

LEGISLATIVE BILL 289

Approved by the Governor May 26, 1989

Introduced by Natural Resources Committee, Schmit, 23,
Chairperson; Lamb, 43; Smith, 33;
R. Johnson, 34; Weihing, 48; Beck, 8;
Morrisey, 1; Coordsen, 32

AN ACT relating to petroleum releases; to amend sections 81-15,117, 81-15,119, and 81-15,124, Reissue Revised Statutes of Nebraska, 1943; to adopt the Petroleum Release Remedial Action Act; to redefine a term; to provide for rules and regulations; to harmonize provisions; to repeal the original sections; and to declare an emergency.

Be it enacted by the people of the State of Nebraska,

Section 1. Sections 1 to 30 of this act shall be known and may be cited as the Petroleum Release Remedial Action Act.

Sec. 2. (1) The Legislature restates the declaration of legislative purpose as set forth in section 81-1501 that the public policy of this state is hereby declared to be:

(a) To conserve the water in this state and to protect and improve the quality of water for human consumption, wildlife, fish and other aquatic life, industry, recreation, and other productive, beneficial uses;

(b) To achieve and maintain a reasonable degree of purity of the natural atmosphere of this state that human beings and all other animals and plants which are indigenous to this state will flourish in approximately the same balance as they have in recent history and to adopt and promulgate laws, rules, and regulations and to uniformly enforce the same in such a manner as to give meaningful recognition to the protection of each element of the environment, air, water, and land; and

(c) To cooperate with other states and the federal government to accomplish the objectives set forth in the Environmental Protection Act.

(2) The Legislature finds that the number of leaking petroleum storage tanks throughout the state is increasing and that there exists a serious threat to the health and safety of citizens because petroleum

contained in leaking storage tanks is a potential land and ground water contaminant and major fire and explosive hazard. Furthermore, owners of petroleum tanks may not have the ability to assess and clean up any releases from those petroleum tanks.

(3) The Legislature finds and declares that it is in the public interest that a distribution network for petroleum be available to the public in the State of Nebraska. It is essential in this state to encourage owners of petroleum tanks across the state to remain in business to maintain the viability of the distribution network. At the present time, meeting financial responsibility requirements imposed by the federal government has placed a burden on the owners of petroleum tanks that jeopardizes their ability to store and distribute petroleum and to remain a part of the distribution network.

Sec. 3. For purposes of the Petroleum Release Remedial Action Act, the definitions found in sections 4 to 15 of this act shall be used.

Sec. 4. Department shall mean the Department of Environmental Control.

Sec. 5. Distributor shall mean a dealer licensed pursuant to section 66-403 or a special fuel dealer licensed pursuant to section 66-611.

Sec. 6. Fund shall mean the Petroleum Release Remedial Action Cash Fund created in section 19 of this act.

Sec. 7. Importer shall mean any person who imports or causes to be imported petroleum from any other state or territory of the United States or from a foreign country for such person's own use in or for sale in this state, whether or not in the original package, receptacle, or container. Importer shall not include a person who imports petroleum in a tank directly connected to the engine of a motor vehicle, train, water craft, or airplane for purposes of providing fuel to the engine to which the tank is connected.

Sec. 8. Operator shall mean a person in control of or having responsibility for the daily operation of a tank.

Sec. 9. Owner shall mean:

(1) In the case of a tank in use on or after November 8, 1984, or brought into use after such date, any person who owns a tank used for the storage, use, or dispensing of petroleum; and

(2) In the case of a tank in use before November 8, 1984, but no longer in use on such date, any person who owned such tank immediately before the

discontinuation of its use.

Owner shall not include a person who, without participating in the management of a tank, holds indicia of ownership primarily to protect his or her security interest in a tank or a lienhold interest in the property on or within which a tank is located.

Sec. 10. Petroleum shall mean:

(1) Motor vehicle fuels as defined in section 66-401, except denatured agricultural ethyl alcohol that is not blended with motor vehicle fuels, and special fuels as defined in section 66-602 except combustible gases; and

(2) A fraction of crude oil that is liquid at a temperature of sixty degrees Fahrenheit and a pressure of fourteen and seven-tenths pounds per square inch absolute.

Sec. 11. Refiner shall mean any person who refines, prepares, blends, distills, manufactures, or compounds petroleum in Nebraska for such person's own use in this state or for sale or delivery in this state.

Sec. 12. Release shall mean any spilling, leaking, emitting, discharging, escaping, leaching, or disposing of petroleum from a tank into ground water, surface water, surface soils, or subsurface soils whether occurring before, on, or after the effective date of this act.

Sec. 13. Remedial action shall mean any immediate or long-term response to a release or suspected release in accordance with rules and regulations adopted and promulgated by the department or the State Fire Marshal, including tank testing only in conjunction with a release or suspected release, site investigation, cleanup, restoration, mitigation, and any other action ordered by the department or the State Fire Marshal which is reasonable and necessary. Remedial action shall not include:

(1) Tank restoration, upgrading, replacement, or rehabilitation;

(2) Actions which do not minimize, eliminate, or clean up a release or suspected release to protect the public safety, health, and welfare or the environment;

(3) Loss of income, attorney's fees, relocation of any resident, decreased property values, reimbursement for the responsible person's own time spent in planning and administering a corrective action plan, and aesthetic improvements; and

(4) Compensation to third parties for bodily injury and property damage caused by a release.

Sec. 14. Responsible person shall mean a person who is an owner or operator of a tank. However, in the event that an owner or operator is unwilling or unable or fails to comply with required remedial action, responsible person shall also mean a person in the chain of title of a tank or in the property on or within which a tank is located or a person who holds a security interest in a tank or a lienhold interest in the property on or within which a tank is located who voluntarily proposes to implement required remedial action. Such voluntary action by a person in the chain of title of a tank or in the property on or within which a tank is located or a person who holds a security interest in a tank or a lienhold interest in the property on or within which a tank is located shall not be construed to render such party responsible or liable for remedial action under any law of the state.

Sec. 15. Tank shall mean any one or a combination of stationary aboveground or underground containers and enclosures, including structures and appurtenances connected to them, that is or has been used to contain or dispense petroleum, but tank shall not include any pipeline facilities, including gathering lines, regulated under the Natural Gas Pipeline Safety Act of 1968, 49 U.S.C. chapter 24, or the Hazardous Liquid Pipeline Safety Act of 1979, 49 U.S.C. chapter 29, as in effect on January 1, 1988, or any lease production tank used in the production of crude oils.

Sec. 16. No responsible person may avoid responsibility under state law for a release by means of a conveyance of any right, title, or interest in real property or by any indemnification, hold-harmless, or similar agreement. This section shall not be construed to:

(1) Prohibit a responsible person from entering into an agreement by which the person is insured or is a member of a risk retention group and is thereby indemnified for part or all of the liability;

(2) Prohibit the enforcement of an insurance, hold-harmless, or indemnification agreement; or

(3) Bar a cause of action brought by a responsible person or by an insurer or guarantor, whether by right of subrogation or otherwise.

Sec. 17. Reimbursement for remedial actions shall be governed by the Petroleum Release Remedial Action Act.

Nothing in the act shall be construed to limit the powers of the department or preclude the pursuit of any other administrative, civil, injunctive, or criminal

remedies by the department or any other person. Administrative remedies need not be exhausted in order to proceed under the act. The remedies provided by the act shall be in addition to those provided under existing statutory or common law.

Nothing in the act shall be construed to limit a person's duty to notify the department and the State Fire Marshal or to take other action related to a release as required pursuant to the Environmental Protection Act or the Petroleum Products and Hazardous Substances Storage and Handling Act.

Nothing in the Petroleum Release Remedial Action Act shall be construed to allow a payment or reimbursement from the fund for compensating third parties for bodily injury and property damage caused by a release.

Sec. 18. The Environmental Control Council shall adopt and promulgate rules and regulations regarding the form and procedure for applications for payment or reimbursement from the fund, procedures for investigation of claims for payment or reimbursement, procedures for determining the amount and type of costs that are eligible for payment or reimbursement from the fund, and other provisions necessary to carry out the Petroleum Release Remedial Action Act.

Sec. 19. There is hereby created the Petroleum Release Remedial Action Cash Fund to be administered by the department. Revenue from the following sources shall be remitted to the State Treasurer for credit to the fund:

(1) The fees imposed by sections 20 and 21 of this act;

(2) Money paid under an agreement, stipulation, or settlement; and

(3) Money received by the department in the form of gifts, grants, reimbursements, or appropriations from any source intended to be used for the purposes of the fund.

Money in the fund may only be spent for: (a) Reimbursement for remedial action by a responsible person or his or her designated representative; (b) fee collection expenses incurred by the State Fire Marshal; and (c) direct expenses incurred by the department in carrying out the Petroleum Release Remedial Action Act.

Any money in the fund available for investment shall be invested by the state investment officer pursuant to sections 72-1237 to 72-1276.

Sec. 20. (1) On or before August 1, 1989, all owners of operating tanks registered in accordance with

section 81-15.121 shall pay a petroleum release remedial action fee to the State Fire Marshal for each registered tank. The fee shall be based on the size of the tank as follows:

(a) Up to two thousand five hundred gallons, fifty dollars per tank;

(b) Two thousand five hundred one to five thousand gallons, seventy-five dollars per tank;

(c) Five thousand one to seven thousand five hundred gallons, one hundred dollars per tank; and

(d) Over seven thousand five hundred gallons, one hundred fifty dollars per tank.

(2) On January 1, 1990, and each January 1 thereafter, all owners of operating tanks registered in accordance with section 81-15.121 shall pay a petroleum release remedial action fee of twenty-five dollars to the State Fire Marshal for each registered tank.

(3) The State Fire Marshal shall remit the fees received pursuant to this section to the State Treasurer for credit to the fund.

Sec. 21. (1) A petroleum release remedial action fee is hereby imposed upon the refiner, importer, or distributor who first sells, offers for sale, or uses petroleum within this state, except that the fee shall not be imposed on petroleum packaged in individual containers of one hundred ten gallons or less and intended for sale or use in this state. The amount of the fee shall be three-tenths of one cent per gallon on motor vehicle fuels as defined in section 66-401 and one-tenth of one cent per gallon on petroleum other than such motor vehicle fuels. The fee shall be paid by all refiners, importers, and distributors subject to the fee by filing a monthly return on or before the twentieth day of the calendar month following the monthly period to which it relates. The pertinent provisions, specifically including penalty provisions, of sections 66-611 to 66-615, 66-621 to 66-626, and 66-630 shall apply to the administration and collection of the fee. There shall be a refund allowed on any fee paid on petroleum which was taxed and then exported. The fee paid under this subsection shall not be eligible for the credit under section 66-452.

(2) After October 1, 1989, no refiner, importer, or distributor shall sell, offer for sale, or use petroleum in this state without having first obtained a license. Application for a petroleum release remedial action license shall be made to the Tax Commissioner. The application for a petroleum release remedial action license shall be filed upon a form

prepared and furnished by the Tax Commissioner. Such license shall be known as a petroleum release remedial action license. Failure to obtain a license prior to such sale, offer for sale, or use of petroleum shall be a Class IV misdemeanor. The Tax Commissioner may suspend or cancel the license of any refiner, importer, or distributor who fails to pay the fee imposed by subsection (1) of this section in the same manner as licenses are suspended or canceled pursuant to sections 66-614 and 66-615.

(3) The Tax Commissioner shall adopt and promulgate rules and regulations necessary to carry out this section.

(4) The Tax Commissioner shall deduct and withhold from the petroleum release remedial action fee collected pursuant to this section an amount sufficient to reimburse himself or herself for the direct costs of collecting and administering the petroleum release remedial action fee. Such costs shall not exceed sixty-five thousand dollars for the fiscal year 1989-90 and twenty-eight thousand dollars for each subsequent fiscal year. The twenty-eight thousand dollars shall be prorated, based on the number of months the fee is collected, whenever the fee is collected for only a portion of a year. The amount deducted and withheld for costs shall be deposited in the Petroleum Release Remedial Action Collection Fund which is hereby created. The Petroleum Release Remedial Action Collection Fund shall be appropriated to the Department of Revenue. Any money in the fund available for investment shall be invested by the state investment officer pursuant to sections 72-1237 to 72-1276.

Sec. 22. (1) The Tax Commissioner shall collect the fee imposed by subsection (1) of section 21 of this act beginning October 1, 1989. Whenever the unobligated balance of the fund reaches five million dollars or more, the department shall notify the Tax Commissioner, at which time the Tax Commissioner shall suspend the collection of the fee. If the unobligated balance of the fund falls below three million dollars, the department shall notify the Tax Commissioner who shall again start the collection of the fee until the unobligated balance of the fund reaches five million dollars.

(2) Unobligated balance shall be the balance in the fund as of the twentieth day of any month less the estimated cost of the remedial action plans which have been approved by the department for the applications for reimbursement pending before the

department. Such estimated cost shall be determined by the department.

(3) The effective date of the notification shall be the first day of the next month following receipt of such notification by the commissioner if the notification is received thirty days prior to the first day of the next month. If the notification is not received thirty days prior to the first day of the next month, the effective date of such notification shall be the first day of the following month.

Sec. 23. The department shall provide reimbursement from the fund in accordance with section 25 of this act in an amount not to exceed nine hundred seventy-five thousand dollars per occurrence for the cost of remedial action to eligible responsible persons for releases reported after July 17, 1986. The responsible person shall be responsible for (1) the first ten thousand dollars of the cost of the remedial action and (2) twenty-five percent of the remaining cost of the remedial action not to exceed fifteen thousand dollars. The department may make partial reimbursement during the time that remedial action is being taken if the department is satisfied that the remedial action being taken is as required by the department. If the fund is insufficient for any reason to reimburse the amount set forth in this section, the maximum amount that the fund shall be required to reimburse is the amount in the fund. If reimbursements approved by the department exceed the amount in the fund, reimbursements shall be made in the order in which the applications for them were received by the department.

For purposes of this section, occurrence shall mean an accident, including continuous or repeated exposure to conditions, which results in a release from a tank.

Sec. 24. The State of Nebraska shall not be liable for any reimbursement under the Petroleum Release Remedial Action Act in the event that the fund is insufficient to reimburse the amount set forth in section 23 of this act.

Sec. 25. Any responsible person or his or her designated representative who has taken remedial action in response to a release first reported after July 17, 1986, may apply to the department under the rules and regulations adopted and promulgated pursuant to section 18 of this act for reimbursement for the remedial action. The department may accept applications for reimbursement at any time on and after October 1, 1989.

No reimbursement may be made unless the

department determines that:

(1) The tank was in substantial compliance with any rules and regulations of the United States Environmental Protection Agency, the State Fire Marshal, and the department which were applicable to the tank at the time the release was discovered. Substantial compliance shall be determined by the department taking into consideration the purposes of the Petroleum Release Remedial Action Act and the adverse effect that any violation of the rules and regulations may have had on the tank thereby causing or contributing to the release and the extent of the remedial action thereby required;

(2) Either the State Fire Marshal or the department was given notice of the release in substantial compliance with the rules and regulations adopted and promulgated pursuant to the Environmental Protection Act and the Petroleum Products and Hazardous Substances Storage and Handling Act. Substantial compliance shall be determined by the department taking into consideration the purposes of the Petroleum Release Remedial Action Act and the adverse effect that any violation of the notice provisions of the rules and regulations may have had on the remedial action being taken in a prompt, effective, and efficient manner;

(3) The responsible person reasonably cooperated with the department and the State Fire Marshal in responding to the release;

(4) The department has approved the plan submitted by the responsible person for the remedial action in accordance with rules and regulations adopted and promulgated by the department pursuant to the Environmental Protection Act or the Petroleum Products and Hazardous Substances Storage and Handling Act or that portion of the plan for which payment or reimbursement is requested;

(5) The costs for the remedial action were actually incurred by the responsible person or his or her designated representative after the effective date of this act and were eligible and reasonable; and

(6) The responsible person or his or her designated representative has paid (a) the first ten thousand dollars of the cost of the remedial action and (b) twenty-five percent of the remaining cost of the remedial action not to exceed fifteen thousand dollars.

The State Fire Marshal shall review each application prior to consideration by the department and provide to the department any information the State Fire Marshal deems relevant to subdivisions (1) through (6) of this section.

The department may withhold taking action on an application during the pendency of an enforcement action by the state or federal government related to the tank or a release from the tank.

Sec. 26. The amount of reimbursement to be paid for remedial action which was done by a third party shall not be subject to legal process or attachment if paid to the responsible person for the purpose of payment to a third party who performed the remedial action.

Sec. 27. If the responsible person who has received partial reimbursement from the fund for remedial action does not complete the remedial action as required by the rules and regulations, the responsible person shall reimburse to the fund an amount equal to the reimbursements received from the fund.

Sec. 28. Nothing in the Petroleum Release Remedial Action Act shall be construed to bar a common law, statutory, or any other cause of action which may be maintained against a responsible person by a private person who, subsequent to a release, received a conveyance of any right, title, or interest in the parcel of real property on which such release occurred.

Sec. 29. Nothing in the Petroleum Release Remedial Action Act shall be construed to prohibit a responsible person from assigning to a third party any right, title, or interest which the responsible person may have in and to the proceeds from reimbursement for remedial action. Such third party may be a designated representative for the purposes of the act.

Sec. 30. The department shall cooperate in any action necessary to obtain federal funding to carry out the Petroleum Release Remedial Action Act.

Sec. 31. That section 81-15,117, Reissue Revised Statutes of Nebraska, 1943, be amended to read as follows:

81-15,117. Sections 81-15,117 to 81-15,127 and section 34 of this act shall be known and may be cited as the Petroleum Products and Hazardous Substances Storage and Handling Act.

Sec. 32. That section 81-15,119, Reissue Revised Statutes of Nebraska, 1943, be amended to read as follows:

81-15,119. As used in For purposes of the Petroleum Products and Hazardous Substances Storage and Handling Act, unless the context otherwise requires:

(1) Operator shall mean any person in control of, or having responsibility for, the daily operation of a tank;

(2) Owner shall mean:

(a) In the case of a tank in use on July 17, 1986, or brought into use after such date, any person who owns a tank used for the storage or dispensing of regulated substances; and

(b) In the case of any tank in use before July 17, 1986, but no longer in use on such date, any person who owned such tank immediately before the discontinuation of its use.

Owner shall not include a person who, without participating in the management of a tank, holds indicia of ownership primarily to protect his or her security interest in a tank or a lienhold interest in the property on or within which a tank is located;

(3) Permanent abandonment shall mean that a tank has been taken permanently out of service as a storage vessel for any reason or has not been used for active storage for more than one year;

(4) Person shall mean any individual, firm, joint venture, partnership, corporation, association, political subdivision, cooperative association, or joint-stock association, and includes any trustee, receiver, assignee, or personal representative thereof owning or operating a tank;

(5) Regulated substance shall mean:

(a) Any substance defined in section 101(14) of the Comprehensive Environmental Response, Compensation and Liability Act of 1980, but not including any substance regulated as a hazardous waste under subtitle C of such act; and

(b) Any petroleum product, including, but not limited to, petroleum-based motor or vehicle fuels, gasoline, kerosene, and other products used for the purposes of generating power, lubrication, illumination, heating, or cleaning, but shall not include propane or liquefied natural gas;

(6) Release shall mean any spilling, leaking, emitting, discharging, escaping, leaching, or disposing from a tank into ground water, surface water, or subsurface soils;

(7) Tank shall mean any tank or combination of tanks, including underground pipes connected to such tank or tanks, which is used to contain an accumulation of regulated substances and the volume of which is ten percent or more beneath the surface of the ground. Tank shall not include any:

(a) Farm or residential tank of one thousand one hundred gallons or less capacity used for storing motor fuel for consumptive use on the premises where

stored, subject to a one-time fee;

(b) Tank with a storage capacity of one thousand one hundred gallons or less used for storing heating oil for consumptive use on the premises where stored, subject to a one-time fee;

(c) Septic tank;

(d) Tank situated in an underground area such as a basement, cellar, mineworking, drift, shaft, or tunnel if the tank is situated on or above the surface of the floor;

(e) Pipeline facility, including gathering lines:

(i) Regulated under the Natural Gas Pipeline Safety Act of 1979, 49 U.S.C. App. 1671;

(ii) Regulated under the Hazardous Liquid Pipeline Safety Act of 1979, 49 U.S.C. App. 2001; or

(iii) Which is an intrastate pipeline regulated under state law comparable to the laws prescribed in subdivisions (e)(i) and (e)(ii) of this subdivision;

(f) Surface impoundment, pit, pond, or lagoon;

(g) Flow-through process tank;

(h) Liquid trap or associated gathering lines directly related to oil or gas production and gathering operations; or

(i) Storm water or wastewater collection system; and

(8) Temporary abandonment shall mean that a tank will be or has been out of service for at least one hundred eighty days but not more than one year.

Sec. 33. That section 81-15,124, Reissue Revised Statutes of Nebraska, 1943, be amended to read as follows:

81-15,124. Any reported or suspected release of a regulated substance from any tank shall be investigated by the State Fire Marshal and the Department of Environmental Control. In the event that the State Fire Marshal or the Department of Environmental Control finds an adverse effect caused by a release of a regulated substance from a tank:

(1) The State Fire Marshal shall (a) determine the immediate danger presented by the release, (b) take all steps necessary to assure immediate public safety, and (c) assist the Department of Environmental Control in determining the source of the release and taking all steps necessary to ensure that the release is halted;

(2) By order of the Department of Environmental Control, the owner or operator of the tank causing the release shall, after securing the source of

the release, develop a plan of reeovery remedial action to be approved by the Department of Environmental Control; and

(3) The approved reeovery remedial action plan shall then be carried out by the owner or operator of the tank causing the release. All expenses incurred during the cleanup and reeovery remedial action shall be paid by the owner or operator subject to reimbursement pursuant to the Petroleum Release Remedial Action Act.

If it is determined that the source of the release is unknown or that the owner or operator of the facility causing the release is unknown or unavailable, a reeovery remedial action plan shall be developed by or under the direction of the Department of Environmental Control. Such reeovery remedial action plan shall be developed and carried out by the department with money from the Petroleum Products and Hazardous Substances Storage and Handling Fund if funds are available. If at a later date the owner or operator of the facility which caused the release is determined, he or she shall be responsible for reeovery remedial action costs incurred on his or her behalf subject to reimbursement pursuant to the Petroleum Release Remedial Action Act. Any money received from such person shall be deposited in the Petroleum Products and Hazardous Substances Storage and Handling Fund.

Sec. 34. The Environmental Control Council shall adopt and promulgate rules and regulations governing the plan for remedial action to be taken by owners and operators pursuant to section 81-15,124.

Sec. 35. That original sections 81-15,117, 81-15,119, and 81-15,124, Reissue Revised Statutes of Nebraska, 1943, are repealed.

Sec. 36. Since an emergency exists, this act shall be in full force and take effect, from and after its passage and approval, according to law.