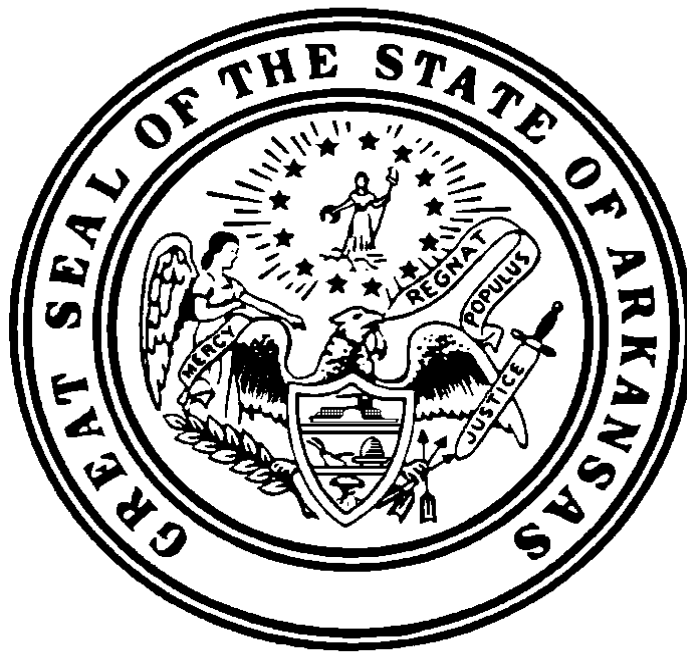


# **Exhibit D:**

## **REVISED Final Proposed Regulation**

**ARKANSAS POLLUTION CONTROL  
AND ECOLOGY COMMISSION  
REGULATION NO. 12  
STORAGE TANKS**



**Approved by the Arkansas Pollution Control & Ecology Commission  
August 24, 2018**

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## CHAPTER 1: GENERAL PROVISIONS

### Reg. 12.101 Purpose and Title

The purpose of Arkansas Pollution Control and Ecology Commission Regulation Number 12 (Storage Tanks), referred to herein as “Regulation” and may be cited as “APC&EC Regulation 12 (Storage Tanks),” is to regulate underground storage tank systems and certain aboveground storage tank systems to protect the public health and the lands and waters of the State of Arkansas.

### Reg. 12.102 Authority

This Regulation is promulgated under the authority of Arkansas Code Annotated (Ark. Code Ann.) § 8-7-801 *et seq.* and the Petroleum Storage Tank Trust Fund Act, Ark. Code Ann. § 8-7-901 *et seq.*

### Reg. 12.103 Definitions

(A) Except for the definitions of “Owner,” “Person,” and “Release” found at 40 C.F.R. § 280.12, the definitions set forth in 40 C.F.R. §§ 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 (1) 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 gallons (1,320 gals.) and not more than forty thousand gallons (40,000 gals.) and that is used to contain or dispense motor fuels, distillate special fuels, or other refined petroleum products. The 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 containers, vessels, or enclosures used to contain or dispense refined petroleum substances listed under Section 101(14) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C.S. § 9601(14).

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

(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.

(4) **“Combination,”** for purposes of implementation of this Regulation on aboveground storage tanks only, means containers, vessels, and enclosures located aboveground that are joined by common piping and located in tandem.

(5) **“Commission,”** unless indicated otherwise by the context, means the Arkansas Pollution Control & Ecology Commission.

(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 that has not been reduced to judgment as of April 7, 2003.

(7) **“Community water system”** means a public water system that serves at least fifteen (15) service connections used by year-round residents or regularly serves at least 25 year-round residents. This term includes any collection, treatment, storage, and distribution facilities under control of the system operator, and used primarily in connection with the system.

(8) **“Corrective action”** means any action that may be necessary to protect human health and the environment as a result of an accidental release, sudden or nonsudden.

(9) **“De minimis concentration of a regulated substance”** means a quantity less than three-tenths percent (0.3%) by volume of a regulated substance in a blended material contained within a storage tank.

(10) **“Department”** means the Arkansas Department of Environmental Quality.

(11) **“Director”** means the Director of the Arkansas Department of Environmental Quality.

(12) **“Motor fuel dispenser”** means a device that measures and transfers liquid fuel via pressure or suction from an underground storage tank system into a motor vehicle or container. The term “motor fuel dispenser” does not include the equipment necessary to connect a dispenser to an underground storage tank system.

(13) **“Motor fuel dispenser system”** means the equipment necessary to connect a dispenser to an underground storage tank system, and may include check valves, shear valves, unburied risers or flexible connectors, or other transitional components that are beneath a dispenser and connect a dispenser to underground piping.

(14) **“Operator,”** in addition to having the meaning given in the definition found at 40 C.F.R. § 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, Six, and Seven, and Reg. 12.104(A) shall not include such persons.

(15) **“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, Six, and Seven, and Reg. 12.104(A) shall not include such persons.

(16) **“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.

(17) **“Potable drinking water well”** means any hole (dug, driven, drilled, or bored) that extends into the earth until it meets groundwater that:

(a) Supplies water for a non-community public water system, or

(b) Otherwise supplies water for household use (consisting of drinking, bathing, and cooking, or other similar uses.)

(18) **“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.

(19) **“Secondary containment”** means a release prevention and release detection system for an underground storage tank or piping or both, that provides an inner barrier, an outer barrier, and an interstitial space between the two barriers for monitoring to detect the presence of a leak or release of regulated substances from the underground storage tank or piping, or both. This term includes containment sumps used for interstitial monitoring of piping.

(20) **“Storage tank”** means an aboveground storage tank or underground storage tank as defined by this Regulation.

(21) **“Trust fund”** means the Petroleum Storage Tank Trust Fund created by the Petroleum Storage Tank Trust Fund Act, Ark. Code Ann. § 8-7-901 *et seq.*

(22) **“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 the tank in the form of visible vent pipes, fill caps, or lines protruding from the tank.

## **Reg. 12.104      Incorporation of Federal Regulations**

(A) The following regulations promulgated on or before August 24, 2018, 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 the 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 (C.F.R.), Title 40

- (1) 280.10 through 280.74
- (2) 280.90 through 280.116
- (3) 280.200 through 280.230
- (4) 280.250 through 280.252

(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 that 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 C.F.R. § 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.

### **Reg. 12.109      Secondary Containment**

(A)(1) Each new underground storage tank, or piping connected to any new underground storage tank<sup>1</sup> shall be secondarily contained and monitored for leaks.

(2) In the case of a new underground storage tank system consisting of one (1) or more underground storage tanks and connected by piping, the requirement to provide secondary containment shall apply to all underground storage tanks and connected pipes comprising the system.

(B)(1) Any existing underground storage tank, or existing piping connected to an existing underground storage tank that is replaced<sup>2</sup> shall be secondarily contained and monitored for leaks.

(2) In the case of a replacement of an existing underground storage tank, or existing piping connected to the underground storage tank, the requirement to provide secondary containment shall apply only to the specific underground storage tank or piping being replaced, not to other underground storage tanks and connected pipes comprising the system.

(C)(1) Each installation of a new motor fuel dispenser system, or replacement of an existing motor fuel dispenser system<sup>3</sup> shall include under-dispenser spill containment.

(2) Under-dispenser spill containment must:

- (a) Be liquid-tight on its sides, bottom, and at any penetrations;
- (b) Be compatible with the substance conveyed by the piping; and
- (c) Allow for visual inspection and access to the components in the containment system and/or be monitored.

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<sup>1</sup> A new underground storage tank or its piping is subject to the secondary containment requirements under this section if it was installed after July 1, 2007.

<sup>2</sup> An existing underground storage tank or existing piping is subject to the secondary containment requirements under this section if it was replaced after July 1, 2007.

<sup>3</sup> A new motor fuel dispenser system is subject to the secondary containment requirements under this section if it was installed or replaced after July 1, 2007.

- (3) A motor fuel dispenser system is considered to have been replaced if:
- (a) An existing motor fuel dispenser and the equipment necessary to connect the motor fuel dispenser to the underground storage tank system are removed, and
  - (b) Another motor fuel dispenser and the equipment necessary to connect the motor fuel dispenser to the underground storage tank system are put in its place.
- (D) Secondary containment systems shall be designed, constructed, and installed to:
- (1) Contain regulated substances released from the tank system until they are detected and removed;
  - (2) Prevent the release of regulated substances to the environment at any time during the operational life of the underground storage tank system; and
  - (3) Be checked for evidence of a release at least every thirty (30) days.
- (E) In addition to the requirements of subsection (D) of this section, double-walled tanks must be designed, constructed, and installed to:
- (1) Contain a release from any portion of the inner tank within the outer wall; and
  - (2) Detect the failure of the inner wall.
- (F) In addition to the requirements of subsection (D) of this section, external liners (including vaults) must be designed, constructed, and installed to:
- (1) Contain one hundred percent (100%) of the capacity of the largest tank within its boundary;
  - (2) Prevent the interference of precipitation or groundwater intrusion with the ability to contain or detect a release of regulated substances; and
  - (3) Surround the tank completely (i.e., it is capable of preventing lateral as well as vertical migration of regulated substances.)
- (G) Underground piping must be equipped with secondary containment that satisfies the requirements of subsection (D) of this section.
- (H) In accordance with the requirement of subdivision (D)(3) of this section, interstitial monitoring shall meet at least one (1) of the following requirements:
- (1) For double-walled underground storage tank systems, the sampling or testing method can detect a release through the inner wall in any portion of the tank that routinely contains a regulated substance;
  - (2) For underground storage tank systems with a secondary barrier within the excavation zone, the sampling or testing method used can detect a release between the underground storage tank system and the secondary barrier;
    - (a) The secondary barrier around or beneath the underground storage tank system consists of artificially constructed material that is sufficiently thick and impermeable (at least  $10^{-6}$  cm/sec for the regulated substance stored) to direct a release to the monitoring point and permit its detection;
    - (b) The barrier is compatible with the regulated substance stored so that a release

from the underground storage tank system will not cause a deterioration of the barrier allowing a release to pass through undetected;

(c) For cathodically protected tanks, the secondary barrier must be installed so that it does not interfere with the proper operation of the cathodic protection system;

(d) The groundwater, soil moisture, or rainfall will not render the testing or sampling method used inoperative so that a release could go undetected for more than thirty (30) days;

(e) The site is assessed to ensure that the secondary barrier is always above the groundwater and not in a 25-year flood plain, unless the barrier and monitoring designs are for use under these conditions; and

(f) Monitoring wells are clearly marked and secured to avoid unauthorized access and tampering; or

(3) For tanks with an internally fitted liner, an automated device can detect a release between the inner wall of the tank and the liner, and the liner is compatible with the substance stored.

(I) The requirements of this section do not apply to:

(1) Suction piping that meets the requirements of 40 C.F.R. § 280.41(b)(2)(i)-(v); or

(2) Piping that manifolds two (2) or more underground tanks together.

#### **Reg. 12.110      Delivery Prohibition**

(A) It shall be unlawful to deliver to, deposit into, or accept a regulated substance into an underground storage tank at a facility that has been identified by the Department as ineligible for fuel delivery or deposit.

(B)(1) To prevent the delivery of a regulated substance into an underground storage tank system that has been identified by the Department as ineligible, a tamper-proof red tag shall be affixed to the fill pipe of the ineligible underground storage tank.

(2) This affixed red tag shall serve as written notification to the owner, operator, and the product delivery industry of the prohibition of delivery to the tank system.

(C) An owner or operator shall not receive any regulated substance into any underground storage tank to which notification of delivery prohibition (red tag) has been affixed.

(D) A person selling any regulated substance shall not deliver or cause to be delivered a regulated substance into any underground storage tank to which notification of delivery prohibition (red tag) has been affixed.

(E) It shall be unlawful for any person, other than an authorized representative of the Department, to remove, tamper with, destroy, or damage a red tag affixed to any underground storage tank by Department personnel.

(F)(1) Under this section, a red tag shall immediately be affixed upon finding by the Department of any of the following:

(a) Required spill prevention equipment is not present;

- (b) Required overfill protection equipment is not present;
- (c) Required release detection equipment is not present; or
- (d) Required corrosion protection equipment is not present.

(2) The Department, in its sole discretion, may delay the affixing of a red tag to an underground storage tank for up to one hundred eighty (180) days upon determination that:

- (a) No urgent threat to public health exists; and
- (b) The action would jeopardize the availability of, or access to, fuel for the local community.

(G) Under this section, a red tag shall be affixed to an underground storage tank upon finding by the Department of any of the following if the owner or operator has been provided a written notice of noncompliance and the owner or operator has failed to comply within the time frame given in the notice:

- (1) Failure to properly operate or maintain release detection equipment;
- (2) Failure to properly operate or maintain spill, overfill, or corrosion protection equipment; or
- (3) Failure to maintain financial responsibility.

(H)(1) For an owner or operator of an underground storage tank that has been red tagged to have the tank reclassified by the Department as eligible to receive delivery of a regulated substance, he or she must provide a written statement to the Department that the deficiencies listed in the notice of noncompliance have been corrected.

(2) The Department will determine whether the deficiencies have been corrected as soon as practicable but within five (5) business days after receipt of the owner's written statement of compliance.

(3) Upon verification of compliance, Department personnel will remove the red tag.

## CHAPTER 2: REGISTRATION OF STORAGE TANKS

### Reg. 12.201 Registration Requirement

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

(B)(1) An owner or operator shall not receive any regulated substance into any underground storage tank without furnishing current and proper proof of registration under Reg. 12.202(A) to the person selling the regulated substance.

(2) A person selling any regulated substance shall not deliver or cause to be delivered a regulated substance into any underground storage tank for which he or she has not obtained current and proper proof of registration under Reg. 12.202(A) from the owner or operator.

(C) This Regulation shall not apply to aboveground storage tanks located on farms if the contents are used for agricultural purposes and not held for resale.

(D) This Regulation shall not apply to aboveground tanks storing a regulated substance at a location on a transitory or temporary basis, for example, short-term use at non-permanent construction, roadway maintenance, timber harvesting, or emergency response locations.

(E) This Regulation shall not apply to storage tanks containing a *de minimis* concentration of a regulated substance.

(F)(1) An aboveground storage tank that contains petroleum may be registered under this section at the option of the owner or operator for the purpose of allowing potential eligibility for reimbursement under the Petroleum Storage Tank Trust Fund Act, Ark. Code Ann. § 8-7-901 *et seq.*

(2) If an owner or operator of an aboveground storage tank that contains petroleum chooses to register the aboveground storage tank under this section, a certification of registration under Reg. 12.203 must be obtained and the storage tank registration fees under Reg. 12.203 must be paid.

### 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 Reg. 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 written notice of the change in status of the tank has been provided to the Department.

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

(C) The annual registration fee for all storage tanks shall be seventy-five dollars (\$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 is grounds for legal action by the Department, and may result in the assessment of civil penalties as provided in Chapter 9 of this Regulation.

(G) Any fees required by this Chapter shall be non-refundable.

## **CHAPTER 3: 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 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 C.F.R. § 280.93 to demonstrate financial responsibility for taking corrective action in response to an accidental release from an underground petroleum storage tank system. One mechanism that 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 subdivision (A)(1) of this section also must utilize an additional financial responsibility mechanism, as described in subdivision (D)(2) of this section, 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 also may qualify for and access the trust fund.

(C) The trust fund shall not be accessed for storage tank systems storing any substance listed under Section 101(14) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 [42 U.S.C.S. § 9601 (14)], as amended. These tank systems shall not be considered qualified storage tanks for purposes of Chapters Three and Four of this Regulation.

(D) 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 the permanent closure requirements of this Regulation are satisfied; and

(2) Maintain financial responsibility in the amount of seven thousand five hundred dollars (\$7,500) per occurrence for corrective action costs, by any one (1) or combination of the following: insurance, guaranty, surety bond, letter of credit, insurance pool, or any other mechanism allowed by 40 C.F.R. § 280.

(E)(1) Any person requesting Advisory Committee review of a Department determination on trust fund eligibility or costs must file a request with the Department within ninety (90) days of the date of the Department's determination.

(2) A request for Advisory Committee review must be in writing and mailed to the Department's postal address, to the attention of the Regulated Storage Tanks Division Chief.



### **Reg. 12.303 Trust Fund Coverage for a Release**

(A) 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 Reg. 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 Reg. 12.305;

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

(5) 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) 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 Reg. 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 Reg. 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 Reg. 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 the 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. 12.305 Notice Requirements**

(A) The Department must be given timely notice of any release as required by 40 C.F.R. § 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 an underground storage tank system.

(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) A reimbursement for corrective action costs shall not be made from the trust fund until the deductible for the occurrence has been expended by the owner or operator.

(2) An owner or operator may not 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 that shall be credited toward the deductible are costs that 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) To apply for reimbursement of corrective action costs, an owner or operator must meet the requirements for coverage set forth in Reg. 12.303 and meet the requirements of this Chapter for reimbursement applications.

(B) An application shall not 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 that may be identified by the Department. The application also shall 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 where 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 what amounts the applicant represents as being paid to that person have been paid in full; and
- (6) Any other information that 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 subdivision (D)(1)(a) of this section, 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 \_\_\_\_\_.

(F) Application for reimbursement of corrective action costs must be made by an eligible owner or operator no later than one (1) year after the Department's issuance of a "No Further Action" letter for the occurrence.

#### **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 this section, 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-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 shall consist of payment of an amount not to exceed ninety percent (90%) of 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 Reg. 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 Reg. 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, what 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 under subdivision (D)(1) of this section. It shall make a written recommendation to the Director as to whether the applicant has met the trust fund eligibility requirements and, if so, what 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 under subdivision (D)(1) of this section and by the Advisory Committee under subdivision (D)(3) of this section.

(2) The Director shall decide whether the applicant has met the trust fund eligibility requirements and, if so, what costs for which reimbursement is requested are reasonable, allowable, and necessary and therefore should 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 or her designee may, within thirty (30) days after the date of the final decision of the director or his or her 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) A cost is not reasonable unless it is also an allowable cost under this Chapter.

**Reg. 12.312 Allowable Costs**

(A) Only those costs that are allowable costs under this Chapter shall be reimbursable.

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

(b) For purposes of appeal only, a cost that has been submitted to, reviewed and disallowed by the Department is deemed "approved by the Department" under subdivision (B)(1)(a) of this section.

(c) 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) A reimbursement shall not 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 Reg. 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 that is approved by the Department.

(F) The determination as to what 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;

(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, that can be charged to a specific site;

(11) Travel costs that are necessary for corrective action and present the least-cost alternative for the required corrective action; and

(12)(a) Repair, reassembly, or reinstallation of fixtures, equipment, or appurtenances that are disassembled, moved, or otherwise taken apart as a necessary requirement of the investigation or remediation of a petroleum storage tank release and that are, or would be, damaged by the investigation or remediation.

(b) Subdivision (F)(12)(a) of this section shall not apply to structures, landscaping, or petroleum storage tank systems, except for the costs of repairing boring or sampling holes inside structures.

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

(1) Retrofitting, repairing or replacing petroleum storage tank 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 percent (5%) or more unless payment of the 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 percent (5%) or more unless the 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 percent (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 except as allowed in subdivision (F)(12) of this section;

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

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

(9) Duplicative charges for travel time and mileage for any trip to multiple job sites where the 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 that are expended at a given site, or equipment that must be installed at a site to implement a corrective action plan, are allowable. Equipment that cannot be charged to a specific site includes without limitation 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) A reimbursement shall not be made under this Chapter for any item for which payment is made under a third-party claim for the same occurrence under Chapter 4.

(2) A third-party claim reimbursement shall not be made under Chapter 4 for any item that is included in an approved corrective action plan and is reimbursable under this Chapter.

### **Reg. 12.313      Necessary Costs**

Only costs that 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 Reg. 12.302 have been fulfilled shall be retained by the owner or operator until one (1) 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 Reg. 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:

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

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

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

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

(B) The Department has the right of subrogation that applies 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 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 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 from taking any appropriate enforcement action.

(B) This Chapter shall not 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.

#### **Reg. 12.319      Reimbursement of Equipment Costs**

(A) An owner or operator or a consultant may be eligible for reimbursement for the purchase of equipment needed to undertake corrective action.

(B) An eligible cost incurred by a consultant on behalf of an owner or operator for the purchase of equipment needed to perform corrective action, and determined by the Department to be reimbursable, will apply toward the owner’s or operator’s maximum reimbursable amount for the occurrence.

(C) A consultant may not submit an application for reimbursement of eligible costs to purchase equipment for corrective action except in conjunction with a reimbursement application of an owner or operator who provides proof of the equipment purchase by the consultant in the application.

(D) Upon the written permission of the owner or operator, the eligible costs of purchasing equipment needed to perform corrective action, incurred by a consultant on behalf of the owner or operator, may be reimbursed directly to the consultant.

(E) All requests for reimbursement of equipment purchases must, at a minimum, include the following information:

- (1) Name and description of the equipment; and
- (2) Model and serial number(s) (if applicable).

(F) An equipment purchase by the owner or operator or a consultant must be approved by the Department prior to the purchase to be eligible for reimbursement.

(G)(1) For purposes of this Chapter only, “residual value of equipment” means the actual value of the equipment at the time the equipment is taken out of service.

- (2) The residual value of equipment is not a reimbursable cost.

(3) The residual value of equipment may be projected based on the expected duration the equipment will be used for corrective action and the salvage value of the equipment, if applicable.

(H)(1) Equipment purchased under this section is the property of the owner or operator or the consultant making the purchase.

(2) Reimbursement to an owner or operator or a consultant for the cost of purchasing equipment needed for undertaking corrective action shall establish a lien by the Department on the equipment for the duration of the corrective action.

(3) If corrective action is not completed by the owner or operator in accordance with Ark. Code Ann. § 8-7-807(a)(1), the Department shall be granted ownership of any equipment upon which a lien is established.

(I) Depreciation schedules for equipment purchased under this section may be determined in accordance with applicable federal and state tax requirements.

(J) Purchase costs and rental costs shall not be reimbursed for the same equipment.

### **Reg. 12.320      Transfer of Trust Fund Eligibility**

(A) An owner or operator determined to be eligible for reimbursement of corrective action for a release from a qualified storage tank may transfer the eligibility to a subsequent owner or operator of the qualified storage tank if the Department determines that the subsequent owner or operator has the financial and legal capacity to complete the corrective action and has met all the requirements of this section.

(B) The removal of the storage tank after initiation of corrective action shall not bar the transfer of eligibility as provided in subsection (A) of this section.

(C) An owner or operator must notify the Department no fewer than thirty (30) days prior to any transfer of eligibility and provide documentation that the subsequent owner or operator has the legal and financial capacity to complete the corrective action.

(D) Documentation of legal capacity includes, but is not limited to, the following, as appropriate:

- (1) Proof of authorization to conduct business in Arkansas, e.g., current registration with, and a valid certificate of good standing issued by, the Arkansas Secretary of State;
- (2) Proof of proper registration of the tank system by the subsequent owner or operator;

(3) Copy of any access agreement(s) between the subsequent tank owner and the owner of the real property, if different from the tank owner or operator; and

(4) Copy of any access agreement(s) between the subsequent tank owner and adjacent property owner(s), if off-site access will be necessary to conduct corrective action.

(E) Documentation of financial capacity includes, but is not limited to, the following:

(1) Accurate and complete cost estimate for remaining corrective action activities required to abate a release from a qualified storage tank;

(2) A time schedule for completion of corrective action; and

(3) Any one (1) or combination of the items below that affirms, as determined by the Department, the subsequent owner or operator has sufficient assets to complete corrective action:

(a) An independently audited copy of the most recent annual financial statements that indicates the availability of sufficient funds to finance the remaining corrective action;

(b) Copies of bank statements or any other financial records that indicate the availability of sufficient funds of the subsequent owner or operator to finance the remaining corrective action;

(c) A letter from a financial institution or other funding agency indicating a binding commitment to provide a specified amount of funds and the uses for which the funds may be utilized; or

(d) In cases where funding is required but there can be no binding commitment of money until approvals are received, a letter of “intent to fund” from the appropriate funding institution indicating the amount of funds and their specified uses.

(F) Upon approval of the Department that the subsequent owner or operator has both the legal and financial capacity to complete corrective action, the owner or operator, the subsequent owner or operator, and the Department will enter into a consent administrative order, upon agreement of all parties, setting forth the following:

(1) The owner or operator relinquishes eligibility for trust fund coverage for the occurrence;

(2) The owner or operator acknowledges continuing liability for undertaking corrective action for the occurrence; and

(3) The subsequent owner or operator assumes responsibility for completion of corrective action for the occurrence.

(G) Transfer of eligibility for trust fund coverage for the occurrence is effective upon execution of the consent administrative order.

(H) Nothing in this section shall be construed to alter the limits of reimbursement for corrective action set out in Ark. Code Ann. § 8-7-907.

**Reg. 12.321      Reimbursement to Lender or Secured Creditor**

(A) A lender or secured creditor that holds ownership in a storage tank primarily to protect a security interest on the storage tank or the facility where it is located, or both, is eligible for reimbursement for corrective action if the lender or secured creditor assumes responsibility for completing the corrective action of a release from a qualified storage tank.

(B) If an owner or operator is performing corrective action to the Department's satisfaction, a lender or secured creditor is not eligible to assume responsibility for corrective action or to receive reimbursement for corrective action.

(C) A lender or secured creditor must notify the Department thirty (30) days prior to assuming responsibility for completing corrective action for a release from a qualified storage tank and provide documentation of the security interest in the storage tank or the facility where the storage tank is located.

(D) Upon verification of the security interest of the lender or secured creditor and determination by the Department that the owner or operator is performing corrective action in an unsatisfactory manner, the lender or secured creditor will enter into a consent administrative order with the Department setting forth the following:

(1) The lender or secured creditor assumes responsibility for completing the corrective action for a release from a qualified storage tank; and

(2) The lender or secured creditor shall cooperate fully with the Department in conducting the corrective action for a release from a qualified storage tank.

(E) A lender or secured creditor that is eligible for reimbursement for corrective action for a release from a qualified storage tank under this section shall comply with this Regulation.

(F) Eligibility for reimbursement of corrective action costs for the occurrence is effective upon execution of the consent administrative order.

(G) Nothing in this section shall be construed to alter the limits of reimbursement for corrective action set out in Ark. Code Ann. § 8-7-907.

## **CHAPTER 4: 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 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 C.F.R. § 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 that 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 subdivision (A)(1) of this section also must utilize an additional financial responsibility mechanism, as described in subdivision (C)(1) of this section, 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 also may qualify for and access the trust fund.

(C) 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 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 C.F.R. § 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 Reg. 12.403(B).

### **Reg. 12.403 Trust Fund Coverage for a Release**

(A) 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 Reg. 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 Reg. 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 (B) of this section.

(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 C.F.R. § 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 Reg. 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 Reg. 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 Reg. 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 the 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 subdivision (A)(1) of this section 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 under subdivision (B)(1) of this section, the Department shall immediately notify the Attorney General, who shall have the right to intervene in any 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 (B) of this section.

#### **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) To apply for payment of a third-party claim, an owner or operator must meet the requirements for coverage set forth in Reg. 12.403 and meet the application requirements of either subsection (C) of this section for judgments or subsection (E) of this section for settlements.



(B)(1) Unless otherwise stated in writing, an item is considered satisfied or compensated if it is:

- (a) Contained in any information submitted to support a third-party claim;
- (b) Presented for payment; and
- (c) Approved and paid.

(2) A third-party claim is not reimbursable as corrective action under Chapter 3 unless otherwise agreed in writing before it 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 the proof 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, 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 subdivision (D)(1) of this section.

(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, that 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 under subdivision (E)(1)(a) of this section, 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 subdivision (E)(3) of this section, before it is submitted to the Advisory Committee.

(3) Any otherwise binding settlement agreement submitted under subsection (E) of this

section 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 Reg. 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 Reg. 12.408(C) or Reg. 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 that would exceed the settlement amount and therefore it would be in the best interests of the fund to pay 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 under subdivision (F)(1) of this section. 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 therefore should be paid.

(G)(1) The Director shall consider, but is not bound by, the recommendations made by the Department under subdivision (F)(1) of this section and by the Advisory Committee under subdivision (F)(3) of this section.

(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 that have been reduced to judgment and for which payment is requested under Reg. 12.408(C) shall be presumed reasonable under this Chapter.

(B) All settled third-party claims for which payment is requested under Reg. 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) A payment shall not be made under this Chapter for any injury or damages caused by the performance of corrective action.

(C)(1) A payment shall not be made under this Chapter for any item for which reimbursement is made for the same occurrence under corrective action under Chapter 3.

(2) A payment shall not be made under this Chapter for any item that is included in an approved corrective action plan and reimbursable under Chapter 3.

#### **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 Reg. 12.402 and the trust fund coverage requirements of Reg. 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 Reg. 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 subdivision (B)(1) of this section, the Department may institute an action against the owner or operator to recover such monies under 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 that applies 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 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 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.

#### **Reg. 12.417      Transfer of Trust Fund Eligibility**

(A) An owner or operator determined to be eligible for payment of third-party claims for a release may transfer the eligibility to a subsequent owner or operator if the Department determines that the subsequent owner or operator has the financial and legal capacity to pay third-party claims and has met all the requirements of this section.

(B) A transfer under this section shall not affect the potential liability of the owner or operator for payment of compensatory damages to a third party.

(C) An owner or operator must notify the Department thirty (30) days prior to any transfer of eligibility and provide documentation that the subsequent owner or operator has the legal and financial capacity to pay third-party claims.

(D) Documentation of legal capacity includes, but is not limited to, the following, as appropriate:

(1) Proof of authorization to conduct business in Arkansas, e.g., current registration with, and a valid certificate of good standing issued by, the Arkansas Secretary of State; and

(2) Proof of proper registration of the tank system by the subsequent owner or operator.

(E) Documentation of financial capacity includes, but is not limited to, any one (1) or combination of items below that affirms, as determined by the Department, that the subsequent owner or operator has sufficient assets to pay third-party claims of at least one million dollars (\$1,000,000):

(1) An independently audited copy of the most recent annual financial statements that indicates the availability of sufficient funds;

(2) Copies of bank statements or other financial records that indicate availability of sufficient funds for the subsequent owner or operator to pay third-party claims;

(3) A letter from a financial institution or other funding agency indicating a binding commitment to provide a specified amount of funds and the uses for which the funds may be utilized; or

(4) In cases where funding is required but there can be no binding commitment of money until approvals are received, a letter of “intent to fund” from the appropriate funding institution indicating the amount of funds and their specified uses.

(F) Upon approval of the Department that the subsequent owner or operator has both the legal and financial capacity to assume responsibility for third-party claims, the owner or operator, the subsequent owner or operator, and the Department will enter into a consent administrative order, upon agreement of all parties, setting forth the following:

(1) The owner or operator relinquishes eligibility for trust fund coverage for any third-party claims for damages resulting from the occurrence;

(2) The owner or operator acknowledges a transfer of eligibility under this section does not affect the potential liability of the owner or operator for payment of compensatory damages to a third party; and

(3) The subsequent owner or operator assumes responsibility for any third-party claims for damages resulting from the occurrence.

(G) Transfer of eligibility for trust fund payment of third-party claims for damages resulting from a release from a qualified storage tank is effective upon execution of the consent administrative order.

(H) Nothing in this section shall be construed to alter the limits for payment of third-party claims as set out in Ark. Code Ann. § 8-7-908.

## **CHAPTER 5: LICENSING OF UNDERGROUND STORAGE TANK INSTALLERS AND SERVICE PERSONNEL**

### **Reg. 12.501      Purpose**

The purpose of this Chapter is to provide for the regulation of persons installing, repairing, upgrading and closing underground storage tank systems that contain regulated substances to assure that the systems are installed, repaired, upgraded and closed in a manner that will not encourage or facilitate leaking and will protect the public health and the lands and waters of the State of Arkansas.

### **Reg. 12.502      Definitions**

The following definitions, in addition to the definitions in Chapter 1, apply to this Chapter:

(A) **“Closing” or “closure”** means the process of removing and disposing of or closing in place an underground storage tank system.

(B) **“Contractor”** means any person who contracts to install, repair, upgrade or close an underground storage tank system for a third party.

(C) **“Critical junctures,”** in the case of an installation, means the steps in the installation of an underground storage tank system that are important to the prevention of releases and shall, at a minimum, include all of the following:

- (1) Preparation of the excavation immediately prior to receiving backfill and the tank;
- (2) Setting of the tank and the piping, including placement of any strapping or other anchoring devices and backfilling to the level of the tank;
- (3) Any time during the installation in which components of the piping are connected;
- (4) Any time during the installation of corrosion protection measures;
- (5) All pressure testing of the underground storage tank system, including associated piping, performed during the installation; and
- (6) Placement of backfill and filling of the excavation.

(D) **“Critical junctures,”** in the case of the repair or upgrade of an underground storage tank system, means the steps in the project that are comparable to the steps listed in subsection (C) of this section in terms of their importance in the prevention of leaks and shall, at a minimum, include all of the following:

- (1) The excavation of the existing tank or piping;
- (2) The actual performance of the repairs or upgrades to the tank or the piping;
- (3) Any time during the project in which components of the piping are connected; and
- (4) Any time during the project in which the tank system or its associated piping is tested.

(E) **“Critical junctures”** in the case of a closure means the steps in the removal or in-place closure of an underground storage tank system that are important to the safe removal or closure

in place (including the detection of current or previous leakage) and shall, at a minimum, include all of the following:

- (1) The purging or inerting of vapors;
  - (2) The removal and disposal of underground storage tank contents;
  - (3) The excavation of the existing underground storage tank system;
  - (4) The actual performance of the tests or monitoring to determine if previous or current leakage is present;
  - (5) The actual removal of the existing underground storage tank and piping; and
  - (6) The assessment of the site to ascertain if a current or previous release has resulted in contamination of the environment.
- (F) **“Install”** or **“installation”** means the work involved in placing an underground storage tank system or any part thereof in the ground and preparing it to be placed in service.
- (G) **“Repair”** means the correction or modification of an underground storage tank system, including but not limited to the replacement of piping, valves, fill pipes or vents and any repairs to the tank.
- (H) **“Upgrade”** means the addition or retrofit of systems such as cathodic protection, lining, spill and overfill controls, or leak detection devices to improve the ability of an underground storage tank system to prevent the release of product to the environment.

#### **Reg. 12.503      Applicability**

(A) This Chapter applies to all persons who install, repair, upgrade or close underground storage tank systems in Arkansas, including officers or employees of owners or operators, except as provided in subsections (B) and (C) of this section.

(B) This Chapter does not apply to the installation, repair, upgrade or closure of the following underground storage tanks:

- (1) Wastewater treatment tanks;
- (2) Sumps;
- (3) Underground storage tanks containing radioactive waste;
- (4) Electrical equipment tanks;
- (5) Hydraulic lift tanks; and
- (6) Any underground storage tank with a capacity of one hundred ten gallons (110 gals.) or less.

(C) This Chapter does not apply to the installation, repair, upgrade or closure of any underground storage tank systems holding hazardous wastes that are listed or identified under the Resource Conservation and Recovery Act of 1976, as amended, or the Arkansas Hazardous Waste Management Act of 1979, as amended.



#### **Reg. 12.504      General Requirements**

(A)(1) A person shall not install, repair, upgrade or close underground storage tank systems in Arkansas unless the person is, or employs, an individual who is licensed by the Department to perform the work.

(2) A person shall not exercise supervisory control over installations, repairs, upgrades or closures unless that person is licensed by the Department to perform the work.

(B) Neither a contractor nor individual shall perform or agree to perform any installation, repair, upgrade, or closure unless it is or has in its employ one or more licensed individuals who:

(1) Exercises responsible supervisory control over any installation, repair, upgrade or closure undertaken;

(2) At a minimum, is physically present on site at all critical junctures in the installation, repair, upgrade and closure;

(3) Is competent to perform the installation, repair, upgrade or closure; and

(4) Has adequate knowledge of appropriate materials, technical requirements and installation, repair, upgrade and closure procedures for the work.

(C)(1) Neither a contractor nor individual shall affix his or her signature or license number to certify any installation, repair, upgrade or closure for which he or she lacks competence.

(2) Neither a contractor nor individual shall certify to an owner or operator that an installation, repair, upgrade or closure is complete unless the installation, repair, upgrade or closure complies with this Regulation.

(3) If an installation, repair, upgrade or closure is performed for an owner or operator on a contract basis, both the individual and the contractor for whom the individual works are responsible for the accuracy of any representations made concerning the work.

(D) This Chapter is not intended to prohibit the employment of apprentices or helpers so long as a licensed individual exercises responsible supervisory control and is physically present on site at the critical junctures in the installation, repair, upgrade or closure.

(E) This Chapter is in addition to, and not in lieu of, any other licensing and registration requirements imposed by other local, state, or federal laws or regulations.

(F) This Chapter does not relieve the owner or operator of any obligations or liabilities under any other applicable state and federal laws or regulations.

#### **Reg. 12.505      Surety Requirement**

(A) A person shall not install, repair, close, or upgrade any underground storage tank system unless that person or the contractor by whom he or she is employed has purchased a surety bond, letter of credit, or cash bond in the amount of at least twenty-five thousand dollars (\$25,000), which provides that the Department is the obligee or payee of the instrument, and otherwise complies with the regulations promulgated under this subchapter.

(B) Persons whose installation, repair, closure, or upgrade activities are limited to their own underground storage tank system or their employers' companies' underground storage tank systems are exempt from the surety requirement of subsection (A) of this section.

(C) If the licensee or contracting company fails to properly install, remove, repair, close, or upgrade any underground storage tank under state law or regulation, the Director shall commence proceedings to collect on the surety.

(D) The Department shall notify the licensee or contracting company in writing of the collection against the surety, and the licensee or contracting company shall be given an opportunity for a hearing as provided herein.

#### **Reg. 12.506      Notification Requirement**

(A) For any installation or upgrade, the individual or contractor shall notify the Department at least one (1) week prior to the beginning of the second critical juncture as described in Reg. 12.502(C)(2) and Reg. 12.502(D)(2).

(B)(1) For any repair, the individual or contractor shall notify the Department at least one (1) week prior to the beginning of the second critical juncture as described in Reg. 12.502(D)(2).

(2) Notwithstanding subdivision (B)(1) of this section, if the repair is necessary to prevent or abate a release to the environment, the repair shall be performed immediately and the Department shall be notified within twenty-four (24) hours.

(C) If the date scheduled for installation or upgrade, or repair under subdivision (B)(1) of this section, changes, the Department must be notified immediately of the change and the revised schedule.

#### **Reg. 12.507      Contractor Licensing**

(A) An applicant for a contractor's license must meet all of the following requirements to be licensed by the Department:

(1) The applicant must file an application with the Department on a form furnished by the Department, accompanied by a non-refundable fee of three hundred dollars (\$300);

(2) The applicant, if an individual, must be at least eighteen (18) years of age;

(3) The applicant need not, for purposes of this Regulation, be a resident of Arkansas;

(4) The applicant must demonstrate that:

(a) It is in good standing with all licensing authorities by whom licensing is required, given the nature and scope of its business;

(b) It holds a current contractor's license, if required by local, state, or federal laws or regulations; and

(c) It has not had a business or occupational license suspended or revoked in Arkansas or any other state, except as provided in subsection (B) of this section;

(5) At least one (1) active officer, partner, owner, or designated managerial representative of the contractor must pass Part One of the licensing examination described in Reg. 12.511; and

(6) The applicant must attest in the application that on any job involving the installation, repair, upgrade or closure of an underground storage tank system, a licensed individual will exercise responsible supervisory control over the work and will be physically present on the site at all critical junctures in the installation, repair, upgrade or closure.

(B) An application filed with the Department will remain pending for one (1) year from the date of the application. If, during that year, a license is not issued to the applicant, the applicant must file a new application, complete with the appropriate fee, to obtain a license from the Department.

(C) Notwithstanding subdivision (A)(4)(c) of this section, the Department may grant a license to an applicant who has had a business or occupational license or certificate suspended or revoked if the suspension or revocation, by reason of its date or nature or because of other considerations, is not relevant to the applicant's competence to install, repair, upgrade or close underground storage tanks systems.

#### **Reg. 12.508      Individual Licensing**

(A) An applicant for an individual license must meet all of the following requirements to receive a license from the Department:

(1) The applicant must file an application with the Department on a form furnished by the Department, accompanied by a non-refundable fee of one hundred fifty dollars (\$150);

(2) The applicant must be an individual and must be at least eighteen (18) years of age;

(3) The applicant need not, for purposes of this Regulation, be a resident of Arkansas;

(4) The applicant must demonstrate that he or she is in good standing with all licensing authorities by whom licensing is required, given the nature and scope of the applicant's work, and that he or she has not had a business or occupational license or certificate suspended or revoked in Arkansas or any other state, except as provided in subsection (B) of this section;

(5) The applicant must meet the experience requirements of Reg. 12.510; and

(6) The applicant must pass the licensing examination required by Reg. 12.511.

(B) An application filed with the Department will remain pending for one (1) year from the date of the application. If, during that year, a license is not issued to the applicant, the applicant must file a new application, complete with the appropriate fee, to obtain a license from the Department.

(C) Notwithstanding subdivision (A)(4) of this section, the Department may grant a license to an applicant who has had a business or occupational license or certificate suspended or revoked if the suspension or revocation, by reason of its date or nature or because of other considerations, is not relevant to the applicant's competence to install, repair, upgrade or close underground storage tank systems.

## **Reg. 12.509 Contractor/Individual Licensing**

A person who is seeking to be both the contractor and the sole licensed individual exercising supervisory control, as required by Reg. 12.507(A)(6), under that contractor's license need only pay the contractor licensing fee required by Reg. 12.507(A)(1). The person must meet all of the requirements for an individual license set forth in Reg. 12.508 except for the fee requirement of Reg. 12.508(A)(1).

## **Reg. 12.510 Experience Requirements**

To qualify for an individual license under Reg. 12.508, an applicant must demonstrate that he or she has had, within the three (3) years immediately prior to making the application, one (1) year of field experience in installation, repair, upgrade or closure of underground storage tank systems.

## **Reg. 12.511 Licensing Examination**

(A) To qualify for an individual license under Reg. 12.508, an applicant shall pass a written examination covering all aspects of the installation, repair, upgrade or closure of underground storage tank systems.

(B) At the time an application is filed, the Department will furnish the applicant with a study package to assist him or her in preparing for the examination. The study package will refer applicants to the appropriate laws and regulations and industry publications used by the Department in preparing the examination and upon which the examination will be based.

(C) The examination will consist of three (3) parts, as follows:

(1) Part One will test an applicant's familiarity with this Regulation and the applicable Arkansas and federal laws and regulations;

(2) Part Two will test an applicant's familiarity with current technology and industry recommended practices with respect to the proper installation, repair and upgrade of underground storage tank systems;

(3) Part Three will test an applicant's familiarity with current technology and industry recommended practices for proper closure of underground storage tank systems.

(D)(1) To be licensed to perform installations, repairs, or upgrades, an applicant must pass Parts One and Two.

(2) To be licensed to perform closures, an applicant must pass Parts One and Three.

(3) To be licensed to perform installations, repairs, upgrades, and closures, an applicant must pass all parts of the examination.

(E)(1) An applicant must score seventy percent (70%) or higher on each part of the examination taken to pass the examination.

(2) An applicant passing any part of the initial examination taken need not be retested on that part, provided that any part taken but not passed must be passed within one (1) year of the initial testing date; otherwise, the entire examination must be retaken.

(3)(a) An applicant who fails the examination may, by paying a non-refundable fee of twenty-five dollars (\$25), retake the examination.

(b) This fee must accompany each request for retesting after initial failure of the examination.

(c) For purposes of retesting, an application will remain pending for a period of one (1) year after the applicant's failure to pass the initial examination.

(d) If the applicant has not requested retesting within the one-year period, the applicant must file a new application, complete with the appropriate fee, to obtain a license from the Department.

(F)(1) The Department shall offer the examination at least four (4) times each year.

(2) At least thirty (30) days prior to the date of a licensing examination, the Department shall provide notice of the examination to all persons who have requested the notice and to any person who has completed an application for a license since the date of the last examination.

(3) Only persons who have filed applications at least ten (10) business days in advance of an examination are eligible to take the examination.

(G)(1) The Department shall grade all examinations and notify the applicants of the results within thirty (30) days of the date of the examination.

(2) Examination papers will not be returned to applicants, but may be reviewed by applicants at the Department offices in North Little Rock.

## **Reg. 12.512      Renewal of Licenses**

(A) Any license issued under Reg. 12.507 or Reg. 12.508 must be renewed every two (2) years.

(B)(1) At least thirty (30) days before the expiration date of a license, the Department shall mail a renewal application form to the licensee, at the licensee's address of record with the Department.

(2) The licensee shall renew the license on a timely basis regardless of whether an application form has been received from the Department. A form may be requested from the Department if it has not been received by mail.

(C) To qualify for renewal, a licensed contractor must:

(1) Apply for renewal on a form furnished by the Department and accompanied by a non-refundable fee of three hundred dollars (\$300); and

(2) Attest in its renewal application that on any job involving the installation, repair, upgrade or closure of an underground storage tank system, a licensed individual will exercise responsible supervisory control over the work and will be physically present on the site at all critical junctures in the installation, repair, upgrade or closure.

(D) To qualify for renewal, a licensed individual must:

(1) Apply for renewal on a form furnished by the Department and accompanied by a non-refundable fee of one hundred fifty dollars (\$150);

(2) Demonstrate that he or she has completed at least three (3) installations, repairs, upgrades or closures during the two-year period preceding the renewal application; and

(3) Demonstrate that he or she has completed sixteen (16) hours of Department-approved continuing education in the two-year period preceding the renewal application.

(E) Any license that is not renewed prior to its expiration date shall be considered lapsed and shall not be used in the solicitation or performance of any installation, repair, upgrade or closure.

(F)(1) A license should be renewed prior to its expiration date but may be renewed up to two (2) months after the date of expiration if the following requirements are met:

(a) A late fee of twenty-five dollars (\$25) in addition to the renewal fee must be paid; and

(b) The requirements for renewal must be satisfied.

(2) Licenses not renewed within two (2) months after the date of expiration shall be considered lapsed and invalid and applications for renewal will not be accepted after that time.

(3) Any individual or contractor whose license has become lapsed and invalid, as provided in subdivision (F)(2) of this section, must submit an application for a new license under Reg. 12.507 or Reg. 12.508 and comply with the requirements therein.

(4) Any individual applying for a new license under Reg. 12.508 who previously held a license within the past two years that is lapsed and invalid must meet the continuing education requirements of subdivision (D)(3) of this section and submit a certificate or certificates as proof of meeting those requirements as part of his or her application.

### **Reg. 12.513 Denial of Licenses**

(A) A license required by this Chapter shall not be issued or renewed if the applicant for issuance or renewal fails to meet any of the applicable licensing requirements.

(B)(1) The Department shall, by certified mail with return receipt requested, give written notice to the applicant of its decision to deny the issuance or renewal of a license.

(2) The notice of denial shall state:

(a) The specific reasons for the denial;

(b) That to appeal the denial, the applicant must submit a written request for a meeting with the Director to review the Department's decision; and

(c) That the request for a meeting with the Director must be received by the Department no later than ten (10) days following the applicant's receipt of the notice of denial.

(C)(1) An applicant shall be afforded an opportunity to appeal to the Director a decision of the Department to deny the license.

(2)(a) To appeal the Department's decision to deny the license, an applicant must submit to the Director a written request for a meeting to review the Department's decision.

(b) The request must be received by the Director no later than ten (10) days following the applicant's receipt of the notice described in subsection (B) of this section.

(c) If no request is received by the Director within the time specified in subdivision (C)(2)(b) of this section, the decision of the Department shall be final and may not be appealed.

(3) The Director or his or her designee shall arrange a meeting to discuss the denial of the license within fifteen (15) days of the Director's receipt of the applicant's request under subdivisions (C)(2)(a) and (b) of this section.

(D)(1) Following a meeting held under subdivision (C)(3) of this section, the Director shall issue a written decision to issue or deny the license in accordance with Regulation No. 8 (Administrative Procedures).

(2) The decision of the Director shall be final; however, it may be appealed to the Commission by filing a Request for Commission Review and Adjudicatory Hearing in accordance with Regulation No. 8.

(E) During the pendency of an appeal under this section, the denial of a license shall stand.

#### **Reg. 12.514 Department Approval of Training and Continuing Education**

(A)(1) The types of training and continuing education required by this Chapter that may be eligible for approval include instructional courses, seminars, or conferences sponsored by the Department, the Environmental Protection Agency, educational institutions, independent professional or trade associations, manufacturers, or firms engaged in underground storage tank system installation, repair, upgrade, closure or management.

(2) Course content must be reasonably related to work performed by persons installing, maintaining, repairing, upgrading or closing underground storage tank systems.

(B) Evidence of participation by the individual must be furnished to the Department by the organization sponsoring the approved training or continuing education.

#### **Reg. 12.515 Violations**

(A)(1) The Department may undertake investigations it deems necessary to ensure compliance with this Chapter.

(2)(a) The Department may take actions it deems necessary to ensure compliance with this Chapter, including issuing compliance orders, assessing penalties, and revoking or suspending licenses.

(b) The Department may, to effectuate the actions described in subdivision (A)(2)(a) of this section, commence civil or administrative actions under Arkansas law or Chapter 9 of this Regulation.

(B) The Department may suspend or revoke the license for an individual or contractor upon grounds that the individual or contractor:

- (1) Exercised fraud, misrepresentation or deception in obtaining a license;
- (2) Exhibited gross incompetence in the performance of an installation, repair, upgrade or closure;
- (3) Was derelict in the performance of a duty as a licensed individual or contractor; or
- (4) Knowingly violated any provision of this Regulation.

## **CHAPTER 6: LICENSING OF UNDERGROUND STORAGE TANK TESTERS**

### **Reg. 12.601      Purpose**

The purpose of this Chapter is to provide for the regulation of persons testing underground storage tank systems that contain regulated substances to assure that the systems are tested in a manner that will not encourage or facilitate leaking and will protect the public health and the lands and waters of the State of Arkansas.

### **Reg. 12.602      Definitions**

The following definitions, in addition to the definitions in Chapter 1, apply to this Chapter:

(A) **“Company”** means any person who contracts to test an underground storage tank system for a third party.

(B) **“Tester”** means an individual or company who tests underground storage tank systems in Arkansas; and

(C) **“Test”** or **“testing”** means the work involved in assessing the integrity of an underground storage tank system, including associated piping, to determine whether or not it is capable of meeting the tightness testing performance standards of 40 C.F.R. §§ 280.43(c) and 280.44(b).

### **Reg. 12.603      Applicability**

(A) This Chapter applies to all persons who perform testing on underground storage tank systems in Arkansas, including officers or employees of owners or operators, except as provided in subsections (B) and (C) of this section.

(B) This Chapter does not apply to the testing of the following underground storage tanks:

- (1) Wastewater treatment tanks;
- (2) Sumps;
- (3) Underground storage tanks containing radioactive waste;
- (4) Electrical equipment tanks;
- (5) Hydraulic lift tanks; and
- (6) Any underground storage tank with a capacity of one hundred ten gallons (110 gals.) or less.

(C) This Chapter does not apply to the testing of any underground storage tank system holding hazardous wastes listed or identified under the Resource Conservation and Recovery Act (RCRA) of 1976 as amended, or the Arkansas Hazardous Waste Management Act of 1979, as amended.



#### **Reg. 12.604      General Requirements**

(A)(1) A person shall not test underground storage tank systems in Arkansas unless the person is or employs an individual who has been licensed by the Department to perform the testing.

(2) A person shall not exercise supervisory control over a test unless that person is licensed by the Department to perform the testing.

(B) A tester shall not perform or agree to perform a test unless he or she is licensed as an individual or has in his or her employ one or more licensed individuals who:

(1) Will exercise responsible supervisory control over any testing undertaken;

(2) Will, at a minimum, be physically present on the site during all preparations for the test and during the actual test itself;

(3) Is certified by the test method manufacturer to perform the particular test method utilized; and

(4) Has adequate knowledge of appropriate materials, technical requirements and testing procedures for the testing.

(C)(1) A tester shall not affix his or her signature or license number to certify any testing for which he or she lacks competence.

(2) A tester shall not certify to an owner or operator that a test is complete unless the test complies with this Regulation.

(3) If a test is performed for an owner or operator on a contract basis, both the individual and the company for whom the individual works are responsible for the accuracy of any representations made concerning the test.

(D) The requirements of this Chapter are not intended to prohibit the employment of apprentices or helpers so long as a licensed individual exercises responsible supervisory control and is physically present on site during all preparations for the test and during the actual test itself.

(E) The requirements of this Chapter are in addition to, not in lieu of, any other licensing and registration requirements imposed by local, state, or federal laws or regulations.

(F) This Chapter does not relieve the owner or operator of any obligations or liabilities under any other applicable state and federal laws or regulations.

#### **Reg. 12.605      Surety Requirement**

(A) A person shall not test any underground storage tank system unless that person or the contractor by whom he or she is employed has purchased a surety bond, letter of credit, or cash bond in the amount of at least twenty-five thousand dollars (\$25,000), which provides that the Department is the obligee or payee of the instrument, and otherwise complies with the regulations promulgated under this subchapter.

(B) Persons whose testing activities are limited to their own underground storage tank systems or their employers' companies' underground storage tank systems are exempt from the surety requirement of subsection (A) of this section.

(C) If the licensee or contracting company fails to properly test any underground storage tank under state law or regulation, the Director shall commence proceedings to collect on the surety bond, letter of credit or cash bond.

(D) The Department shall notify the licensee or contracting company in writing of the collection against the surety, and the licensee or contracting company shall be given an opportunity for a hearing as provided herein.

#### **Reg. 12.606      Company Licensing**

(A) An applicant for a company license must meet all of the following requirements to be licensed by the Department:

(1) The applicant must file an application with the Department on a form furnished by the Department, accompanied by a non-refundable fee of three hundred dollars (\$300);

(2) The applicant, if an individual, must be at least eighteen (18) years of age;

(3) The applicant need not, for purposes of this Regulation, be a resident of Arkansas;

(4) The applicant must demonstrate that:

(a) It is in good standing with all licensing authorities by whom licensing is required, given the nature and scope of its business;

(b) It holds a current contractor's license, if required by local, state, or federal laws or regulations; and

(c) It has not had a business or occupational license suspended or revoked in Arkansas or any other state, except as provided in subsection (C) of this section;

(5) At least one (1) active officer, partner, owner, or designated managerial representative of the company must pass Part One of the licensing examination described in Reg. 12.511; and

(6) The applicant must attest in the application that on any job involving the testing of an underground storage tank system, a licensed individual will exercise responsible supervisory control over the work and will be physically present on the site during all preparations for the test and during the actual test itself.

(B) An application filed with the Department will remain pending for one (1) year from the date of the application. If, during that year, a license is not issued to the applicant, the applicant must file a new application, complete with the appropriate fee, to obtain a license from the Department.

(C) Notwithstanding subdivision (A)(4)(c) of this section, the Department may grant a license to an applicant who has had a business or occupational license or certificate suspended or revoked if the suspension or revocation, by reason of its date or nature or because of other considerations, is not relevant to the applicant's competence to test underground storage tank systems.

#### **Reg. 12.607      Individual Licensing**

(A) An applicant for an individual license must meet all of the following requirements to receive a license from the Department:

(1) The applicant must file an application with the Department on a form furnished by the Department, accompanied by a non-refundable fee of one hundred fifty dollars (\$150);

(2) The applicant must be an individual and must be at least eighteen (18) years of age;

(3) The applicant need not, for the purposes of this Regulation, be a resident of Arkansas;

(4) The applicant must demonstrate that he or she is in good standing with all licensing authorities by whom licensing is required, given the nature and scope of the applicant's work, and that he or she has not had a business or occupational license or certificate suspended or revoked in Arkansas or any other state, except as provided in subsection (C) of this section;

(5) The applicant must meet the experience requirements of Reg. 12.609;

(6) The applicant must provide the Department with certification by the manufacturer of the testing method to be used by the applicant that the method will meet the federal performance standard as stated in 40 C.F.R. §§ 280.43(c) and 280.44(b);

(7) At the time application for the license is made, the applicant must provide the Department with certification from the manufacturer of the test method to be used by the applicant that the applicant has received training, been examined, and satisfactorily shown proficiency in the use of the chosen testing method; and

(8) The applicant must pass Part One of the licensing examination described in Reg. 12.511.

(B) An application filed with the Department will remain pending for one year (1) from the date of the application. If, during that year, a license is not issued to the applicant, the applicant must file a new application, complete with the appropriate fee, to obtain a license from the Department.

(C) Notwithstanding subdivision (A)(4) of this section, the Department may grant a license to an applicant who has had a business or occupational license or certificate suspended or revoked if the suspension or revocation, by reason of its date or nature or because of other considerations, is not relevant to the applicant's competence to test underground storage tank systems.

(D)(1) If an individual chooses a test method that is different from that for which he or she is licensed, the individual must provide proof to the Department that he or she has met the requirements of subdivisions (A)(6) and (A)(7) of this section for the chosen method. Upon receipt of adequate documentation, the Department shall update its file on that license to reflect the change in method.

(2) The requirements of subdivision (D)(1) of this section must be met before the individual performs any testing as a licensed tester using a method different from that for which the existing license was issued.

(3) If the change in test method is made before the expiration of the existing license, no additional fee is required to update that license.

### **Reg. 12.608      Company/Individual Licensing**

A person who is seeking to be both the company and the sole licensed individual exercising supervisory control, as required by Reg. 12.606(A)(6), under that company's license need only pay the company licensing fee required by Reg. 12.606(A)(1). The person must meet all of the requirements for an individual license set forth in Reg. 12.607 except for the fee requirement of Reg. 12.607(A)(1).

### **Reg. 12.609      Experience Requirements**

To qualify for an individual license under Reg. 12.607, an applicant must demonstrate that he or she has had, within the three (3) years immediately prior to making the application, one (1) year of field experience in testing.

### **Reg. 12.610      Renewal of Licenses**

(A) Any license issued under Reg. 12.606 or Reg. 12.607 must be renewed every two (2) years.

(B)(1) At least thirty (30) days before the expiration date of a license, the Department shall mail a renewal application form to the licensee, at the licensee's address of record with the Department.

(2) The licensee shall renew the license on a timely basis regardless of whether an application form has been received from the Department. A form may be requested from the Department if it has not been received by mail.

(C) To qualify for renewal, a licensed company must:

(1) Apply for renewal on a form furnished by the Department and accompanied by a non-refundable fee of three hundred dollars (\$300); and

(2) Attest in its renewal application that on any job involving the testing of an underground storage tank system, a licensed individual will exercise responsible supervisory control over the work and will be physically present on the site during all preparations for the test and during the actual test itself.

(D) To qualify for renewal, a licensed individual must:

(1) Apply for renewal on a form furnished by the Department accompanied by a non-refundable fee of one hundred fifty dollars (\$150);

(2) Demonstrate that he or she has completed at least three (3) tests during the two-year period preceding the renewal application; and

(3) Demonstrate that he or she has completed continuing education in the test method chosen for use by that individual and received recertification by the manufacturer of the test method.

(E) Any license that is not renewed prior to its expiration date shall be considered lapsed and shall not be used in the solicitation or performance of any test.

(F)(1) A license should be renewed prior to its expiration but may be renewed up to two (2) months after the date of expiration if the following requirements are met:

(a) A late fee of twenty-five dollars (\$25) in addition to the renewal fee must be paid; and

(b) The requirements for renewal must be satisfied.

(2) Licenses that have not been renewed within two (2) months after the date of expiration shall be considered lapsed and invalid and applications for renewal will not be accepted after that time.

(3) Any individual or company whose license has lapsed as provided in subdivision (F)(2) of this section must submit an application for a new license under Reg. 12.606 or Reg. 12.607 and comply with the requirements therein.

### **Reg. 12.611 Denial of Licenses**

(A) A license required by this Chapter shall not be issued or renewed if the applicant for issuance or renewal fails to meet any of the applicable licensing requirements.

(B)(1) The Department shall, by certified mail with return receipt requested, give written notice to the applicant of its decision to deny the issuance or renewal of a license.

(2) The notice of denial shall state:

(a) The specific reasons for the denial;

(b) That to appeal the denial, the applicant must submit a written request for a meeting with the Director to review the Department's decision; and

(c) That the request for a meeting with the Director must be received by the Department no later than ten (10) days following the applicant's receipt of the notice of denial.

(C)(1) An applicant shall be afforded an opportunity to appeal to the Director a decision of the Department to deny the license.

(2)(a) To appeal the Department's decision to deny the license, an applicant must submit to the Director a written request for a meeting to review the Department's decision.

(b) The request must be received by the Director no later than ten (10) days following the applicant's receipt of the notice described in subsection (B) of this section.

(c) If no request is received by the Director within the time specified in subdivision (C)(2)(b) of this section, the decision of the Department shall be final and may not be appealed.

(3) The Director or his or her designee shall arrange a meeting to discuss the denial of the license within fifteen (15) days of the Director's receipt of the applicant's request under subdivisions (C)(2)(a) and (b) of this section.

(D)(1) Following a meeting held under subdivision (C)(3) of this section, the Director shall issue a written decision to issue or deny the license in accordance with Regulation No. 8 (Administrative Procedures).

(2) The decision of the Director shall be final; however, it may be appealed to the Commission by filing a Request for Commission Review and Adjudicatory Hearing in accordance with Regulation No. 8.

(E) During the pendency of an appeal under this section, the denial of a license shall stand.

#### **Reg. 12.612 Department Approval of Training and Continuing Education**

(A)(1) The types of training and continuing education required by this Chapter that may be eligible for approval include instructional courses, seminars or conferences sponsored by the Department, the Environmental Protection Agency, educational institutions, independent professional or trade associations, manufacturers, or firms engaged in underground storage tank system testing.

(2) Course content must be reasonably related to work performed by persons testing underground storage tank systems.

(B) Evidence of participation by the individual must be furnished to the Department by the organization sponsoring the approved training or continuing education.

#### **Reg. 12.613 Violations**

(A)(1) The Department may undertake investigations it deems necessary to ensure compliance with this Chapter.

(2)(a) The Department may take actions it deems necessary to ensure compliance with this Chapter, including issuing compliance orders, assessing penalties, and revoking or suspending licenses.

(b) The Department may, to effectuate the actions described in subdivision (A)(2)(a) of this section, commence civil or administrative actions under Arkansas law or Chapter 9 of this Regulation.

(B) The Department may suspend or revoke the license for an individual or contractor upon grounds that the individual or contractor:

- (1) Exercised fraud, misrepresentation or deception in obtaining a license;
- (2) Exhibited gross incompetence in the performance of a test;
- (3) Was derelict in the performance of a duty as a licensed individual or company; or
- (4) Knowingly violated any provision of this Regulation.

## CHAPTER 7: OPERATOR TRAINING

### Reg. 12.701 Purpose

The purpose of this Chapter is to provide for the training or certification of persons operating and maintaining underground storage tank systems that contain regulated substances to assure that the systems are operated and maintained in a manner that will protect the public health and the lands and waters of the State of Arkansas.

### Reg. 12.702 Definitions

The following definitions, in addition to the definitions in Chapter 1, apply to this Chapter:

(A) **“Operator”** means any person in control of, or having responsibility for, the daily operation of the underground storage tank system. This term shall not include contractors or consultants performing compliance monitoring, testing, emergency response, or other services on an underground storage tank system for a tank owner or operator.

(1) **“Class A Operator”** means any operator having primary responsibility for onsite operation and maintenance of underground storage tank systems.

(2) **“Class B Operator”** means any operator having daily onsite responsibility for the operation and maintenance of underground storage tank systems.

(3) **“Class C Operator”** means a daily, onsite employee having primary responsibility for addressing emergencies presented by a spill or release from an underground storage tank system.

(B) **“Unmanned facility”** means any facility that does not have an operator onsite during operation of the underground storage tank system.

### Reg. 12.703 Applicability

(A) This Chapter applies to all persons who are responsible for operating or maintaining underground storage tank systems in Arkansas as defined in Reg. 12.702.

(B) This Chapter does not relieve the owner or operator, as defined in 40 C.F.R. § 280 and this Regulation, from any legal responsibility mandated by federal and state underground storage tank laws and regulations.

### Reg. 12.704 General Requirements

(A)(1) By August 8, 2012, each facility with an underground storage tank system must have a Class A, Class B, and Class C operator designated for that facility who has been trained or certified in accordance with the requirements of this Chapter.

(2) Separate individuals may be designated for each class of operator, or one (1) individual may be designated to more than one (1) operator class provided he or she is trained in accordance with Department requirements for the class or classes designated.

(3) At least one (1) Class C operator must be present onsite during all hours of operation of an underground storage tank facility with the exception of:

- (a) Unmanned facilities with an emergency generator tank(s) only; or
  - (b) Unmanned facilities that meet the compliance requirements of the Arkansas State Fire Code.
- (B) The Department may accept Class A or Class B operator certification from another state with an EPA-recognized operator training program.
- (C) An owner or operator must maintain records documenting the training or certification for all Class A, Class B, and Class C operators at the underground storage tank facility, immediately available for inspection by the Department, or at a readily available alternative location and shall provide the records for inspection to the Department upon request.
- (D) If the Department determines an underground storage tank facility has been identified as ineligible for fuel delivery under this Regulation, both the designated Class A operator and the designated Class B operator for that facility must complete Department-provided retraining and be recertified within forty-five (45) days of the facility being identified as ineligible for fuel delivery.
- (E) Certification required by this Chapter may be denied by the Department if the individual fails to meet any of the applicable operator training or certification requirements.
- (F) A denial of certification will be considered a final decision of the Director for purposes of appeal.

#### **Reg. 12.705      Class A Operator Certification**

- (A) At a minimum, a Class A operator must be certified by the Department in the following areas:
- (1) A general knowledge of applicable federal and state underground storage tank system requirements for operation, maintenance, and recordkeeping including, but not limited to:
    - (a) Release prevention;
    - (b) Release detection;
    - (c) Emergency response; and
    - (d) Product compatibility;
  - (2) Financial responsibility requirements;
  - (3) Notification requirements;
  - (4) Release and suspected release reporting requirements;
  - (5) Temporary and permanent closure requirements; and
  - (6) Operator training requirements.
- (B) After August 8, 2012, Class A operators must be certified within thirty (30) days after assuming operation and maintenance responsibilities for an underground storage tank system.

#### **Reg. 12.706      Class B Operator Certification**

- (A) At a minimum, a Class B operator must be certified by the Department in the following



areas and demonstrate an in-depth knowledge of underground storage tank system requirements for day-to-day operation, maintenance, and recordkeeping including, but not limited to:

- (1) Release prevention;
- (2) Release detection;
- (3) Components of underground storage tank systems;
- (4) Materials of underground storage tank system components;
- (5) Emergency response;
- (6) Product compatibility;
- (7) Reporting and recordkeeping requirements; and
- (8) Class C operator training requirements.

(B) After August 8, 2012, Class B operators must be certified within thirty (30) days after assuming operation and maintenance responsibilities for an underground storage tank system.

#### **Reg. 12.707      Class C Operator Training**

(A) At a minimum, a Class C operator must be trained in:

- (1) Delivery controls and monitoring of the dispensing or sale of regulated substances;
- (2) Initial response to alarms or releases; and
- (3) Appropriate actions to be taken in response to spills or releases from an underground storage tank system.

(B)(1) A Class C operator must be trained by a Department-certified Class A or Class B operator, and the training must be specific to the facility at which the Class C operator is employed.

(2) Training for Class C operators must be documented on forms provided by the Department.

(C) An up-to-date list of trained Class C operators and training documentation must be maintained on site at the facility or at a readily available alternative site for inspection by the Department upon request.

(D) Class C operators must be trained before assuming responsibility for responding to emergencies.

(E) Department-certified Class A and Class B operators meet the training requirements of a Class C operator.

#### **Reg. 12.708      Operator Examination**

(A) To be certified as a Class A or Class B operator under Reg. 12.705 or Reg. 12.706, an individual shall pass a written examination given by the Department, covering the requirements of those sections, with a score of seventy percent (70%) or higher.

(B) To take the exam to be certified as a Class A or Class B operator under this Regulation, an individual must be at least eighteen (18) years of age.

(C) At least one (1) week prior to the date of examination, a registration form along with a non-refundable examination fee of twenty-five dollars (\$25) for each examination taken must be received by the Department.

(D) Any individual taking a Class A or Class B operator exam must, at the time of the exam, declare on forms provided by the Department, the facility identification number of each underground storage tank facility for which the individual will be the designated Class A or Class B operator.

#### **Reg. 12.709      Violations**

(A)(1) The Department may undertake investigations it deems necessary to ensure compliance with this Chapter.

(2)(a) The Department may take actions it deems necessary to ensure compliance with this Chapter, including issuing enforcement actions, assessing penalties, and revoking certifications.

(b) The Department may, to effectuate the actions described in subdivision (A)(2)(a) of this section, commence civil or administrative actions under Arkansas law or Chapter 9 of this Regulation.

(B) The Department may revoke the certification for an individual upon grounds that the individual:

(1) Exercised fraud, misrepresentation or deception in obtaining certification;

(2) Exercised fraud, misrepresentation or deception in the training, certification or documentation of training for other operators as defined in this Chapter;

(3) Exhibited gross negligence regarding the operation, maintenance, or recordkeeping of an underground storage tank facility or Class C operator training requirements.

#### **Reg. 12.710      Disclosure Exemption**

Any certification required by this Chapter is exempt from the disclosure requirements of Ark. Code Ann. § 8-1-106 and Regulation No. 8.

## **CHAPTER 8: CONFIDENTIALITY**

### **Reg. 12.801      Requests for Confidentiality**

- (A)(1) Any information submitted to the Department may be claimed as confidential.
- (2) Any claim must be asserted at the time of submission.
- (3) No information shall be eligible for protection as confidential information under Reg. 12.805 unless it is submitted in accordance with this Chapter.
- (B) If no claim of confidentiality is made at the time of submission, the Department may make the information available to the public without further notice.
- (C) If a claim of confidentiality is asserted at the time of submission, the Director or his or her designee shall make a determination of eligibility for protection as confidential information in accordance with Reg. 12.803.

### **Reg. 12.802      Submission Procedures**

- (A) Any person claiming information as confidential under Reg. 12.801 shall:
- (1) Clearly mark each page containing information with the word “CONFIDENTIAL”; and
- (2) Submit an affidavit setting forth the reasons that the person believes the information is entitled to protection as a trade secret.
- (B)(1) Any information submitted to the Department for which a claim of confidentiality is made shall be submitted in a sealed envelope marked “CONFIDENTIAL” and addressed to the Director.
- (2) The information shall be submitted in two separate parts as follows:
- (a) The first part shall contain all information that is not deemed by the submitter to be confidential and shall include appropriate cross references to the second part; and
- (b) The second part shall contain data, words, phrases, paragraphs or pages and appropriate affidavits containing or relating to the information that is claimed to be confidential.

### **Reg. 12.803      Prerequisites for Protection**

- (A) No information shall be protected as confidential unless:
- (1) It is submitted in accordance with this Chapter; and
- (2) The Director finds the information would constitute a trade secret under Arkansas law.
- (B) If the Director determines information that is properly submitted constitutes a trade secret, then the information shall be kept confidential in accordance with Reg. 12.805.

#### **Reg. 12.804      Acceptability of Information**

(A) The Director or his or her designee shall give written notice to any person submitting information for which confidentiality is claimed of his or her decision on whether the information has been accepted as confidential.

(B) All information that the Director or his or her designee determines is entitled to protection shall be marked with the term “ACCEPTED” and shall be protected in accordance with Reg. 12.805.

(C)(1) If the Director or his or her designee finds the information submitted does not meet the requirements of Reg. 12.803, he or she shall promptly notify the person submitting the information of this finding. The Director or his or her designee shall give the person reasonable opportunity to further justify his or her claim that the information deserves protection as a trade secret or to limit the scope of information for which the request for protection is made.

(2) If the person fails to satisfactorily demonstrate to the Director or the Director’s designee that the information submitted meets the criteria of Reg. 12.803, the information shall be marked with the term “REJECTED” and promptly returned to the person submitting the information.

#### **Reg. 12.805      Security**

(A)(1) All information accepted by the Director as confidential shall be stored in locked filing cabinets.

(2) A person shall not have access to confidential information unless the person requires access to carry out his or her responsibilities under the Regulated Substance Storage Tank program, the Petroleum Storage Tank Trust Fund Act, or this Regulation.

(B) A person shall not disclose any confidential information except in accordance with applicable state law.

## **CHAPTER 9: ENFORCEMENT AND ADMINISTRATIVE PROCEDURES**

### **Reg. 12.901      Enforcement**

(A) Violation of any provision of this Regulation, or of any order issued by the Department pursuant thereto, shall be considered a violation of this Regulation and shall be subject to the penalty provisions of the Regulated Substance Storage Tank program.

(B) Regulation No. 7 (Civil Penalties) shall apply to enforcement actions taken under this Regulation.

### **Reg. 12.902      Administrative Procedures**

Regulation No. 8 (Administrative Procedures) shall apply to administrative licensing, operator training and certification, or enforcement actions taken under this Regulation. Additionally, all administrative hearings and appeals arising under this Regulation shall be conducted in accordance with the procedures described in Ark. Code Ann. § 8-7-804 and Regulation No. 8.

## **CHAPTER 10: SEVERABILITY AND EFFECTIVE DATE**

### **Reg. 12.1001 Severability**

The provisions of this regulation are severable. If any part of this regulation is declared invalid or unenforceable by a court, the remainder of the regulation will continue to be valid and enforceable.

### **Reg. 12.1002 Effective Date**

This Regulation is effective ten (10) days after filing with the Secretary of State, the State Library, and the Bureau of Legislative Research.