

Title 159 - STATE FIRE MARSHAL

Chapter 9 - FINANCIAL RESPONSIBILITY

001. The financial responsibility provisions apply to owners and operators of all petroleum UST systems except those exempted in §003 of this Chapter.

002. Owners and operators of petroleum UST systems are subject to the requirements of this chapter if they are in operation on or after the effective date of these regulations.

003. Financial responsibility requirements shall not apply to the following groups of tank owners and operators:

003.01. State and federal government entities whose debts and liabilities are the debts and liabilities of a state or the United States.

003.02. Owners and operators of tanks excluded or deferred in §002 of Chapter 1 of this Title.

004. If the owner and operator of a petroleum UST are separate persons, only one person is required to demonstrate financial responsibility; however, both parties are liable in the event of noncompliance.

005. DEFINITIONS

005.01. "Accidental release" means any sudden or nonsudden release of petroleum from an underground storage tank that results in a need for corrective action and/or compensation for bodily injury or property damage neither expected nor intended by the tank owner or operator.

005.02. "Bodily injury" shall have the meaning given to this term by applicable state law; however, this term shall not include those liabilities which, consistent with standard insurance industry practices, are excluded from coverage in liability insurance policies for bodily injury.

005.03. "Chief Financial officer," in the case of local government owners and operators, means the individual with the overall authority and responsibility for the collection, disbursement and use of funds by the local government.

005.04. "Controlling interest" means direct ownership of at least 50 percent of the voting stock of another entity.

005.05. "Financial reporting year" means the latest consecutive twelve-month period for which any of the following reports used to support a financial test is prepared:

005.05A. a 10-K report submitted to the SEC;

005.05B. an annual report of tangible net worth submitted to Dun and Bradstreet; or

005.05C. annual reports submitted to the Energy Information Administration or the Rural Electrification Administration.

"Financial reporting year" may thus comprise a fiscal or a calendar year period.

005.06. "Legal defense cost" is any expense that an owner or operator or provider of financial assurance incurs in defending against claims or actions brought,

005.06A. By EPA or a state to require corrective action or to recover the costs of corrective action;

005.06B. By or on behalf of a third party for bodily injury or property damage caused by an accidental release; or

005.06C. By any person to enforce the terms of a financial assurance mechanism.

005.07. "Local government" shall mean political subdivisions of the State of Nebraska as defined by state statute.

005.08. "Occurrence" means an accident, including continuous or repeated exposure to conditions, which results in a release from an underground storage tank. Note: This definition is intended to assist in the understanding of these regulations and is not intended either to limit the meaning of "occurrence" in a way that conflicts with standard insurance usage or to prevent the use of other standard insurance terms in place of "occurrence."

005.09. "Owner or operator," when the owner or operator are separate parties, refers to the party that is obtaining or has obtained financial assurances.

005.10. "Petroleum marketing facilities" include all facilities at which petroleum is produced or refined and all facilities from which petroleum is sold or transferred to other petroleum marketers or to the public.

005.11. "Petroleum marketing firm" shall mean any firm which owns petroleum marketing facilities.

005.12. "Property damage" shall have the meaning given this term by applicable state law. This term shall not include those liabilities which, consistent with standard insurance industry practices, are excluded from coverage in liability insurance policies for property damage. However, such exclusions for property damage shall not include corrective action associated with releases from tanks which are covered by the policy.

005.13. "Provider of financial assurance" means an entity that provides financial assurance to an owner or operator of an underground storage tank through one of the mechanisms listed in §§280.95 - 280.103 of 40 CFR Part 280, Subpart H, including a guarantor, insurer, risk retention group, surety, issuer of a letter of credit, issuer of a state-required mechanism, or a state.

005.14. "Substantial business relationship" means the extent of a business relationship necessary under Nebraska law to make a guarantee contract issued incident to that relationship valid and enforceable. A guarantee contract is issued "incident to that relationship" if it arises from and depends on existing economic transactions between the guarantor and the owner or operator.

005.15. "Substantial governmental relationship" means the extent of a governmental relationship necessary under Nebraska law to make an added guarantee contract issued incident to that relationship valid and enforceable. A guarantee contract is issued "incident to that relationship" if it arises from a clear commonality of interest in the event of an UST release such as coterminous boundaries, overlapping constituencies, common ground-water aquifer, or other relationship other than monetary compensation that provides a motivation for the guarantor to provide a guarantee.

005.16. "Tangible net worth" means the tangible assets that remain after deducting liabilities; such assets do not include intangibles such as goodwill and rights to patents or royalties. For purposes of this definition, "assets" means all existing and all probable future economic benefits obtained or controlled by a particular entity as a result of past transactions.

006. AMOUNT AND SCOPE OF FINANCIAL RESPONSIBILITY

006.01. Owners or operators of petroleum underground storage tanks must demonstrate financial responsibility for taking corrective action and for compensating third parties for bodily injury and property damage caused by accidental releases arising from the operation of petroleum underground storage tanks in at least the following per-occurrence amounts:

006.01A. For owners or operators of petroleum underground storage tanks that are located at petroleum marketing facilities, or that handle an average of more than 10,000 gallons of petroleum per month based on annual throughput for the previous calendar year; \$1 million.

006.01B. For all other owners or operators of petroleum underground storage tanks; \$500,000.

006.02. Owners or operators of petroleum underground storage tanks must demonstrate financial responsibility for taking corrective action and for compensating third parties for bodily injury property damage caused by accidental releases arising from the operation of petroleum underground storage tanks in at least the following annual aggregate amounts:

006.02A. For owners or operators of 1 to 100 petroleum underground storage tanks, \$1 million; and

006.02B. For owners or operators of 101 or more petroleum underground storage tanks, \$2 million.

006.03. For the purposes of §§006.02 and 006.06 of this chapter, only, "a petroleum underground storage tank" means a single containment unit and does not mean combinations of single containment units.

006.04. Except as provided in §006.05 of this chapter, if the owner or operator uses separate mechanisms or separate combinations of mechanisms to demonstrate financial responsibility for:

006.04A. Taking corrective action;

006.04B. Compensating third parties for bodily injury and property damage caused by sudden accidental release; or

006.04C. Compensating third parties for bodily injury and property damage caused by nonsudden accidental releases, the amount of assurance provided by each mechanism or combination of mechanisms must be in the full amount specified in §§006.01 and 006.02 of this chapter.

006.05. If an owner or operator uses separate mechanisms or separate combinations of mechanisms to demonstrate financial responsibility for different petroleum underground storage tanks, the annual aggregate required shall be based on the number of tanks covered by each such separate mechanism or combination of mechanisms.

006.06. Owners or operators shall review the amount of aggregate assurance provided whenever additional petroleum underground storage tanks are acquired or installed. If the number of petroleum underground storage tanks for which assurance must be provided exceeds 100, the owner or operator shall demonstrate financial responsibility in the amount of at least \$2 million of annual aggregate assurance by the anniversary of the date on which the mechanism demonstrating financial responsibility became effective. If assurance is being demonstrated by a combination of mechanisms, the owner or operator shall demonstrate financial responsibility in the amount of at least \$2 million of annual aggregate assurance by the first-occurring effective date anniversary of any one of the mechanisms combined (other than a financial test or guarantee) to provide assurance.

006.07. The amounts of assurance required under this section exclude legal defense costs.

006.08. The required per-occurrence and annual aggregate coverage amounts do not in any way limit the liability of the owner or operator.

007. ALLOWABLE MECHANISMS AND COMBINATIONS OF MECHANISMS

007.01. An owner or operator may use any one or a combination of the mechanisms listed in §§280.95 through 280.105 of 40 CFR Part 280, Subpart H, to demonstrate financial responsibility under this chapter for one or more petroleum underground storage tanks. These mechanisms are found in the Appendix and are hereby incorporated by this reference.

007.02. A local government owner or operator may use any one or combination of the mechanisms listed in §§280.104 through 280.107 of 40 CFR Part 280, Subpart H, to demonstrate financial responsibility under this chapter for one or more underground storage tanks. These mechanisms are found in the Appendix and are hereby incorporated by this reference.

007.03. An owner or operator may use self-insurance in combination with a guarantee only if, for the purpose of meeting the requirement of the financial test under the federal rule, the financial statements of the owner or operator are not consolidated with the financial statements of the guarantor.

008. SUBSTITUTIONS OF FINANCIAL ASSURANCE MECHANISMS BY OWNER OR OPERATOR

008.01. An owner or operator may substitute any alternate financial assurance mechanisms as specified in this chapter, provided that at all times he or she maintains an effective financial assurance mechanism or combination of mechanisms that satisfies the requirements of §§006 and 007.

008.02. After obtaining alternate financial assurance as specified in this chapter, an owner or operator may cancel a financial assurance mechanism by providing notice to the provider of financial assurance.

009. CANCELLATION OR NONRENEWAL BY A PROVIDER OF FINANCIAL ASSURANCE

009.01. Except as otherwise provided, a provider of financial assurance may cancel or fail to renew an assurance mechanism by sending a notice of termination by certified mail to the owner or operator.

009.01A. Termination of a local government guarantee, a guarantee, a surety bond, or a letter of credit may not occur until 120 days after the date on which the owner or operator receives the notice of termination, as evidenced by the return receipt.

009.01B. Termination of insurance or risk retention group coverage, except for non-payment or misrepresentation by the assured, or state funded assurance may not occur until 60 days after the date on which the owner or operator receives the notice of termination, as evidenced by the return receipt. Termination for non-payment of premium or misrepresentation by the insured may not occur until a minimum of 10 days after the date on which the owner or operator receives the notice of termination, as evidenced by the return receipt.

009.02. If a provider of financial responsibility cancels or fails to renew for reasons other than incapacity of the provider as specified in §011, the owner or operator must obtain alternate coverage as specified in this section within 60 days after receipt of the notice of termination. If the owner or operator fails to obtain alternate coverage within 60 days after receipt of the notice of termination, the owner or operator must notify the State Fire Marshal of such failure and submit:

009.02A. The name and address of the provider of financial assurance;

009.02B. The effective date of termination; and

009.02C. The evidence of the financial assistance mechanism subject to the termination maintained in accordance with §012.02.

010. REPORTING BY OWNER OR OPERATOR

010.01. An owner or operator must submit the appropriate forms listed in §011.02 documenting current evidence of financial responsibility to the State Fire Marshal, FLST Division:

010.01A. Within 30 days after the owner or operator identifies a release from an underground storage tank required to be reported under Chapter 8.

010.01B. If the owner or operator fails to obtain alternate coverage as required by this chapter, within 30 days after the owner or operator receives notice of:

010.01B1. Commencement of a voluntary or involuntary proceeding under Title 11 (Bankruptcy), U.S. Code, naming a provider of financial assurance as a debtor,

010.01B2. Suspension or revocation of the authority of a provider of financial assurance to issue a financial assurance mechanism,

010.01B3. Failure of a guarantor to meet the requirements of the financial test,

010.01B4. Other incapacity of a provider of financial assurance; or

010.01C. As required by §280.95(g) of 40 CFR Part 280, Subpart H and §009.02 of this chapter.

010.02. An owner or operator must certify compliance with the financial responsibility requirements of this chapter as specified in the new tank notification form when notifying the State Fire Marshal of the installation of a new underground storage tank.

010.03. The State Fire Marshal may require an owner or operator to submit evidence of financial assurance as described in §011.02 or other information relevant to compliance with this chapter at any time.

011. RECORD KEEPING

011.01. Owners or operators must maintain evidence of all financial assurance mechanisms used to demonstrate financial responsibility under this chapter for an underground storage tank until released from the requirements of this chapter under §012. An owner or operator must maintain such evidence at the

underground storage tank site or another location approved by the State Fire Marshal.

011.02. An owner or operator must maintain the following types of evidence of financial responsibility:

011.02A. An owner or operator using an assurance mechanism specified in §007.01 must maintain a copy of the instrument worded as specified.

011.02B. An owner or operator using a financial test or guarantee, or a local government financial test, or a local government guarantee supported by the local government financial test must maintain a copy of the chief financial officer's letter based on year-end financial statements for the most recent completed financial reporting year. Such evidence must be on file no later than 120 days after the close of the financial reporting year.

011.02C. An owner or operator using a guarantee, surety bond, or letter of credit must maintain a copy of the signed standby trust fund agreement and copies of any amendments to the agreement.

011.02D. An owner or operator using an insurance policy or risk retention group coverage must maintain a copy of the signed insurance policy or risk retention group coverage policy, with the endorsement or certificate of insurance and any amendments to the agreements.

011.02E. A local government owner or operator using a local government guarantee under §280.106(d) of 40 CFR Part 280, Subpart H, must maintain a copy of the signed standby trust fund agreement and copies of any amendments to the agreements.

011.02F. A local government owner or operator using the local government

011.02G. A local government owner or operator using the local government guarantee under §280.106 of 40 CFR Part 280, Subpart H, where the guarantor's demonstration of financial responsibility relies on the bond rating test under §280.104 of 40 CFR Part 280, Subpart H, must maintain a copy of the guarantor's bond rating published within the last twelve months by Moody's or Standard & Poor's.

011.02H. An owner or operator covered by a state fund or other state assurance must maintain on file a copy of any evidence of coverage supplied by or required by the state under §280.101(d) of 40 CFR Part 280, Subpart H.

011.02I. An owner or operator using a local government fund under §280.107 of 40 CFR Part 280, Subpart H, must maintain the following documents:

011.02I1. A copy of the state constitutional provision or local government statute, charter, ordinance, or order dedicating the fund, and

011.02I2. Year-end financial statements for the most recent completed financial reporting year showing the amount in the fund. If the fund is established under §280.107(a)(3) of 40 CFR Part 280, Subpart H, using incremental funding backed by bonding authority, the financial statements must show the previous year's balance, the amount of funding during the year, and the closing balance in the fund.

011.02I3. If the fund is established under §280.107(a)(3) of 40 CFR Part 280, Subpart H, using incremental funding backed by bonding authority, the owner or operator must also maintain documentation of the required bonding authority, including either the results of voter referendum (under §280.107(a)(3)(i)), or attestation by the State Attorney General as specified under §280.107(a)(3)(ii) of 40 CFR Part 280, Subpart H.

011.01J. A local government owner or operator using the local government guarantee supported by the local government fund must maintain a copy of the guarantor's year-end financial statements for the most recent completed financial reporting year showing the amount of the fund.

011.02K. An owner or operator using an assurance mechanism specified in §§280.95 through 280.102 of 40 CFR Part 280, Subpart H, must maintain an updated copy of a certification of financial responsibility worded as follows, except that instructions in brackets are to be replaced with the relevant information and the brackets deleted:

Certification of Financial Responsibility

[Owner or operator] hereby certifies that it is in compliance with the requirements of Chapter 9, Title 159, NAC.

The financial assurance mechanism[s] used to demonstrate financial responsibility under this title is [are] as follows:

[For each mechanism, list the type of mechanism, name of issuer, mechanism number (if applicable), amount of coverage, effective period of coverage and whether the mechanism covers "taking corrective action" and/or "compensating third parties for bodily injury and property damage caused by" either "sudden accidental releases" or "nonsudden accidental releases" or "accidental releases."]

[Signature of owner or operator]

[Name of owner or operator]

[Title]
[Date]
[Signature of witness or notary]
[Name of witness or notary]
[Date]

The owner or operator must update this certification whenever the financial assurance mechanism(s) used to demonstrate financial responsibility change(s).

012. RELEASE FROM THE REQUIREMENTS

An owner or operator is no longer required to maintain financial responsibility under this chapter for an underground storage tank after the tank has been permanently closed or, if corrective action is required, after corrective action has been completed and the tank has been properly closed as required by Chapter 10 of this title.

013. BANKRUPTCY OR OTHER INCAPACITY OF OWNER OR OPERATOR OF PROVIDER OF FINANCIAL ASSURANCE

013.01. Within 10 days after commencement of a voluntary or involuntary proceeding under Title 11 (Bankruptcy), U.S. Code, naming an owner or operator as debtor, the owner or operator must notify the State Fire Marshal by certified mail of such commencement and submit the appropriate forms listed in §011.02 documenting current financial responsibility.

013.02. Within 10 days after commencement of a voluntary or involuntary proceeding under Title 11 (Bankruptcy), U.S. Code, naming a guarantor providing financial assurance as debtor, such guarantor must notify the owner or operator by certified mail of such commencement as required under the terms of the guarantee specified in §280.96 of 40 CFR Part 280, Subpart H.

013.03. Within 10 days after commencement of a of a voluntary or involuntary proceeding under Title 11 (Bankruptcy), U.S. Code, naming a local government owner or operator as debtor, the local government owner or operator must notify the State Fire Marshal by certified mail of such commencement and submit the appropriate forms listed in §011.02 documenting current financial responsibility.

013.04. Within 10 days after commencement of a voluntary or involuntary proceeding under Title 11 (Bankruptcy), U.S. Code, naming a guarantor providing a local government financial assurance as debtor, such guarantor must notify the local government owner or operator by certified mail of such commencement as required under the terms of the guarantee specified in §280.106 of 40 CFR Part 280, Subpart H.

013.05. An owner or operator who obtains financial assurance by a mechanism other than the financial test of self-insurance will be deemed to be without the required financial assurance in the event of a bankruptcy or incapacity of its provider of financial assurance, or a suspension or revocation of the authority of the provider of financial assurance to issue a guarantee, insurance policy, risk retention group coverage policy, surety bond, letter of credit, or state-required mechanism. The owner or operator must obtain alternate financial assurance as specified in this chapter within 30 days after receiving notice of such an event. If the owner or operator does not obtain alternate coverage within 30 days after such notification, he or she must notify the State Fire Marshal.

013.06. Within 30 days after receipt of notification that a state fund or other state assurance has become incapable of paying for assured corrective action or third-party compensation costs, the owner or operator must obtain alternate financial assurance.

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Nebraska State Fire Marshal