

TITLE 20 ENVIRONMENTAL PROTECTION
CHAPTER 5 PETROLEUM STORAGE TANKS
PART 121 CORRECTIVE ACTION FUND USE AND EXPENDITURES

20.5.121.1 ISSUING AGENCY: New Mexico Environmental Improvement Board.
[20.5.121.1 NMAC - N, 07/24/2018]

20.5.121.2 SCOPE: This part applies to owners and operators of storage tanks as provided in 20.5.101 NMAC and to the use of the corrective action fund. If the owner and the operator of a storage tank are separate persons, only one person is required to comply with the requirements of this part; however, both parties are liable in the event of noncompliance.
[20.5.121.2 NMAC - N, 07/24/2018]

20.5.121.3 STATUTORY AUTHORITY: This part is promulgated pursuant to the provisions of the Ground Water Protection Act, sections 74-6B-1 through 74-6B-14 NMSA 1978, and the general provisions of the Environmental Improvement Act, sections 74-1-1 through 74-1-16 NMSA 1978.
[20.5.121.3 NMAC - N, 07/24/2018]

20.5.121.4 DURATION: Permanent.
[20.5.121.4 NMAC - N, 07/24/2018]

20.5.121.5 EFFECTIVE DATE: July 24, 2018, unless a later date is indicated in the bracketed history note at the end of a section.
[20.5.121.5 NMAC - N, 07/24/2018]

20.5.121.6 OBJECTIVE: The purposes of this part are (1) to establish priorities for the use of the corrective action fund at sites contaminated by releases of regulated substances from storage tanks and (2) to specify procedures for administering the fund in conjunction with the procedures set forth in 20.5.123 NMAC, adopted by the New Mexico environment department.
[20.5.121.6 NMAC - N, 07/24/2018]

20.5.121.7 DEFINITIONS: The definitions in 20.5.101 NMAC and the Ground Water Protection Act apply to this part. In the case of conflict, the definitions in the Ground Water Protection Act shall apply to this part.
[20.5.121.7 NMAC - N, 07/24/2018]

20.5.121.8 to 20.5.121.2099 [RESERVED]

20.5.121.2100 PERMISSIBLE FUND EXPENDITURES: The department shall make expenditures from the fund that are necessary to take emergency corrective action, to investigate releases and undertake other corrective action in accordance with the priorities established in this part, to make payments to or on behalf of owners and operators as provided in 20.5.123 NMAC, to pay for the department's reasonable costs of administering the fund, to pay for the department's costs associated with the recovery of expenditures from the fund pursuant to section 74-6B-8 NMSA 1978, including related legal costs, and to pay the state's share of federal leaking underground storage tank trust fund cleanup costs as required by the federal Resource Conservation and Recovery Act. The department shall keep records of the expenditures made from the fund and shall make those records available to the interim legislative finance committee upon request.
[20.5.121.2100 NMAC - N, 07/24/2018]

20.5.121.2101 CORRECTIVE ACTION BY OWNERS AND OPERATORS: Owners and operators shall take corrective action in accordance with 20.5.118 NMAC and 20.5.119 or 20.5.120 NMAC, and the department shall make payments to or on behalf of owners and operators in accordance with section 74-6B-13 NMSA 1978 and the provisions of 20.5.123 NMAC. The department shall designate a site where the owner or operator takes corrective action and applies to the fund for payment of corrective action costs as a responsible party-lead site.
[20.5.121.2101 NMAC - N, 07/24/2018]

20.5.121.2102 CORRECTIVE ACTION BY THE DEPARTMENT - INFORMATION REQUIRED:

A. When the department determines that the owners and operators are unknown, unable or unwilling to take corrective action as described in 20.5.121.2101 NMAC, or when the department determines that a single entity is necessary to lead the corrective action, the department may designate the site as a state-lead site and take corrective action using the fund.

B. To make a determination that the owner and operator are unknown, the department shall, as appropriate:

- (1) investigate site specifics;
- (2) ascertain the current status and past history of the tanks at the site and determine the compliance status of the tanks; and
- (3) review and document search results of all additional reasonably available records.

C. To make a determination that the owner and operator are unable to take corrective action, the department shall, as appropriate:

- (1) investigate site specifics;
- (2) ascertain the current status and past history of the tanks at the site and determine the compliance status of the tanks;
- (3) request and review the owner's and operator's documentation of mental or physical inability, including but not limited to physician statements and court orders;
- (4) request and review the owner's and operator's financial records for the past two years, including but not limited to federal tax returns, and evaluate the owner's and operator's ability to pay, based on anticipated costs of remediation; and

- (5) review and document search results of all additional reasonably available records.

D. To make a determination that the owner and operator are unwilling to take corrective action, the department shall, as appropriate:

- (1) investigate site specifics;
- (2) ascertain the liable owner and operator and identify any other owner and operator that may be liable;
- (3) review and document search results of all additional reasonably available records; and
- (4) send a notice of violation, return receipt requested, to the appropriate owner and operator.

E. To make a determination that a single entity is necessary to lead the corrective action, or in the case of danger to human health and the environment, the department shall, as appropriate:

- (1) investigate site specifics;
- (2) ascertain the current status and past history of the tanks at the site and determine the compliance status of the tanks; and
- (3) review and document search results of all additional reasonably available records.

[20.5.121.2102 NMAC - N, 07/24/2018]

20.5.121.2103 CORRECTIVE ACTION BY THE DEPARTMENT - OWNER AND OPERATOR NOTIFICATION:

A. Upon a determination that a site be designated a state-lead site, the department shall send a notice to the owner and operator, if known, with the division director's signature notifying the owner and operator that the site is being designated a state-lead site and that the department may initiate an action for recovery of its costs of corrective action from the owner and operator pursuant to Subsection C of this section.

B. When the department takes corrective action at sites as described in 20.5.121.2102 NMAC, it shall do so in accordance with the provisions of 20.5.121.2104 NMAC.

C. The department may recover the costs of corrective action taken under 20.5.121.2102 NMAC from the owner or operator, unless the owner or operator demonstrates compliance as required by section 74-6B-8 NMSA 1978 and the provisions of 20.5.123 NMAC.

D. Owners and operators at sites where the department has taken corrective action under this section shall assume responsibility for and control of the corrective action when required or permitted by the department. Any request by the owner and operator to change the designation of a site from a state-lead site to a responsible party-lead site shall be in writing, shall state the reasons why corrective action by the department is no longer necessary, and shall include appropriate documentation to support the request. The department may request additional documentation from the owner and operator, shall respond to the request in writing and shall state the reasons for its decision.

[20.5.121.2103 NMAC - N, 07/24/2018]

20.5.121.2104 SITE PRIORITIZATION:

A. The department shall assign a rank to all sites contaminated by releases from storage tanks using the leaking storage tank (LST) ranking system, as defined in 20.5.101.7 NMAC, and shall classify sites as being first, second or third priority sites. A site's priority shall be based on a minimum site assessment, as defined in 20.5.101.7 NMAC, or other available information that documents an effect or potential effect of the release on public health, safety and welfare or the environment. The department may re-rank and reclassify as warranted, based on facts affecting public health, safety and welfare and the environment.

(1) A first priority site is a site where the release of a regulated substance from a storage tank system has created an actual or imminent hazard to public health, safety and welfare or the environment such that the following corrective action is required:

- (a) water supply protection or replacement pursuant to Subsection C or D of 20.5.119.1902 and 20.5.120.2002 NMAC;
- (b) mitigation of toxic or explosive or potentially toxic or explosive vapors pursuant to Subsection F of 20.5.119.1902 and 20.5.120.2002 NMAC; or
- (c) other corrective action as required to protect public health, safety and welfare or the environment from hazards caused by the release pursuant to Subsection G of 20.5.119.1902 and 20.5.120.2002 NMAC.

(2) A second priority site is a site where the release of a regulated substance from a storage tank system has created a source of environmental contamination such that the following corrective action is required:

- (a) containment and removal of non-aqueous phase liquid pursuant to 20.5.119.1905 and 20.5.120.2005 NMAC; or
- (b) treatment of contaminant saturated soils pursuant to 20.5.119.1906 and 20.5.120.2006 NMAC.

(3) A third priority site is a site which is not first or second priority, containing contaminants that were released from the storage tank system and where corrective action is required by 20.5.119 or 20.5.120 NMAC.

B. When the department approves corrective action other than minimum site assessments, it shall approve corrective action at sites in order of rank and shall approve priority one sites first, priority two sites after priority one sites, and priority three sites after priority one and priority two sites, except that the department may approve emergency corrective action at any time.

[20.5.121.2104 NMAC - N, 07/24/2018]

20.5.121.2105 ORDER OF PAYMENTS IN CASE OF INSUFFICIENT FUNDS:

A. If, after the department has determined that the owner or operator is in substantial compliance, the department determines that the fund budget or the fund balance is insufficient to cover the amount requested for payment, the department shall promptly notify the owner or operator. Payment for eligible costs shall occur when sufficient amounts are available in the fund budget or the fund, subject to the provisions of this section.

B. If the fund budget or the fund balance is insufficient to pay all applications for payment under 20.5.123.2318 NMAC but the fund remains an approved financial responsibility mechanism under 20.5.117.1711 NMAC, the department shall pay applications for payment for approved corrective action in order of priority as established in accordance with this part from the funds available, so long as funds are available.

C. Applications for sites of equal score based on the priorities established in this part shall be paid in order of date of receipt of complete applications for payment. For applications for sites of equal score with the same date of receipt, the earliest date on which a corrective action was taken as evidenced by the date of the earliest invoice included in the application shall determine the order of payment.

D. When the fund budget or the fund balance is insufficient to pay all applications for payment under 20.5.123.2318 NMAC and the fund is no longer an approved financial responsibility mechanism, the department shall make payments according to priority rank as established in this part and in the following percentages, so long as funds are available:

- (1) one hundred percent of all reasonable and necessary eligible costs incurred to complete a minimum site assessment in excess of the deductible;
- (2) one hundred percent of all reasonable and necessary eligible costs incurred to conduct a secondary investigation in accordance with 20.5.119.1910 or 20.5.120.2010 NMAC;
- (3) in the case of reasonable and necessary costs incurred to complete corrective action other than the minimum site assessment and secondary investigation, according to the following formulae:

(a) for owners or operators of two or fewer facilities used for retail gasoline sales and whose facilities have less than 40,000 gallons combined total of product dispensed monthly, averaged over the last two years of operation: first priority LST ranked sites: one hundred percent; second priority LST ranked sites: ninety-five percent; third priority LST ranked sites: ninety percent; or

(b) for sites owned or operated by other owners or operators: one hundred percent for first priority LST ranked sites. The percentage of payment for second and third priority LST ranked sites shall be based on the ending quarterly unobligated balance of the fund proportional to the amount of each application for payment received in that quarter for these sites. The quarters end on June 30, September 30, December 31 and March 31. The percentage of payment equals the unobligated fund balance on the last day of the quarter divided by the dollar amount of reasonable and necessary eligible costs of applications for payment received in the quarter, not to exceed one hundred percent. For purposes of this subparagraph, “unobligated balance” or “unobligated fund balance” means corrective action fund equity less all known or anticipated liabilities against the fund; and

(4) payment for remaining eligible costs shall be made pursuant to Subsection E of this section.

E. When the fund is reestablished as an approved financial responsibility mechanism, payment shall be made for the balance of the eligible costs previously submitted but not paid under provisions of this section. These payments shall be made in the order in which sites were ranked by the department, in accordance with this part, as funds become available.

F. The department’s determinations under this section concerning the availability of funds shall be final and not subject to appeal.

[20.5.121.2105 NMAC - N, 07/24/2018]

20.5.121.2106 RESERVED MONEY:

A. The department shall establish a reserve of one-million dollars (\$1,000,000) in the fund for the costs of taking emergency corrective action. The department may make expenditures from this reserve during the fiscal year and replenish the reserve at the beginning of the next fiscal year.

B. Money that is reserved pursuant to Subsection A of this section may be expended by the department only for corrective action necessary when an emergency threat to public health, safety and welfare or the environment is determined by the department to exist.

[20.5.121.2106 NMAC - N, 07/24/2018]

HISTORY OF 20.5.121 NMAC:

Pre-NMAC History:

The material in this part was derived from that previously filed with the commission of public records - state records center and archives:

EIB/USTR-15, Underground Storage Tank Regulations - Part XV - Ground Water Protection Act Regulations, filed 6/18/91.

History of Repealed Material:

20 NMAC 5.15 Underground Storage Tanks, Corrective Action Fund Allocation for State-Lead Sites (filed 10/6/95), repealed 2/2/00.

20 NMAC 5.15, Underground Storage Tanks, Corrective Action Fund Use and Expenditures (filed 12/30/99), repealed 8/15/03.

20.5.15 NMAC, Petroleum Storage Tanks, Corrective Action Fund Use and Expenditures (filed 7/16/03), repealed 6/15/09.

20.5.15 NMAC, Petroleum Storage Tanks, Corrective Action Fund Use and Expenditures (filed 6/15/09), repealed 7/24/18.

Other History:

EIB/USTR-15, Underground Storage Tank Regulations - Part XV - Ground Water Protection Act Regulations (filed 6/18/91), renumbered, reformatted and replaced by 20 NMAC 5.15, effective 11/5/95.

20 NMAC 5.15, Underground Storage Tanks, Corrective Action Fund Use and Expenditures (filed 10/6/95), was replaced by 20 NMAC 5.15, Underground Storage Tanks, Corrective Action Fund Use and Expenditures, effective 2/2/00.

20 NMAC 5.15, Underground Storage Tanks, Corrective Action Fund Use and Expenditures (filed 12/30/99), renumbered, reformatted and replaced by 20.5.15, NMAC, Petroleum Storage Tanks, Corrective Action Fund Use and Expenditures, effective 8/15/03.

20.5.15 NMAC, Petroleum Storage Tanks, Corrective Action Fund Use and Expenditures (filed 7/16/03), was replaced by 20.5.15 NMAC, Petroleum Storage Tanks, Corrective Action Fund Use and Expenditures, effective 6/15/09.

20.5.15 NMAC, Petroleum Storage Tanks, Corrective Action Fund Use and Expenditures (filed 6/15/09), was replaced by 20.5.121 NMAC, Petroleum Storage Tanks, Corrective Action Fund Use and Expenditures, effective 7/24/18.