

CHAPTER 2890
DEPARTMENT OF COMMERCE
PETROLEUM TANK RELEASES

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2890.0010 DEFINITIONS.

Subpart 1. **Scope.** For purposes of this chapter, the terms in this part have the meanings given them.

Subp. 2. **Agency.** "Agency" means the Pollution Control Agency.

Subp. 2a. **Board.** "Board" means the petroleum tank release compensation board.

Subp. 3. **Commissioner.** "Commissioner" means the commissioner of the Pollution Control Agency.

Subp. 3a. **Consultant services.** "Consultant services" means professional consulting, investigation, or design services.

Subp. 3b. **Contractor services.** "Contractor services" means products and services within a scope of work that can be defined by typical written plans and specifications including, but not limited to, excavation, treatment of contaminated soil and groundwater, soil borings and well installations, laboratory analysis, surveying, electrical, plumbing, carpentry, and equipment.

Subp. 4. **Corrective action.** "Corrective action" means an action taken to minimize, eliminate, or clean up a release to protect the public health and welfare or the environment.

Subp. 5. **Person.** "Person" means an individual, partnership, association, public or private corporation, or other legal entity, including the United States government, an interstate commission or other body, the state, or any agency, board, bureau, office, department, or political subdivision of the state.

Subp. 6. **Responsible person.** "Responsible person" means a person who is an owner or operator of a tank at any time during or after the release, except as provided in Minnesota Statutes, section 115C.021, subdivision 2.

Subp. 7. **Volunteer.** "Volunteer" means a person who:

- A. is not a responsible person under Minnesota Statutes, section 115C.02;
- B. holds legal or equitable title to the property where a release occurred; and
- C. incurs reimbursable costs on or after May 23, 1989.

Statutory Authority: *MS s 46.023; 115C.07*

History: *12 SR 2142; 13 SR 496; 14 SR 1928; 15 SR 2266; 16 SR 2684*

2890.0020 BOARD MEETINGS; TIME, PLACE, NOTICE.

Subpart 1. **Regular meetings.** A regular meeting of the board must be scheduled at least four times a year. A scheduled meeting may be canceled if there is insufficient business.

Subp. 2. **Special meetings.** A special meeting may be called by the chair or by written request of three board members.

Statutory Authority: *MS s 115C.07 subd 3*

History: *12 SR 2142*

2890.0030 VICE-CHAIR.

A vice-chair shall be elected by the board. The vice-chair shall preside at regular and special meetings in the absence of the chair and perform other duties assigned by the board.

Statutory Authority: *MS s 115C.07 subd 3*

History: *12 SR 2142*

2890.0040 CONDUCT OF MEETINGS.

Subpart 1. **Quorum.** A quorum shall consist of three board members.

Subp. 2. **Minutes.** Meetings shall be tape recorded and minutes prepared by staff.

Subp. 3. **Parliamentary procedure.** Except as specifically provided by statute or negotiation, Robert's Rules of Order shall govern questions that may arise at a meeting of the board.

Statutory Authority: *MS s 115C.07 subd 3*

History: *12 SR 2142*

2890.0050 CONFLICT OF INTEREST.

A member of the board who has a direct or indirect financial or employment interest relating to a matter before the board, which interest is reasonably likely to affect impartiality or judgment in the matter, shall make known the interest and shall refrain from participating in, or voting upon, the matter. The abstention of a board member or members shall not prevent the remaining members from conducting a legal vote.

Statutory Authority: *MS s 115C.07 subd 3*

History: *12 SR 2142*

2890.0060 REIMBURSEMENT OF COSTS.

Subpart 1. **Generally.** Each responsible person who has incurred reimbursable costs after June 4, 1987, in response to a release, and each volunteer who has incurred reimbursable costs on or after May 23, 1989, in response to a release, may apply to the board for partial reimbursement of eligible costs.

Subp. 2. **Conditions for reimbursement.** A reimbursement may not be made unless the board determines that the commissioner has determined that the corrective action has, or when completed will have, adequately addressed the release in terms of public health, welfare, and the environment.

Subp. 2a. **Amount of reimbursement.** The board shall reimburse a responsible person or volunteer who is eligible for 90 percent of the portion of the total reimbursable costs or \$1,000,000, whichever is less.

Subp. 2b. **Reduced reimbursement.** The board shall reduce the amount of reimbursement to be made under this part if it finds that the responsible person or volunteer has not complied with one or more of the following requirements:

A. at the time of the release the tank was in substantial compliance with state and federal rules and regulations applicable to the tank, including rules or regulations relating to financial responsibility;

B. the agency was given notice of the release as required by Minnesota Statutes, section 115.061;

C. the responsible person or volunteer, to the extent possible, fully cooperated with the agency in responding to the release;

D. if the responsible person is an operator, the person exercised due care with regard to operation of the tank, including maintaining inventory control procedures; and

E. the reimbursement shall be reduced as much as 100 percent for failure by the responsible person or volunteer to comply with items A to D. In determining the amount of the reimbursement reduction, the board shall consider:

(1) the likely environmental impact of the noncompliance;

(2) whether the noncompliance was negligent, knowing, or willful;

(3) the deterrent effect of the award reduction on other tank owners and operators; and

(4) the amount of reimbursement reduction recommended by the commissioner.

Subp. 3. **Multiple responsible persons.** If there is more than one responsible person or volunteer who incurs reimbursable costs for a single release or at a single corrective action site, each responsible person or volunteer must apply separately for reimbursement. Not

more than \$1,000,000 may be reimbursed for costs associated with a single release, regardless of the number of persons eligible for reimbursement.

Subp. 4. Eligibility of other persons. Notwithstanding Minnesota Statutes, section 115.09, subdivisions 1 to 3, the board shall provide full reimbursement to a person who has taken corrective action if the board determines that:

A. the person took the corrective action in response to a request or order of the commissioner made under Minnesota Statutes, chapter 115C;

B. the commissioner has determined that the person was not a responsible person or volunteer under Minnesota Statutes, section 115C.02; and

C. the costs for which reimbursement is requested were actually incurred and were reasonable.

Statutory Authority: *MS s 46.023; 115C.07*

History: *12 SR 2142; 13 SR 496; 14 SR 1928; 15 SR 2266*

2890.0065 REDUCTION OF REIMBURSEMENT AMOUNT.

Subpart 1. Amount of reduction. Pursuant to Minnesota Statutes, section 115C.09, subdivision 2, the board shall reduce the amount of reimbursement to be made to a noncompliant responsible person as follows:

A. For failure to comply with state and federal rules and regulations applicable to the tank, the board shall reduce the amount of reimbursement by ten to 25 percent upon consideration of the likely environmental impact of the failure to comply. Notwithstanding the foregoing, the board shall reduce the amount of reimbursement by five percent, with a minimum reduction of \$200, for failure to register a tank pursuant to Minnesota Statutes, section 116.48.

B. For failure to report a release as required by Minnesota Statutes, section 115.061, the board shall reduce the amount of reimbursement by ten to 25 percent upon consideration of the likely environmental impact of the failure to report.

C. For failure to cooperate with the agency in responding to the release, the board shall reduce the amount of reimbursement by 25 to 50 percent upon consideration of the likely environmental impact of the failure to cooperate.

D. For failure to exercise due care with regard to operation of the tank, the board shall reduce the amount of reimbursement by 25 to 50 percent upon consideration of the likely environmental impact of the failure to exercise due care.

Subp. 2. Cumulative application. The reduction percentages specified in subpart 1 shall be applied on a cumulative basis.

Subp. 3. Deviations. The board may increase or decrease the amount of reduction by up to 50 percent of the original amount of reimbursement if warranted upon consideration of the following factors:

A. the public interest;

B. the deterrent effect of the award reduction on other tank owners and operators;

C. the amount of reimbursement reduction recommended by the commissioner;

and

D. whether the noncompliance was knowing or willful.

Statutory Authority: *MS s 115C.07*

History: *15 SR 2266*

2890.0070 ELIGIBLE COSTS.

Subpart 1. Reimbursable corrective actions. Costs associated with the following corrective actions may be eligible for reimbursement from the fund:

A. Emergency response and initial site hazard mitigation. Costs may include, but are not limited to, those necessary to abate acute risks to human health, safety, and the environment.

B. Temporary site hazard control measures. Costs may include, but are not limited to, temporary provision of drinking water and housing, initial abatement of vapors, and removal of free product.

C. Investigation and source identification including, but not limited to, collecting and analyzing soil samples, testing the groundwater, testing adjacent drinking water supplies, tank integrity testing, and engineering services.

D. Development of a corrective action plan in accordance with the commissioner's requirements.

E. Clean up of releases including, but not limited to, removal, treatment, or disposal of surface and subsurface contamination and provision of a permanent alternative water supply. Clean up must be performed in accordance with a corrective action plan approved by the commissioner.

Subp. 2. [Repealed, 16 SR 2684]

Statutory Authority: *MS s 46.023; 115C.07*

History: *12 SR 2142; 14 SR 1928; 15 SR 2266; 16 SR 2684*

2890.0075 DOCUMENTATION OF REASONABLENESS.

Subpart 1. **Generally.** The applicant shall prove the reasonableness of all incurred eligible costs. Effective for any contract entered into or commenced on or after June 15, 1992, the applicant shall solicit a minimum of two written competitive bids for each contractor service, and two written proposals for consultant services. The board shall pay only those costs it determines to be reasonable.

Subp. 2. **Contractor services; bids.** The applicant or its agent shall solicit, publicly or privately, a minimum of two written competitive bids in a form prescribed by the board based upon comparable unit costs for each contractor service performed in connection with corrective action from contractors considered by the applicant or its agent to be qualified and who shall have all necessary licenses and government approvals for the work to be performed.

Copies of the written bids shall be submitted to the board with the application for reimbursement. Unit costs substantially in excess of those in the bid of the lowest qualified bidder shall be considered prima facie unreasonable by the board.

Subp. 3. **Consultant services; proposals.** The applicant shall solicit a minimum of two written proposals for consultant services from consultants considered by the applicant to be qualified in a form prescribed by the board setting forth the qualifications of the consultant and estimates of costs for consulting services. The applicant must make a good faith effort to assure that the costs in the proposal selected are reasonable considering the qualifications of the consultant and the services to be performed.

Copies of the written proposals shall be submitted to the board with the application for reimbursement. The board shall require the applicant to justify the reasonableness of the costs in the proposal selected if the reasonableness of the costs is not apparent in the documentation submitted with the application.

The applicant may present evidence of reasonableness by a showing that the lowest cost proposal was selected, or that the services to be performed or the selected consultant's qualifications, including, but not limited to, education, experience, certifications and registrations, health and safety training, insurance, availability and references, justified the selection of a higher cost proposal.

Subp. 4. **Exemptions.** The applicant shall be granted an exemption from the requirement that a minimum of two bids be obtained for each contractor service or a minimum of two proposals be obtained for consultant services:

A. if the board determines that the applicant has provided satisfactory evidence:

(1) that only one contractor or consultant was reasonably available to perform the necessary service and that costs are not substantially in excess of costs charged for similar services by a comparable contractor or consultant in the same geographical area; or

(2) that the necessary services were required by an emergency, including the abatement of free product, for which there was not sufficient time to obtain bids or proposals; or

B. if the board makes an annual determination that the applicant has established that a standing contract that was entered into via a bidding or evaluation process will result in reasonable corrective action costs by providing to the board:

(1) documentation of the bidding process that led to the standing contract for contractor services or a written explanation of the evaluation process that led to the standing contract for consultant services; and

(2) a written explanation of why the standing contract results in lower corrective action costs than obtaining bids or proposals on a per job basis.

Subp. 5. Reasonableness of incurred costs. Notwithstanding subparts 1 to 4, the board may consider all invoice costs submitted for reimbursement to determine whether the costs incurred are reasonable.

Statutory Authority: *MS s 115C.07*

History: *16 SR 2684*

2890.0080 INELIGIBLE COSTS.

All costs associated with actions that do not minimize, eliminate, or clean up a release to protect the public health and welfare or the environment are ineligible costs. Ineligible costs include, but are not limited to, any costs related to the permanent repair or replacement of a tank, upgrading tanks, removal of tanks, loss of income, attorney's fees, permanent relocation of residents, decreased property values, reimbursement for the responsible person's own time spent in planning and administering a corrective action plan, aesthetic improvements, or any work performed that is not in compliance with safety codes including but not limited to Occupational Safety and Health Administration requirements, well codes, and fire codes. Other ineligible costs include corrective action costs which are covered under an insurance or other contract for initial and supplemental applications received by the board after October 21, 1991.

Statutory Authority: *MS s 115C.07*

History: *12 SR 2142; 16 SR 958*

2890.0090 APPLICATION PROCESS.

Subpart 1. Applications. A person who requests compensation from the fund shall complete, sign, and submit to the board a written application. The application shall be made on a form prescribed by the board and shall contain at least the following:

A. the name of the person making the application;

B. a description of the site of the release;

C. (1) for costs associated with corrective action related to soil contamination, a copy of the commissioner's approval of a soil corrective action plan, or evidence that a proposed soil corrective action plan has been submitted to the commissioner; or

(2) for costs associated with corrective action that will address the entire release, including groundwater if necessary, a copy of the commissioner's approval of a comprehensive corrective action plan, or evidence that a proposed comprehensive corrective action plan has been submitted to the commissioner; or

(3) a closure letter issued by the commissioner;

D. an itemized list of all corrective actions taken, the eligible costs associated with the actions, and the name of the engineer, contractor, or subcontractor who performed the action; and

E. documentation of solicitation of competitive bids or proposals or qualification for exemption as required by part 2890.0075.

Subp. 2. Time of application. The application and all accompanying documentation must be received by the board's office 30 days before a board meeting in order for reimbursement to be considered at that meeting. The board may waive the 30-day requirement, if it finds that undue financial hardship to the applicant will result if action is delayed until the next regular meeting.

Subp. 3. Subsequent applications. An eligible responsible person or volunteer who has already obtained partial reimbursement from the board and who has incurred additional or continuing eligible costs due to the same release may reapply if:

A. the amount of the person's original reimbursement was less than 90 percent of the eligible costs or \$1,000,000, whichever is less.

B. the eligible costs submitted on a subsequent application are not related to any new releases at the site.

The total reimbursement to a responsible person or volunteer for a release shall not exceed 90 percent of the total eligible costs or \$1,000,000, whichever is less, regardless of the number of applications for reimbursement submitted by the responsible person or volunteer.

Subp. 4. **Signatures.** An application must be signed as follows:

A. for a corporation, by a principal executive officer of at least the level of vice-president or the duly authorized representative or agent of the executive officer if the representative or agent is responsible for the overall operation of the facility that is the subject of the application or a person whom the board of directors designates by means of a corporate resolution;

B. for a partnership, sole proprietorship or individual, by a general partner, the proprietor, or individual respectively; or

C. for a municipality, state, federal, or other public agency, by either a principal, executive officer, or ranking elected official.

Subp. 5. **Certification.** 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 certify that if I have submitted invoices for costs that I have incurred but that remain unpaid, I will pay those invoices within 30 days of receipt of reimbursement from the board. I understand that if I fail to do so, the board may demand return of all or any portion of reimbursement paid to me and that if I fail to comply with the board's demand, that the board may recover the reimbursement, plus administrative and legal expenses in a civil action in district court. I understand that I may also be subject to a civil penalty."

Additionally, if the responsible person is not an individual, the person authorized under subpart 4 shall make the following certification: "I further certify that I am authorized to sign and submit this application on behalf of (entity)."

Subp. 6. **Report of the commissioner.** Upon notification by the board's staff that a complete application has been received, the commissioner shall, in a timely manner, provide the board with a written report on the applicant's compliance or noncompliance with Minnesota Statutes, section 115C.09, subdivision 2, paragraphs (b) and (c). The report shall include documentation supporting the commissioner's findings. The commissioner shall file the report with the board no later than 15 days after notification.

In addition, the board may, as it deems necessary, request additional information from the commissioner or can request participation of agency staff at a board meeting. All responses to requests for information shall be delivered in a timely manner. The board may delegate these powers to its staff.

Statutory Authority: *MS s 46.023; 115C.07*

History: *12 SR 2142; 14 SR 1928; 15 SR 2266; 16 SR 2684*

2890.0100 REVIEW AND DETERMINATION.

Subpart 1. **Review.** The board's staff shall review all applications. If the staff finds that the application is incomplete or otherwise deficient, the staff shall promptly advise the applicant of the incompleteness or deficiency. Further processing of the application affected by the deficiency shall be suspended until the applicant has supplied the necessary information or otherwise corrected the deficiency. A complete application and the corresponding report of the commissioner constitutes the written record.

Subp. 2. **Staff recommendation.** After a reimbursement application is complete and the commissioner has provided the information relevant to the application, the board's staff shall make a recommendation as to the eligibility of the applicant and the costs specified in the application.

Subp. 3. **Board determination.** The board shall determine the amount of the reimbursement based on those costs it finds are eligible, actually incurred, and reasonable. The determination shall be made on the basis of the written record. The board may also allow supplemental information explaining the application to be presented orally. The board may establish a fair and reasonable limit on time allowed for oral presentation.

The applicant shall be notified in writing within ten days of the board's decision. If the board rejects any portion of the request for reimbursement, a statement of the reasons for rejection shall be included with the notification.

Statutory Authority: *MS s 115C.07 subd 3*

History: *12 SR 2142*

2890.0110 RIGHT TO APPEAL.

A person may appeal a determination by the board as a contested case hearing under Minnesota Statutes, chapter 14.

Statutory Authority: *MS s 115C.07*

History: *12 SR 2142; 15 SR 2266*

2890.0120 FUNDING OF MPCA ACTIONS.

In accordance with Minnesota Statutes, section 115C.10, subdivision 1, paragraph (a), the agency may apply to the board for money to pay for actions taken under Minnesota Statutes, section 115C.03, if all other state and federal funds appropriated for such actions have been exhausted. The application shall consist of a written statement of proposed corrective actions, an itemized estimate of costs for the proposed actions, and documentation that applicable state appropriations and federal awards have been exhausted by actions authorized under Minnesota Statutes, section 115C.03.

The board shall pay the agency the cost of the proposed actions if the board determines that:

- A. applicable state and federal funds are exhausted;
- B. the agency's proposed actions are authorized under Minnesota Statutes, section 115C.03; and
- C. an adequate amount exists in the fund to pay for the proposed actions.

Statutory Authority: *MS s 115C.07 subd 3*

History: *12 SR 2142*

2890.0130 ACTION ON NOTICE OF LIEN FILING.

In accordance with Minnesota Statutes, section 514.673, the commissioner shall send written notice of intent to file an environmental lien notice to each board member. If a regular meeting of the board is to be held within 30 days of receipt of the commissioner's notice, the approval of the lien filing must be considered at the next regular meeting. If no regular meeting is scheduled within the 30 day period, a special meeting to consider approval of the lien filing shall be scheduled at the request of at least one board member. If the board takes no action on the matter within the 30 day period, the commissioner may file the lien notice.

Statutory Authority: *MS s 115C.07 subd 3*

History: *13 SR 496*