid; and

(d) Before payment is made from the trust fund, proof of payment of the deductible of seven thousand five hundred dollars (\$7,500).

(2) As an alternative to providing a legally binding settlement agreement pursuant to 12.408(E)(1)(a), an owner or operator may submit a copy of a proposed settlement agreement and request a preliminary Department review of the agreement before it is made binding. However, the settlement agreement must be made binding, except as provided in 12.408(E)(3), before it is submitted to the Advisory Committee.

(3) Any otherwise binding settlement agreement submitted under Subsection 12.408(E) may be conditioned upon approval of payment from the trust fund.

Reg.12.409 Third-Party Claim Review

(A) (1) Before commencing a substantive review of a third-party claim, the Department shall determine whether the release meets the requirements of Section 12.403 for third-party coverage by the trust fund.

(2) Any person aggrieved by the Department's determination of whether a release is eligible for third-party coverage by the trust fund may request that the Advisory Committee, and, if necessary thereafter, the Director, review the Department's determination.

(B) The Department is not required to commence substantive review of a third-party claim until any corrective action necessary to address the release has been completed.

(C) The Department is not required to commence substantive review of a third-party claim until it has received all of the information required by Subsection 12.408(C) or Subsection 12.408(E), as applicable. If, during the course of the substantive review, the Department finds that additional information is needed to evaluate the claim, the Department may require that the information be provided before review of the claim may be completed.

(D) The Department and the Advisory Committee shall not recommend, and the Director shall not approve, payment of third-party claims unless they are reasonable and allowable.

(E) The Department and the Advisory Committee shall recommend, and the Director shall approve, payment of a settled claim only upon determining that litigation would result in costs to the trust fund which would exceed the settlement amount.

(F) (1) After its third-party claim eligibility determination and substantive review is complete, the Department shall make a written recommendation to the Advisory Committee as to whether the applicant has met the trust fund eligibility requirements and, if so, whether the claim, or any portion of it, is both reasonable and allowable.

(2) The Advisory Committee in its sole discretion may allow supplemental information explaining the claim to be presented orally. It may establish a fair and reasonable limit on time allowed for oral presentation.

(3) The Advisory Committee may consider, but is not bound by, the recommendation prepared by the Department pursuant to 12.409(F)(1). It shall make a written recommendation to the Director as to whether the applicant has met the trust fund eligibility requirements and, if so, whether the claim, or any portion of it, is both reasonable and allowable and should therefore be paid.

(G) (1) The Director shall consider, but is not bound by, the recommendations made by the Department pursuant to 12.409(F)(1) and by the Advisory Committee pursuant to 12.409(F)(3).

(2) The Director shall decide whether the applicant has met the trust fund eligibility requirements and, if so, whether the claim, or any portion of it, is both reasonable and allowable and should therefore be paid.

(3) The Director may solicit advice on a claim from the Commission.

(4) If the decision of the Director is contrary to the recommendation of the Advisory Committee, the Director shall provide in writing his or her reasons for declining to follow the Advisory Committee's recommendation.

(H) (1) The decision of the Director shall be the final decision of the Department.

(2) The decision of the Director may be appealed to the Commission. An owner or operator who considers himself or herself injured in his or her business, person or property by a final decision of the director or his designee, may, within thirty (30) days after the date of the final decision of the director or

his designee, appeal the decision to the Commission.

Reg.12.410 Reasonable Claims

(A) Third-party claims which have been reduced to judgment and for which payment is requested pursuant to Subsection 12.408(C) shall be presumed reasonable under this Chapter.

(B) All settled third-party claims for which payment is requested pursuant to Subsection 12.408(E) must be shown to be reasonable as compared to similar claims for compensatory damages.

Reg.12.411 Allowable Claims

(A) Only claims for compensatory damages, as the term is defined by this regulation, caused by an accidental release from a qualified storage tank are considered allowable under this Chapter.

(B) No payment shall be made pursuant to this Chapter for any injury or damages caused by the performance of corrective action.

(C) (1) No payment shall be made pursuant to this Chapter for any item for which reimbursement is made for the same occurrence under corrective action pursuant to Chapter Three.

(2) No payment shall be made pursuant to this Chapter for any item which is included in an approved corrective action plan and is reimbursable under Chapter Three.

Reg.12.412 Records

(A) Any owner or operator participating in the trust fund shall maintain the following records and submit them or make them available to the Department upon request:

(1) Evidence of current financial responsibility for seven thousand five hundred dollars (\$7,500) per occurrence; and

(2) Any other records as may reasonably be required by the Department or the Advisory Committee in the performance of their duties under law.

(B) All records necessary to demonstrate that the trust fund eligibility requirements of Section 12.402 and the trust fund coverage requirements of Section 12.403 have been fulfilled shall be

retained by the owner or operator until one of the following is accomplished:

(1) Closure requirements of this Regulation, if applicable, are satisfied;

(2) Responsibility for meeting the financial assurance requirements of this Regulation is legally transferred;

(3) The owner or operator is otherwise instructed in writing by the Department.

Reg.12.413 Audits

(A) The Director may cause audits to be performed as necessary to ensure that claims, for which payment is sought or has been made, were in fact reasonable and allowable.

(B) The audits may be performed by the Department or by any qualified person at the direction of the Director.

(C) Monies in the trust fund may be expended by the Director as necessary to pay the cost of audits performed by persons other than the Department.

Reg.12.414 Cost Recovery

(A) The Department may initiate proceedings against any owner or operator of a petroleum storage tank system or third-party claimant for recovery of monies that were solicited and received from the trust fund either through willful or accidental utilization of incorrect information.

(B) (1) Any owner or operator of a petroleum storage tank system who was not in substantial compliance at the time of a release, as defined by Section 12.402, for which a third-party claimant was compensated from the trust fund, shall be required to reimburse the trust fund for the amount of the claim paid.

(2) If the owner or operator does not reimburse the trust fund as required in 12.414(B) (1), the Department may institute an action against the owner or operator to recover such monies pursuant to the authority of the Regulated Substance Storage Tank program, the Petroleum Storage Tank Trust Fund Act, or this Regulation.

(C) The Department has the right of subrogation which

shall apply to sites where corrective action is taken by owners, operators, or the Department. The right of subrogation extends to:

(1) Any insurance policies in existence at the time of the occurrence to the extent of any rights the owner or operator of a site may have had under that policy; and

(2) Any third party who caused or contributed to the occurrence.

(D) For purposes of subrogation, "third party" does not include a former owner or operator of the site where corrective action is taken.

Reg.12.415 Trust Fund Availability

(A) (1) All claims for payment submitted under the provisions of this Chapter are subject to the availability of monies in the trust fund.

(2) Nothing in this Regulation shall be construed to create a permanent entitlement to monies in the trust fund.

(3) The Commission reserves the right to amend the provisions of this Chapter, including the provisions regarding coverage and eligibility and reasonable and allowable costs.

(B) (1) If the monies in the trust fund prove insufficient to cover all trust fund claims for reimbursement, the Advisory Committee shall recommend to the Director a priority system based upon any factors it deems appropriate.

(2) The Director may adopt a priority system based upon any factors he or she deems appropriate.

Reg.12.416 Obligation to Comply

(A) Eligibility of an owner or operator for the trust fund shall not preclude the Department's taking any appropriate enforcement action.

(B) Nothing in this Chapter shall affect the liability or responsibility of an owner or operator of a petroleum storage tank system for taking corrective action, as required by this Regulation or any other law, in response to a release.