

**CHAPTER 33.1-24-08**  
**TECHNICAL STANDARDS AND CORRECTIVE ACTION REQUIREMENTS FOR OWNERS**  
**AND OPERATORS OF UNDERGROUND STORAGE TANKS**

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**33.1-24-08-01. Applicability (technical standards and corrective action).**

1. The requirements of this chapter apply to all owners and operators of an underground storage tank system as defined in section 33.1-24-08-03, except as otherwise provided in subsections 2, 3, and 4. Any underground storage tank system listed in subsection 3 must meet the requirements of section 33.1-24-08-02.
  - a. Previously deferred underground storage tank systems. Airport hydrant fuel distribution systems, underground storage tank systems with field-constructed tanks, and underground storage tank systems that store fuel solely for use by emergency power generators must meet the requirements of this chapter as follows:
    - (1) Airport hydrant fuel distribution systems and underground storage tank systems with field-constructed tanks must meet the requirements in sections 33.1-24-08-70 through 33.1-24-08-72.

- (2) Underground storage tank systems that store fuel solely for use by emergency power generators installed on or before April 1, 2018, must meet the sections 33.1-24-08-30 through 33.1-24-08-35 requirements on or before April 1, 2021.
  - (3) Underground storage tank systems that store fuel solely for use by emergency power generators installed after April 1, 2018, must meet all applicable requirements of this chapter at installation.
2. The following underground storage tank systems are excluded from the requirements of this chapter:
  - a. Any underground storage tank system holding hazardous wastes listed or identified under North Dakota Century Code chapter 23.1-04, or a mixture of such hazardous waste and other regulated substances;
  - b. Any wastewater treatment tank system that is part of a wastewater treatment facility regulated under section 402 or 307(b) of the Clean Water Act;
  - c. Equipment or machinery that contains regulated substances for operational purposes such as hydraulic lift tanks and electrical equipment tanks;
  - d. Any underground storage tank system whose capacity is one hundred ten gallons [416.39 liters] or less;
  - e. Any underground storage tank system that contains a de minimus concentration of regulated substances; or
  - f. Any emergency spill or overflow containment underground storage tank system that is expeditiously emptied after use.
3. Partial exclusions. Sections 33.1-24-08-10 through 33.1-24-08-43, sections 33.1-24-08-45 through 33.1-24-08-48, sections 33.1-24-08-60 through 33.1-24-08-64, and sections 33.1-24-08-70 through 33.1-24-08-72 do not apply to:
  - a. Wastewater treatment tank systems not covered under subdivision b of subsection 2;
  - b. Aboveground storage tanks associated with:
    - (1) Airport hydrant fuel distribution systems regulated under sections 33.1-24-08-70 through 33.1-24-08-73; and
    - (2) Underground storage tank systems with field-constructed tanks regulated under sections 33.1-24-08-70 through 33.1-24-08-73;
  - c. Any underground storage tank systems containing radioactive material that are regulated under the Atomic Energy Act of 1954 [42 U.S.C. 2011 and following]; and
  - d. Any underground storage tank system that is part of an emergency generator system at nuclear power generation facilities licensed by the nuclear regulatory commission and subject to nuclear regulatory commission requirements regarding design and quality criteria, including 10 CFR part 50.

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**General Authority:** NDCC 23.1-04-03, 23.1-04-06; S.L. 2017, ch. 199, § 1

**Law Implemented:** NDCC 23.1-04-06; S.L. 2017, ch. 199, § 19

**33.1-24-08-02. Installation requirements for partially excluded underground storage tank systems.**

1. Owners and operators installing an underground storage tank system listed in subsection 3 of section 33.1-24-08-01 for the purpose of storing regulated substances (whether of single-wall or double-wall construction) shall meet the following requirements:
  - a. Will prevent releases due to corrosion or structural failure for the operational life of the underground storage tank system;
  - b. Is cathodically protected against corrosion, constructed of noncorrodible material, steel clad with a noncorrodible material, or designed in a manner to prevent the release or threatened release of any stored substance; and
  - c. Is constructed or lined with material that is compatible with the stored substance.
2. Notwithstanding subsection 1, an underground storage tank system without corrosion protection may be installed at a site that is determined by a corrosion expert not to be corrosive enough to cause it to have a release due to corrosion during its operating life. Owners and operators must maintain records that demonstrate compliance with the requirements of this subsection for the remaining life of the tank.

NOTE: The following codes of practice may be used as guidance for complying with this section:

- (a) National Association of Corrosion Engineers (NACE) International Standard "Practice SP 0285, "External Corrosion Control of Underground Storage Tank Systems by Cathodic Protection";
- (b) National Association of Corrosion Engineers International Standard Practice SP 0169, "Control of External Corrosion on Underground or Submerged Metallic Piping Systems";
- (c) American Petroleum Institute Recommended Practice 1632, "Cathodic Protection of Underground Petroleum Storage Tanks and Piping Systems"; or
- (d) Steel Tank Institute Recommended Practice R892, "Recommended Practice for Corrosion Protection of Underground Piping Networks Associated with Liquid Storage and Dispensing Systems".

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**Law Implemented:** NDCC 23.1-04-06; S.L. 2017, ch. 199, § 19

**33.1-24-08-03. Definitions (technical standards, delivery prohibition, and corrective action).**

1. "Aboveground release" means any release to the surface of the land or to surface water. This includes releases from the aboveground portion of an underground storage tank system and aboveground releases associated with overfills and transfer operations as the regulated substance moves to or from an underground storage tank system.
2. "Ancillary equipment" means any devices including such devices as piping, fittings, flanges, valves, and pumps used to distribute, meter, or control the flow of regulated substances to and from an underground storage tank.
3. "Belowground release" means any release to the subsurface of the land and the ground water. This includes releases from the belowground portions of an underground storage tank system and belowground releases associated with overfills and transfer operations as the regulated substance moves to or from an underground storage tank.

4. "Beneath the surface of the ground" means beneath the ground surface or otherwise covered with earthen materials.
5. "Cathodic protection" is a technique to prevent corrosion of a metal surface by making that surface the cathode of an electrochemical cell. For example, a tank system can be cathodically protected through the application of either galvanic anodes or impressed current.
6. "Cathodic protection tester" means a person who can demonstrate an understanding of the principles and measurements of all common types of cathodic protection systems as applied to buried or submerged metal piping and tank systems. At a minimum, such persons must have education and experience in soil resistivity, stray current, structure-to-soil potential, and component electrical isolation measurements of buried metal piping and tank systems.
7. "CERCLA" means the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended.
8. "Class A operator" means an individual who has primary responsibility to operate and maintain the underground storage tank system in accordance with applicable requirements established by the department. The class A operator typically manages resources and personnel, such as establishing work assignments, to achieve and maintain compliance with regulatory requirements.
9. "Class B operator" means the individual who has day-to-day responsibility for implementing applicable regulatory requirements established by the department. The class B operator typically implements in-field aspects of operation, maintenance, and associated recordkeeping for the underground storage tank system.
10. "Class C operator" means the individual responsible for initially addressing emergencies presented by a spill or release from an underground storage tank system. The class C operator typically controls or monitors the dispensing or sale of regulated substances.
11. "Community water system (CWS)" means a public water system which serves at least fifteen service connections used by year-round residents or regularly serves at least twenty-five year-round residents.
12. "Compatible" means the ability of two or more substances to maintain their respective physical and chemical properties upon contact with one another for the design life of the tank system under conditions likely to be encountered in the underground storage tank.
13. "Connected piping" means all underground piping including valves, elbows, joints, flanges, and flexible connectors attached to a tank system through which regulated substances flow. For the purpose of determining how much piping is connected to any individual underground storage tank system, the piping that joins two underground storage tank systems should be allocated equally between them.
14. "Consumptive use" with respect to heating oil means consumed on the premises.
15. "Containment sump" means a liquid-tight container that protects the environment by containing leaks and spills of regulated substances from piping, dispensers, pumps, and related components in the containment area. Containment sumps may be single walled or secondarily contained and located at the top of the tank (tank top or submersible turbine pump sump), underneath the dispenser (under-dispenser containment sump), or at other points in the piping run (transition or intermediate sump).
16. "Corrosion expert" means a person who, by reason of thorough knowledge of the physical sciences and the principles of engineering and mathematics acquired by a professional education and related practical experience, is qualified to engage in the practice of corrosion

control on buried or submerged piping systems and metal tanks. Such a person must be accredited or certified as being qualified by the national association of corrosion engineers or be a registered professional engineer who has certification or licensing that includes education and experience in corrosion control of buried or submerged metal piping systems and metal tanks.

17. "Department" means the department of environmental quality charged with the administration and enforcement of this chapter.
18. "Dielectric material" means a material that does not conduct direct electrical current. Dielectric coatings are used to electrically isolate underground storage tank systems from the surrounding soils. Dielectric bushings are used to electrically isolate portions of the underground storage tank system (for example, tank from piping).
19. "Dispenser" means equipment located aboveground that dispenses regulated substances from the underground storage tank system.
20. "Dispenser system" means the dispenser and the equipment necessary to connect the dispenser to the underground storage tank system.
21. "Electrical equipment" means underground equipment that contains dielectric fluid that is necessary for the operation of equipment such as transformers and buried electrical cable.
22. "Excavation zone" means the volume containing the tank system and backfill material bounded by the ground surface, walls, and floor of the pit and trenches into which the underground storage tank system is placed at the time of installation.
23. "Existing tank system" means a tank system used to contain an accumulation of regulated substances or for which installation has commenced on or before December 22, 1988. Installation is considered to have commenced if:
  - a. The owner or operator has obtained all federal, state, and local approvals or permits necessary to begin physical construction of the site or installation of the tank system; and if,
  - b. Either:
    - (1) A continuous onsite physical construction or installation program has begun; or
    - (2) The owner or operator has entered into contractual obligations, which cannot be canceled or modified without substantial loss, for physical construction at the site or installation of the tank system to be completed within a reasonable time.
24. "Farm tank" is a tank located on a tract of land devoted to the production of crops or raising animals, including fish, and associated residences and improvements. A farm tank must be located on the farm property. "Farm" includes fish hatcheries, rangeland, and nurseries with growing operations.
25. "Flowthrough process tank" is a tank that forms an integral part of a production process through which there is a steady, variable, recurring, or intermittent flow of materials during the operation of the process. Flowthrough process tanks do not include tanks used for the storage of materials prior to their introduction into the production process or for the storage of finished products or byproducts from the production process.
26. "Free product" refers to a regulated substance that is present as a nonaqueous phase liquid (for example, liquid not dissolved in water).

27. "Gathering lines" means any pipeline, equipment, facility, or building used in the transportation of oil or gas during oil or gas production or gathering operations.
28. "Hazardous substance underground storage tank system" means an underground storage tank system that contains a hazardous 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) or any mixture of such substances and petroleum, and which is not a petroleum underground storage tank system.
29. "Heating oil" means petroleum that is No. 1, No. 2, No. 4-light, No. 4-heavy, No. 5-light, No. 5-heavy, and No. 6 technical grades of fuel oil; other residual fuel oils (including navy special fuel oil and bunker c); and other fuels when used as substitutes for one of these fuel oils. Heating oil is typically used in the operation of heating equipment, boilers, or furnaces.
30. "Hydraulic lift tank" means a tank holding hydraulic fluid for a closed-loop mechanical system that uses compressed air or hydraulic fluid to operate lifts, elevators, and other similar devices.
31. "Liquid trap" means sumps, well cellars, and other traps used in association with oil and gas production, gathering, and extraction operations (including gas production plants), for the purpose of collecting oil, water, and other liquids. These liquid traps may temporarily collect liquids for subsequent disposition or reinjection into a production or pipeline stream, or may collect and separate liquids from a gas stream.
32. "Maintenance" means the normal operational upkeep to prevent an underground storage tank system from releasing product.
33. "Motor fuel" means a complex blend of hydrocarbons typically used in the operation of a motor engine, such as motor gasoline, aviation gasoline, No. 1 or No. 2 diesel fuel, or any blend containing one or more of these substances (for example: motor gasoline blended with alcohol).
34. "New tank system" means a tank system that will be used to contain an accumulation of regulated substances and for which installation has commenced after December 22, 1988. (See also "existing tank system".)
35. "Noncommercial purposes" with respect to motor fuel means not for resale.
36. "On the premises where stored" with respect to heating oil means underground storage tank systems located on the same property where the stored heating oil is used.
37. "Operational life" refers to the period beginning when installation of the tank system has commenced until the time the tank system is properly closed under sections 33.1-24-08-60 through 33.1-24-08-64.
38. "Operator" means any person in control of, or having responsibility for, the daily operation of the underground storage tank system.
39. "Overfill release" is a release that occurs when a tank is filled beyond its capacity, resulting in a discharge of the regulated substance to the environment.
40. "Owner" means:
  - a. In the case of an underground storage tank system in use on November 8, 1984, or brought into use after that date, any person who owns an underground storage tank system used for storage, use, or dispensing of regulated substances; and



- b. In the case of any underground storage tank system in use before November 8, 1984, but no longer in use on that date, any person who owned such underground storage tank immediately before the discontinuation of its use.
- 41. "Person" means an individual, trust, firm, joint stock company, federal agency, corporation, state, municipality, commission, political subdivision of a state, or any interstate body. "Person" also includes a consortium, a joint venture, a commercial entity, and the United States government.
  - 42. "Petroleum underground storage tank system" means an underground storage tank system that contains petroleum or a mixture of petroleum with de minimus quantities of other regulated substances. Such systems include those containing motor fuels, jet fuels, distillate fuel oils, residual fuel oils, lubricants, petroleum solvents, and used oils.
  - 43. "Pipe" or "piping" means a hollow cylinder or tubular conduit that is constructed of nonearthen materials that routinely contains and conveys regulated substances from the underground tank or tanks to the dispenser or dispensers, or other end-use equipment. Such piping includes any elbows, couplings, unions, valves, or other in-line fixtures that contain and convey regulated substances from the underground tank or tanks to the dispenser or dispensers. This definition does not include vent, vapor recovery, or fill lines.
  - 44. "Pipeline facilities (including gathering lines)" are new and existing pipe rights of way and any associated equipment, facilities, or buildings.
  - 45. "Potable drinking water well" means any hole (dug, driven, drilled, or bored) that extends into the earth until it meets ground water which:
    - a. Supplies water for a noncommunity public water system, or;
    - b. Otherwise supplies water for household use (consisting of drinking, bathing, and cooking, or other similar uses).

Such wells may provide water to entities such as a single-family residence, group of residences, businesses, schools, parks, campgrounds, and other permanent or seasonal communities.

- 46. "Public water system (PWS)" means a system for the provision to the public of water for human consumption through pipes, or, after August 5, 1998, other constructed conveyances, if such system has at least fifteen service connections or regularly serves an average of at least twenty-five individuals daily at least sixty days out of the year. Such term includes:
  - a. Any collection, treatment, storage, and distribution facilities under control of the operator of such system and used primarily in connection with such system; and
  - b. Any collection or pretreatment storage facilities not under such control which are used primarily in connection with such system.

Such term does not include any "special irrigation district". A public water system is either a "community water system" or a "noncommunity water system".

- 47. "Red tag" means a tag, device, or mechanism on the tank's fill pipes that clearly identifies an underground storage tank as ineligible for product delivery. The tag or device is easily visible to the transfer operator and clearly states and conveys that it is unlawful to deliver to, deposit into, or accept product into the ineligible underground storage tank. The tag, device, or mechanism is generally tamper resistant.
- 48. "Regulated substance" means:

- 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 North Dakota Century Code chapter 23.1-04; and
  - b. Petroleum, including crude oil or any fraction thereof that is liquid at standard conditions of temperature and pressure (sixty degrees Fahrenheit [10 degrees Celsius] and fourteen and seven-tenths pounds per square inch [101.3 kilopascals] absolute). The term "regulated substance" includes petroleum and petroleum-based substances comprised of a complex blend of hydrocarbons, such as motor fuels, jet fuels, distillate fuel oils, residual fuel oils, lubricants, petroleum solvents, and used oils.
49. "Release" means any spilling, leaking, emitting, discharging, escaping, leaching, or disposing from an underground storage tank into ground water, surface water, or subsurface soils.
  50. "Release detection" means determining whether a release of a regulated substance has occurred from the underground storage tank system into the environment or a leak has occurred into the interstitial space between the underground storage tank system and its secondary barrier or secondary containment around it.
  51. "Repair" means to restore to proper operating condition a tank pipe, spill prevention equipment, overfill prevention equipment, corrosion protection equipment, release detection equipment, or other underground storage tank system component that has caused a release of product from the underground storage tank system or has failed to function properly. Piping repair includes installation of a single run of up to ten feet of new piping to replace existing piping. Piping repair involving installation of a single run of more than ten feet of new piping to replace existing piping constitutes replacement as defined in subsection 52. Dispenser repair includes installation of a new dispenser to replace an existing dispenser so long as work is performed entirely on or above any shear valves and check valves. Installation of a new dispenser to replace an existing dispenser constitutes replacement as defined in subsection 52 if the work is performed beneath any shear valves or check valves, or on any flexible connectors, or unburied risers.
  52. "Replace or replacement" means the installation of a new underground tank system or component in substantially the same location as another tank system or component in lieu of that tank system or component.
    - a. For a tank - To remove a tank and install another tank.
    - b. For piping - To remove ten feet or more of piping and install other piping, excluding connectors, connected to a single tank. For tanks with multiple piping runs, this definition applies independently to each piping run.
  53. "Residential tank" is a tank located on property used primarily for dwelling purposes.
  54. "SARA" means the Superfund Amendments and Reauthorization Act of 1986.
  55. "Secondary containment or secondarily contained" means a release prevention and release detection system for a tank or piping. This system has an inner and outer barrier with an interstitial space that is monitored for leaks. This term includes containment sumps when used for interstitial monitoring of piping.
  56. "Septic tank" is a watertight covered receptacle designed to receive or process, through liquid separation or biological digestion, the sewage discharged from a building sewer. The effluent from such receptacle is distributed for disposal through the soil and settled solids and scum from the tank are pumped out periodically and hauled to a treatment facility.

57. "Storm water or wastewater collection system" means piping, pumps, conduits, and any other equipment necessary to collect and transport the flow of surface water runoff resulting from precipitation, or domestic, commercial, or industrial wastewater to and from retention areas or any areas where treatment is designated to occur. The collection of storm water and wastewater does not include treatment except where incidental to conveyance.
58. "Surface impoundment" is a natural topographic depression, manmade excavation, or diked area formed primarily of earthen materials (although it may be lined with manmade materials) that is not an injection well.
59. "Tank" is a stationary device designed to contain an accumulation of regulated substances and constructed of nonearthen materials (for example, concrete, steel, plastic) that provide structural support.
60. "Training program" means any program that provides information to and evaluates the knowledge of a class A, class B, or class C operator through testing, practical demonstration, or another approach acceptable to the department regarding requirements for underground storage tank systems that meet the requirements of sections 33.1-24-08-45 through 33.1-24-08-48.
61. "Transfer operator" means any person who delivers or deposits product into an underground storage tank. This term may include major oil companies, jobbers, petroleum transportation companies, or other product delivery entities.
62. "Under-dispenser containment (UDC)" means containment underneath a dispenser system designed to prevent leaks from the dispenser and piping within or above the under-dispenser containment from reaching soil or ground water. Such containment must:
  - a. Be liquid-tight on its sides, bottom, and at any penetrations;
  - b. Be compatible with the substance conveyed by the piping; and
  - c. Allow for visual inspection and access to the components in the containment system or be monitored.
63. "Underground area" means an underground room, such as a basement, cellar, shaft, or vault, providing enough space for physical inspection of the exterior of the tank situated on or above the surface of the floor.
64. "Underground release" means any belowground release.
65. "Underground storage tank" means any one or combination of tanks (including underground pipes connected thereto) that is used to contain an accumulation of regulated substances, and the volume of which (including the volume of underground pipes connected thereto) is ten percent or more beneath the surface of the ground. This term does not include any:
  - a. Farm or residential tank of one thousand one hundred gallons [4,163.94 liters] or less capacity used for storing motor fuel for noncommercial purposes;
  - b. Tank used for storing heating oil for consumptive use on the premises where stored;
  - c. Septic tank;
  - d. Pipeline facility (including gathering lines) regulated under:
    - (1) Chapter 601 [Title 49 of the Pipeline Safety Statute]; or

- (2) Which is an intrastate pipeline facility regulated under state laws as provided in chapter 601 of Title 49 of the Pipeline Safety Statute and which is determined by the United States secretary of transportation to be connected to a pipeline, or to be operated or intended to be capable of operating at pipeline pressure or as an integral part of a pipeline;
- e. Surface impoundment, pit, pond, or lagoon;
- f. Storm water or wastewater collection system;
- g. Flowthrough process tank;
- h. Liquid trap or associated gathering lines directly related to oil or gas production and gathering operations; or
- i. Storage tank situated in an underground area (such as a basement, cellar, mineworking, drift, shaft, or tunnel) if the storage tank is situated upon or above the surface of the floor.

The term "underground storage tank" does not include any pipes connected to any tank which is described in subdivisions a through i of this subsection.

- 66. "Unattended cardtrol facility" means a facility where control of the dispensing of a regulated substance is through a mechanical or electronic method without the constant onsite presence of a class A, class B, or class C operator.
- 67. "Underground storage tank system" or "tank system" means an underground storage tank, connected underground piping, underground ancillary equipment, and containment system, if any.
- 68. "Upgrade" means the addition or retrofit of some systems such as cathodic protection, lining, or spill and overfill controls to improve the ability of an underground storage tank system to prevent the release of product.
- 69. "Wastewater treatment tank" means a tank that is designed to receive and treat an influent wastewater through physical, chemical, or biological methods.

**History:** Effective January 1, 2019.

**General Authority:** NDCC 23.1-04-03, 23.1-04-06; S.L. 2017, ch. 199, § 1

**Law Implemented:** NDCC 23.1-04-06; S.L. 2017, ch. 199, § 19

**33.1-24-08-04. [Reserved].**

**33.1-24-08-05. [Reserved].**

**33.1-24-08-06. [Reserved].**

**33.1-24-08-07. [Reserved].**

**33.1-24-08-08. [Reserved].**

**33.1-24-08-09. [Reserved].**

### 33.1-24-08-10. Performance standards for new underground storage tank systems.

In order to prevent releases due to structural failure, corrosion, or spills and overfills for as long as the underground storage tank system is used to store regulated substances, all owners and operators of new underground storage tank systems must meet the following requirements. In addition, except for suction piping that meets the requirements of subparagraphs a through e of paragraph 2 of subdivision a of subsection 2 of section 33.1-24-08-31, tanks and piping installed or replaced after January 1, 2009, must be secondarily contained and use interstitial monitoring in accordance with subsection 7 of section 33.1-24-08-33. Secondary containment must be able to contain regulated substances leaked from the primary containment until they are detected and removed and prevent the release of regulated substances to the environment at any time during the operational life of the underground storage tank system. For cases where the piping is considered to be replaced, the entire piping run must be secondarily contained.

1. **Tanks.** Each tank must be properly designed and constructed, and any portion underground that routinely contains product must be protected from corrosion in accordance with a code of practice developed by a nationally recognized association or independent testing laboratory as specified below:

- a. The tank is constructed of fiberglass-reinforced plastic.

NOTE: The following codes of practice may be used to comply with this subdivision: Underwriters Laboratory Standard 1316, "Glass-Fiber-Reinforced Plastic Underground Storage Tanks for Petroleum Products Alcohols, and Alcohol-Gasoline Mixtures"; or Underwriters Laboratories of Canada S615, "Standard for Reinforced Plastic Underground Tanks for Flammable and Combustible Liquids".

- b. The tank is constructed of steel and cathodically protected in the following manner:

- (1) The tank is coated with a suitable dielectric material;
- (2) Field-installed cathodic protection systems are designed by a corrosion expert;
- (3) Impressed current systems are designed to allow determination of current operating status as required in subsection 3 of section 33.1-24-08-21; and
- (4) Cathodic protection systems are operated and maintained in accordance with section 33.1-24-08-21 or according to guidelines established by the department.

NOTE: The following codes of practice may be used to comply with this subdivision: Steel Tank Institute "Specification STI-P3® Specification and Manual for External Corrosion Protection of Underground Steel Storage Tanks"; Underwriters Laboratories Standard 1746, "External Corrosion Protection Systems for Steel Underground Storage Tanks"; Underwriters Laboratories of Canada S603, "Standard for Steel Underground Tanks for Flammable and Combustible Liquids", and S603.1, "Standard for External Corrosion Protection Systems for Steel Underground Tanks for Flammable and Combustible Liquids", and S631, "Standard for Isolating Bushings for Steel Underground Tanks Protected with External Corrosion Protection Systems"; Steel Tank Institute Standard F841, "Standard for Dual Wall Underground Steel Storage Tanks"; or NACE International Standard Practice SP 0285, "External Corrosion Control of Underground Storage Tank Systems by Cathodic Protection"; and Underwriters Laboratories Standard 58, "Standard for Steel Underground Tanks for Flammable and Combustible Liquids".

- c. The tank is constructed of steel and clad or jacketed with a noncorrodible material.

NOTE: The following codes of practice may be used to comply with this subdivision: Underwriters Laboratories Standard 1746, "External Corrosion Protection Systems for

Steel Underground Storage Tanks"; Steel Tank Institute ACT-100® Specification F894, "Specification for External Corrosion Protection of FRP Composite Steel Underground Storage Tanks"; Steel Tank Institute ACT-100-U® Specification F961, "Specification for External Corrosion Protection of Composite Steel Underground Storage Tanks"; or Steel Tank Institute Specification F922, "Steel Tank Institute Specification for Permatank®".

- d. The tank is constructed of metal without additional corrosion protection measures provided that:
  - (1) The tank is installed at a site that is determined by a corrosion expert not be corrosive enough to cause it to have a release due to corrosion during its operating life; and
  - (2) Owners and operators maintain records that demonstrate compliance with the requirements of paragraph 1 of this subdivision for the remaining life of the tank.
- e. The tank construction and corrosion protection are determined by the department to be designed to prevent the release or threatened release of any stored regulated substance in a manner that is no less protective of human health and the environment than subdivisions a through d.

- 2. **Piping.** The piping that routinely contains regulated substances and is in contact with the ground must be properly designed, constructed, and protected from corrosion in accordance with a code of practice developed by a nationally recognized association or independent testing laboratory as specified below:

- a. The piping is constructed of a noncorrodible material.

NOTE: The following codes of practice may be used to comply with this subdivision: Underwriters Laboratories Standard 971, "Nonmetallic Underground Piping for Flammable Liquids"; Underwriters Laboratories of Canada Standard S660, "Standard for Nonmetallic Underground Piping for Flammable and Combustible Liquids".

- b. The piping is constructed of steel and cathodically protected in the following manner:

- (1) The piping is coated with a suitable dielectric material;
- (2) Field-installed cathodic protection systems are designed by a corrosion expert;
- (3) Impressed current systems are designed to allow determination of current operating status as required in subsection 3 of section 33.1-24-08-21; and
- (4) Cathodic protection systems are operated and maintained in accordance with section 33.1-24-08-21 or guidelines established by the department.

NOTE: The following codes of practice may be used to comply with this subdivision: American Petroleum Institute Recommended Practice 1632, "Cathodic Protection of Underground Petroleum Storage Tanks and Piping Systems"; Underwriters Laboratories Subject 971A, "Outline of Investigation for Metallic Underground Fuel Pipe"; Steel Tank Institute Recommended Practice R892, "Recommended Practice for Corrosion Protection of Underground Piping Networks Associated with Liquid Storage and Dispensing Systems"; NACE International Standard Practice SP 0169 "Control of External Corrosion on Underground Submerged Metallic Piping Systems", NACE International Standard Practice SP 0285, "External Corrosion Control of Underground Storage Tank Systems by Cathodic Protection".

- c. The piping is constructed of metal without additional corrosion protection measures provided that:
    - (1) The piping is installed at a site that is determined by a corrosion expert to not be corrosive enough to cause it to have a release due to corrosion during its operating life; and
    - (2) Owners and operators maintain records that demonstrate compliance with the requirements of paragraph 1 for the remaining life of the piping.
  - d. The piping construction and corrosion protection are determined by the department to be designed to prevent the release or threatened release of any stored regulated substance in a manner that is no less protective of human health and the environment than the requirements in subdivisions a through c.
3. **Spill and overfill prevention equipment.**
- a. Except as provided in subdivisions b and c, to prevent spilling and overfilling associated with product transfer to the underground storage tank system, owners and operators must use the following spill and overfill prevention equipment:
    - (1) Spill prevention equipment that will prevent release of product to the environment when the transfer hose is detached from the fill pipe (for example, a spill catchment basin); and
    - (2) Overfill prevention equipment that will:
      - (a) Automatically shut off flow into the tank when the tank is no more than ninety-five percent full;
      - (b) Alert the transfer operator when the tank is no more than ninety percent full by restricting the flow into the tank or triggering a high-level alarm; or
      - (c) Restrict flow thirty minutes prior to overfilling, alert the transfer operator with a high-level alarm one minute before overfilling, or automatically shut off flow into the tank so that none of the fittings located on top of the tank are exposed to product due to overfilling.
  - b. Owners and operators are not required to use the spill and overfill prevention equipment specified in subdivision a if:
    - (1) Alternative equipment is used that is determined by the department to be no less protective of human health and the environment than the equipment specified in paragraphs 1 and 2 of subdivision a; or
    - (2) The underground storage tank system is filled by transfers of no more than twenty-five gallons [94.63 liters] at one time.
  - c. Flow restrictors used in vent lines may not be used to comply with paragraph 2 of subdivision a of subsection 3 when overfill prevention is installed or replaced after April 1, 2018.
  - d. Spill and overfill prevention equipment must be periodically tested or inspected in accordance with section 33.1-24-08-25.
4. **Dispenser systems.** Each underground storage tank system must be equipped with under-dispenser containment for any new dispenser system installed after September 28, 2018:

- a. A dispenser system is considered new when both the dispenser and the equipment needed to connect the dispenser to the underground storage tank system are installed at an underground storage tank facility. The equipment necessary to connect the dispenser to the underground storage tank system includes check valves, shear valves, unburied risers or flexible connectors, or other transitional components that are underneath the dispenser and connect the dispenser to the underground piping.
  - b. Under-dispenser containment must be liquid-tight on its sides, bottom, and at any penetrations. Under-dispenser containment must allow for visual inspection and access to the components in the containment system or be periodically monitored for leaks from the dispenser system.
5. **Installation.** The underground storage tank system must be properly installed in accordance with a code of practice developed by a nationally recognized association or independent testing laboratory and in accordance with the manufacturer's instructions.

NOTE: Tank and piping system installation practices and procedures described in the following codes of practice may be used to comply with the requirements of this subsection: American Petroleum Institute Publication 1615, "Installation of Underground Petroleum Storage System"; Petroleum Equipment Institute Publication RP100, "Recommended Practices for Installation of Underground Liquid Storage Systems"; or National Fire Protection Association Standard 30, "Flammable and Combustible Liquids Code" and Standard 30A, "Code for Motor Fuel Dispensing Facilities and Repair Garages".

6. **Certification of installation.** All owners and operators must ensure that one or more of the following methods of certification, testing, or inspection is used to demonstrate compliance with subsection 5 by providing a certification of compliance on the underground storage tank notification form in accordance with section 33.1-24-08-12:
- a. The installer has been certified by the tank and piping manufacturers;
  - b. The installer has been certified or licensed by the department;
  - c. The installation has been inspected and certified by a registered professional engineer with education and experience in underground storage tank system installation;
  - d. The installation has been inspected and approved by the department;
  - e. All work listed in the manufacturer's installation checklists has been completed; or
  - f. The owner and operator have complied with another method for ensuring compliance with subsection 5 that is determined by the department to be no less protective of human health and the environment.

**History:** Effective January 1, 2019.

**General Authority:** NDCC 23.1-04-03, 23.1-04-06; S.L. 2017, ch. 199, § 1

**Law Implemented:** NDCC 23.1-04-06; S.L. 2017, ch. 199, § 19

### **33.1-24-08-11. Upgrading of existing underground storage tank systems.**

Owners and operators must permanently close (in accordance with sections 33.1-24-08-60 through 33.1-24-08-64) any underground storage tank system that does not meet the new underground storage tank system performance standards in section 33.1-24-08-10 or has not been upgraded in accordance with subsections 2 through 4. This does not apply to previously deferred underground storage tank systems described in sections 33.1-24-08-70 to 33.1-24-08-72 and where an upgrade is determined to be appropriate by the department.



1. **Alternatives allowed.** All existing underground storage tank systems must comply with one of the following requirements:
  - a. New underground storage tank system performance standards under section 33.1-24-08-10;
  - b. The upgrading requirements in subsections 2 through 4; or
  - c. Closure requirements under sections 33.1-24-08-60 through 33.1-24-08-64, including applicable requirements for corrective action under sections 33.1-24-08-50 through 33.1-24-08-57.
2. **Tank upgrading requirements.** Steel tanks must be upgraded to meet one of the following requirements in accordance with a code of practice developed by a nationally recognized association or independent testing laboratory:
  - a. Interior lining. Tanks upgraded by internal lining must meet the following:
    - (1) The lining was installed in accordance with the requirements of section 33.1-24-08-23; and
    - (2) Within ten years after lining, and every five years thereafter, the lined tank is internally inspected and found to be structurally sound with the lining still performing in accordance with original design specifications. If the internal lining is no longer performing in accordance with original design specifications and cannot be repaired in accordance with a code of practice developed by a nationally recognized association or independent testing laboratory, then the lined tank must be permanently closed in accordance with sections 33.1-24-08-60 through 33.1-24-08-64.

NOTE: The following codes of practice may be used to comply with the periodic lining inspection requirement of this section: American Petroleum Institute Recommended Practice 1631, "Interior Lining and Periodic Inspection of Underground Storage Tanks"; National Leak Prevention Association Standard 631, Chapter B "Future Internal Inspection Requirements for Lined Tanks"; or Ken Wilcox Associates Recommended Practice, "Recommended Practice for Inspecting Buried Lined Steel Tanks Using a Video Camera".

- b. Cathodic protection. Tanks upgraded by cathodic protection must meet the requirements of paragraphs 2, 3, and 4 of subdivision b of subsection 1 of section 33.1-24-08-10 and the integrity of the tank must have been ensured using one of the following methods:
  - (1) The tank was internally inspected and assessed to ensure that the tank is structurally sound and free of corrosion holes prior to installing the cathodic protection system;
  - (2) The tank had been installed for less than ten years and is monitored monthly for releases in accordance with subsections 4 through 9 of section 33.1-24-08-33;
  - (3) The tank had been installed for less than ten years and is assessed for corrosion holes by conducting two tightness tests that meet the requirements of subsection 3 of section 33.1-24-08-33. The first tightness test must have been conducted prior to installing the cathodic protection system. The second tightness test must have been conducted between three and six months following the first operation of the cathodic protection system; or

- (4) The tank was assessed for corrosion holes by a method that is determined by the department to prevent releases in a manner that is no less protective of human health and the environment than paragraphs 1 through 3.
- c. Internal lining combined with cathodic protection. Tanks upgraded by both internal lining and cathodic protection must meet the following:
  - (1) The lining was installed in accordance with the requirements of section 33.1-24-08-23; and
  - (2) The cathodic protection system meets the requirements of paragraphs 2, 3, and 4 of subdivision b of subsection 1 of section 33.1-24-08-10.

NOTE: The following historical codes of practice were listed as options for complying with this section: American Petroleum Institute Publication 1631, "Recommended Practice for the Interior Lining of Existing Steel Underground Storage Tanks"; National Leak Prevention Association Standard 631, "Spill Prevention, Minimum 10 Year Life Extension of Existing Steel Underground Tanks by Lining Without the Addition of Cathodic Protection"; National Association of Corrosion Engineers Standard RP-02-85, "Control of External Corrosion on Metallic Buried, Partially Buried, or Submerged Liquid Storage Systems"; and American Petroleum Institute Recommended Practice 1632, "Cathodic Protection of Underground Petroleum Storage Tanks and Piping Systems".

3. **Piping upgrading requirements.** Metal piping that routinely contains regulated substances and is in contact with the ground must be cathodically protected in accordance with a code of practice developed by a nationally recognized association or independent testing laboratory and must meet the requirements of paragraphs 2, 3, and 4 of subdivision b of subsection 2 of section 33.1-24-08-10.

NOTE: The codes of practice listed in the note following subdivision b of subsection 2 of section 33.1-24-08-10 may be used to comply with this requirement.

4. **Spill and overflow prevention equipment.** To prevent spilling and overflowing associated with product transfer to the underground storage tank system, all existing underground storage tank systems must comply with new underground storage tank system spill and overflow prevention equipment requirements specified in subsection 3 of section 33.1-24-08-10.

**History:** Effective January 1, 2019.

**General Authority:** NDCC 23.1-04-03, 23.1-04-06; S.L. 2017, ch. 199, § 1

**Law Implemented:** NDCC 23.1-04-06; S.L. 2017, ch. 199, § 19

#### **33.1-24-08-12. Notification requirements.**

1. After May 8, 1986, an owner must submit notice of a tank system's existence to the department within thirty days of bringing the underground storage tank system into use. Owners must use the form prescribed in appendix I.

NOTE: Owners and operators of underground storage tank systems that were in the ground on or after May 8, 1986, unless taken out of operation on or before January 1, 1974, were required to notify the designated state or local agency in accordance with the Hazardous and Solid Waste Amendments of 1984, Public Law 98-616, on a form published by the environmental protection agency on November 8, 1985, (50 Federal Register 46602) unless notice was given pursuant to section 103(c) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980. Owners and operators who have not complied with the notification requirements may use portions I through VI of the notification form contained in appendix I.

2. Within thirty days of acquisition, any person who assumes ownership of a regulated underground storage tank system, except as described in subsection 1, must submit a notice of the ownership change to the department, using the form in appendix I, state form in accordance with subsection 3.
3. Owners required to submit notices under subsections 1 and 2 must provide notices to the department for each tank they own. Owners may provide notice for several tanks using one notification form, but owners who own tanks located at more than one place of operation must file a separate notification form for each separate place of operation.
4. Notices required to be submitted under subsection 1 must provide all of the information in sections I through VI of the prescribed form for each tank for which notice must be given.
5. All owners and operators of new underground storage tank systems must certify in the notification form compliance with the following requirements:
  - a. Installation of tanks and piping under subsection 6 of section 33.1-24-08-10;
  - b. Cathodic protection of steel tanks and piping under subsections 1 and 2 of section 33.1-24-08-10;
  - c. Financial responsibility under sections 33.1-24-08-80 through 33.1-24-08-106; and
  - d. Release detection under sections 33.1-24-08-31 and 33.1-24-08-32.
6. Beginning October 24, 1988, any person who sells a tank intended to be used as an underground storage tank must notify the purchaser of such tank of the owner's notification obligations under subsection 1. The statement provided in appendix II, when used on shipping tickets and invoices, may be used to comply with this requirement.
7. All owners and operators of new underground storage tank systems must ensure that the installer certifies in the notification form that the methods used to install the tanks and piping complies with the requirements in subsection 5 of section 33.1-24-08-10.

**History:** Effective January 1, 2019.

**General Authority:** NDCC 23.1-04-03, 23.1-04-06; S.L. 2017, ch. 199, § 1

**Law Implemented:** NDCC 23.1-04-06; S.L. 2017, ch. 199, § 19

**33.1-24-08-13. [Reserved].**

**33.1-24-08-14. [Reserved].**

**33.1-24-08-15. [Reserved].**

**33.1-24-08-16. [Reserved].**

**33.1-24-08-17. [Reserved].**

**33.1-24-08-18. [Reserved].**

**33.1-24-08-19. [Reserved].**

### **33.1-24-08-20. Spill and overfill control.**

1. Owners and operators must ensure that releases due to spilling or overfilling do not occur. The owner and operator must ensure that the volume available in the tank is greater than the volume of product to be transferred to the tank before the transfer is made and that the transfer operation is monitored constantly to prevent overfilling and spilling.

NOTE: The transfer procedures described in National Fire Protection Association Standard 385 "Standard for Tank Vehicles for Flammable and Combustible Liquids" or American Petroleum Institute Recommended Practice 1007, "Loading and Unloading of MC 306/DOT 406 Cargo Tank Motor Vehicles" may be used to comply with this subsection. Further guidance on spill and overfill prevention appears in American Petroleum Institute Recommended Practice 1621, "Bulk Liquid Stock Control at Retail Outlets".

2. The owner and operator must report, investigate, and clean up any spills and overfills in accordance with section 33.1-24-08-43.

**History:** Effective January 1, 2019.

**General Authority:** NDCC 23.1-04-03, 23.1-04-06; S.L. 2017, ch. 199, § 1

**Law Implemented:** NDCC 23.1-04-06; S.L. 2017, ch. 199, § 19

### **33.1-24-08-21. Operation and maintenance of corrosion protection.**

All owners and operators of metal underground storage tank systems with corrosion protection must comply with the following requirements to ensure that releases due to corrosion are prevented until the underground storage tank system is permanently closed or undergoes a change-in-service pursuant to section 33.1-24-08-61:

1. All corrosion protection systems must be operated and maintained to continuously provide corrosion protection to the metal components of that portion of the tank and piping that routinely contain regulated substances and are in contact with the ground;
2. All underground storage tank systems equipped with cathodic protection systems must be inspected for proper operation by a qualified cathodic protection tester in accordance with the following requirements:
  - a. Frequency. All cathodic protection systems must be tested within six months of installation and at least every three years thereafter or according to another reasonable timeframe established by the department;
  - b. Inspection criteria. The criteria that are used to determine that cathodic protection is adequate as required by this section must be in accordance with a code of practice developed by a nationally recognized association;

NOTE: The following codes of practice may be used to comply with subsection 2: NACE International Test Method TM0101, "Measurement Techniques Related to Criteria for Cathodic Protection of Underground Storage Tank Systems"; NACE International Test Method TM0497, "Measurement Techniques Related to Criteria for Cathodic Protection on Underground or Submerged Metallic Piping Systems"; Steel Tank Institute Recommended Practice R051, "Cathodic Protection Testing Procedures for STI-P3® USTs"; NACE International Standard Practice SP 0285, "External Control of Underground Storage Tank Systems by Cathodic Protection"; or NACE International Standard Practice SP 0169, "Control of External Corrosion on Underground or Submerged Metallic Piping Systems".

3. Underground storage tank systems with impressed current cathodic protection systems must also be inspected every sixty days to ensure the equipment is running properly; and

4. For underground storage tank systems using cathodic protection, records of the operation of the cathodic protection must be maintained (in accordance with section 33.1-24-08-24) to demonstrate compliance with the performance standards. These records must provide the following:
  - a. The results of the last three inspections required in subsection 3; and
  - b. The results of testing from the last two inspections required in subsection 2.

**History:** Effective January 1, 2019.

**General Authority:** NDCC 23.1-04-03, 23.1-04-06; S.L. 2017, ch. 199, § 1

**Law Implemented:** NDCC 23.1-04-06; S.L. 2017, ch. 199, § 19

### **33.1-24-08-22. Compatibility.**

1. Owners and operators must use an underground storage tank system made of or lined with materials that are compatible with the substance stored in the underground storage tank system.
2. Owners and operators must notify the department at least thirty days prior to switching to a regulated substance containing greater than ten percent ethanol, greater than twenty percent biodiesel, or any other regulated substance identified by the department. In addition, owners and operators with underground storage tank systems storing these regulated substances must meet one of the following:
  - a. Demonstrate compatibility of the underground storage tank system, including the tank, piping, containment sumps, pumping equipment, release detection equipment, spill equipment, and overfill equipment. Owners and operators may demonstrate compatibility of the underground storage tank system by using one of the following options:
    - (1) Certification or listing of underground storage tank system equipment or components by a nationally recognized, independent testing laboratory for use with the regulated substance stored; or
    - (2) Equipment or component manufacturer approval. The manufacturer's approval must be in writing, indicate an affirmative statement of compatibility, specify the range of biofuel blends the equipment or component is compatible with, and be from the equipment or component manufacturer; or
  - b. Use another option determined by the department to be no less protective of human health and the environment than the options listed in subdivision a.
3. Owners and operators must maintain records in accordance with subsection 2 of section 33.1-24-08-24 documenting compliance with subsection 2 for as long as the underground storage tank system is used to store the regulated substance.

NOTE: The following code of practice may be useful in complying with this section: American Petroleum Institute Recommended Practice 1626, "Storing and Handling Ethanol and Gasoline-Ethanol Blends at Distribution Terminals and Filling Stations".

**History:** Effective January 1, 2019.

**General Authority:** NDCC 23.1-04-03, 23.1-04-06; S.L. 2017, ch. 199, § 1

**Law Implemented:** NDCC 23.1-04-06; S.L. 2017, ch. 199, § 19

### 33.1-24-08-23. Repairs allowed.

Owners and operators of underground storage tank systems must ensure that repairs will prevent releases due to structural failure or corrosion as long as the underground storage tank system is used to store regulated substances. The repairs must meet the following requirements:

1. Repairs to underground storage tank systems must be properly conducted in accordance with a code of practice developed by a nationally recognized association or an independent testing laboratory;

NOTE: The following codes of practice may be used to comply with this subsection: National Fire Protection Association Standard 30, "Flammable and Combustible Liquids Code"; American Petroleum Institute Recommended Practice RP 2200, "Repairing Crude Oil, Liquefied Petroleum Gas, and Product Pipelines"; American Petroleum Institute Recommended Practice RP 1631, "Recommended Practice for the Interior Lining and Periodic Inspection Underground Storage Tanks"; National Fire Protection Association Standard 326, "Standard for the Safeguarding of Tanks and Containers for Entry, Cleaning, or Repair"; National Leak Prevention Association Standard 631, Chapter A, "Entry, Cleaning, Interior Inspection, Repair, and Lining of Underground Storage Tanks"; Steel Tank Institute Recommended Practice R972, "Recommended Practice for the Addition of Supplemental Anodes to STI-P3® Tanks"; NACE International Standard Practice SP 0285, "External Control of Underground Storage Tank Systems by Cathodic Protection"; or Fiberglass Tank and Pipe Institute Recommended Practice T-95-02, "Remanufacturing of Fiberglass Reinforced Plastic (FRP) Underground Storage Tanks".

2. Repairs to fiberglass-reinforced plastic tanks may be made by the manufacturer's authorized representatives or in accordance with a code of practice developed by a nationally recognized association or an independent testing laboratory;
3. Metal pipe sections and fittings that have released product as a result of corrosion or other damage must be replaced. Noncorrodible pipes and fittings may be repaired in accordance with the manufacturer's specifications;
4. Repairs to secondary containment areas of tanks and piping used for interstitial monitoring and to containment sumps used for interstitial monitoring of piping must have the secondary containment tested for tightness according to the manufacturer's instructions, a code of practice developed by a nationally recognized association or independent testing laboratory, or according to requirements established by the department within thirty days following the date of completion of the repair. All other repairs to tanks and piping must be tightness tested in accordance with subsection 3 of section 33.1-24-08-33 and subsection 2 of section 33.1-24-08-34 within thirty days following the date of the completion of the repair except as provided in subdivisions a through c:
  - a. The repaired tank is internally inspected in accordance with a code of practice developed by a nationally recognized association or an independent testing laboratory;
  - b. The repaired portion of the underground storage tank system is monitored monthly for releases in accordance with a method specified in subsections 4 through 9 of section 33.1-24-08-33; or
  - c. Another test method is used that is determined by the department to be no less protective of human health and the environment than those listed above;

NOTE: The following codes of practice may be used to comply with subsection 4 of this subsection: Steel Tank Institute Recommended Practice R012, "Recommended Practice for Interstitial Tightness Testing of Existing Underground Double Wall Steel Tanks"; or

Fiberglass Tank and Pipe Institute Protocol, "Field Test Protocol for Testing the Annular Space of Installed Underground Fiberglass Double and Triple-Wall Tanks with Dry Annular Space"; Petroleum Equipment Institute Recommended Practice RP1200, "Recommended Practices for the Testing and Verification of Spill, Overfill, Leak Detection and Secondary Containment Equipment at UST Facilities".

5. Within six months following the repair of any cathodically protected underground storage tank system, the cathodic protection system must be tested in accordance with subsections 2 and 3 of section 33.1-24-08-21 to ensure that it is operating properly; and
6. Within thirty days following any repair to spill or overfill prevention equipment, the repaired spill or overfill prevention equipment must be tested or inspected, as appropriate, in accordance with section 33.1-24-08-25 to ensure it is operating properly.
7. Underground storage tank system owners and operators must maintain records, in accordance with section 33.1-24-08-24, of each repair until the underground storage tank system is permanently closed or undergoes a change-in-service pursuant to section 33.1-24-08-61.

**History:** Effective January 1, 2019.

**General Authority:** NDCC 23.1-04-03, 23.1-04-06; S.L. 2017, ch. 199, § 1

**Law Implemented:** NDCC 23.1-04-06; S.L. 2017, ch. 199, § 19

### **33.1-24-08-24. Reporting and recordkeeping.**

Owners and operators of underground storage tank systems must cooperate fully with inspections, monitoring, and testing conducted by the department, as well as requests for document submission, testing, and monitoring by the owner or operator pursuant to North Dakota Century Code section 23.1-04-06.

1. **Reporting.** Owners and operators must submit the following information to the department:
  - a. Notification for all underground storage tank systems (section 33.1-24-08-12), which includes certification of installation for new underground storage tank systems (subsection 6 of section 33.1-24-08-10), and notification when any person assumes ownership of an underground storage tank system (subsection 2 of section 33.1-24-08-12);
  - b. Notification prior to underground storage tank systems switching to certain regulated substances (subsection 2 of section 33.1-24-08-22);
  - c. Reports of all releases, including suspected releases (section 33.1-24-08-40), spills and overfills (section 33.1-24-08-43), and confirmed releases (section 33.1-24-08-51);
  - d. Corrective actions planned or taken, including initial abatement measures (section 33.1-24-08-52), initial site characterization (section 33.1-24-08-53), free product removal (section 33.1-24-08-54), investigation of soil and ground water cleanup (section 33.1-24-08-55), and corrective action plan (section 33.1-24-08-56); and
  - e. A notification before permanent closure or change in service (section 33.1-24-08-61).
2. **Recordkeeping.** Owners and operators must maintain the following information:
  - a. A corrosion expert's analysis of site corrosion potential if corrosion protection equipment is not used (subdivision d of subsection 1 of section 33.1-24-08-10 and subdivision c of subsection 2 of section 33.1-24-08-10);

- b. Documentation of operation of corrosion protection equipment (section 33.1-24-08-21);
  - c. Documentation of compatibility for underground storage tank systems (subsection 3 of section 33.1-24-08-22);
  - d. Documentation of underground storage tank system repairs (subsection 7 of section 33.1-24-08-23);
  - e. Documentation of compliance for spill and overfill prevention equipment and containment sumps used for interstitial monitoring of piping (subsection 3 of section 33.1-24-08-25);
  - f. Documentation of periodic walkthrough inspections (subsection 2 of section 33.1-24-08-26);
  - g. Documentation of compliance with release detection requirements (section 33.1-24-08-35); and
  - h. Results of the site investigation conducted at permanent closure (section 33.1-24-08-64).
3. **Availability and maintenance of records.** Owners and operators must keep the records required either:
- a. At the underground storage tank site and immediately available for inspection by the department;
  - b. At a readily available alternative site and be provided for inspection to the department upon request; or
  - c. In case of permanent closure records required under section 33.1-24-08-64, owners and operators are also provided with the additional alternative of mailing closure records to the department if they cannot be kept at the site or an alternative site as indicated above.

**History:** Effective January 1, 2019.

**General Authority:** NDCC 23.1-04-03, 23.1-04-06; S.L. 2017, ch. 199, § 1

**Law Implemented:** NDCC 23.1-04-06; S.L. 2017, ch. 199, § 19

**33.1-24-08-25. Periodic testing of spill prevention equipment and containment sumps used for interstitial monitoring of piping and periodic inspection of overfill prevention equipment.**

1. Owners and operators of underground storage tank systems with spill and overfill prevention equipment and containment sumps used for interstitial monitoring of piping must meet these requirements to ensure the equipment is operating properly and will prevent releases to the environment:
  - a. Spill prevention equipment, such as a catchment basin, spill bucket, or other spill containment device, and containment sumps used for interstitial monitoring of piping must prevent releases to the environment by meeting one of the following:
    - (1) The equipment is double walled and the integrity of both walls is periodically monitored at a frequency not less than the frequency of the walkthrough inspections described in section 33.1-24-08-26. Owners and operators shall begin fulfilling paragraph 2 of subdivision a of subsection 1 and conduct a test within thirty days of discontinuing periodic monitoring of this equipment; or
    - (2) The spill prevention equipment and containment sumps used for interstitial monitoring of piping are tested at least once every three years to ensure the equipment is liquid tight by using vacuum, pressure, or liquid testing in accordance with one of the following criteria:



- (a) Requirements developed by the manufacturer;

NOTE: Owners and operators may use this option only if the manufacturer has developed requirements.

- (b) Code of practice developed by a nationally recognized association or independent testing laboratory; or

- (c) Requirements determined by the department to be no less protective of human health and the environment than the requirements listed in subparagraphs a and b of paragraph 2 of subdivision a of subsection 1.

- b. Overfill prevention equipment must be inspected at least once every three years. At a minimum, the inspection must ensure that overfill prevention equipment is set to activate at the correct level specified in subsection 3 of section 33.1-24-08-10 and will activate when a regulated substance reaches that level. Inspections must be conducted in accordance with one of the criteria in subparagraphs a through c of paragraph 2 of subdivision a of subsection 1.

- 2. Owners and operators must begin meeting these requirements as follows:

- a. For underground storage tank systems in use on or before April 1, 2018, the initial spill prevention equipment test, containment sump test, and overfill prevention equipment inspection must be conducted not later than April 1, 2021.

- b. For underground storage tank systems brought into use after April 1, 2018, these requirements apply at installation.

- 3. Owners and operators must maintain records as follows, in accordance with section 33.1-24-08-24, for spill prevention equipment, containment sumps used for interstitial monitoring of piping, and overfill prevention equipment:

- a. All records of testing or inspection must be maintained for three years; and

- b. For spill prevention equipment and containment sumps used for interstitial monitoring of piping not tested every three years, documentation showing that the prevention equipment is double walled and the integrity of both walls is periodically monitored must be maintained for as long as the equipment is periodically monitored.

NOTE: To paragraph 2 of subdivision a of subsection 1 and subdivision b of subsection 1 the following code of practice may be used to comply with paragraph 2 of subdivision a of subsection 1 and subdivision b of subsection 1: Petroleum Equipment Institute Publication RP1200, "Recommended Practices for the Testing and Verification of Spill, Overfill, Leak Detection and Secondary Containment Equipment at UST Facilities".

**History:** Effective January 1, 2019.

**General Authority:** NDCC 23.1-04-03, 23.1-04-06; S.L. 2017, ch. 199, § 1

**Law Implemented:** NDCC 23.1-04-06; S.L. 2017, ch. 199, § 19

### **33.1-24-08-26. Periodic operation and maintenance walkthrough inspections.**

- 1. To properly operate and maintain underground storage tank systems, not later than April 1, 2021, owners and operators shall meet one of the following:

- a. Conduct a walkthrough inspection that, at a minimum, checks the following equipment as specified below:

- (1) **Every thirty days** (Exception: spill prevention equipment at underground storage tank systems receiving deliveries at intervals greater than every thirty days may be checked prior to each delivery):
  - (a) Spill prevention equipment - Visually check for damage; remove liquid or debris; check for and remove obstructions in the fill pipe; check the fill cap to make sure it is securely on the fill pipe; and, for double walled spill prevention equipment with interstitial monitoring, check for a leak in the interstitial area; and
  - (b) Release detection equipment - Check to make sure the release detection equipment is operating with no alarms or other unusual operating conditions present, and ensure records of release detection testing are reviewed and current; and

(2) **Annually:**

- (a) Containment sumps - Visually check for damage, leaks to the containment area, or releases to the environment; remove liquid (in contained sumps) or debris; and, for double walled sumps with interstitial monitoring, check for a leak in the interstitial area; and
  - (b) Hand-held release detection equipment - Check devices, such as tank gauge sticks or ground water bailers for operability and serviceability;
- b. Conduct operation and maintenance walkthrough inspections according to a standard code of practice developed by a nationally recognized association or independent testing laboratory that checks equipment comparable to subdivision a of subsection 1 of section 33.1-24-08-25; or

NOTE: The following code of practice may be used to comply with subdivision b of subsection 1 of section 33.1-24-08-26: Petroleum Equipment Institute Recommended Practice RP 900, "Recommended Practices for the Inspection and Maintenance of UST Systems".

- c. Conduct operation and maintenance walkthrough inspections developed by the department that checks equipment comparable to subdivision a of subsection 1.

- 2 Owners and operators shall maintain records, in accordance with section 33.1-24-08-24, of operation and maintenance walkthrough inspections for one year. Records must include a list of each area checked, whether each area checked was acceptable or needed action taken, a description of actions taken to correct an issue, and delivery records if spill prevention equipment is checked less frequently than every thirty days due to infrequent deliveries.

**History:** Effective January 1, 2019.

**General Authority:** NDCC 23.1-04-03, 23.1-04-06; S.L. 2017, ch. 199, § 1

**Law Implemented:** NDCC 23.1-04-06; S.L. 2017, ch. 199, § 19

**33.1-24-08-27. [Reserved].**

**33.1-24-08-28. [Reserved].**

**33.1-24-08-29. [Reserved].**

**33.1-24-08-30. General release detection requirements for all underground storage tank systems.**

1. Owners and operators of underground storage tank systems must provide a method, or combination of methods, of release detection that:
  - a. Can detect a release from any portion of the tank and the connected underground piping that routinely contains product;
  - b. Is installed and calibrated in accordance with the manufacturer's instructions;
  - c. Beginning on April 1, 2021, is operated and maintained, and electronic and mechanical components are tested for proper operation, in accordance with one of the following: manufacturer's instructions, a code of practice developed by a nationally recognized association or independent testing laboratory, or requirements determined by the department to be no less protective of human health and the environment than the two options listed above. A test of the proper operation must be performed at least annually and, at a minimum, as applicable to the facility, cover the following components and criteria:
    - (1) Automatic tank gauge and other controllers: test alarm, verify system configuration, and test battery backup;
    - (2) Probes and sensors: inspect for residual buildup, ensure floats move freely, ensure shaft is not damaged, ensure cables are free of kinks and breaks, and test alarm operability and communication with controller;
    - (3) Automatic line leak detector: test operation to meet criteria in subsection 1 of section 33.1-24-08-34 by simulating a leak;
    - (4) Vacuum pumps and pressure gauges: ensure proper communication with sensors and controller; and
    - (5) Hand-held electronic sampling equipment associated with groundwater and vapor monitoring: ensure proper operation.

NOTE: The following code of practice may be used to comply with subdivision c of subsection 1: Petroleum Equipment Institute Publication RP1200, "Recommended Practices for the Testing and Verification of Spill, Overfill, Leak Detection and Secondary Containment Equipment at UST Facilities".
  - d. Meets the performance requirements in sections 33.1-24-08-33, 33.1-24-08-34, 33.1-24-08-70, 33.1-24-08-71, or 33.1-24-08-72, as applicable, with any performance claims and their manner of determination described in writing by the equipment manufacturer or installer. In addition, the methods listed in subsections 2, 3, and 4 of section 33.1-24-08-33; subsections 1 and 2 of section 33.1-24-08-34; and sections 33.1-24-08-70, 33.1-24-08-71, or 33.1-24-08-72, must be capable of detecting the leak rate or quantity specified for that method in the corresponding section of the rule with a probability of detection of ninety-five hundredths and a probability of false alarm of five hundredths.
2. When a release detection method operated in accordance with the performance standards in sections 33.1-24-08-33 and 33.1-24-08-34; and either 33.1-24-08-70, 33.1-24-08-71, or 33.1-24-08-72 indicates a release may have occurred, owners and operators must notify the department in accordance with sections 33.1-24-08-40 through 33.1-24-08-43.

3. Any underground storage tank system that cannot apply a method of release detection that complies with the requirements of this section must complete the closure procedures in sections 33.1-24-08-60 through 33.1-24-08-64. For previously deferred underground storage tank systems described in sections 33.1-24-08-01, 33.1-24-08-02, or 33.1-24-08-03; and 33.1-24-08-70, 33.1-24-08-71, or 33.1-24-08-72, this requirement applies after the effective dates described in paragraphs 2 and 3 of subdivision a of subsection 1 of section 33.1-24-08-01 and subsection 1 of section 33.1-24-08-71.

**History:** Effective January 1, 2019.

**General Authority:** NDCC 23.1-04-03, 23.1-04-06; S.L. 2017, ch. 199 § 1

**Law Implemented:** NDCC 23.1-04-06; S.L. 2017, ch. 199 § 19

**33.1-24-08-31. Release detection requirements for petroleum underground storage tank systems.**

Owners and operators of petroleum underground storage tank systems must provide release detection for tanks and piping as follows:

1. **Tanks.** Tanks must be monitored for releases as follows:
  - a. Tanks installed on or before September 28, 2018, must be monitored for releases at least every thirty days using one of the methods listed in subsections 4 through 9 of section 33.1-24-08-33 except that:
    - (1) Underground storage tank systems that meet the performance standards in section 33.1-24-08-10 or 33.1-24-08-11, and the monthly inventory control requirements in subsection 1 or 2 of section 33.1-24-08-33, may use tank tightness testing (conducted in accordance with subsection 3 of section 33.1-24-08-33) at least every five years until ten years after the tank was installed and tanks with capacity of five hundred fifty gallons [2081.98 liters] or less and tanks with a capacity of five hundred fifty-one to one thousand gallons which meet the tank diameter criteria in subsection 2 of section 33.1-24-08-33 may use manual tank gauging (conducted in accordance with subsection 2 of section 33.1-24-08-33).
    - (2) Tanks installed after September 28, 2018, must be monitored for releases at least every thirty days in accordance with subsection 7 of section 33.1-24-08-33.
2. **Piping.** Underground piping that routinely contains regulated substances must be monitored for releases in a manner that meets one of the following requirements:
  - a. Piping installed on or before September 28, 2018, must meet one of the following:
    - (1) Pressurized piping. Underground piping that conveys regulated substances under pressure must:
      - (a) Be equipped with an automatic line leak detector conducted in accordance with subsection 1 of section 33.1-24-08-34; and
      - (b) Have an annual line tightness test conducted in accordance with subsection 2 of section 33.1-24-08-34 or have monthly monitoring conducted in accordance with subsection 3 of section 33.1-24-08-34.
    - (2) Suction piping. Underground piping that conveys regulated substances under suction must either have a line tightness test conducted at least every three years and in accordance with subsection 2 of section 33.1-24-08-34, or use a monthly monitoring method conducted in accordance with subsection 3 of section

33.1-24-08-34. No release detection is required for suction piping that is designed and constructed to meet the following standards:

- (a) The below-grade piping operates at less than atmospheric pressure;
  - (b) The below-grade piping is sloped so that the contents of the pipe will drain back into the storage tank if the suction is released;
  - (c) Only one check valve is included in each suction line;
  - (d) The check valve is located directly below and as close as practical to the suction pump; and
  - (e) A method is provided that allows compliance with subparagraphs b through d to be readily determined.
- b. Piping installed or replaced after September 28, 2018, must meet one of the following:
- (1) Pressurized piping must be monitored for releases at least every thirty days in accordance with subsection 7 of section 33.1-24-08-33 and be equipped with an automatic line leak detector in accordance with subsection 1 of section 33.1-24-08-34; or
  - (2) Suction piping must be monitored for releases at least every thirty days in accordance with subsection 7 of section 33.1-24-08-33. No release detection is required for suction piping that meets subparagraphs a through e of paragraph 2 of subdivision a of subsection 2.

**History:** Effective January 1, 2019.

**General Authority:** NDCC 23.1-04-03, 23.1-04-06; S.L. 2017, ch. 199 § 1

**Law Implemented:** NDCC 23.1-04-06; S.L. 2017, ch. 199 § 19

**33.1-24-08-32. Release detection requirements for hazardous substance underground storage tank systems.**

Owners and operators of hazardous substance underground storage tank systems must provide containment that meets the following requirements and monitor these systems using subsection 7 of section 33.1-24-08-33 at least every thirty days:

1. Secondary containment systems must be designed, constructed, and installed:
  - a. Contain regulated substances leaked from the primary containment until they are detected and removed;
  - b. Prevent the release of regulated substances to the environment at any time during the operational life of the underground storage tank system; and
  - c. Be checked for evidence of a release at least every thirty days.

NOTE: The provisions of section 33.1-24-05-106 may be used to comply with this subsection for tanks installed on or before April 1, 2018.

2. Double-walled tanks must be designed, constructed, and installed to:
  - a. Contain a leak from any portion of the inner tank within the outer wall; and
  - b. Detect the failure of the inner wall.
3. External liners (including vaults) must be designed, constructed, and installed to:

- a. Contain one hundred percent of the capacity of the largest tank within its boundary;
  - b. Prevent the interference of precipitation or ground water intrusion with the ability to contain or detect a release of regulated substances; and
  - c. Surround the tank completely (for example, it is capable of preventing lateral as well as vertical migration of regulated substances).
4. Underground piping must be equipped with secondary containment that satisfies the requirements of subsection 1 (for example, trench liners, double-walled pipe). In addition, underground piping that conveys regulated substances under pressure must be equipped with an automatic line leak detector in accordance with subsection 1 of section 33.1-24-08-34.
  5. For hazardous substance underground storage tank systems installed on or before April 1, 2018, other methods of release detection may be used if owners and operators:
    - a. Demonstrate to the department that an alternate method can detect a release of the stored substance as effectively as any of the methods allowed in subsections 2 through 9 of section 33.1-24-08-33 can detect a release of petroleum;
    - b. Provide information to the department on effective corrective action technologies, health risks, and chemical and physical properties of the stored substance, and the characteristics of the underground storage tank site; and
    - c. Obtain approval from the department to use the alternate release detection method before the installation and operation of the new underground storage tank system.

**History:** Effective January 1, 2019.

**General Authority:** NDCC 23.1-04-03, 23.1-04-06; S.L. 2017, ch. 199 § 1

**Law Implemented:** NDCC 23.1-04-06; S.L. 2017, ch. 199 § 19

### **33.1-24-08-33. Methods of release detection for tanks.**

Each method of release detection for tanks used to meet the requirements of section 33.1-24-08-31 must be conducted in accordance with the following:

1. **Inventory control.** Product inventory control (for another test of equivalent performance) must be conducted monthly to detect a release of at least one percent of flowthrough plus one hundred thirty gallons [492.10 liters] on a monthly basis in the following manner:
  - a. Inventory volume measurements for regulated substance inputs, withdrawals, and the amount still remaining in the tank are recorded each operating day;
  - b. The equipment used is capable of measuring the level of product over the full range of the tank's height to the nearest one-eighth of an inch [3.05 millimeters];
  - c. The regulated substance inputs are reconciled with delivery receipts by measurement of the tank inventory volume before and after delivery;
  - d. Deliveries are made through a drop tube that extends to within one foot [0.30 meters] of the tank bottom;
  - e. Product dispensing is metered and recorded within the local standards for meter calibration or an accuracy of six cubic inches [98.32 milliliters] for every five gallons [18.93 liters] of product withdrawn; and
  - f. The measurement of any water level in the bottom of the tank is made to the nearest one-eighth of an inch [3.05 millimeters] at least once a month.

NOTE: Practices described in the American Petroleum Institute, Recommended Practice RP 1621, "Bulk Liquid Stock Control at Retail Outlets", may be used, where applicable, as guidance in meeting the requirements.

2. **Manual tank gauging.** Manual tank gauging must meet the following requirements:
  - a. Tank liquid level measurements are taken at the beginning and ending of a period using the appropriate minimum duration of test value in the table below during which no liquid is added to or removed from the tank;
  - b. Level measurements are based on an average of two consecutive stick readings at both the beginning and ending of the period;
  - c. The equipment used is capable of measuring the level of product over the full range of the tank's height to the nearest one-eighth of an inch [3.05 millimeters];
  - d. A release is suspected and subject to the requirements of sections 33.1-24-08-40 through 33.1-24-08-43 if the variation between beginning and ending measurements exceeds the weekly or monthly standards in the following table:

Nominal Tank Capacity	Minimum Duration of Test	Weekly Standard (One Test)	Monthly Standard (Average of Four Tests)
550 gallons or less	36 hours	10 gallons	5 gallons
551-1,000 gallons (when tank diameter is 64 inches)	44 hours	9 gallons	4 gallons
551-1,000 gallons (when tank diameter is 48 inches)	58 hours	12 gallons	6 gallons
551-1,000 gallons (also requires periodic tank tightness testing)	36 hours	13 gallons	7 gallons
1,001-2,000 gallons (also requires periodic tank tightness testing)	36 hours	26 gallons	13 gallons

- e. Tanks of five hundred fifty gallons [2,081.98 liters] or less nominal capacity and tanks with a nominal capacity of five hundred fifty-one to one thousand gallons [2,085.76 to 3,785.41 liters] which meet the tank diameter criteria in the table in subdivision d may use this as the sole method of release detection. All other tanks with a nominal capacity of five hundred fifty-one to two thousand gallons [2,085.76 to 7,570.80 liters] may use this method in place of inventory control in subsection 1. Tanks of greater than two thousand gallons [7,570.80 liters] nominal capacity may not use this method to meet the requirements of sections 33.1-24-08-30 through 33.1-24-08-35.
3. **Tank tightness testing.** Tank tightness testing (or another test of equivalent performance) must be capable of detecting a one-tenth gallon [.38 liter] per hour leak rate from any portion of the tank that routinely contains product while accounting for the effects of thermal expansion or contraction of the product, vapor pockets, tank deformation, evaporation or condensation, and the location of the water table.

4. **Automatic tank gauging.** Equipment for automatic tank gauging that tests for the loss of product and conducts inventory control must meet the following requirements:
  - a. The automatic product level monitor test can detect a two-tenths gallon [.76 liter] per hour leak rate from any portion of the tank that routinely contains product;
  - b. The automatic tank gauging equipment must meet the inventory control (or other test of equivalent performance) requirements of subsection 1; and
  - c. The test must be performed with the system operating in one of the following modes:
    - (1) In-tank static testing conducted at least once every thirty days; or
    - (2) Continuous in-tank leak detection operating on an uninterrupted basis or operating within a process that allows the system to gather incremental measurements to determine the leak status of the tank at least once every thirty days.
  
5. **Vapor monitoring.** Testing or monitoring for vapors within the soil gas of the excavation zone must meet the following requirements:
  - a. The materials used as backfill are sufficiently porous (for example, gravel, sand, crushed rock) to readily allow diffusion of vapors from releases into the excavation area;
  - b. The stored regulated substance, or a tracer compound placed in the tank system, is sufficiently volatile (for example, gasoline) to result in a vapor level that is detectable by the monitoring devices located in the excavation zone in the event of a release from the tank;
  - c. The measurement of vapors by the monitoring device is not rendered inoperative by the ground water, rainfall, or soil moisture or other known interferences so that a release could go undetected for more than thirty days;
  - d. The level of background contamination in the excavation zone will not interfere with the method used to detect releases from the tank;
  - e. The vapor monitors are designed and operated to detect any significant increase in concentration above background of the regulated substance stored in the tank system, a component or components of that substance, or a tracer compound placed in the tank system;
  - f. In the underground storage tank excavation zone, the site is assessed to ensure compliance with the requirements in subdivisions a through d and to establish the number and positioning of monitoring wells that will detect releases within the excavation zone from any portion of the tank that routinely contains product; and
  - g. Monitoring wells are clearly marked and secured to avoid unauthorized access and tampering.
  
6. **Ground water monitoring.** Testing or monitoring for liquids on the ground water must meet the following requirements:
  - a. The regulated substance stored is immiscible in water and has a specific gravity of less than one;
  - b. Ground water is never more than twenty feet [6.07 meters] from the ground surface and the hydraulic conductivity of the soils between the underground storage tank system and the monitoring wells or devices is not less than one one-hundredths centimeter per



second (for example, the soil should consist of gravels, coarse-to-medium sands, coarse silts or other permeable materials);

- c. The slotted portion of the monitoring well casing must be designed to prevent migration of natural soils or filter pack into the well and to allow entry of regulated substance on the water table into the well under both high and low ground water conditions;
  - d. Monitoring wells must be sealed from the ground surface to the top of the filter pack;
  - e. Monitoring wells or devices intercept the excavation zone or are as close to it as is technically feasible;
  - f. The continuous monitoring devices or manual methods used can detect the presence of at least one-eighth of an inch [3.05 millimeters] of free product on top of the ground water in the monitoring wells;
  - g. Within and immediately below the underground storage tank system excavation zone, the site is assessed to ensure compliance with the requirements in subdivisions a through e and to establish the number and positioning of monitoring wells or devices that will detect releases from any portion of the tank that routinely contains product; and
  - h. Monitoring wells are clearly marked and secured to avoid unauthorized access and tampering.
7. **Interstitial monitoring.** Interstitial monitoring between the underground storage tank system and a secondary barrier immediately around or beneath it may be used, but only if the system is designed, constructed, and installed to detect a leak from any portion of the tank that routinely contains product and also meets one of the following requirements:
- a. For double-walled underground storage tank systems, the sampling or testing method can detect a leak through the inner wall in any portion of the tank that routinely contains product;
  - b. For underground storage tank systems with a secondary barrier within the excavation zone, the sampling or testing method used can detect a leak between the underground storage tank system and the secondary barrier;
    - (1) The secondary barrier around or beneath the underground storage tank system consists of artificially constructed material that is sufficiently thick and impermeable (at least  $10^{-6}$  centimeter per second for the regulated substance stored) to direct a leak to the monitoring point and permit its detection;
    - (2) The barrier is compatible with the regulated substance stored so that a release from the underground storage tank system will not cause a deterioration of the barrier allowing a release to pass through undetected;
    - (3) For cathodically protected tanks, the secondary barrier must be installed so that it does not interfere with the proper operation of the cathodic protection system;
    - (4) The ground water, soil moisture, or rainfall will not render the testing or sampling method used inoperative so that a release could go undetected for more than thirty days;
    - (5) The site is assessed to ensure the secondary barrier is always above the ground water and not in a twenty-five-year floodplain, unless the barrier and monitoring designs are for use under such conditions; and

- (6) Monitoring wells are clearly marked and secured to avoid unauthorized access and tampering.
  - c. For tanks with an internally fitted liner, an automated device can detect a leak between the inner wall of the tank and the liner, and the liner is compatible with the substance stored.
8. **Statistical inventory reconciliation.** Release detection methods based on the application of statistical principles to inventory data similar to those described in subsection 1 must meet the following requirements:
- a. Report a quantitative result with a calculated leak rate;
  - b. Be capable of detecting a leak rate of two-tenths gallon per hour or a release of one hundred fifty gallons within thirty days; and
  - c. Use a threshold that does not exceed one-half the minimum detectible leak rate.
9. **Other methods.** Any other type of release detection method, or combination of methods, can be used if:
- a. It can detect a two-tenths gallon [.76 liter] per hour leak rate or a release of one hundred fifty gallons [567.81 liters] within a month with a probability of detection of ninety-five hundredths and a probability of false alarm of five one-hundredths; or
  - b. The department may approve another method if the owner and operator can demonstrate that the method can detect a release as effectively as any of the methods allowed in subsections 3 through 8. In comparing methods, the department shall consider the size of release the method can detect and the frequency and reliability with which it can be detected. If the method is approved, the owner and operator must comply with any conditions imposed by the department on its use to ensure the protection of human health and the environment.

**History:** Effective January 1, 2019.

**General Authority:** NDCC 23.1-04-03, 23.1-04-06; S.L. 2017, ch. 199 § 1

**Law Implemented:** NDCC 23.1-04-06; S.L. 2017, ch. 199 § 19

### **33.1-24-08-34. Methods of release detection for piping.**

Each method of release detection for piping used to meet the requirements of subsection 2 of section 33.1-24-08-10 and section 33.1-24-08-31 must be conducted in accordance with the following:

1. **Automatic line leak detectors.** Methods which alert the operator to the presence of a leak by restricting or shutting off the flow of regulated substances through piping or triggering an audible or visual alarm may be used only if they detect leaks of three gallons [11.36 liters] per hour at ten pounds per square inch line pressure within one hour. An annual test of the operation of the leak detector must be conducted in accordance with subdivision c of subsection 1 of section 33-24-08-30.
2. **Line tightness testing.** A periodic test of piping may be conducted only if it can detect a one-tenth gallon [.38 liter] per hour leak rate at one and one-half times the operating pressure.
3. **Applicable tank methods.** Except as described in subsection 1 of section 33.1-24-08-31, any of the methods in subsections 5 through 9 of section 33.1-24-08-33 may be used if they are designed to detect a release from any portion of the underground piping that routinely contains regulated substances.

**History:** Effective January 1, 2019.

**General Authority:** NDCC 23.1-04-03, 23.1-04-06; S.L. 2017, ch. 199 § 1

**Law Implemented:** NDCC 23.1-04-06; S.L. 2017, ch. 199 § 19

### **33.1-24-08-35. Release detection recordkeeping.**

All underground storage tank system owners and operators must maintain records in accordance with section 33.1-24-08-24 demonstrating compliance with all applicable requirements of sections 33.1-24-08-30 through 33.1-24-08-35. These records must include the following:

1. All written performance claims pertaining to any release detection system used, and the manner in which these claims have been justified or tested by the equipment manufacturer or installer, must be maintained for five years or for another reasonable period of time determined by the department, from the date of installation. Not later than April 1, 2021, records of site assessments required under subdivision f of subsection 5 and subdivision g of subsection 6 of section 33.1-24-08-33 must be maintained for as long as the methods are used. Records of site assessments developed after April 1, 2018, must be signed by a professional engineer or professional geologist, or equivalent licensed professional with experience in environmental engineering, hydrogeology, or other relevant technical discipline acceptable to the department.
2. The results of any sampling, testing, or monitoring must be maintained for at least one year, or for another reasonable period of time determined by the department, except as follows:
  - a. The results of annual operation tests conducted in accordance with subdivision c of subsection 1 of section 33.1-24-08-30 must be maintained for three years. At a minimum, the results must list each component tested, indicate whether each component tested meets criteria in subdivision c of subsection 1 of section 33.1-24-08-30 or needs to have action taken, and describe any action taken to correct an issue; and
  - b. The results of tank tightness testing conducted in accordance with subsection 3 of section 33.1-24-08-33 must be retained until the next test is conducted; and
  - c. The results of tank tightness testing, line tightness testing, and vapor monitoring using a tracer compound placed in the tank system conducted in accordance with subsection 4 of section 33.1-24-08-72 must be retained until the next test is conducted.
3. Written documentation of all calibration, maintenance, and repair of release detection equipment permanently located onsite must be maintained for at least one year after the servicing work is completed, or for another reasonable time period determined by the department. Any schedules of required calibration and maintenance provided by the release detection equipment manufacturer must be retained for five years from the date of installation.

**History:** Effective January 1, 2019.

**General Authority:** NDCC 23.1-04-03, 23.1-04-06; S.L. 2017, ch. 199 § 1

**Law Implemented:** NDCC 23.1-04-06; S.L. 2017, ch. 199 § 19

### **33.1-24-08-36. Applicability (delivery prohibition).**

1. Tank owners and operators and transfer operators are responsible for ensuring that product is not delivered, deposited, or accepted into an underground storage tank identified by the department as ineligible to receive product.
2. For purposes of this section the term "underground storage tank" means those tanks that satisfy the definition of petroleum underground storage tank system in section 33.1-24-08-03, except for those tanks identified as excluded or deferred storage tanks.

**History:** Effective January 1, 2019.

**General Authority:** NDCC 23.1-04-03, 23.1-04-06; S.L. 2017, ch. 199 § 1

**Law Implemented:** NDCC 23.1-04-06; S.L. 2017, ch. 199 § 19

**33.1-24-08-37. Criteria for delivery prohibition.**

1. An underground storage tank shall be classified as ineligible for delivery, deposit, or acceptance of product upon determination by the department that the underground storage tank meets one or more of the following conditions:
  - a. Spill prevention equipment as required by this chapter is not installed;
  - b. Overfill protection equipment as required by this chapter is not installed;
  - c. Leak detection equipment as required by this chapter is not installed;
  - d. Corrosion protection equipment as required by this chapter is not installed; or
  - e. Other conditions which the department determines may present an imminent and substantial endangerment to public health and the environment.
2. The department may also classify an underground storage tank as ineligible for delivery, deposit, or acceptance of product if the owner or operator of that tank has been issued a written warning or citation (for example, field citation, warning letter, notice of violation), and has failed to take corrective action, within a reasonable period of time determined by the department, under any of the following circumstances:
  - a. Failure to properly operate or maintain leak detection equipment;
  - b. Failure to properly operate or maintain spill, overfill, or corrosion protection equipment;
  - c. Failure to insure owners and operators of underground storage tank systems have designated class A, class B, and class C operators;
  - d. Failure to maintain financial responsibility;
  - e. Failure to protect a buried metal flexible connector from corrosion; or
  - f. Other conditions which the department determines may present an imminent and substantial endangerment to public health and the environment.
3. The department shall retain the discretion to decide whether to identify an underground storage tank as ineligible to deliver, deposit, or accept product based on whether the prohibition is in the best interest of the public. In those cases where prohibition of delivery, deposit, or acceptance of product to an underground storage tank is not in the best interest of the public (for example, certain emergency generator underground storage tanks), the department may classify an underground storage tank as ineligible to receive product, but authorize an emergency delivery.
4. The department may also consider not treating an underground storage tank as ineligible for delivery, deposit, or acceptance of product if such treatment would jeopardize the availability of, or access to, motor fuel in any rural and remote areas. The department shall only defer application of delivery prohibition for up to one hundred eighty days after determining an underground storage tank is ineligible for delivery, deposit, or acceptance of product.

**History:** Effective January 1, 2019.

**General Authority:** NDCC 23.1-04-03, 23.1-04-06; S.L. 2017, ch. 199 § 1

**Law Implemented:** NDCC 23.1-04-06; S.L. 2017, ch. 199 § 19

### **33.1-24-08-38. Mechanisms for designating tanks ineligible for delivery.**

1. Upon identifying an underground storage tank as ineligible for delivery, deposit, or acceptance of product, the department shall notify tank owners or operators in writing (for example, field notification or mail) prior to prohibiting the delivery, deposit, or acceptance of product into the ineligible tank.
2. After reasonable effort is made to notify the underground storage tank owner or operator in writing, the department may affix a "red tag" to the fill pipe of the noncompliant underground storage tank system using a tamper-resistant strap or straps, fill pipe bag, or any combination thereof so the tag clearly identifies the tank as ineligible to receive product.
3. The department shall develop a process and procedure for notifying transfer operators when an underground storage tank is ineligible for delivery, deposit, or acceptance of product. Notice shall be made available (for example, electronic listing) to transfer operators within twenty-four hours of an underground storage tank being identified as ineligible to receive product.

**History:** Effective January 1, 2019.

**General Authority:** NDCC 23.1-04-03, 23.1-04-06; S.L. 2017, ch. 199 § 1

**Law Implemented:** NDCC 23.1-04-06; S.L. 2017, ch. 199 § 19

### **33.1-24-08-39. Reclassifying ineligible tanks as eligible for delivery.**

1. Upon notification by the owner or operator that the violation or violations has or have been corrected, the department shall confirm compliance.
2. The department shall reclassify an ineligible underground storage tank as eligible to receive product the same day the department confirms the underground storage tank has been returned to compliance. Likewise, notice shall be made available to transfer operators the same day an ineligible tank has been reclassified as eligible to receive product.

**History:** Effective January 1, 2019.

**General Authority:** NDCC 23.1-04-03, 23.1-04-06; S.L. 2017, ch. 199 § 1

**Law Implemented:** NDCC 23.1-04-06; S.L. 2017, ch. 199 § 19

### **33.1-24-08-40. Reporting of suspected releases.**

Owners and operators of underground storage tank systems must report to the department within twenty-four hours, or another reasonable period specified by the department, and follow the procedures in section 33.1-24-08-42 for any of the following conditions:

1. The discovery by owners and operators or others of released regulated substances at the underground storage tank site or in the surrounding area (such as the presence of free product or vapors in soils, basements, sewer and utility lines, and nearby surface water);
2. Unusual operating conditions observed by owners and operators (such as the erratic behavior of product dispensing equipment, the sudden loss of product from the underground storage tank system, an unexplained presence of water in the tank, or liquid in the interstitial space of secondarily contained systems), unless:
  - a. The system equipment or component is found not to be releasing regulated substances to the environment;
  - b. Any defective system equipment or component is immediately repaired or replaced; and

- c. For secondarily contained systems, except as provided for in paragraph 4 of subdivision b of subsection 7 of section 33.1-24-08-33, any liquid in the interstitial space not used as part of the interstitial monitoring method (for example, brine filled) is immediately removed.
3. Monitoring results, including investigation of an alarm, from a release detection method required under sections 33.1-24-08-31 and 33.1-24-08-32 that indicate a release may have occurred unless:
- a. The monitoring device is found to be defective, and is immediately repaired, recalibrated, or replaced, and additional monitoring does not confirm the initial result;
  - b. The leak is contained in the secondary containment and:
    - (1) Except as provided for in paragraph 4 of subdivision b of subsection 7 of section 33.1-24-08-33, any liquid in the interstitial space not used as part of the interstitial monitoring method (for example, brine filled) is immediately removed; and
    - (2) Any defective system equipment or component is immediately repaired or replaced.
  - c. In the case of inventory control, described in subsection 1 of section 33.1-24-08-33, a second month of data does not confirm the initial result or the investigation determines no release has occurred; or
  - d. The alarm was investigated and determined to be a nonrelease event (for example, from a power surge or caused by filling the tank during release detection testing).

**History:** Effective January 1, 2019.

**General Authority:** NDCC 23.1-04-03, 23.1-04-06; S.L. 2017, ch. 199 § 1

**Law Implemented:** NDCC 23.1-04-06; S.L. 2017, ch. 199 § 19

#### **33.1-24-08-41. Investigation due to offsite impacts.**

When required by the department, owners and operators of underground storage tank systems must follow the procedures in section 33.1-24-08-42 to determine if the underground storage tank system is the source of offsite impacts. These impacts include the discovery of regulated substances (such as the presence of free product or vapors in soils, basements, sewer and utility lines, and nearby surface and drinking waters) that has been observed by the department or brought to its attention by another party.

**History:** Effective January 1, 2019.

**General Authority:** NDCC 23.1-04-03, 23.1-04-06; S.L. 2017, ch. 199 § 1

**Law Implemented:** NDCC 23.1-04-06; S.L. 2017, ch. 199 § 19

#### **33.1-24-08-42. Release investigation and confirmation steps.**

Unless corrective action is initiated in accordance with sections 33.1-24-08-50 through 33.1-24-08-57, owners and operators must immediately investigate and confirm all suspected releases of regulated substances requiring reporting under section 33.1-24-08-40 within seven days, or another reasonable time period specified by the department, using either the following steps or another procedure approved by the department:

1. **System test.** Owners and operators must conduct tests (according to the requirements for tightness testing in subsection 3 of section 33.1-24-08-33 and subsection 2 of section 33.1-24-08-34 or, as appropriate, secondary containment testing described in subsection 4 of section 33.1-24-08-23).

- a. The test must determine whether:
    - (1) A leak exists in that portion of the tank that routinely contains product, or the attached delivery piping; or
    - (2) A breach of either wall of the secondary containment has occurred.
  - b. If the system test confirms a leak into the interstice or a release, owners and operators must repair, replace, upgrade, or close the underground storage tank system, and begin corrective action in accordance with sections 33.1-24-08-50 through 33.1-24-08-57 if the test results for the system, tank, or delivery piping indicate that a release exists.
  - c. Further investigation is not required if the test results for the system, tank, and delivery piping do not indicate that a release exists and if environmental contamination is not the basis for suspecting a release.
  - d. Owners and operators must conduct a site check as described in subsection 2 if the test results for the system, tank, and delivery piping do not indicate that a release exists but environmental contamination is the basis for suspecting a release.
2. **Site check.** Owners and operators must measure for the presence of a release where contamination is most likely to be present at the underground storage tank site. In selecting sample types, sample locations, and measurement methods, owners and operators must consider the nature of the stored substance, the type of initial alarm or cause for suspicion, the type of backfill, the depth of ground water, and other factors appropriate for identifying the presence and source of the release.
- a. If the test results for the excavation zone or the underground storage tank site indicate that a release has occurred, owners and operators must begin corrective action in accordance with sections 33.1-24-08-50 through 33.1-24-08-57.
  - b. If the test results for the excavation zone or the underground storage tank site do not indicate that a release has occurred, further investigation is not required.

**History:** Effective January 1, 2019.

**General Authority:** NDCC 23.1-04-03, 23.1-04-06; S.L. 2017, ch. 199 § 1

**Law Implemented:** NDCC 23.1-04-06; S.L. 2017, ch. 199 § 19

### **33.1-24-08-43. Reporting and cleanup of spills and overfills.**

- 1. Owners and operators of underground storage tank systems must contain and immediately clean up a spill or overfill and report to the department within twenty-four hours, or another reasonable time period specified by the department, and begin corrective action in accordance with sections 33.1-24-08-50 through 33.1-24-08-57 in the following cases:
  - a. Spill or overfill of petroleum that results in a release to the environment that exceeds twenty-five gallons [94.63 liters] or another reasonable amount specified by the department, or that causes a sheen on nearby surface water; and
  - b. Spill or overfill of a hazardous substance that results in a release to the environment that equals or exceeds its reportable quantity under the Comprehensive Environmental Response, Compensation, and Liability Act [40 CFR 302].
- 2. Owners and operators of underground storage tank systems must contain and immediately clean up a spill or overfill of petroleum that is less than twenty-five gallons [94.63 liters] or another reasonable amount specified by the department, and a spill or overfill of a hazardous substance that is less than the reportable quantity. If cleanup cannot be accomplished within

twenty-four hours, or another reasonable time period established by the department, owners and operators must immediately notify the department.

NOTE: A release of a hazardous substance equal to or in excess of its reportable quantity must also be reported immediately (rather than within twenty-four hours) to the National Response Center under sections 102 and 103 of the Comprehensive Environmental Response, Compensation, and Liability Act and to appropriate state and local authorities under title III of the Superfund Amendments and Reauthorization Act.

**History:** Effective January 1, 2019.

**General Authority:** NDCC 23.1-04-03, 23.1-04-06; S.L. 2017, ch. 199 § 1

**Law Implemented:** NDCC 23.1-04-06; S.L. 2017, ch. 199 § 19

### **33.1-24-08-44. Unattended cardtrol facilities.**

A facility that normally has no employee or other responsible person onsite, or is open to dispense fuel at times when no employee or responsible person is onsite, shall have a sign posted in a conspicuous place, giving the name and telephone number of the facility owner, operator, or local emergency responders, and an emergency shutoff device, if the facility dispenses fuel.

**History:** Effective January 1, 2019.

**General Authority:** NDCC 23.1-04-03, 23.1-04-06; S.L. 2017, ch. 199 § 1

**Law Implemented:** NDCC 23.1-04-06; S.L. 2017, ch. 199 § 19

### **33.1-24-08-45. Operator designations and requirements for operator training.**

All owners and operators of underground storage tank systems shall ensure they have designated class A, class B, and class C operators who meet the requirements of sections 33.1-24-08-45 through 33.1-24-08-48. Owners or operators of underground storage tank systems must designate a class A, class B, and class C operator for each tank system, except unattended cardtrol facilities which are not required to designate a class C operator. Either a class A, or class B, or class C operator must be present onsite during the operation of the tank system, except unattended cardtrol facilities which must have a posted sign in accordance with section 33.1-24-08-44.

Separate individuals may be designated for each class of operator or an individual may be designated to more than one operator class. An individual who is designated to more than one operator class must be trained in each operator class for which the individual is designated. Owners or operators must notify the department (for example, written or electronic notice: name of owner, business location address, city, state, zip code, and telephone number), and provide the name of the designated class A and class B operator for each underground storage tank facility owned. The owner or operator shall notify the department of any change of designated class A or class B operators within thirty days of the change. Documentation identifying the designated class C operators shall be maintained at each facility.

1. The class A operator has primary responsibility to operate and maintain the underground storage tank system. The class A operator's responsibilities include managing resources and personnel to achieve and maintain compliance with regulatory requirements.

Each designated class A operator must either be trained in accordance with subdivisions a and b, or pass a comparable examination in accordance with subsection 5.

- a. At a minimum, the training program for the class A operator must provide general knowledge of the requirements in this subdivision. At a minimum, the training must teach the class A operators, as applicable, about the purpose, methods, and function of:

- (1) Spill and overfill prevention;



- (2) Release detection;
  - (3) Corrosion protection;
  - (4) Emergency response;
  - (5) Product and equipment compatibility and demonstration;
  - (6) Financial responsibility;
  - (7) Notification and storage tank registration;
  - (8) Temporary and permanent closure;
  - (9) Related reporting, recordkeeping, testing, and inspections;
  - (10) Environmental and regulatory consequences of releases; and
  - (11) Training requirements for class B and class C operators.
- b. At a minimum, the training program must evaluate class A operators to determine these individuals have the knowledge and skills to make informed decisions regarding compliance and determine whether appropriate individuals are fulfilling the operation, maintenance, and recordkeeping requirements for underground storage tank systems in accordance with subdivision a.
2. The class B operator has primary responsibility for implementing the routine daily aspects of operation, maintenance, and recordkeeping for the underground storage tank system.

Each designated class B operator must either receive training in accordance with subdivisions a and b, or pass a comparable examination in accordance with subsection 5.

- a. At a minimum, the training program for the class B operator must cover either general requirements that encompass all regulatory requirements and typical equipment used at underground storage tank facilities, or site-specific requirements which address only the regulatory requirements and equipment specific to the facility. At a minimum, the training program for class B operators must teach the class B operator, as applicable, about the purpose, methods, and function of:
- (1) Operation and maintenance;
  - (2) Spill and overfill prevention;
  - (3) Release detection and related reporting;
  - (4) Corrosion protection;
  - (5) Emergency response;
  - (6) Product and equipment compatibility and demonstration;
  - (7) Reporting, recordkeeping, testing, and inspections;
  - (8) Environmental and regulatory consequences of releases; and
  - (9) Training requirements for class C operators.
- b. At a minimum, the training program must evaluate class B operators to determine these individuals have the knowledge and skills to implement applicable underground storage

tank regulatory requirements in the field on the components of typical underground storage tank systems or, as applicable, site-specific equipment used at an underground storage tank facility in accordance with subdivision a.

- c. The class B operator shall ensure the performance and documentation of the onsite operator inspection in accordance with section 33.1-24-08-49.
3. Each designated class C operator either must be trained by a class A or class B operator in accordance with subdivisions a and b, complete a training program in accordance with subdivisions a and b, or pass a comparable examination in accordance with subsection 5.
  - a. At a minimum, the training program for the class C operator must teach the class C operators to take appropriate actions (including notifying appropriate authorities) in response to emergencies or alarms caused by spills or releases resulting from the operation of the underground storage tank system.
  - b. At a minimum, the training program must evaluate class C operators to determine these individuals have the knowledge and skills to take appropriate action (including notifying appropriate authorities) in response to emergencies or alarms caused by spills or releases from an underground storage tank system.
4. Training program. Any training program must meet the minimum requirements of this section and include an evaluation through testing, a practical demonstration, or another approach acceptable to the department.
5. Comparable examination. A comparable examination must, at a minimum, test the knowledge of the class A, class B, or class C operators in accordance with the requirements of subsections 1, 2, or 3, as applicable.

**History:** Effective January 1, 2019.

**General Authority:** NDCC 23.1-04-03, 23.1-04-06; S.L. 2017, ch. 199 § 1

**Law Implemented:** NDCC 23.1-04-06; S.L. 2017, ch. 199 § 19

### **33.1-24-08-46. Timing of operator training and reciprocity.**

Operator training must evaluate operator knowledge in the areas described for each class of operator in accordance with subsections 1, 2, and 3 of section 33.1-24-08-45.

1. By August 8, 2012, the owner or operator of an underground storage tank system regulated by this chapter, except those excluded by regulation in subsection 2 of section 33.1-24-08-01, and those deferred by regulation in subsection 3 of section 33.1-24-08-01, shall have trained class A, class B, and class C operators for each facility owned.
2. After August 8, 2012, class A and class B operators must be trained within thirty days or another reasonable period specified by the department, after assuming operation and maintenance responsibilities of the underground storage tank system. Class C operators must be trained before assuming responsibility for responding to emergencies.
3. Training of underground storage tank system operators shall be performed by the department or by a third-party trainer approved by the department, except that a trained class A, or class B, operator may train a class C operator.
4. Training reciprocity. The department may accept operator training certification verification from other states that have equivalent operator training requirements.

NOTE: The following alternate third-party methods may be used to comply with this section: a certificate issued by a nationally recognized underground storage tank operator examination approved

by the department, or written proof of successful completion of an equivalent operator training and testing program that has received prior approval from the department.

**History:** Effective January 1, 2019.

**General Authority:** NDCC 23.1-04-03, 23.1-04-06; S.L. 2017, ch. 199 § 1

**Law Implemented:** NDCC 23.1-04-06; S.L. 2017, ch. 199 § 19

### **33.1-24-08-47. Operator retraining.**

Class A and class B operators of underground storage tank systems determined by the department to be out of compliance shall complete a training program or comparable examination in accordance with requirements in section 33.1-24-18-45. The training program or comparable examination must be developed or administered by an independent organization, the department, or a recognized authority. At a minimum, the training must cover the area determined to be out of compliance. Underground storage tank system owners and operators shall ensure class A and class B operators are retrained pursuant to this section no later than thirty days from the date the department determines the facility is out of compliance except in one of the following situations:

1. Class A and class B operators take annual refresher training. Refresher training for class A and class B operators must cover all applicable requirements in section 33.1-24-18-45; or
2. The department, at its discretion, waives this retraining requirement for either the class A or class B operator or both.

**History:** Effective January 1, 2019.

**General Authority:** NDCC 23.1-04-03, 23.1-04-06; S.L. 2017, ch. 199 § 1

**Law Implemented:** NDCC 23.1-04-06; S.L. 2017, ch. 199 § 19

### **33.1-24-08-48. Operator training documentation.**

Owners and operators of underground storage tank systems shall maintain a list of designated class A, class B, and class C operators and maintain records verifying that training and retraining, as applicable, have been completed, in accordance with section 33.1-24-18-24 as follows:

1. The list must:
  - a. Identify all class A, class B, and class C operators currently designated for the facility; and
  - b. Include names, class of operator trained, date assumed duties, date each completed initial training, and any retraining.
2. Records verifying completion of training or retraining must be a paper or electronic record for class A, class B, and class C operators. The records, at a minimum, must identify name of trainee, date trained, operator training class completed, and list the name of the trainer or examiner and the training company name, address, and telephone number. Owners and operators shall maintain these records for as long as class A, class B, and class C operators are designated. The following requirements also apply to the following types of training:
  - a. Records from classroom or field training programs, including class C operator training provided by the class A or class B operator, or a comparable examination, at a minimum, must be signed by the trainer or examiner;
  - b. Records from computer-based training, at a minimum, must indicate the name of the training program and web address, if internet based; and

- c. Records of retraining must include those areas on which the class A or class B operator has been retrained.

**History:** Effective January 1, 2019.

**General Authority:** NDCC 23.1-04-03, 23.1-04-06; S.L. 2017, ch. 199 § 1

**Law Implemented:** NDCC 23.1-04-06; S.L. 2017, ch. 199 § 19

### **33.1-24-08-49. [Reserved].**

### **33.1-24-08-50. General release response and corrective action for underground storage tank systems containing petroleum or hazardous substances.**

Owners and operators of petroleum or hazardous substance underground storage tank systems must, in response to a confirmed release from the underground storage tank system, comply with the requirements of this section except for underground storage tanks excluded under subsection 2 of section 33.1-24-08-01 and underground storage tank systems subject to the hazardous waste provisions of North Dakota Century Code chapter 23.1-04.

**History:** Effective January 1, 2019.

**General Authority:** NDCC 23.1-04-03, 23.1-04-06; S.L. 2017, ch. 199, § 1

**Law Implemented:** NDCC 23.1-04-06; S.L. 2017, ch. 199, § 19

### **33.1-24-08-51. Initial response.**

Upon confirmation of a release in accordance with section 33.1-24-08-42 or after a release from the underground storage tank system is identified in any other manner, owners and operators must perform the following initial response actions within twenty-four hours of a release or within another reasonable period of time determined by the department:

1. Report the release to the department (for example, by telephone or electronic mail);
2. Take immediate action to prevent any further release of the regulated substance into the environment; and
3. Identify and mitigate fire, explosion, and vapor hazards.

**History:** Effective January 1, 2019.

**General Authority:** NDCC 23.1-04-03, 23.1-04-06; S.L. 2017, ch. 199, § 1

**Law Implemented:** NDCC 23.1-04-06; S.L. 2017, ch. 199, § 19

### **33.1-24-08-52. Initial abatement measures and site check.**

1. Unless directed to do otherwise by the department, owners and operators must perform the following abatement measures:
  - a. Remove as much of the regulated substance from the underground storage tank system as is necessary to prevent further release to the environment;
  - b. Visually inspect any aboveground releases or exposed belowground releases and prevent further migration of the released substance into surrounding soils and ground water;
  - c. Continue to monitor and mitigate any additional fire and safety hazards posed by vapors or free product that have migrated from the underground storage tank excavation zone and entered into subsurface structures (such as sewers or basements);

- d. Remedy hazards posed by contaminated soils that are excavated or exposed as a result of release confirmation, site investigation, abatement, or corrective action activities. If these remedies include treatment or disposal of soils, the owner and operator must comply with applicable state and local requirements;
  - e. Measure for the presence of a release where contamination is most likely to be present at the underground storage tank site, unless the presence and source of the release have been confirmed in accordance with the site check required by subsection 2 of section 33.1-24-08-42 or the closure site assessment of subsection 1 of section 33.1-24-08-62. In selecting sample types, sample locations, and measurement methods, the owner and operator must consider the nature of the stored substance, the type of backfill, depth to ground water, and other factors as appropriate for identifying the presence and source of the release; and
  - f. Investigate to determine the possible presence of free product, and begin free product removal as soon as practicable and in accordance with section 33.1-24-08-54.
2. Within twenty days after release confirmation, or within another reasonable period of time determined by the department, owners and operators must submit a report to the department summarizing the initial abatement steps taken under subsection 1 and any resulting information or data.

**History:** Effective January 1, 2019.

**General Authority:** NDCC 23.1-04-03, 23.1-04-06; S.L. 2017, ch. 199, § 1

**Law Implemented:** NDCC 23.1-04-06; S.L. 2017, ch. 199, § 19

**33.1-24-08-53. Initial site characterization.**

1. Unless directed to do otherwise by the department, owners and operators must assemble information about the site and the nature of the release, including information gained while confirming the release or completing the initial abatement measures in sections 33.1-24-08-50 and 33.1-24-08-51. This information must include, but is not necessarily limited to, the following:
- a. Data on the nature and estimated quantity of release;
  - b. Data from available sources or site investigations, or both, concerning the following factors: surrounding populations, water quality, use and approximate locations of wells potentially affected by the release, subsurface soil conditions, locations of subsurface sewers, climatological conditions, and land use;
  - c. Results of the site check required under subdivision e of subsection 1 of section 33.1-24-08-52; and
  - d. Results of the free product investigations required under subdivision f of subsection 1 of section 33.1-24-08-52, to be used by owners and operators to determine whether free product must be recovered under section 33.1-24-08-54.
2. Within forty-five days of release confirmation or another reasonable period of time determined by the department, owners and operators must submit the information collected in compliance with subsection 1 to the department in a manner that demonstrates its applicability and technical adequacy, or in a format and according to the schedule required by the department.

**History:** Effective January 1, 2019.

**General Authority:** NDCC 23.1-04-03, 23.1-04-06; S.L. 2017, ch. 199, § 1

**Law Implemented:** NDCC 23.1-04-06; S.L. 2017, ch. 199, § 19

### **33.1-24-08-54. Free product removal.**

At sites where investigations under subdivision f of subsection 1 of section 33.1-24-08-52 indicate the presence of free product, owners and operators must remove free product to the maximum extent practicable as determined by the department while continuing, as necessary, any actions initiated under sections 33.1-24-08-51 through 33.1-24-08-53, or preparing for actions required under sections 33.1-24-08-55 and 33.1-24-08-56. In meeting the requirements of this section, owners and operators must:

1. Conduct free product removal in a manner that minimizes the spread of contamination into previously uncontaminated zones by using recovery and disposal techniques appropriate to the hydrogeologic conditions at the site, and that properly treats, discharges, or disposes of recovery byproducts in compliance with applicable local, state, and federal regulations;
2. Use abatement of free product migration as a minimum objective for the design of the free product removal systems;
3. Handle any flammable products in a safe and competent manner to prevent fires or explosions; and
4. Unless directed to do otherwise by the department, prepare and submit to the department, within forty-five days after confirming a release, a free product removal report that provides at least the following information:
  - a. The name of the persons responsible for implementing the free product removal measures;
  - b. The estimated quantity, type, and thickness of free product observed or measured in wells, boreholes, and excavations;
  - c. The type of free product recovery system used;
  - d. Whether any discharge will take place onsite or offsite during the recovery operation and where this discharge will be located;
  - e. The type of treatment applied to, and the effluent quality expected from, any discharge;
  - f. The steps that have been or are being taken to obtain necessary permits for any discharge; and
  - g. The disposition of the recovered free product.

**History:** Effective January 1, 2019.

**General Authority:** NDCC 23.1-04-03, 23.1-04-06; S.L. 2017, ch. 199, § 1

**Law Implemented:** NDCC 23.1-04-06; S.L. 2017, ch. 199, § 19

### **33.1-24-08-55. Investigations for soil and ground water cleanup.**

1. In order to determine the full extent and location of soils contaminated by the release and the presence and concentrations of dissolved product contamination in the ground water, owners and operators must conduct investigations of the release, the release site, and the surrounding area possibly affected by the release if any of the following conditions exist:
  - a. There is evidence that ground water wells have been affected by the release (for example, as found during release confirmation or previous corrective action measures);
  - b. Free product is found to need recovery in compliance with section 33.1-24-08-54;

- c. There is evidence that contaminated soils may be in contact with ground water (for example, as found during conduct of the initial response measures or investigations required under sections 33.1-24-08-50 through 33.1-24-08-54); and
  - d. The department requests an investigation, based on the potential effects of contaminated soil or ground water on nearby surface water and ground water resources.
2. Owners and operators must submit the information collected under subsection 1 as soon as practicable or in accordance with a schedule established by the department.

**History:** Effective January 1, 2019.

**General Authority:** NDCC 23.1-04-03, 23.1-04-06; S.L. 2017, ch. 199, § 1

**Law Implemented:** NDCC 23.1-04-06; S.L. 2017, ch. 199, § 19

### **33.1-24-08-56. Corrective action plan.**

1. At any point after reviewing the information submitted in compliance with sections 33.1-24-08-51 through 33.1-24-08-53, the department may require owners and operators to submit additional information or to develop and submit a corrective action plan for responding to contaminated soils and ground water. If a plan is required, owners and operators must submit the plan according to a schedule and format established by the department. Alternatively, owners and operators may, after fulfilling the requirements of sections 33.1-24-08-51 through 33.1-24-08-53, choose to submit a corrective action plan for responding to contaminated soil and ground water. In either case, owners and operators are responsible for submitting a plan that provides for adequate protection of human health and the environment as determined by the department, and must modify their plan as necessary to meet this standard.
2. The department will approve the corrective action plan only after ensuring that implementation of the plan will adequately protect human health, safety, and the environment. In making this determination, the department should consider the following factors as appropriate:
  - a. The physical and chemical characteristics of the regulated substance, including its toxicity, persistence, and potential for migration;
  - b. The hydrogeologic characteristics of the facility and the surrounding area;
  - c. The proximity, quality, and current and future uses of nearby surface water and ground water;
  - d. The potential effects of residual contamination on nearby surface water and ground water;
  - e. An exposure assessment; and
  - f. Any information assembled in compliance with sections 33.1-24-08-50 through 33.1-24-08-57.
3. Upon approval of the corrective action plan or as directed by the department, owners and operators must implement the plan, including modifications to the plan made by the department. They must monitor, evaluate, and report the results of implementing the plan in accordance with a schedule and in a format established by the department.
4. Owners and operators may, in the interest of minimizing environmental contamination and promoting more effective cleanup, begin cleanup of soil and ground water before the corrective action plan is approved provided they:

- a. Notify the department of their intention to begin cleanup;
- b. Comply with any conditions imposed by the department, including halting cleanup or mitigating adverse consequences from cleanup activities; and
- c. Incorporate these self-initiated cleanup measures in the corrective action plan that is submitted to the department for approval.

**History:** Effective January 1, 2019.

**General Authority:** NDCC 23.1-04-03, 23.1-04-06; S.L. 2017, ch. 199, § 1

**Law Implemented:** NDCC 23.1-04-06; S.L. 2017, ch. 199, § 19

### **33.1-24-08-57. Public participation.**

1. For each confirmed release that requires a corrective action plan, the department must provide notice to the public by means designed to reach those members of the public directly affected by the release and the planned corrective action. This notice may include, but is not limited to, public announcements, publication in a state register, letters to individual households, or personal contacts by field staff.
2. The department must ensure that site release information and decisions concerning the corrective action plan are made available to the public for inspection upon request.
3. Before approving a corrective action plan, the department may hold a public meeting to consider comments on the proposed corrective action plan if there is sufficient public interest, or for any other reason.
4. The department must give public notice that complies with subsection 1 if implementation of an approved corrective action plan does not achieve the established cleanup levels in the plan and termination of that plan is under consideration by the department.

**History:** Effective January 1, 2019.

**General Authority:** NDCC 23.1-04-03, 23.1-04-06; S.L. 2017, ch. 199, § 1

**Law Implemented:** NDCC 23.1-04-06; S.L. 2017, ch. 199, § 19

### **33.1-24-08-58. [Reserved].**

### **33.1-24-08-59. [Reserved].**

### **33.1-24-08-60. Temporary closure.**

1. When an underground storage tank system is temporarily closed, owners and operators must continue operation and maintenance of corrosion protection in accordance with section 33.1-24-08-21, and any release detection in accordance with sections 33.1-24-08-30 through 33.1-24-08-35 and sections 33.1-24-08-70 through 33.1-24-08-72. Sections 33.1-24-08-40 through 33.1-24-08-43 and sections 33.1-24-08-50 through 33.1-24-08-57 must be complied with if a release is suspected or confirmed. However, release detection and release detection operation and maintenance testing and inspections in sections 33.1-24-08-20 through 33.1-24-08-26 and sections 33.1-24-08-30 through 33.1-24-08-35 are not required as long as the underground storage tank system is empty. The underground storage tank system is empty when all materials have been removed using commonly employed practices so that no more than two and five-tenths centimeters [1 inch] of residue, or three-tenths of one percent by weight of the total capacity of the underground storage tank system, remain in the system. In addition, spill and overfill operation and maintenance testing and inspections in sections 33.1-24-08-20 through 33.1-24-08-26 are not required.



2. When an underground storage tank system is temporarily closed for three months or more, owners and operators must also comply with the following requirements:
  - a. Leave vent lines open and functioning; and
  - b. Cap and secure all other lines, pumps, manways, and ancillary equipment.
3. When an underground storage tank system is temporarily closed for more than twelve months, owners and operators must permanently close the underground storage tank system if it does not meet either performance standards in section 33.1-24-08-10 for new underground storage tank systems or the upgrading requirements in section 33.1-24-08-11, except that the spill and overfill equipment requirements do not have to be met. Owners and operators must permanently close the substandard underground storage tank systems at the end of this twelve-month period in accordance with sections 33.1-24-08-61 through 33.1-24-08-64, unless the department provides an extension of the twelve-month temporary closure period. Owners and operators must complete a site assessment in accordance with section 33.1-24-08-62 before such an extension can be applied for.

**History:** Effective January 1, 2019.

**General Authority:** NDCC 23.1-04-03, 23.1-04-06; S.L. 2017, ch. 199, § 1

**Law Implemented:** NDCC 23.1-04-06; S.L. 2017, ch. 199, § 19

### **33.1-24-08-61. Permanent closure and changes in service.**

1. At least thirty days before beginning either permanent closure or a change in service under subsections 2 and 3, or within another reasonable time period determined by the department, owners and operators must notify the department of their intent to permanently close or make the change in service, unless such action is in response to corrective action. The required assessment of the excavation zone under section 33.1-24-08-62 must be performed after notifying the department, but before completion of the permanent closure or a change in service.
2. To permanently close a tank, owners and operators must empty and clean it by removing all liquids and accumulated sludges. All tanks taken out of service permanently must be removed from the ground, filled with an inert solid material, or closed in place in a manner approved by the department.
3. Continued use of an underground storage tank system to store a nonregulated substance is considered a change in service. Before a change in service, owners and operators must empty and clean the tank by removing all liquid and accumulated sludge and conduct a site assessment in accordance with section 33.1-24-08-62.

NOTE: The following cleaning and closure procedures may be used to comply with this section: American Petroleum Institute Recommended Practice RP 1604, "Closure of Underground Petroleum Storage Tanks"; American Petroleum Institute Standard 2015, "Safe Entry and Cleaning of Petroleum Storage Tanks, Planning and Managing Tank Entry From Decommission Through Recommissioning"; American Petroleum Institute Recommended Practice 2016, "Guidelines and Procedures for Entering and Cleaning Petroleum Storage Tanks", American Petroleum Institute Recommended Practice RP 1631, "Interior Lining and Periodic Inspection of Underground Storage Tanks", may be used as guidance for compliance with this section; National Fire Protection Association Standard 326, "Standard for the Safeguarding of Tanks and Containers for Entry, Cleaning, or Repair"; and The National Institute for Occupational Safety and Health Publication 80-106 "Criteria for a Recommended Standard: Working in Confined Spaces" may be used as guidance for conducting safe closure procedures at some hazardous substance tanks.

**History:** Effective January 1, 2019.

**General Authority:** NDCC 23.1-04-03, 23.1-04-06; S.L. 2017, ch. 199, § 1

**Law Implemented:** NDCC 23.1-04-06; S.L. 2017, ch. 199, § 19

**33.1-24-08-62. Assessing the site at closure or change in service.**

1. Before permanent closure or a change in service is completed, owners and operators must measure for the presence of a release where contamination is most likely to be present at the underground storage tank site. In selecting sample types, sample locations, and measurement methods, owners and operators must consider the method of closure, the nature of the stored substance, the type of backfill, the depth to ground water, and other factors appropriate for identifying the presence of a release. The requirements of this section are satisfied if one of the external release detection methods allowed in subsections 5 and 6 of section 33.1-24-08-33 is operating in accordance with the requirements in section 33.1-24-08-33 at the time of closure, and indicates no release has occurred.
2. If contaminated soils, contaminated ground water, or free product as a liquid or vapor is discovered under subsection 1, or by any other manner, owners and operators must begin corrective action in accordance with sections 33.1-24-08-50 through 33.1-24-08-57.

**History:** Effective January 1, 2019.

**General Authority:** NDCC 23.1-04-03, 23.1-04-06; S.L. 2017, ch. 199, § 1

**Law Implemented:** NDCC 23.1-04-06; S.L. 2017, ch. 199, § 19

**33.1-24-08-63. Applicability to previously closed underground storage tank systems.**

When directed by the department, the owner and operator of an underground storage tank system permanently closed before December 22, 1988, must assess the excavation zone and close the underground storage tank system in accordance with sections 33.1-24-08-60 through 33.1-24-08-64 if releases from the underground storage tank may, in the judgment of the department, pose a current or potential threat to human health and the environment.

**History:** Effective January 1, 2019.

**General Authority:** NDCC 23.1-04-03, 23.1-04-06; S.L. 2017, ch. 199, § 1

**Law Implemented:** NDCC 23.1-04-06; S.L. 2017, ch. 199, § 19

**33.1-24-08-64. Closure records.**

Owners and operators must maintain records in accordance with section 33.1-24-08-24 that are capable of demonstrating compliance with closure requirements under sections 33.1-24-08-60 through 33.1-24-08-64. The results of the excavation zone assessment required in section 33.1-24-08-62 must be maintained for at least three years after completion of permanent closure or change in service in one of the following ways:

1. By the owners and operators who took the underground storage tank system out of service;
2. By the current owners and operators of the underground storage tank system site; or
3. By mailing these records to the department if they cannot be maintained at the closed facility.

**History:** Effective January 1, 2019.

**General Authority:** NDCC 23.1-04-03, 23.1-04-06; S.L. 2017, ch. 199, § 1

**Law Implemented:** NDCC 23.1-04-06; S.L. 2017, ch. 199, § 19

**33.1-24-08-65. [Reserved].**

**33.1-24-08-66. [Reserved].**

**33.1-24-08-67. [Reserved].**

**33.1-24-08-68. [Reserved].**

**33.1-24-08-69. [Reserved].**

**33.1-24-08-70. Underground storage tank systems with field-constructed tanks and airport hydrant fuel distribution systems definitions.**

For purposes of this section, the following definitions apply:

1. "Airport hydrant fuel distribution system" (also called airport hydrant system) means an underground storage tank system which fuels aircraft and operates under high pressure with large diameter piping that typically terminates into one or more hydrants (fill stands). The airport hydrant system begins where fuel enters one or more tanks from an external source, such as a pipeline, barge, rail car, or other motor fuel carrier.
2. "Field-constructed tank" means a tank constructed in the field. For example, a tank constructed of concrete that is poured in the field, or a steel or fiberglass tank primarily fabricated in the field is considered field-constructed.

**History:** Effective January 1, 2019.

**General Authority:** NDCC 23.1-04-03, 23.1-04-06; S.L. 2017, ch. 199, § 1

**Law Implemented:** NDCC 23.1-04-06; S.L. 2017, ch. 199, § 19

**33.1-24-08-71. General requirements.**

1. Implementation of requirements. Owners and operators shall comply with the requirements of this chapter for underground storage tank systems with field-constructed tanks and airport hydrant systems as follows:
  - a. For underground storage tank systems installed on or before April 1, 2018, the requirements are effective according to the following schedule:

<b>Requirement</b>	<b>Effective Date</b>
Upgrading underground storage tank systems, general operating requirements, and operator training	April 1, 2021
Release detection	April 1, 2021
Release reporting, response, and investigation; closure; financial responsibility and notification (except as provided in subsection 2)	April 1, 2018

- b. For underground storage tank systems installed after April 1, 2018, the requirements apply at installation.
2. No later than April 1, 2021, all owners of previously deferred underground storage tank systems shall submit a one-time notice of tank system existence to the department, using the state form in appendix I, in accordance with subsection 3 of section 33.1-24-08-12. Owners and operators of underground storage tank systems in use as of April 1, 2018, shall demonstrate financial responsibility at the time of submission of the notification form.
3. Except as provided in section 33.1-24-08-72, owners and operators shall comply with the requirements of sections 33.1-24-08-01 through 33.1-24-08-106.

4. In addition to the codes of practice listed in section 33.1-24-08-10, owners and operators may use military construction criteria, such as Unified Facilities Criteria 3-460-01, Petroleum Fuel Facilities, when designing, constructing, and installing airport hydrant systems and underground storage tank systems with field-constructed tanks.

**History:** Effective January 1, 2019.

**General Authority:** NDCC 23.1-04-03, 23.1-04-06; S.L. 2017, ch. 199, § 1

**Law Implemented:** NDCC 23.1-04-06; S.L. 2017, ch. 199, § 19

**33.1-24-08-72. Additions, exceptions, and alternatives for underground storage tank systems with field-constructed tanks and airport hydrant systems.**

1. Exception to piping secondary containment requirements. Owners and operators may use single-walled piping when installing or replacing piping associated with underground storage tank systems with field-constructed tanks greater than fifty thousand gallons and piping associated with airport hydrant systems. Piping associated with underground storage tank systems with field-constructed tanks less than or equal to fifty thousand gallons not part of an airport hydrant system must meet the secondary containment requirement when installed or replaced.
2. Upgrade requirements. No later than April 1, 2021, airport hydrant systems and underground storage tank systems with field-constructed tanks where installation commenced on or before April 1, 2018, must meet the following requirements or be permanently closed pursuant to sections 33.1-24-08-60 through 33.1-24-08-64.
  - a. Corrosion protection. Underground storage tank system components in contact with the ground that routinely contain regulated substances must meet one of the following:
    - (1) Except as provided in subsection 1, the new underground storage tank system performance standards for tanks at subsection 1 of section 33.1-24-08-10 and for piping at subsection 2 of section 33.1-24-08-10; or
    - (2) Be constructed of metal and cathodically protected according to a code of practice developed by a nationally recognized association or independent testing laboratory and meets the following:
      - (a) Cathodic protection must meet the requirements of paragraphs 2 through 4 of subdivision b of subsection 1 of section 33.1-24-08-10 for tanks, and paragraphs 2 through 4 of subdivision b of subsection 2 of section 33.1-24-08-10 for piping.
      - (b) Tanks greater than ten years old without cathodic protection must be assessed to ensure the tank is structurally sound and free of corrosion holes prior to adding cathodic protection. The assessment must be by internal inspection or another method determined by the department to adequately assess the tank for structural soundness and corrosion holes.

(NOTE: The following codes of practice may be used to comply with this section: NACE International Standard Practice SP 0285, "External Control of Underground Storage Tank Systems by Cathodic Protection", NACE International Standard Practice SP 0169, "Control of External Corrosion on Underground or Submerged Metallic Piping Systems"; National Leak Prevention Association Standard 631, Chapter C, "Internal Inspection of Steel Tanks for Retrofit of Cathodic Protection"; or American Society for Testing and Materials Standard G158, "Standard Guide for Three Methods of Assessing Buried Steel Tanks".)

- b. Spill and overflow prevention equipment. To prevent spilling and overflowing associated with product transfer to the underground storage tank system, all underground storage tank systems with field-constructed tanks and airport hydrant systems must comply with new underground storage tank system spill and overflow prevention equipment requirements specified in subsection 3 of section 33.1-24-08-10.
3. Walkthrough inspections. In addition to the walkthrough inspection requirements in section 33.1-24-08-26, owners and operators shall inspect the following additional areas for airport hydrant systems at least once every thirty days if confined space entry according to the occupational safety and health administration (see 29 CFR part 1910) is not required or at least annually if confined space entry is required and keep documentation of the inspection according to subsection 2 of section 33.1-24-08-26.
- a. Hydrant pits - Visually check for any damage, remove any liquid or debris, and check for any leaks; and
  - b. Hydrant piping vaults - Check for any hydrant piping leaks.
4. Release detection. Owners and operators of underground storage tank systems with field-constructed tanks and airport hydrant systems shall begin meeting the release detection requirements described in sections 33.1-24-08-70 through 33.1-24-08-72 no later than April 1, 2021.
- a. Methods of release detection for field-constructed tanks. Owners and operators of field-constructed tanks with a capacity less than or equal to fifty thousand gallons shall meet the release detection requirements in sections 33.1-24-08-30 through 33.1-24-08-35. Owners and operators of field-constructed tanks with a capacity greater than fifty thousand gallons shall meet either the requirements in sections 33.1-24-08-30 through 33.1-24-08-35 (except subsections 5 and 6 of section 33.1-24-08-33 must be combined with inventory control as stated below) of this chapter or use one or a combination of the following alternative methods of release detection:
    - (1) Conduct an annual tank tightness test that can detect a one-half gallon per hour leak rate;
    - (2) Use an automatic tank gauging system to perform release detection at least every thirty days that can detect a leak rate less than or equal to one gallon per hour. This method must be combined with a tank tightness test that can detect a two-tenths gallon per hour leak rate performed at least every three years;
    - (3) Use an automatic tank gauging system to perform release detection at least every thirty days that can detect a leak rate less than or equal to two gallons per hour. This method must be combined with a tank tightness test that can detect a two-tenths gallon per hour leak rate performed at least every two years;
    - (4) Perform vapor monitoring (conducted in accordance with subsection 5 of section 33.1-24-08-33 for a tracer compound placed in the tank system) capable of detecting a one-tenth gallon per hour leak rate at least every two years;
    - (5) Perform inventory control (conducted in accordance with department of defense Directive 4140.25, ATA Airport Fuel Facility Operations and Maintenance Guidance Manual, or equivalent procedures) at least every thirty days that can detect a leak equal to or less than one-half percent of flowthrough; and
      - (a) Perform a tank tightness test that can detect a one-half gallon per hour leak rate at least every two years; or

- (b) Perform vapor monitoring or groundwater monitoring (conducted in accordance with subsections 5 and 6 of section 33.1-24-08-33, respectively, for the stored regulated substance) at least every thirty days; or
- (6) Another method approved by the department if the owner and operator can demonstrate the method can detect a release as effectively as any of the methods allowed in paragraphs 1 through 5. In comparing methods, the department shall consider the size of release the method can detect and the frequency and reliability of detection.
- b. Methods of release detection for piping. Owners and operators of underground piping associated with field-constructed tanks less than or equal to fifty thousand gallons shall meet the release detection requirements in sections 33.1-24-08-30 through 33.1-24-08-35. Owners and operators of underground piping associated with airport hydrant systems and field-constructed tanks greater than fifty thousand gallons shall follow either the requirements in sections 33.1-24-08-30 through 33.1-24-08-35 (except subsections 5 and 6 of section 33.1-24-08-33 must be combined with inventory control as stated below) of this chapter or use one or a combination of the following alternative methods of release detection:
- (1) Perform a semiannual or annual line tightness test at or above the piping operating pressure in accordance with the table below.

<b>Maximum Leak Detection Rate Per Test Section Volume</b>		
<b>Test Section Volume (Gallons)</b>	<b>Semiannual Test - Leak Detection Rate Not To Exceed (Gallons Per Hour)</b>	<b>Annual Test - Leak Detection Rate Not To Exceed (Gallons Per Hour)</b>
<50,000	1.0	0.5
≥50,000 to < 75,000	1.5	0.75
≥75,000 to < 100,000	2.0	1.0
≥100,000	3.0	1.5

Piping segment volumes greater than or equal to one hundred thousand gallons not capable of meeting the maximum three gallon per hour leak rate for the semiannual test may be tested at a leak rate up to six gallons per hour according to the following schedule:

<b>Phase-In For Piping Segments ≥ 100,000 Gallons In Volume</b>	
First test	Not later than April 1, 2021, (may use up to 6.0 gph leak rate)
Second test	Between April 1, 2021, and April 1, 2024, (may use up to 6.0 gph leak rate)
Third test	Between April 1, 2024, and April 1, 2025, (must use 3.0 gph for leak rate)
Subsequent tests	After April 1, 2025, begin using semiannual or annual line testing according to the Maximum Leak Detection Rate Per Test Section Volume table above

- (2) Perform vapor monitoring (conducted in accordance with subsection 5 of section 33.1-24-08-33 for a tracer compound placed in the tank system) capable of detecting a one-tenth gallon per hour leak rate at least every two years;
  - (3) Perform inventory control (conducted in accordance with department of defense Directive 4140.25, ATA Airport Fuel Facility Operations and Maintenance Guidance Manual, or equivalent procedures) at least every thirty days that can detect a leak equal to or less than one-half percent of flowthrough; and
    - (a) Perform a line tightness test (conducted in accordance with paragraph 1 of subdivision b using the leak rates for the semiannual test) at least every two years; or
    - (b) Perform vapor monitoring or groundwater monitoring (conducted in accordance with subsections 5 and 6 of section 33.1-24-08-33, respectively, for the stored regulated substance) at least every thirty days; or
  - (4) Another method approved by the department if the owner and operator can demonstrate the method can detect a release as effectively as any of the methods allowed in paragraphs 1 through 3. In comparing methods, the department shall consider the size of release the method can detect and the frequency and reliability of detection.
- c. Recordkeeping for release detection. Owners and operators shall maintain release detection records according to the recordkeeping requirements in section 33.1-24-08-35.
5. Applicability of closure requirements to previously closed underground storage tank systems. When directed by the department, the owner and operator of an underground storage tank system with field-constructed tanks or airport hydrant system permanently closed before April 1, 2018, shall assess the excavation zone and close the underground storage tank system in accordance with sections 33.1-24-08-60 through 33.1-24-08-64 if releases from the underground storage tank may, in the judgment of the department, pose a current or potential threat to human health and the environment.

**History:** Effective January 1, 2019

**General Authority:** NDCC 23.1-04-03, 23.1-04-06; S.L. 2017, ch. 199, § 1

**Law Implemented:** NDCC 23.1-04-06; S.L. 2017, ch. 199, § 19

**33.1-24-08-73. [Reserved].**

**33.1-24-08-74. [Reserved].**

**33.1-24-08-75. [Reserved].**

**33.1-24-08-76. [Reserved].**

**33.1-24-08-77. [Reserved].**

**33.1-24-08-78. [Reserved].**

**33.1-24-08-79. [Reserved].**

### **33.1-24-08-80. Applicability (financial responsibility).**

1. Sections 33.1-24-08-80 through 33.1-24-08-106 apply to owners and operators of all petroleum underground storage tank systems except as otherwise provided.
2. Owners and operators of petroleum underground storage tank systems are subject to these requirements in accordance with section 33.1-24-08-81.
3. State and federal government entities whose debts and liabilities are the debts and liabilities of a state or the United States are exempt from the requirements of sections 33.1-24-08-80 through 33.1-24-08-106.
4. The requirements of sections 33.1-24-08-80 through 33.1-24-08-106 do not apply to owners or operators of any underground storage tank system described in subsections 2 and 3 of section 33.1-24-08-01.
5. If the owner and operator of a petroleum underground storage tank are separate persons, only one person is required to demonstrate financial responsibility; however, both parties are liable in the event of noncompliance.

**History:** Effective January 1, 2019.

**General Authority:** NDCC 23.1-04-03, 23.1-04-06; S.L. 2017, ch. 199, § 1

**Law Implemented:** NDCC 23.1-04-06; S.L. 2017, ch. 199, § 19

### **33.1-24-08-81. Financial responsibility compliance dates.**

Owners of petroleum underground storage tanks shall immediately comply with the requirements of sections 33.1-24-08-80 through 33.1-24-08-106.

Owners of previously deferred systems shall comply with the requirements of this section according to the schedule in subsection 1 of section 33.1-24-08-71.

**History:** Effective January 1, 2019.

**General Authority:** NDCC 23.1-04-03, 23.1-04-06; S.L. 2017, ch. 199, § 1

**Law Implemented:** NDCC 23.1-04-06; S.L. 2017, ch. 199, § 19

### **33.1-24-08-82. Definitions (financial responsibility).**

When used in sections 33.1-24-08-80 through 33.1-24-08-106, the following terms have the meanings given below:

1. "Accidental release" means any sudden or nonsudden release of petroleum arising from operating an underground storage tank that results in a need for corrective action or compensation for bodily injury or property damage, or both, neither expected nor intended by the tank owner or operator.
2. "Bodily injury" has the meaning given to this term by applicable state law; however, this term does not include those liabilities which, consistent with standard insurance industry practices, are excluded from coverage in liability insurance policies for bodily injury.
3. "Chief financial officer", in the case of local government owners and operators, means the individual with overall authority and responsibility for the collection, disbursement, and use of funds by the local government.
4. "Controlling interest" means direct ownership of at least fifty percent of the voting stock of another entity.
5. "Department" means the North Dakota department of environmental quality.



6. "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:
  - a. A 10-K report submitted to the securities and exchange commission;
  - b. An annual report of tangible net worth submitted to dun and bradstreet; or
  - c. Annual reports submitted to the energy information administration or the rural utilities service.

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

7. "Legal defense cost" is any expense that an owner or operator or provider of financial assurance incurs in defending against claims or actions brought:
  - a. By the environmental protection agency or a state to require corrective action or to recover the costs of corrective action;
  - b. By or on behalf of a third party for bodily injury or property damage caused by an accidental release; or
  - c. By any person to enforce the terms of a financial assurance mechanism.
8. "Local government" has the meaning given this term by applicable state law. The term is generally intended to include:
  - a. Counties, municipalities, townships, separately chartered and operated special districts (including local government public transit systems and redevelopment authorities), and independent school districts authorized as governmental bodies by state charter or constitution; and
  - b. Special districts and independent school districts established by counties, municipalities, townships, and other general purpose governments to provide essential services.
9. "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 rules 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".

10. "Owner or operator", when the owner or operator are separate parties, refers to the party that is obtaining or has obtained financial assurances.
11. "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.
12. "Property damage" has the meaning given this term by applicable state law. This term does 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.
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

sections 33.1-24-08-85 through 33.1-24-08-97, including a guarantor, insurer, risk retention group, surety, issuer of a letter of credit, issuer of a state-required mechanism, or a state.

14. "Substantial business relationship" means the extent of a business relationship necessary under applicable state 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.
15. "Substantial governmental relationship" means the extent of a governmental relationship necessary under applicable state law to make an added guarantee contract issued incident to that relationship valid and enforceable. A guarantee contract is insured incident to that relationship if it arises from a clear commonality of interest in the event of an underground storage tank 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.
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.
17. "Termination" under subdivisions a and b of subsection 2 of section 33.1-24-08-87 means only those changes that could result in a gap in coverage as where the insured has not obtained substitute coverage or has obtained substitute coverage with a different retroactive date than the retroactive date of the original policy.

**History:** Effective January 1, 2019.

**General Authority:** NDCC 23.1-04-03, 23.1-04-06; S.L. 2017, ch. 199, § 1

**Law Implemented:** NDCC 23.1-04-06; S.L. 2017, ch. 199, § 19

### **33.1-24-08-83. Amount and scope of required financial responsibility.**

1. 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:
  - a. For owners or operators of petroleum underground storage tanks that are located at petroleum marketing facilities, or that handle an average of more than ten thousand gallons [37,854 liters] of petroleum per month based on annual throughput for the previous calendar year, one million dollars; and
  - b. For all other owners or operators of petroleum underground storage tanks, five hundred thousand dollars.
2. 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 annual aggregate amounts:
  - a. For owners or operators of one to one hundred petroleum underground storage tanks, one million dollars; and
  - b. For owners or operators of one hundred one or more petroleum underground storage tanks, two million dollars.

3. For the purposes of subsections 2 and 6 only, "a petroleum underground storage tank" means a single containment unit and does not mean combinations of single containment units.
4. Except as provided in subsection 5, if the owner or operator uses separate mechanisms or separate combinations of mechanisms to demonstrate financial responsibility for:
  - a. Taking corrective action;
  - b. Compensating third parties for bodily injury and property damage caused by sudden accidental releases; or
  - c. 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 subsections 1 and 2.
5. 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 must be based on the number of tanks covered by each such separate mechanism or combination of mechanisms.
6. 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 one hundred, the owner or operator shall demonstrate financial responsibility in the amount of at least two million dollars 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 two million dollars 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.
7. The amounts of assurance required under this section exclude legal defense costs.
8. The required per-occurrence and annual aggregate coverage amounts do not in any way limit the liability of the owner or operator.

**History:** Effective January 1, 2019.

**General Authority:** NDCC 23.1-04-03, 23.1-04-06; S.L. 2017, ch. 199, § 1

**Law Implemented:** NDCC 23.1-04-06; S.L. 2017, ch. 199, § 19

**33.1-24-08-84. Allowable mechanisms and combinations of mechanisms.**

1. Subject to the limitations of subsections 2 and 3, an owner or operator, including a local government owner or operator may use any one or combination of the mechanisms listed in sections 33.1-24-08-85 through 33.1-24-08-93 to demonstrate financial responsibility under sections 33.1-24-08-80 through 33.1-24-08-106 for one or more underground storage tanks.
2. A local government owner or operator may use any one or combination of the mechanisms listed in sections 33.1-24-08-94 through 33.1-24-08-97 to demonstrate financial responsibility under sections 33.1-24-08-80 through 33.1-24-08-106 for one or more underground storage tanks.
3. An owner or operator may use a guarantee under section 33.1-24-08-86 or surety bond under section 33.1-24-08-88 to establish financial responsibility only if the attorney general has submitted a written statement to the department that a guarantee or surety bond executed as described in this section is a legally valid and enforceable obligation in the state.

4. An owner or operator may use self-insurance in combination with a guarantee only if, for the purpose of meeting the requirements of the financial test under this chapter, the financial statements of the owner or operator are not consolidated with the financial statements of the guarantor.

**History:** Effective January 1, 2019.

**General Authority:** NDCC 23.1-04-03, 23.1-04-06; S.L. 2017, ch. 199, § 1

**Law Implemented:** NDCC 23.1-04-06; S.L. 2017, ch. 199, § 19

### **33.1-24-08-85. Financial test of self-insurance.**

1. An owner or operator, or guarantor, or both, may satisfy the requirements of section 33.1-24-08-83 by passing a financial test as specified in this section. To pass the financial test of self-insurance, the owner or operator, or guarantor, or both, must meet the criteria of subsection 2 or 3 based on year-end financial statements for the latest completed fiscal year.
2. The following apply:
  - a. The owner or operator, or guarantor, or both, must have a tangible net worth of at least ten times:
    - (1) The total of the applicable aggregate amount required by section 33.1-24-08-83, based on the number of underground storage tanks for which a financial test is used to demonstrate financial responsibility to the department;
    - (2) The sum of the corrective action cost estimates, the current closure and postclosure care cost estimates, and amount of liability coverage for which a financial test is used to demonstrate financial responsibility to the department under sections 33.1-24-05-58, 33.1-24-05-77, and 33.1-24-05-79; and
    - (3) The sum of current plugging and abandonment cost estimates for which a financial test is used to demonstrate financial responsibility to the department under chapter 33.1-25-01.
  - b. The owner or operator, or guarantor, or both, must have a tangible net worth of at least ten million dollars.
  - c. The owner or operator, or guarantor, or both, must have a letter signed by the chief financial officer worded as specified in subsection 4.
  - d. The owner or operator, or guarantor, or both, must either:
    - (1) File financial statements annually with the United States securities and exchange commission, the energy information administration, or the rural utilities service; or
    - (2) Report annually the firm's tangible net worth to dun and bradstreet, and dun and bradstreet must have assigned the firm a financial strength rating of 4A or 5A.
  - e. The firm's year-end financial statements, if independently audited, cannot include an adverse auditor's opinion, a disclaimer of opinion, or a "going concern" qualification.
3. The following apply:
  - a. The owner or operator, or guarantor, or both, must meet the financial test requirements of subdivision a of subsection 6 of section 33.1-24-05-79, substituting the appropriate amounts specified in subdivisions a and b of subsection 2 of section 33.1-24-08-83 for the "amount of liability coverage" each time specified in that section;

- b. The fiscal year-end financial statements of the owner or operator, or guarantor, or both, must be examined by an independent certified public accountant and be accompanied by the accountant's report of the examination;
  - c. The firm's year-end financial statements cannot include an adverse auditor's opinion, a disclaimer of opinion, or a "going concern" qualification;
  - d. The owner or operator, or guarantor, or both, must have a letter signed by the chief financial officer, worded as specified in subsection 4; and
  - e. If the financial statements of the owner or operator, or guarantor, or both, are not submitted annually to the United States securities and exchange commission, the energy information administration, or the rural utilities service, the owner or operator, or guarantor, or both, must obtain a special report by an independent certified public accountant stating that:
    - (1) The certified public accountant has compared the data that the letter from the chief financial officer specifies as having been derived from the latest year-end financial statements of the owner or operator, or guarantor, or both, with the amounts in such financial statements; and
    - (2) In connection with that comparison, no matters came to the certified public accountant's attention which caused the certified public accountant to believe the specified data should be adjusted.
4. To demonstrate that it meets the financial test under subsection 2 or 3, the chief financial officer of the owner or operator, or guarantor, must sign, within one hundred twenty days of the close of each financial reporting year, as defined by the twelve-month period for which financial statements used to support the financial test are prepared, a letter worded exactly as follows, except the instructions in brackets are to be replaced by the relevant information and the brackets deleted:

#### LETTER FROM CHIEF FINANCIAL OFFICER

I am the chief financial officer of [insert: name and address of the owner or operator, or guarantor]. This letter is in support of the use of [insert: "the financial test of self-insurance", and/or "guarantee"] to demonstrate financial responsibility for [insert: "taking corrective action" and/or "compensating third parties for bodily injury and property damage"] caused by [insert: "sudden accidental releases" and/or "nonsudden accidental releases" or "accidental releases"] in the amount of at least [insert: dollar amount] per occurrence and [insert: dollar amount] annual aggregate arising from operating (an) underground storage tank(s).

Underground storage tanks at the following facilities are assured by this financial test by this [insert: "owner or operator", and/or "guarantor"]: [List for each facility: the name and address of the facility where tanks assured by this financial test are located, and whether tanks are assured by this financial test. If separate mechanisms or combinations of mechanisms are being used to assure any of the tanks at this facility, list each tank assured by this financial test by the tank identification number provided in the notification submitted pursuant to state requirements.]

A [insert: "financial test", and/or "guarantee"] is also used by this [insert: "owner or operator", or "guarantor"] to demonstrate evidence of financial responsibility in the following amounts under other environmental protection agency regulations or state programs authorized by the environmental protection agency under 40 CFR Parts 271 and 145:

EPA Regulations	Amount
Closure [§§264.143 and 265.143]	\$ _____
Post-Closure Care [§§264.145 and 265.145]	\$ _____
Liability Coverage [§§264.147 and 265.147]	\$ _____
Corrective Action [§264.101(b)]	\$ _____
Plugging and Abandonment [§144.63]	\$ _____
Closure	\$ _____
Post-Closure Care	\$ _____
Liability Coverage	\$ _____
Corrective Action	\$ _____
Plugging and Abandonment	\$ _____
 Total	 \$ _____

This [insert: "owner or operator", or "guarantor"] has not received an adverse opinion, a disclaimer of opinion, or a "going concern" qualification from an independent auditor on his financial statements for the latest completed fiscal year.

[Fill in the information for Alternative I if the criteria of subsection 2 of section 33.1-24-08-85 are being used to demonstrate compliance with the financial test requirements. Fill in the information for Alternative II if the criteria of subsection 3 of section 33.1-24-08-85 are being used to demonstrate compliance with the financial test requirements.]

### ALTERNATIVE I

- | 1. Amount of annual underground storage tank aggregate coverage being assured by a financial test, and/or guarantee  | \$ _____ |   |     |    |  |  |
|--|----------|---|-----|----|--|--|
| 2. Amount of corrective action, closure and postclosure care costs, liability coverage, and plugging and abandonment costs covered by a financial test, and/or guarantee | \$ _____ |   |     |    |  |  |
| 3. Sum of lines 1 and 2  | \$ _____ |   |     |    |  |  |
| 4. Total tangible assets   | \$ _____ |   |     |    |  |  |
| 5. Total liabilities [if any of the amount reported on line 3 is included in total liabilities, you may deduct that amount from this line and add that amount to line 6] | \$ _____ |   |     |    |  |  |
| 6. Tangible net worth [subtract line 5 from line 4]  | \$ _____ |   |     |    |  |  |
|  |          | <table border="0" style="width: 100%;"> <thead> <tr> <th style="text-align: left;">Yes</th> <th style="text-align: left;">No</th> </tr> </thead> <tbody> <tr> <td style="width: 50%;"></td> <td style="width: 50%;"></td> </tr> </tbody> </table> | Yes | No |  |  |
| Yes  | No       |   |     |    |  |  |
|  |          |   |     |    |  |  |
| 7. Is line 6 at least \$10 million?  | _____    | _____   |     |    |  |  |
| 8. Is line 6 at least 10 times line 3?   | _____    | _____   |     |    |  |  |
| 9. Have financial statements for the latest fiscal year been filed with the Securities and Exchange Commission?  | _____    | _____   |     |    |  |  |

- |   |       |       |
|---|-------|-------|
| 10. Have financial statements for the latest fiscal year been filed with the Energy Information Administration?   | _____ | _____ |
| 11. Have financial statements for the latest fiscal year been filed with the Rural Utilities Service?   | _____ | _____ |
| 12. Has financial information been provided to Dun and Bradstreet, and has Dun and Bradstreet provided a financial strength rating of 4A or 5A? [Answer "Yes" only if both criteria have been met.] | _____ | _____ |

**ALTERNATIVE II**

- |  |          |
|--|----------|
| 1. Amount of annual underground storage tank aggregate coverage being assured by a test, and/or guarantee  | \$ _____ |
| 2. Amount of corrective action, closure and postclosure care costs, liability coverage, and plugging and abandonment costs covered by a financial test, and/or guarantee | \$ _____ |
| 3. Sum of lines 1 and 2  | \$ _____ |
| 4. Total tangible assets   | \$ _____ |
| 5. Total liabilities [if any of the amount reported on line 3 is included in total liabilities, you may deduct that amount from this line and add that amount to line 6] | \$ _____ |
| 6. Tangible net worth [subtract line 5 from line 4]  | \$ _____ |
| 7. Total assets in the United States [required only if less than 90 percent of assets are located in the United States]  | \$ _____ |

- |                                       |       |       |
|---------------------------------------|-------|-------|
|                                       | Yes   | No    |
| 8. Is line 6 at least \$10 million?   | _____ | _____ |
| 9. Is line 6 at least 6 times line 3? | _____ | _____ |

- |  |       |       |
|--|-------|-------|
| 10. Are at least 90 percent of assets located in the United States? [If "No", complete line 11.] | _____ | _____ |
| 11. Is line 7 at least 6 times line 3? [Fill in either lines 12-15 or lines 16-18.]              | _____ | _____ |

- |   |          |
|---|----------|
| 12. Current assets                                      | \$ _____ |
| 13. Current liabilities                                 | \$ _____ |
| 14. Net working capital [subtract line 13 from line 12] | \$ _____ |

- |  |       |       |
|--|-------|-------|
|  | Yes   | No    |
| 15. Is line 14 at least 6 times line 3?            | _____ | _____ |
| 16. Current bond rating of most recent bond issue: | _____ |       |

17. Name of rating service: \_\_\_\_\_
18. Date of maturity of bond: \_\_\_\_\_
19. Have financial statements for the latest fiscal year been filed with the SEC, the Energy Information Administration, or the Rural Utilities Service? \_\_\_\_\_

[If "No", please attach a report from an independent certified public accountant certifying that there are no material differences between data as reported in lines 4-18 above and the financial statements for the latest fiscal year.]

[For both Alternative I and Alternative II complete the certification with this statement.]

I hereby certify the wording of this letter is identical to the wording specified in subsection 4 of section 33.1-24-08-85 as such rules were constituted on the date shown immediately below.

[Signature]

[Name]

[Title]

[Date]

5. If an owner or operator using the test to provide financial assurance finds the owner or operator no longer meets the requirements of the financial test based on the year-end financial statements, the owner or operator must obtain alternative coverage within one hundred fifty days of the end of the year for which financial statements have been prepared.
6. The department may require reports of financial condition at any time from the owner or operator, or guarantor, or both. If the department finds, on the basis of such reports or other information, that the owner or operator, or guarantor, or both, no longer meets the financial test requirements of subsections 2 or 3 and 4 of section 33.1-24-08-85, the owner or operator must obtain alternate coverage within thirty days after notification of such a finding.
7. If the owner or operator fails to obtain alternate assurance within one hundred fifty days of finding the owner or operator no longer meets the requirements of the financial test based on the year-end financial statements, or within thirty days of notification by the department that the owner or operator no longer meets the requirements of the financial test, the owner or operator must notify the department of such failure within ten days.

**History:** Effective January 1, 2019.

**General Authority:** NDCC 23.1-04-03, 23.1-04-06; S.L. 2017, ch. 199, § 1

**Law Implemented:** NDCC 23.1-04-06; S.L. 2017, ch. 199, § 19

**33.1-24-08-86. Guarantee.**

1. An owner or operator may satisfy the requirements of section 33.1-24-08-83 by obtaining a guarantee that conforms to the requirements of this section. The guarantor must be:
  - a. A firm that:
    - (1) Possesses a controlling interest in the owner or operator;
    - (2) Possesses a controlling interest in a firm described under paragraph 1 of subdivision a of subsection 1; or



- (3) Is controlled through stock ownership by a common parent firm that possesses a controlling interest in the owner or operator; or
  - b. A firm engaged in a substantial business relationship with the owner or operator and issuing the guarantee as an act incident to that business relationship.
2. Within one hundred twenty days of the close of each financial reporting year the guarantor must demonstrate that it meets the financial test criteria of section 33.1-24-08-85 based on year-end financial statements for the latest completed financial reporting year by completing the letter from the chief financial officer described in subsection 4 of section 33.1-24-08-85 and must deliver the letter to the owner or operator. If the guarantor fails to meet the requirements of the financial test at the end of any financial reporting year, within one hundred twenty days of the end of that financial reporting year the guarantor shall send via certified mail, before cancellation or nonrenewal of the guarantee, notice to the owner or operator. If the department notifies the guarantor that the guarantor no longer meets the requirements of the financial test of subsections 2 or 3 and 4 of section 33.1-24-08-85, the guarantor must notify the owner or operator within ten days of receiving such notification from the department. In both cases, the guarantee will terminate no less than one hundred twenty days after the date the owner or operator receives the notification, as evidenced by the return receipt. The owner or operator must obtain alternative coverage as specified in subsection 3 of section 33.1-24-08-104.
3. The guarantee must be worded as follows, except that instructions in brackets are to be replaced with the relevant information and the brackets deleted:

#### **GUARANTEE**

Guarantee made this [date] by [name of guaranteeing entity], a business entity organized under the laws of the state of [name of state], herein referred to as guarantor, to the department and to any and all third parties, and obligees, on behalf of [owner or operator] of [business address].

Recitals.

- (1) Guarantor meets or exceeds the financial test criteria of subsections 2 or 3 and 4 of section 33.1-24-08-85 and agrees to comply with the requirements for guarantors as specified in subsection 2 of section 33.1-24-08-86.
- (2) [Owner or operator] owns or operates the following underground storage tank(s) covered by this guarantee: [List the number of tank(s) at each facility and the name(s) and address(es) of the facility(ies) where the tanks are located. If more than one instrument is used to assure different tanks at any one facility, for each tank covered by this instrument, list the tank identification number provided in the notification submitted pursuant to section 33.1-24-08-12, and the name and address of the facility. This guarantee satisfies sections 33.1-24-08-80 through 33.1-24-08-106 requirements for assuring funding for [insert: "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"; if coverage is different for different tanks or locations, indicate the type of coverage applicable to each tank or location] arising from operating the above-identified underground storage tank(s) in the amount of [insert dollar amount] per occurrence and [insert dollar amount] annual aggregate.
- (3) [Insert appropriate phrase: "On behalf of our subsidiary" (if guarantor is corporate parent of the owner or operator); "On behalf of our affiliate" (if guarantor is a related firm of the owner or operator); or "Incident to our business relationship with" (if guarantor is

providing the guarantee as an incident to a substantial business relationship with owner or operator)] [owner or operator], guarantor guarantees to the department and to any and all third parties that:

In the event that [owner or operator] fails to provide alternative coverage within sixty days after receipt of a notice of cancellation of this guarantee and the department has determined or suspects a release has occurred at an underground storage tank covered by this guarantee, the guarantor, upon instructions from the department shall fund a standby trust fund in accordance with the provisions of section 33.1-24-08-102, in an amount not to exceed the coverage limits specified above.

In the event that the department determines that [owner or operator] has failed to perform corrective action for releases arising out of the operation of the above-identified tank(s) in accordance with sections 33.1-24-08-50 through 33.1-24-08-57, the guarantor upon written instructions from the department shall fund a standby trust in accordance with the provisions of section 33.1-24-08-102, in an amount not to exceed the coverage limits specified above.

If [owner or operator] fails to satisfy a judgment or award based on a determination of liability for bodily injury or property damage to third parties caused by ["sudden" and/or "nonsudden"] accidental releases arising from the operation of the above-identified tank(s), or fails to pay an amount agreed to in settlement of a claim arising from, or alleged to arise from, such injury or damage, the guarantor, upon written instructions from the department, shall fund a standby trust in accordance with the provisions of section 33.1-24-08-102 to satisfy such judgment(s), award(s), or settlement agreement(s) up to the limits of coverage specified above.

- (4) Guarantor agrees that if, at the end of any fiscal year before cancellation of this guarantee, the guarantor fails to meet the financial test criteria of subsections 2 or 3 and 4 of section 33.1-24-08-85, guarantor shall send within one hundred twenty days of such failure, by certified mail, notice to [owner or operator]. The guarantee will terminate one hundred twenty days from the date of receipt of the notice by [owner or operator], as evidenced by the return receipt.
- (5) Guarantor agrees to notify [owner or operator] by certified mail of a voluntary or involuntary proceeding under Title 11 (Bankruptcy) United States Code naming guarantor as debtor, within ten days after commencement of the proceeding.
- (6) Guarantor agrees to remain bound under this guarantee notwithstanding any modification or alteration of any obligation of [owner or operator] pursuant to chapter 33.1-24-08.
- (7) Guarantor agrees to remain bound under this guarantee for so long as [owner or operator] must comply with the applicable financial responsibility requirements of sections 33.1-24-08-80 through 33.1-24-08-106 for the above-identified tank(s), except that guarantor may cancel this guarantee by sending notice by certified mail to [owner or operator], such cancellation to become effective no earlier than one hundred twenty days after receipt of such notice by [owner or operator], as evidenced by the return receipt.
- (8) The guarantor's obligation does not apply to any of the following:
  - (a) Any obligation of [insert owner or operator] under a workers' compensation, disability benefits, or unemployment compensation law or other similar law;
  - (b) Bodily injury to an employee of [insert owner or operator] arising from, and in the course of, employment by [insert owner or operator];

- (c) Bodily injury or property damage arising from the ownership, maintenance, use, or entrustment to others of any aircraft, motor vehicle, or watercraft;
  - (d) Property damage to any property owned, rented, loaned to, in the care, custody, or control of, or occupied by [insert owner or operator] that is not the direct result of a release from a petroleum underground storage tank; or
  - (e) Bodily injury or property damage for which [insert owner or operator] is obligated to pay damages by reason of the assumption of liability in a contract or agreement other than a contract or agreement entered into to meet the requirements of section 33.1-24-08-83.
- (9) Guarantor expressly waives notice of acceptance of this guarantee by the department, by any or all third parties, or by [owner or operator].

I hereby certify that the wording of this guarantee is identical to the wording specified in subsection 3 of section 33.1-24-08-86 as such rules were constituted on the effective date shown immediately below.

Effective date: \_\_\_\_\_

[Name of guarantor]

[Authorized signature for guarantor]

[Name of person signing]

[Title of person signing]

Signature of witness or notary:

\_\_\_\_\_

4. An owner or operator who uses a guarantee to satisfy the requirements of section 33.1-24-08-83 must establish a standby trust fund when the guarantee is obtained. Under the terms of the guarantee, all amounts paid by the guarantor under the guarantee will be deposited directly into the standby trust fund in accordance with instructions from the department under section 33.1-24-08-102. The standby trust fund must meet the requirements specified in section 33.1-24-08-93.

**History:** Effective January 1, 2019.

**General Authority:** NDCC 23.1-04-03, 23.1-04-06; S.L. 2017, ch. 199, § 1

**Law Implemented:** NDCC 23.1-04-06; S.L. 2017, ch. 199, § 19

**33.1-24-08-87. Insurance and risk retention group coverage.**

1. An owner or operator may satisfy the requirements of section 33.1-24-08-83 by obtaining liability insurance that conforms to the requirements of this section from a qualified insurer or risk retention group. Such insurance may be in the form of a separate insurance policy or an endorsement to an existing insurance policy.
2. Each insurance policy must be amended by an endorsement worded as specified in subdivision a, or evidenced by a certificate of insurance worded as specified in subdivision b, except that instructions in brackets must be replaced with the relevant information and the brackets deleted:
  - a. Endorsement

Name: [name of each covered location] \_\_\_\_\_

Address: [address of each covered location] \_\_\_\_\_

Policy Number: \_\_\_\_\_

Period of Coverage: [current policy period] \_\_\_\_\_

Name of [insurer or risk retention group]: \_\_\_\_\_

Address of [insurer or risk retention group]: \_\_\_\_\_

Name of Insured: \_\_\_\_\_

Address of Insured: \_\_\_\_\_

Endorsement:

1. This endorsement certifies that the policy to which the endorsement is attached provides liability insurance covering the following underground storage tanks:

[List the number of tanks at each facility and the name(s) and address(es) of the facility(ies) where the tanks are located. If more than one instrument is used to assure different tanks at any one facility, for each tank covered by this instrument, list the tank identification number provided in the notification submitted pursuant to section 33.1-24-08-12, and the name and address of the facility.]

For [insert: "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"; in accordance with and subject to the limits of liability, exclusions, conditions, and other terms of the policy; if coverage is different for different tanks or locations, indicate the type of coverage applicable to each tank or location] arising from operating the underground storage tank(s) identified above.

The limits of liability are [insert the dollar amount of the "each occurrence" and "annual aggregate" limits of the insurer's or group's liability; if the amount of coverage is different for different types of coverage or for different underground storage tanks or locations, indicate the amount of coverage for each type of coverage and/or for each underground storage tank or location], exclusive of legal defense costs, which are subject to a separate limit under the policy. This coverage is provided under [policy number]. The effective date of said policy is [date].

2. The insurance afforded with respect to such occurrences is subject to all of the terms and conditions of the policy; provided, however, that any provisions inconsistent with subsections a through e of this paragraph are hereby amended to conform with subsections a through e;
  - a. Bankruptcy or insolvency of the insured shall not relieve the ["insurer" or "group"] of its obligations under the policy to which this endorsement is attached.
  - b. The ["insurer" or "group"] is liable for the payment of amounts within any deductible applicable to the policy to the provider of corrective action or a damaged third party, with a right of reimbursement by the insured for any such payment made by the ["insurer" or "group"]. This provision does not apply with respect to that amount of any deductible for which coverage is demonstrated

under another mechanism or combination of mechanisms as specified in sections 33.1-24-08-85 through 33.1-24-08-92 and 33.1-24-08-97.

- c. Whenever requested by the department, the ["insurer" or "group"] agrees to furnish to the department a signed duplicate original of the policy and all endorsements.
- d. Cancellation or any other termination of the insurance by the ["insurer" or "group"]; except for nonpayment of premium or misrepresentation by the insured, will be effective only upon written notice and only after the expiration of sixty days after a copy of such written notice is received by the insured. Cancellation for nonpayment of premium or misrepresentation by the insured will be effective only upon written notice and only after expiration of a minimum of ten days after a copy of such written notice is received by the insured.

[Insert for claims-made policies:

- e. The insurance covers claims otherwise covered by the policy that are reported to the ["insurer" or "group"] within six months of the effective date of cancellation or nonrenewal of the policy except where the new or renewed policy has the same retroactive date or a retroactive date earlier than that of the prior policy, and which arise out of any covered occurrence that commenced after the policy retroactive date, if applicable, and prior to such policy renewal or termination date. Claims reported during such extended reporting period are subject to the terms, conditions, limits, including limits of liability, and exclusions of the policy.]

I hereby certify that the wording of this instrument is identical to the wording in subdivision a of subsection 2 of section 33.1-24-08-87 and that the ["insurer" or "group"] is ["licensed to transact the business of insurance or eligible to provide insurance as an excess or surplus lines insurer in one or more states"].

[Signature of authorized representative of insurer or risk retention group]

[Name of person signing]

[Title of person signing], Authorized Representative of [name of insurer or risk retention group]

[Address of representative]

b. Certificate of insurance

Name: [name of each covered location] \_\_\_\_\_

Address: [address of each covered location] \_\_\_\_\_

Policy Number: \_\_\_\_\_

Endorsement: [if applicable] \_\_\_\_\_

Period of Coverage: [current policy period] \_\_\_\_\_

Name of [insurer or risk retention group]: \_\_\_\_\_

Address of [insurer or risk retention group]: \_\_\_\_\_

\_\_\_\_\_

Name of Insured: \_\_\_\_\_

\_\_\_\_\_

Address of Insured:

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Certification:

1. [Name of insurer or risk retention group], [the "insurer" or "group"], as identified above, hereby certifies that it has issued liability insurance covering the following underground storage tank(s):

[List the number of tanks at each facility and the name(s) and address(es) of the facility(ies) where the tanks are located. If more than one instrument is used to assure different tanks at any one facility, for each tank covered by this instrument, list the tank identification number provided in the notification submitted pursuant to section 33.1-24-08-12, and the name and address of the facility.]

For [insert: "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"; in accordance with and subject to the limits of liability, exclusions, conditions, and other terms of the policy; if coverage is different for different tanks or locations, indicate the type of coverage applicable to each tank or location] arising from operating the underground storage tank(s) identified above.

The limits of liability are [insert the dollar amount of the "each occurrence" and "annual aggregate" limits of the insurer's or group's liability; if the amount of coverage is different for different types of coverage or for different underground storage tanks or locations, indicate the amount of coverage for each type of coverage and/or for each underground storage tank or location], exclusive of legal defense costs, which are subject to a separate limit under the policy. This coverage is provided under [policy number]. The effective date of said policy is [date].

2. The ["insurer" or "group"] further certifies the following with respect to the insurance described in paragraph 1:
  - a. Bankruptcy or insolvency of the insured shall not relieve the ["insurer" or "group"] of its obligations under the policy to which this certificate applies.
  - b. The ["insurer" or "group"] is liable for the payment of amounts within any deductible applicable to the policy to the provider of corrective action or a damaged third party, with a right of reimbursement by the insured for any such payment made by the ["insurer" or "group"]. This provision does not apply with respect to that amount of any deductible for which coverage is demonstrated under another mechanism or combination of mechanisms as specified in sections 33.1-24-08-85 through 33.1-24-08-92 and 33.1-24-08-97.
  - c. Whenever requested by the department, the ["insurer" or "group"] agrees to furnish to the department a signed duplicate original of the policy and all endorsements.
  - d. Cancellation or any other termination of the insurance by the ["insurer" or "group"], except for nonpayment of premium or misrepresentation by the insured, will be effective only upon written notice and only after the expiration of sixty days after a copy of such written notice is received by the insured. Cancellation for nonpayment of premium or misrepresentation by the insured

will be effective only upon written notice and only after expiration of a minimum of ten days after a copy of such written notice is received by the insured.

[Insert for claims-made policies:

- e. The insurance covers claims otherwise covered by the policy that are reported to the ["insurer" or "group"] within six months of the effective date of cancellation or nonrenewal of the policy except where the new or renewed policy has the same retroactive date or a retroactive date earlier than that of the prior policy, and which arise out of any covered occurrence that commenced after the policy retroactive date, if applicable, and prior to such policy renewal or termination date. Claims reported during such an extended reporting period are subject to the terms, conditions, limits, including limits of liability, and exclusions of the policy.]

I hereby certify that the wording of this instrument is identical to the wording in subdivision b of subsection 2 of section 33.1-24-08-87 and that the ["insurer" or "group"] is ["licensed to transact the business of insurance, or eligible to provide insurance as an excess or surplus lines insurer, in one or more states"].

[Signature of authorized representative of insurer]

[Type name]

[Title], Authorized Representative of [name of insurer or risk retention group]

[Address of representative]

- 3. Each insurance policy must be issued by an insurer or a risk retention group that, at a minimum, is licensed to transact the business of insurance or eligible to provide insurance as an excess or surplus lines insurer in one or more states.

**History:** Effective January 1, 2019.

**General Authority:** NDCC 23.1-04-03, 23.1-04-06; S.L. 2017, ch. 199, § 1

**Law Implemented:** NDCC 23.1-04-06; S.L. 2017, ch. 199, § 19

**33.1-24-08-88. Surety bond.**

- 1. An owner or operator may satisfy the requirements of section 33.1-24-08-83 by obtaining a surety bond that conforms to the requirements of this section. The surety company issuing the bond must be among those listed as acceptable sureties on federal bonds in the latest circular 570 of the United States department of the treasury.
- 2. The surety bond must be worded as follows, except that instructions in brackets must be replaced with the relevant information and the brackets deleted:

**Performance Bond**

Date bond executed:

Period of coverage:

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Principal: [legal name and business address of

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owner or operator]:

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Type of organization: [insert "individual", "joint venture", "partnership", or "corporation"]:

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State of incorporation (if applicable):

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Surety(ies): [name(s) and business address(es)]:

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Scope of Coverage: [List the number of tanks at each facility and the name(s) and address(es) of the facility(ies) where the tanks are located. If more than one instrument is used to assure different tanks at any one facility, for each tank covered by this instrument, list the tank identification number provided in the notification submitted pursuant to section 33.1-24-08-12, and the name and address of the facility. List the coverage guaranteed by the bond: "taking corrective action" provided in the notification submitted pursuant to and/or "compensating third parties for bodily injury and property damage caused by" either "sudden accidental releases" or "nonsudden accidental releases" or "accidental releases" "arising from operating the underground storage tank"].

Penal sums of bond:

Per occurrence \$ \_\_\_\_\_

Annual aggregate \$ \_\_\_\_\_

Surety's bond number: \_\_\_\_\_

Know all Persons by These Presents, that we, the Principal and Surety(ies), hereto are firmly bound to the department, in the above penal sums for the payment of which we bind ourselves, our heirs, executors, administrators, successors, and assigns jointly and severally; provided that, where the Surety(ies) are corporations acting as co-sureties, we, the Sureties, bind ourselves in such sums jointly and severally only for the purpose of allowing a joint action or actions against any or all of us, and for all other purposes each Surety binds itself, jointly and severally with the Principal, for the payment of such sums only as is set forth opposite the name of such Surety, but if no limit of liability is indicated, the limit of liability shall be the full amount of the penal sums.

Whereas said Principal is required under North Dakota Century Code section 23.1-04-06 to provide financial assurance for [insert: "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"; if coverage is different for different tanks or locations, indicate the type of coverage applicable to each tank or location] arising from operating the underground storage tanks identified above, and

Whereas said Principal shall establish a standby trust fund as is required when a surety bond is used to provide such financial assurance;

Now, therefore, the conditions of the obligation are such that if the Principal shall faithfully ["take corrective action, in accordance with sections 33.1-24-08-50 through 33.1-24-08-57 and the department's instructions for", and/or "compensate injured third parties for bodily injury and property damage caused by" either "sudden accidental releases" or "nonsudden accidental releases" or "accidental releases"] arising from operating the tank(s) identified above, or if the Principal shall provide alternate financial assurance, as specified in sections 33.1-24-08-80 through 33.1-24-08-106, within one hundred twenty days after the date the



notice of cancellation is received by the Principal from the Surety(ies), then this obligation shall be null and void; otherwise it is to remain in full force and effect.

Such obligation does not apply to any of the following:

- (a) Any obligation of [insert owner or operator] under a workers' compensation, disability benefits, or unemployment compensation law or other similar law;
- (b) Bodily injury to an employee of [insert owner or operator] arising from, and in the course of, employment by [insert owner or operator];
- (c) Bodily injury or property damage arising from the ownership, maintenance, use, or entrustment to others of any aircraft, motor vehicle, or watercraft;
- (d) Property damage to any property owned, rented, loaned to, in the care, custody, or control of, or occupied by [insert owner or operator] that is not the direct result of a release from a petroleum underground storage tank; or
- (e) Bodily injury or property damage for which [insert owner or operator] is obligated to pay damages by reason of the assumption of liability in a contract or agreement other than a contract or agreement entered into to meet the requirements of section 33.1-24-08-83.

The Surety(ies) shall become liable on this bond obligation only when the Principal has failed to fulfill the conditions described above.

Upon notification by the department that the Principal has failed to ["take corrective action, in accordance with chapter 33.1-24-08, sections 33.1-24-08-50 through 33.1-24-08-57 and the department's instructions", and/or "compensate injured third parties"] as guaranteed by this bond, the Surety(ies) shall either perform ["corrective action in accordance with chapter 33.1-24-08 and the department's instructions", and/or "third-party liability compensation"] or place funds in an amount up to the annual aggregate penal sum into the standby trust fund as directed by the department under section 33.1-24-08-102.

Upon notification by the department that the Principal has failed to provide alternate financial assurance within sixty days after the date the notice of cancellation is received by the Principal from the Surety(ies) and that the department has determined or suspects that a release has occurred, the Surety(ies) shall place funds in an amount not exceeding the annual aggregate penal sum into the standby trust fund as directed by the department under section 33.1-24-08-102.

The Surety(ies) hereby waive(s) notification of amendments to applicable laws, statutes, rules, and regulations and agrees that no such amendment shall in any way alleviate its(their) obligation on this bond.

The liability of the Surety(ies) shall not be discharged by any payment or succession of payments hereunder, unless and until such payment or payments shall amount in the annual aggregate to the penal sum shown on the face of the bond, but in no event shall the obligation of the Surety(ies) hereunder exceed the amount of said annual aggregate penal sum.

The Surety(ies) may cancel the bond by sending notice of cancellation by certified mail to the Principal; provided, however, that cancellation shall not occur during the one hundred twenty days beginning on the date of receipt of the notice of cancellation by the Principal, as evidenced by the return receipt.

The Principal may terminate this bond by sending written notice to the Surety(ies).

In Witness Whereof, the Principal and Surety(ies) have executed this Bond and have affixed their seals on the date set forth above.

The persons whose signatures appear below hereby certify that they are authorized to execute this surety bond on behalf of the Principal and Surety(ies) and that the wording of this surety bond is identical to the wording specified in subsection 2 of section 33.1-24-08-88 as such rules were constituted on the date this bond was executed.

Principal

[Signature(s)]

[Name(s)]

[Title(s)]

[Corporate seal]

Corporate Surety(ies)

[Name and address]

[State of Incorporation: \_\_\_\_\_]

[Liability limit: \$ \_\_\_\_\_]

[Signature(s)]

[Name(s) and title(s)]

[Corporate seal]

[For every co-surety, provide signature(s), corporate seal, and other information in the same manner as for Surety above.]

Bond premium: \$ \_\_\_\_\_

3. Under the terms of the bond, the surety will become liable on the bond obligation when the owner or operator fails to perform as guaranteed by the bond. In all cases, the surety's liability is limited to the per-occurrence and annual aggregate penal sums.
4. The owner or operator who uses a surety bond to satisfy the requirements of section 33.1-24-08-83 must establish a standby trust fund when the surety bond is acquired. Under the terms of the bond, all amounts paid by the surety under the bond will be deposited directly into the standby trust fund in accordance with instructions from the department under section 33.1-24-08-98. This standby trust fund must meet the requirements specified in section 33.1-24-08-93.

**History:** Effective January 1, 2019.

**General Authority:** NDCC 23.1-04-03, 23.1-04-06; S.L. 2017, ch. 199, § 1

**Law Implemented:** NDCC 23.1-04-06; S.L. 2017, ch. 199, § 19

### **33.1-24-08-89. Letter of credit.**

1. An owner or operator may satisfy the requirements of section 33.1-24-08-83 by obtaining an irrevocable standby letter of credit that conforms to the requirements of this section. The issuing institution must be an entity that has the authority to issue letters of credit in each state where used and whose letter-of-credit operations are regulated and examined by a federal or state agency.

2. The letter of credit must be worded as follows, except that instructions in brackets are to be replaced with the relevant information and the brackets deleted:

**Irrevocable Standby Letter of Credit**

[Name and address of issuing institution]

[Name and address of the department]

Dear Sir or Madam: We hereby establish our Irrevocable Standby Letter of Credit No. \_\_\_\_\_ in your favor, at the request and for the account of [owner or operator name] of [address] up to the aggregate amount of [in words] U.S. dollars (\$[insert dollar amount]), available upon presentation [insert, if more than one department is a beneficiary, "by any one of you"] of

- (1) Your sight draft, bearing reference to this letter of credit, No. \_\_\_\_\_, and
- (2) Your signed statement reading as follows: "I certify that the amount of the draft is payable pursuant to rules issued under authority of North Dakota Century Code Section 23.1-04-06".

This letter of credit may be drawn on to cover [insert: "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"] arising from operating the underground storage tank(s) identified below in the amount of [in words] \$ [insert dollar amount] per occurrence and [in words] \$ [insert dollar amount] annual aggregate:

[List the number of tanks at each facility and the name(s) and address(es) of the facility(ies) where the tanks are located. If more than one instrument is used to assure different tanks at any one facility, for each tank covered by this instrument, list the tank identification number provided in the notification submitted pursuant to section 33.1-24-08-12, and the name and address of the facility.]

The letter of credit may not be drawn on to cover any of the following:

- (a) Any obligation of [insert owner or operator] under a workers' compensation, disability benefits, or unemployment compensation law or other similar law;
- (b) Bodily injury to an employee of [insert owner or operator] arising from, and in the course of, employment by [insert owner or operator];
- (c) Bodily injury or property damage arising from the ownership, maintenance, use, or entrustment to others of any aircraft, motor vehicle, or watercraft;
- (d) Property damage to any property owned, rented, loaned to, in the care, custody, or control of, or occupied by [insert owner or operator] that is not the direct result of a release from a petroleum underground storage tank; or
- (e) Bodily injury or property damage for which [insert owner or operator] is obligated to pay damages by reason of the assumption of liability in a contract or agreement other than a contract or agreement entered into to meet the requirements of section 33.1-24-08-83.

This letter of credit is effective as of [date] and shall expire on [date], but such expiration date shall be automatically extended for a period of [at least the length of the original term] on [expiration date] and on each successive expiration date, unless, at least one hundred twenty days before the current expiration date, we notify [owner or operator] by certified mail that we have decided not to extend this letter of credit beyond the current expiration date. In

the event that [owner or operator] is so notified, any unused portion of the credit shall be available upon presentation of your sight draft for one hundred twenty days after the date of receipt by [owner or operator], as shown on the signed return receipt.

Whenever this letter of credit is drawn on under and in compliance with the terms of this credit, we shall duly honor such draft upon presentation to us, and we shall deposit the amount of the draft directly into the standby trust fund of [owner or operator] in accordance with your instructions.

We certify that the wording of this letter of credit is identical to the wording specified in subsection 2 of section 33.1-24-08-89 as such rules were constituted on the date shown immediately below.

[Signature(s) and title(s) of official(s) of issuing institution]

[Date]

This credit is subject to [insert "the most recent edition of the Uniform Customs and Practice for Documentary Credits, published by the International Chamber of Commerce", or "the Uniform Commercial Code"].

3. An owner or operator who uses a letter of credit to satisfy the requirements of section 33.1-24-08-83 must also establish a standby trust fund when the letter of credit is acquired. Under the terms of the letter of credit, all amounts paid pursuant to a draft by the department will be deposited by the issuing institution directly into the standby trust fund in accordance with instructions from the department under section 33.1-24-08-102. This standby trust fund must meet the requirements specified in section 33.1-24-08-93.
4. The letter of credit must be irrevocable with a term specified by the issuing institution. The letter of credit must provide that credit be automatically renewed for the same term as the original term, unless, at least one hundred twenty days before the current expiration date, the issuing institution notifies the owner or operator by certified mail of its decision not to renew the letter of credit. Under the terms of the letter of credit, the one hundred twenty days will begin on the date when the owner or operator receives the notice, as evidenced by the return receipt.

**History:** Effective January 1, 2019.

**General Authority:** NDCC 23.1-04-03, 23.1-04-06; S.L. 2017, ch. 199, § 1

**Law Implemented:** NDCC 23.1-04-06; S.L. 2017, ch. 199, § 19

**33.1-24-08-90. [Reserved].**

**33.1-24-08-91. [Reserved].**

**33.1-24-08-92. Trust fund.**

1. An owner or operator may satisfy the requirements of section 33.1-24-08-83 by establishing a trust fund that conforms to the requirements of this section. The trustee must be an entity that has the authority to act as a trustee and whose trust operations are regulated and examined by a federal agency or an agency of the state in which the fund is established.
2. The wording of the trust agreement must be identical to the wording specified in subdivision a of subsection 2 of section 33.1-24-08-93, and must be accompanied by a formal certification of acknowledgment as specified in subdivision b of subsection 2 of section 33.1-24-08-93.

3. The trust fund, when established, must be funded for the full required amount of coverage, or funded for part of the required amount of coverage and used in combination with other mechanisms that provide the remaining required coverage.
4. If the value of the trust fund is greater than the required amount of coverage, the owner or operator may submit a written request to the department for release of the excess.
5. If other financial assurance as specified in sections 33.1-24-08-80 through 33.1-24-08-106 is substituted for all or part of the trust fund, the owner or operator may submit a written request to the department for release of the excess.
6. Within sixty days after receiving a request from the owner or operator for release of funds as specified in subsection 4 or 5, the department will instruct the trustee to release to the owner or operator such funds as the department specifies in writing.

**History:** Effective January 1, 2019.

**General Authority:** NDCC 23.1-04-03, 23.1-04-06; S.L. 2017, ch. 199, § 1

**Law Implemented:** NDCC 23.1-04-06; S.L. 2017, ch. 199, § 19

### **33.1-24-08-93. Standby trust fund.**

1. An owner or operator using any one of the mechanisms authorized by section 33.1-24-08-86, 33.1-24-08-88, or 33.1-24-08-89 must establish a standby trust fund when the mechanism is acquired. The trustee of the standby trust fund must be an entity that has the authority to act as a trustee and whose trust operations are regulated and examined by a federal agency or an agency of the state in which the fund is established.
2. The following apply:
  - a. The standby trust agreement, or trust agreement, must be worded as follows, except that instructions in brackets are to be replaced with the relevant information and the brackets deleted:

#### **Trust Agreement**

Trust agreement, the "Agreement", entered into as of [date] by and between [name of the owner or operator], a [name of state] [insert "corporation", "partnership", "association", or "proprietorship"], the "Grantor", and [name of corporate trustee], [insert "Incorporated in the state of \_\_\_\_\_" or "a national bank"], the "Trustee".

Whereas, the department has established certain rules applicable to the Grantor, requiring that an owner or operator of an underground storage tank shall provide assurance that funds will be available when needed for corrective action and third-party compensation for bodily injury and property damage caused by sudden and nonsudden accidental releases arising from the operation of the underground storage tank. The attached schedule A lists the number of tanks at each facility and the name(s) and address(es) of the facility(ies) where the tanks are located that are covered by the standby [insert "standby" where trust agreement is standby trust agreement] trust agreement.

[Whereas, the Grantor has elected to establish [insert either "a guarantee", "surety bond", or "letter of credit"] to provide all or part of such financial assurance for the underground storage tanks identified herein and is required to establish a standby trust fund able to accept payments from the instrument (This paragraph is only applicable to the standby trust agreement.);

[Whereas, the Grantor, acting through its duly authorized officers, has selected the Trustee to be the trustee under this agreement, and the Trustee is willing to act as trustee;

Now, therefore, the Grantor and the Trustee agree as follows:

#### Section 1. Definitions.

As used in this Agreement:

- (a) The term "Grantor" means the owner or operator who enters into this Agreement and any successors or assigns of the Grantor.
- (b) The term "Trustee" means the Trustee who enters into this Agreement and any successor Trustee.

#### Section 2. Identification of the Financial Assurance Mechanism.

This Agreement pertains to the [identify the financial assurance mechanism, either a guarantee, surety bond, or letter of credit, from which the standby trust fund is established to receive payments (This paragraph is only applicable to the standby trust agreement.)].

#### Section 3. Establishment of Fund.

The Grantor and the Trustee hereby establish a trust fund, the "Fund", for the benefit of [the department]. The Grantor and the Trustee intend that no third party have access to the Fund except as herein provided. [The Fund is established initially as a standby to receive payments and shall not consist of any property.] Payments made by the provider of financial assurance pursuant to the [department's] instruction are transferred to the Trustee and are referred to as the Fund, together with all earnings and profits thereon, less any payments or distributions made by the Trustee pursuant to this Agreement. The Fund shall be held by the Trustee, IN TRUST, as hereinafter provided. The Trustee shall not be responsible nor shall it undertake any responsibility for the amount or adequacy of, nor any duty to collect from the Grantor as provider of financial assurance, any payments necessary to discharge any liability of the Grantor established by the department.

#### Section 4. Payment for ["Corrective Action" and/or "Third-Party Liability Claims"].

The Trustee shall make payments from the Fund as [the department] shall direct, in writing, to provide for the payment of the costs of [insert: "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"] arising from operating the tanks covered by the financial assurance mechanism identified in this Agreement.

The Fund may not be drawn upon to cover any of the following:

- (a) Any obligation of [insert owner or operator] under a workers' compensation, disability benefits, or unemployment compensation law or other similar law;
- (b) Bodily injury to an employee of [insert owner or operator] arising from, and in the course of employment by [insert owner or operator];
- (c) Bodily injury or property damage arising from the ownership, maintenance, use, or entrustment to others of any aircraft, motor vehicle, or watercraft;
- (d) Property damage to any property owned, rented, loaned to, in the care, custody, or control of, or occupied by [insert owner or operator] that is not the direct result of a release from a petroleum underground storage tank; or
- (e) Bodily injury or property damage for which [insert owner or operator] is obligated to pay damages by reason of the assumption of liability in a contract or agreement other than a contract or agreement entered into to meet the requirements of section 33.1-24-08-83.

The Trustee shall reimburse the Grantor, or other persons as specified by the department, from the Fund for corrective action expenditures and/or third-party liability claims in such amounts as the department shall direct in writing. In addition, the Trustee shall refund to the Grantor such amounts as the department specifies in writing. Upon refund, such funds shall no longer constitute part of the Fund as defined herein.

#### Section 5. Payments Comprising the Fund.

Payments made to the Trustee for the Fund shall consist of cash and securities acceptable to the Trustee.

#### Section 6. Trustee Management.

The Trustee shall invest and reinvest the principal and income of the Fund and keep the Fund invested as a single fund, without distinction between principal and income, in accordance with general investment policies and guidelines which the Grantor may communicate in writing to the Trustee from time to time, subject; however, to the provisions of this section. In investing, reinvesting, exchanging, selling, and managing the Fund, the Trustee shall discharge the duties of the Trustee with respect to the trust fund solely in the interest of the beneficiaries and with the care, skill, prudence, and diligence under the circumstances then prevailing which persons of prudence, acting in a like capacity and familiar with such matters, would use in the conduct of an enterprise of a like character and with like aims; except that:

- (i) Securities or other obligations of the Grantor, or any other owner or operator of the tanks, or any of their affiliates as defined in the Investment Company Act of 1940, as amended, 15 U.S.C. 480a-2(a), shall not be acquired or held, unless they are securities or other obligations of the federal or a state government;
- (ii) The Trustee is authorized to invest the Fund in time or demand deposits of the Trustee, to the extent insured by an agency of the federal or state government; and
- (iii) The Trustee is authorized to hold cash awaiting investment or distribution uninvested for a reasonable time and without liability for the payment of interest thereon.

#### Section 7. Commingling and Investment.

The Trustee is expressly authorized in its discretion:

- (a) To transfer from time to time any or all of the assets of the Fund to any common, commingled, or collective trust fund created by the Trustee in which the Fund is eligible to participate, subject to all the provisions thereof, to be commingled with the assets of other trusts participating therein; and
- (b) To purchase shares in any investment company registered under the Investment Company Act of 1940, 15 U.S.C. 80a-1 et seq., including one which may be created, managed, underwritten, or to which investment advice is rendered or the shares of which are sold by the Trustee. The Trustee may vote such shares in its discretion.

#### Section 8. Express Powers of Trustee.

Without in any way limiting the powers and discretions conferred upon the Trustee by the other provisions of this Agreement or by law, the Trustee is expressly authorized and empowered:

- (a) To sell, exchange, convey, transfer, or otherwise dispose of any property held by it, by public or private sale. No person dealing with the Trustee shall be bound to see to the

application of the purchase money or to inquire into the validity or expediency of any such sale or other disposition;

- (b) To make, execute, acknowledge, and deliver any and all documents of transfer and conveyance and any and all other instruments that may be necessary or appropriate to carry out the powers herein granted;
- (c) To register any securities held in the Fund in its own name or in the name of a nominee and to hold any security in bearer form or in book entry, or to combine certificates representing such securities with certificates of the same issue held by the Trustee in other fiduciary capacities, or to deposit or arrange for the deposit of such securities in a qualified central depository even though, when so deposited, such securities may be merged and held in bulk in the name of the nominee of such depository with other securities deposited therein by another person, or to deposit or arrange for the deposit of any securities issued by the United States Government, or any agency or instrumentality thereof, with a Federal Reserve bank, but the books and records of the Trustee shall at all times show that all such securities are part of the Fund;
- (d) To deposit any cash in the Fund in interest-bearing accounts maintained or savings certificates issued by the Trustee, in its separate corporate capacity, or in any other banking institution affiliated with the Trustee, to the extent insured by an agency of the federal or state government; and
- (e) To compromise or otherwise adjust all claims in favor of or against the Fund.

#### Section 9. Taxes and Expenses.

All taxes of any kind that may be assessed or levied against or in respect of the Fund and all brokerage commissions incurred by the Fund shall be paid from the Fund. All other expenses incurred by the Trustee in connection with the administration of this Trust, including fees for legal services rendered to the Trustee, the compensation of the Trustee to the extent not paid directly by the Grantor, and all other proper charges and disbursements of the Trustee shall be paid from the Fund.

#### Section 10. Advice of Counsel.

The Trustee may from time to time consult with counsel, who may be counsel to the Grantor, with respect to any questions arising as to the construction of this Agreement or any action to be taken hereunder. The Trustee shall be fully protected, to the extent permitted by law, in acting upon the advice of counsel.

#### Section 11. Trustee Compensation.

The Trustee shall be entitled to reasonable compensation for its services as agreed upon in writing from time to time with the Grantor.

#### Section 12. Successor Trustee.

The Trustee may resign or the Grantor may replace the Trustee, but such resignation or replacement shall not be effective until the Grantor has appointed a successor trustee and this successor accepts the appointment. The successor trustee shall have the same powers and duties as those conferred upon the Trustee hereunder. Upon the successor trustee's acceptance of the appointment, the Trustee shall assign, transfer, and pay over to the successor trustee the funds and properties then constituting the Fund. If for any reason the Grantor cannot or does not act in the event of the resignation of the Trustee, the Trustee may apply to a court of competent jurisdiction for the appointment of a successor trustee or for instructions. The successor trustee shall specify the date on which it assumes administration



of the trust in writing sent to the Grantor and the present Trustee by certified mail ten days before such change becomes effective. Any expenses incurred by the Trustee as a result of any of the acts contemplated by this section shall be paid as provided in Section 9.

#### Section 13. Instructions to the Trustee.

All orders, requests, and instructions by the Grantor to the Trustee shall be in writing, signed by such persons as are designated in the attached Schedule B or such other designees as the Grantor may designate by amendment to Schedule B. The Trustee shall be fully protected in acting without inquiry in accordance with the Grantor's orders, requests, and instructions. All orders, requests, and instructions by the department to the Trustee shall be in writing, signed by the department, and the Trustee shall act and shall be fully protected in acting in accordance with such orders, requests, and instructions. The Trustee shall have the right to assume, in the absence of written notice to the contrary, that no event constituting a change or a termination of the authority of any person to act on behalf of the Grantor or the department hereunder has occurred. The Trustee shall have no duty to act in the absence of such orders, requests, and instructions from the Grantor and/or the department, except as provided for herein.

#### Section 14. Amendment of Agreement.

This Agreement may be amended by an instrument in writing executed by the Grantor and the Trustee, or by the Trustee and [the department] if the Grantor ceases to exist.

#### Section 15. Irrevocability and Termination.

Subject to the right of the parties to amend this Agreement as provided in Section 14, this Trust shall be irrevocable and shall continue until terminated at the written direction of the Grantor and the Trustee, or by the Trustee and the department, if the Grantor ceases to exist. Upon termination of the Trust, all remaining trust property, less final trust administration expenses, shall be delivered to the Grantor.

#### Section 16. Immunity and Indemnification.

The Trustee shall not incur personal liability of any nature in connection with any act or omission, made in good faith, in the administration of this Trust, or in carrying out any directions by the Grantor or the department issued in accordance with this Agreement. The Trustee shall be indemnified and saved harmless by the Grantor, from and against any personal liability to which the Trustee may be subjected by reason of any act or conduct in its official capacity, including all expenses reasonably incurred in its defense in the event the Grantor fails to provide such defense.

#### Section 17. Choice of Law.

This agreement shall be administered, construed, and enforced according to the laws of the state of North Dakota, or the Comptroller of the Currency in the case of National Association of Banks.

#### Section 18. Interpretation.

As used in this Agreement, words in the singular include the plural and words in the plural include the singular. The descriptive headings for each section of this Agreement shall not affect the interpretation or the legal efficacy of this Agreement.

In Witness whereof the parties have caused this Agreement to be executed by their respective officers duly authorized and their corporate seals (if applicable) to be hereunto affixed and attested as of the date first above written. The parties below certify that the wording of this

Agreement is identical to the wording specified in subdivision a of subsection 2 of section 33.1-24-08-93 as such rules were constituted on the date written above.

[Signature of Grantor]

[Name of the Grantor]

[Title]

Attest:

[Signature of Trustee]

[Name of the Trustee]

[Title]

[Seal]

[Signature of Witness]

[Name of the Witness]

[Title]

[Seal]

- b. The standby trust agreement, or trust agreement, must be accompanied by a formal certification of acknowledgment similar to the following.

State of \_\_\_\_\_

County of \_\_\_\_\_

On this [date], before me personally came [owner or operator] to me known, who, being by me duly sworn, did depose and say that the owner or operator resides at [address], that the owner or operator is [title] of [corporation], the corporation described in and which executed the above instrument; that the owner or operator knows the seal of said corporation; that the seal affixed to such instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation; and that the owner or operator signed their name thereto by like order.

[Signature of Notary Public]

[Name of Notary Public]

3. The department will instruct the trustee to refund the balance of the standby trust fund to the provider of financial assurance if the department determines that no additional corrective action costs or third-party liability claims will occur as a result of a release covered by the financial assurance mechanism for which the standby trust fund was established.
4. An owner or operator may establish one trust fund as the depository mechanism for all funds assured in compliance with this chapter.

**History:** Effective January 1, 2019.

**General Authority:** NDCC 23.1-04-03, 23.1-04-06; S.L. 2017, ch. 199, § 1

**Law Implemented:** NDCC 23.1-04-06; S.L. 2017, ch. 199, § 19

**33.1-24-08-94. Local government bond rating test.**

1. A general purpose local government owner or operator, or local government, or both, serving as a guarantor may satisfy the requirements of section 33.1-24-08-83 currently outstanding issue or issues of general obligation bonds of one million dollars or more, excluding refunded obligations, with a Moody's rating of Aaa, Aa, A, or Baa, or a Standard and Poor's rating of AAA, AA, A, or BBB. Where a local government has multiple outstanding issues, or where a local government's bonds are rated by both Moody's and Standard and Poor's, the lowest rating must be used to determine eligibility. Bonds that are backed by credit enhancement other than municipal bond insurance may not be considered in determining the amount of applicable bonds outstanding.
2. A local government owner or operator or local government serving as a guarantor that is not a general purpose local government and does not have the legal authority to issue general obligation bonds may satisfy the requirements of section 33.1-24-08-83 by having a currently outstanding issue or issues of revenue bonds of one million dollars or more, excluding refunded issues and by also having a Moody's rating of Aaa, Aa, A, or Baa, or a Standard and Poor's rating of AAA, AA, A, or BBB as the lowest rating for any rated revenue bond issued by the local government. Where bonds are rated by both Moody's and Standard and Poor's, the lower rating for each bond must be used to determine eligibility. Bonds that are backed by credit enhancement may not be considered in determining the amount of applicable bonds outstanding.
3. The local government owner or operator or guarantor, or both, must maintain a copy of its bond rating published within the last twelve months by Moody's or Standard and Poor's.
4. To demonstrate that it meets the local government bond rating test, the chief financial officer of a general purpose local government owner or operator, or guarantor, or both, must sign a letter worded exactly as follows, except that the instructions in brackets are to be replaced by the relevant information and the brackets deleted:

LETTER FROM CHIEF FINANCIAL OFFICER

I am the chief financial officer of [insert: name and address of local government owner or operator, or guarantor]. This letter is in support of the use of the bond rating test to demonstrate financial responsibility for [insert: "taking corrective action" and/or "compensating third parties for bodily injury and property damage"] caused by [insert: "sudden accidental releases" and/or "nonsudden accidental releases"] in the amount of at least [insert: dollar amount] per occurrence and [insert: dollar amount] annual aggregate arising from operating (an) underground storage tank or tanks.

Underground storage tanks at the following facilities are assured by this bond rating test: [List for each facility: the name and address of the facility where tanks are assured by the bond rating test].

The details of the issue date, maturity, outstanding amount, bond rating, and bond rating agency of all outstanding bond issues that are being used by [name of local government owner or operator, or guarantor] to demonstrate financial responsibility are as follows: [complete table]

Issue Date	Maturity Date	Outstanding Amount	Bond Rating	Rating Agency
				[Moody's or Standard and Poor's]

The total outstanding obligation of [insert amount], excluding refunded bond issues, exceeds the minimum amount of one million dollars. All outstanding general obligation bonds issued by this government that have been rated by Moody's or Standard and Poor's are rated as at least investment grade (Moody's Baa or Standard and Poor's BBB) based on the most recent ratings published within the last twelve months. Neither rating service has provided notification within the last twelve months of downgrading of bond ratings below investment grade or of withdrawal of bond rating other than for repayment of outstanding bond issues.

I hereby certify that the wording of this letter is identical to the wording specified in subsection 4 of section 33.1-24-08-94 as such rules were constituted on the date shown immediately below.

[Date]

[Signature]

[Name]

[Title]

5. To demonstrate that it meets the local government bond rating test, the chief financial officer of the local government owner or operator, or guarantor, or both, other than a general purpose government must sign a letter worded exactly as follows, except that the instructions in brackets are to be replaced by the relevant information and the brackets deleted:

The total outstanding obligation of [insert amount], excluding refunded bond issues, exceeds the minimum amount of one million dollars. All outstanding revenue bonds issued by this government that have been rated by Moody's or Standard and Poor's are rated as at least investment grade (Moody's Baa or Standard and Poor's BBB) based on the most recent ratings published within the last twelve months. The revenue bonds listed are not backed by third-party credit enhancement or are insured by a municipal bond insurance company. Neither rating service has provided notification within the last twelve months of downgrading of bond ratings below an investment grade nor of withdrawal of bond rating other than for repayment of outstanding bond issues.

I hereby certify that the wording of this letter is identical to the wording specified in subsection 5 of section 33.1-24-08-94 as such rules were constituted on the date shown immediately below.

[Date]

#### LETTER FROM CHIEF FINANCIAL OFFICER

I am the chief financial officer of [insert: name and address of local government owner or operator, or guarantor]. This letter is in support of the use of the bond rating test to demonstrate financial responsibility for [insert: "taking corrective action" and/or "compensating third parties for bodily injury and property damage"] caused by [insert: "sudden accidental releases" and/or "nonsudden accidental releases" or "accidental releases"] in the amount of at least [insert: dollar amount] per occurrence and [insert: dollar amount] annual aggregate arising from operating an underground storage tank or tanks. This local government is not organized to provide general governmental services and does not have the legal authority under state law or constitutional provisions to issue general obligation debt.

Underground storage tanks at the following facilities are assured by this bond rating test: [List for each facility: the name and address of the facility where tanks are assured by the bond rating test].

The details of the issue date, maturity, outstanding amount, bond rating, and bond rating agency of all outstanding revenue bond issues that are being used by [name of local government owner or operator, or guarantor] to demonstrate financial responsibility are as follows: [complete table]

Issue Date	Maturity Date	Outstanding Amount	Bond Rating	Rating Agency
[Moody's or Standard and Poor's]				

The total outstanding obligation of [insert amount], excluding refunded bond issues, exceeds the minimum amount of \$1 million. All outstanding revenue bonds issued by this government that have been rated by Moody's or Standard and Poor's are rated as at least investment grade (Moody's Baa or Standard and Poor's BBB) based on the most recent ratings published within the last twelve months. The revenue bonds listed are not backed by third-party credit enhancement or are insured by a municipal bond insurance company. Neither rating service has provided notification within the last twelve months of downgrading of bond ratings below investment grade or of withdrawal of bond rating other than for repayment of outstanding bond issues.

I hereby certify that the wording of this letter is identical to the wording specified in subsection 5 of section 33.1-24-08-94 as such regulations were constituted on the date shown immediately below.

[Signature]

[Name]

[Title]

6. The department may require reports of financial condition at any time from the local government owner or operator, or local government guarantor, or both. If the department finds, on the basis of such reports or other information, that the local government owner or operator, or guarantor, or both, no longer meets the local government bond rating test requirements of this section, the local government owner or operator must obtain alternative coverage within thirty days after notification of such a finding.
7. If a local government owner or operator using the bond rating test to provide financial assurance finds that it no longer meets the bond rating test requirements, the local government owner or operator must obtain alternative coverage within one hundred fifty days of the change in status.
8. If the local government owner or operator fails to obtain alternate assurance within one hundred fifty days of finding that it no longer meets the requirements of the bond rating test or within thirty days of notification by the department that it no longer meets the requirements of the bond rating test, the owner or operator shall notify the department of such failure within ten days.

**History:** Effective January 1, 2019.

**General Authority:** NDCC 23.1-04-03, 23.1-04-06; S.L. 2017, ch. 199, § 1

**Law Implemented:** NDCC 23.1-04-06; S.L. 2017, ch. 199, § 19

### **33.1-24-08-95. Local government financial test.**

1. A local government owner or operator may satisfy the requirements of section 33.1-24-08-83 by passing the financial test specified in this section. To be eligible to use the financial test, the local government owner or operator must have the ability and authority to assess and levy taxes or to freely establish fees and charges. To pass the local government financial test, the owner or operator must meet the criteria of subdivision b of subsection 2 and subdivision c of subsection 2 based on year-end financial statements for the latest completed fiscal year.
2. The local government owner or operator must have the following information available, as shown in the year-end financial statements for the latest completed fiscal year:
  - a. The following apply:
    - (1) Total revenues: Consists of the sum of general fund operating and nonoperating revenues, including net local taxes, licenses and permits, fines and forfeitures, revenues from use of money and property, charges for services, investment earnings, sales (property, publications, etc.), intergovernmental revenues (restricted and unrestricted), and total revenues from all other governmental funds including enterprise, debt service, capital projects, and special revenues, but excluding revenues to funds held in a trust or agency capacity. For purposes of this test, the calculation of total revenues shall exclude all transfers between funds under the direct control of the local government using the financial test (interfund transfers), liquidation of investments, and issuance of debt.
    - (2) Total expenditures: Consists of the sum of general fund operating and nonoperating expenditures, including public safety, public utilities, transportation, public works, environmental protection, cultural and recreational, community development, revenue sharing, employee benefits and compensation, office management, planning and zoning, capital projects, interest payments on debt, payments for retirement of debt principal, and total expenditures from all other governmental funds including enterprises, debt service, capital projects, and special revenues. For purposes of this test, the calculation of total expenditures shall include all transfers between funds under the direct control of the local government using the financial test (interfund transfers).
    - (3) Local revenues: Consists of total revenues minus the sum of all transfers from other governmental entities, including all moneys received from federal, state, or local government sources.
    - (4) Debt service: Consists of the sum of all interest and principal payments on all long-term credit obligations and all interest-bearing short-term credit obligations. Includes interest and principal payments on general obligation bonds, revenue bonds, notes, mortgages, judgments, and interest-bearing warrants. Excludes payments on noninterest-bearing short-term obligations, interfund obligations, amounts owed in a trust or agency capacity, and advances and contingent loans from other governments.
    - (5) Total funds: Consists of the sum of cash and investment securities from all funds, including general, enterprise, debt service, capital projects, and special revenue funds, but excluding employee retirement funds, at the end of the local government's financial reporting year. Includes federal securities, federal agency securities, state and local government securities, and other securities such as bonds, notes, and mortgages. For purposes of this test, the calculation of total funds shall exclude agency funds, private trust funds, accounts receivable, value of real property, and other nonsecurity assets.

- (6) Population: Consists of the number of people in the area served by the local government.
  - b. The local government's year-end financial statements, if independently audited, cannot include an adverse auditor's opinion or a disclaimer of opinion. The local government cannot have outstanding issues of general obligation or revenue bonds that are rated as less than investment grade.
  - c. The local government owner or operator must have a letter signed by the chief financial officer worded as specified in subsection 3.
3. To demonstrate that it meets the financial test under subsection 2, the chief financial officer of the local government owner or operator, must sign, within one hundred twenty days of the close of each financial reporting year, as defined by the twelve-month period for which financial statements used to support the financial test are prepared, a letter worded exactly as follows, except that the instructions in brackets are to be replaced by the relevant information and the brackets deleted:

**LETTER FROM CHIEF FINANCIAL OFFICER**

I am the chief financial officer of [insert: name and address of the owner or operator]. This letter is in support of the use of the local government financial test to demonstrate financial responsibility for [insert: "taking corrective action" and/or "compensating third parties for bodily injury and property damage"] caused by [insert: "sudden accidental releases" or "nonsudden accidental releases" or "accidental releases"] in the amount of at least [insert: dollar amount] per occurrence and [insert: dollar amount] annual aggregate arising from operating (an) underground storage tank(s).

Underground storage tanks at the following facilities are assured by this financial test [list for each facility: the name and address of the facility where tanks assured by this financial test are located. If separate mechanisms or combinations of mechanisms are being used to assure any of the tanks at this facility, list each tank assured by this financial test by the tank identification number provided in the notification submitted pursuant to section 33.1-24-08-12].

This owner or operator has not received an adverse opinion, or a disclaimer of opinion from an independent auditor on its financial statements for the latest completed fiscal year. Any outstanding issues of general obligation or revenue bonds, if rated, have a Moody's rating of Aaa, Aa, A, or Baa or a Standard and Poor's rating of AAA, AA, A, or BBB; if rated by both firms, the bonds have a Moody's rating of Aaa, Aa, A, or Baa and a Standard and Poor's rating of AAA, AA, A, or BBB.

**WORKSHEET FOR MUNICIPAL FINANCIAL TEST**

**Part I. Basic Information**

- 1. Total Revenues
  - a. Revenues (dollars)\_\_\_\_\_
 

Value of revenues excludes liquidation of investments and issuance of debt. Value includes all general fund operating and nonoperating revenues, as well as all revenues from all other governmental funds including enterprise, debt service, capital projects, and special revenues, but excluding revenues to funds held in a trust or agency capacity.
  - b. Subtract interfund transfers (dollars)\_\_\_\_\_
  - c. Total Revenues (dollars)\_\_\_\_\_

2. Total Expenditures
  - a. Expenditures (dollars)\_\_\_\_\_
 

Value consists of the sum of general fund operating and nonoperating expenditures including interest payments on debt, payments for retirement of debt principal, and total expenditures from all other governmental funds including enterprise, debt service, capital projects, and special revenues.
  - b. Subtract interfund transfers (dollars)\_\_\_\_\_
  - c. Total Expenditures (dollars)\_\_\_\_\_
3. Local Revenues
  - a. Total Revenues (from 1c) (dollars)\_\_\_\_\_
  - b. Subtract total intergovernmental transfers (dollars)\_\_\_\_\_
  - c. Local Revenues (dollars)\_\_\_\_\_
4. Debt Service
  - a. Interest and fiscal charges (dollars)\_\_\_\_\_
  - b. Add debt retirement (dollars)\_\_\_\_\_
  - c. Total Debt Service (dollars)\_\_\_\_\_
5. Total Funds (Dollars)\_\_\_\_\_
 

(Sum of amounts held as cash and investment securities from all funds, excluding amounts held for employee retirement funds, agency funds, and trust funds.)
6. Population (Persons)\_\_\_\_\_

**Part II: Application of Test**

7. Total Revenues to Population
  - a. Total Revenues (from 1c)\_\_\_\_\_
  - b. Population (from 6)\_\_\_\_\_
  - c. Divide 7a by 7b \_\_\_\_\_
  - d. Subtract 417 \_\_\_\_\_
  - e. Divide by 5.212 \_\_\_\_\_
  - f. Multiply by 4.095 \_\_\_\_\_
8. Total Expenses to Population
  - a. Total Expenses (from 2c)\_\_\_\_\_
  - b. Population (from 6)\_\_\_\_\_
  - c. Divide 8a by 8b \_\_\_\_\_
  - d. Subtract 524 \_\_\_\_\_



- e. Divide by 5.401\_\_\_\_\_
  - f. Multiply by 4.095\_\_\_\_\_
9. Local Revenues to Total Revenues
- a. Local Revenues (from 3c)\_\_\_\_\_
  - b. Total Revenues (from 1c)\_\_\_\_\_
  - c. Divide 9a by 9b\_\_\_\_\_
  - d. Subtract .695\_\_\_\_\_
  - e. Divide by .205\_\_\_\_\_
  - f. Multiply by 2.840\_\_\_\_\_
10. Debt Service to Population
- a. Debt Service (from 4c)\_\_\_\_\_
  - b. Population (from 6)\_\_\_\_\_
  - c. Divide 10a by 10b\_\_\_\_\_
  - d. Subtract 51\_\_\_\_\_
  - e. Divide by 1.038\_\_\_\_\_
  - f. Multiply by -1.866\_\_\_\_\_
11. Debt Service to Total Revenues
- a. Debt Service (from 4c)\_\_\_\_\_
  - b. Total Revenues (from 1c)\_\_\_\_\_
  - c. Divide 11a by 11b\_\_\_\_\_
  - d. Subtract .068\_\_\_\_\_
  - e. Divide by .259\_\_\_\_\_
  - f. Multiply by -3.533\_\_\_\_\_
12. Total Revenues to Total Expenses
- a. Total Revenues (from 1c)\_\_\_\_\_
  - b. Total Expenses (from 2c)\_\_\_\_\_
  - c. Divide 12a by 12b\_\_\_\_\_
  - d. Subtract .910\_\_\_\_\_
  - e. Divide by .899\_\_\_\_\_
  - f. Multiply by 3.458\_\_\_\_\_
13. Funds Balance to Total Revenues

- a. Total Funds (from 5)\_\_\_\_\_
  - b. Total Revenues (from 1c)\_\_\_\_\_
  - c. Divide 13a by 13b\_\_\_\_\_
  - d. Subtract .891\_\_\_\_\_
  - e. Divide by 9.156\_\_\_\_\_
  - f. Multiply by 3.270\_\_\_\_\_
14. Funds Balance to Total Expenses
- a. Total Funds (from 5)\_\_\_\_\_
  - b. Total Expenses (from 2c)\_\_\_\_\_
  - c. Divide 14a by 14b\_\_\_\_\_
  - d. Subtract .866\_\_\_\_\_
  - e. Divide by 6.409\_\_\_\_\_
  - f. Multiply by 3.270\_\_\_\_\_
15. Total Funds to Population\_\_\_\_\_
- a. Total Funds (from 5)\_\_\_\_\_
  - b. Population (from 6)\_\_\_\_\_
  - c. Divide 15a by 15b\_\_\_\_\_
  - d. Subtract 270\_\_\_\_\_
  - e. Divide by 4.548\_\_\_\_\_
  - f. Multiply by 1.866\_\_\_\_\_
16. Add  $7f + 8f + 9f + 10f + 11f + 12f + 13f + 14f + 15f + 4.937$

I hereby certify that the financial index shown on line 16 of the worksheet is greater than zero and that the wording of this letter is identical to the wording specified in subsection 3 of section 33.1-24-08-95 as such rules were constituted on the date shown immediately below.

[Date]

[Signature]

[Name]

[Title]

- 4. If a local government owner or operator using the test to provide financial assurance finds that it no longer meets the requirements of the financial test based on the year-end financial statements, the owner or operator must obtain alternative coverage within one hundred fifty days of the end of the year for which financial statements have been prepared.

5. The department may require reports of financial condition at any time from the local government owner or operator. If the department finds, on the basis of such reports or other information, that the local government owner or operator no longer meets the financial test requirements of subsections 2 and 5, the owner or operator must obtain alternative coverage within thirty days after notification of such a finding.
6. If the local government owner or operator fails to obtain alternate assurance within one hundred fifty days of finding that it no longer meets the requirements of the financial test based on the year-end financial statements or within thirty days of notification by the department that it no longer meets the requirements of the financial test, the owner or operator must notify the department of such failure within ten days.

**History:** Effective January 1, 2019.

**General Authority:** NDCC 23.1-04-03, 23.1-04-06; S.L. 2017, ch. 199, § 1

**Law Implemented:** NDCC 23.1-04-06; S.L. 2017, ch. 199, § 19

### **33.1-24-08-96. Local government guarantee.**

1. A local government owner or operator may satisfy the requirements of section 33.1-24-08-83 by obtaining a guarantee that conforms to the requirements of this section. The guarantor must be either the estate in which the local government owner or operator is located or a local government having a "substantial governmental relationship" with the owner and operator and issuing the guarantee as an act incident to that relationship. A local government acting as the guarantor must:
  - a. Demonstrate that it meets the bond rating test requirement of section 33.1-24-08-94 and deliver a copy of the chief financial officer's letter as contained in subsections 4 and 5 of section 33.1-24-08-94 to the local government owner or operator.
  - b. Demonstrate that it meets the worksheet test requirements of section 33.1-24-08-95 and deliver a copy of the chief financial officer's letter as contained in subsection 3 of section 33.1-24-08-95.
  - c. Demonstrate that it meets the local government fund requirements of subsection 1, 2, or 3 of section 33.1-24-08-97, and deliver a copy of the chief financial officer's letter as contained in section 33.1-24-08-97 to the local government owner or operator.
2. If the local government guarantor is unable to demonstrate financial assurance under sections 33.1-24-08-94, 33.1-24-08-95, subsection 1 of section 33.1-24-08-97, subsection 2 of section 33.1-24-08-97, or subsection 3 of section 33.1-24-08-97, at the end of the financial reporting year, the guarantor shall send by certified mail, before cancellation or nonrenewal of the guarantee, notice to the owner or operator. The guarantee will terminate no less than one hundred twenty days after the date the owner or operator receives the notification, as evidenced by the return receipt. The owner or operator must obtain alternative coverage as specified in subsection 5 of section 33.1-24-08-104.
3. The guarantee agreement must be worded as specified in subsection 4 or 5, depending on which of the following alternative guarantee arrangements is selected:
  - a. If, in the default or incapacity of the owner or operator, the guarantor guarantees to fund a standby trust as directed by the department, the guarantee shall be worded as specified in subsection 4.
  - b. If in the default or incapacity of the owner or operator, the guarantor guarantees to make payments as directed by the department for taking corrective action or compensating third parties for bodily injury and property damage, the guarantee shall be worded as specified in subsection 5.

4. If the guarantor is a state, the local government guarantee with standby trust must be worded exactly as follows, except that instructions in brackets are to be replaced with relevant information and the brackets deleted:

#### LOCAL GOVERNMENT GUARANTEE WITH STANDBY TRUST MADE BY A STATE

Guarantee made this [date] by North Dakota, herein referred to as guarantor, to the department and to any and all third parties, and obligees, on behalf of [local government owner or operator].

Recitals.

- (1) Guarantor is a state.
- (2) [Local government owner or operator] owns or operates the following underground storage tank or tanks, covered by this guarantee: [List the number of tanks at each facility and the name(s) and address(es) of the facility(ies) where the tanks are located. If more than one instrument is used to assure different tanks at any one facility, for each tank covered by this instrument, list the tank identification number provided in the notification submitted pursuant to chapter 33.1-24-08, and the name and address of the facility.] This guarantee satisfies sections 33.1-24-08-80 through 33.1-24-08-106 requirements for assuring funding for [insert: "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"; if coverage is different for different tanks or locations, indicate the type of coverage applicable to each tank or location] arising from operating the above-identified underground storage tank or tanks in the amount of [insert dollar amount] per occurrence and [insert dollar amount] annual aggregate.
- (3) Guarantor guarantees to the department and to any and all third parties that:

In the event that [local government owner or operator] fails to provide alternative coverage within sixty days after receipt of a notice of cancellation of this guarantee and the department has determined or suspects that a release has occurred at an underground storage tank covered by this guarantee, the guarantor, upon instructions from the department shall fund a standby trust fund in accordance with the provisions of section 33.1-24-08-102, in an amount not to exceed the coverage limits specified above.

In the event that the department determines that [local government owner or operator] has failed to perform corrective action for releases arising out of the operation of the above-identified tank or tanks in accordance with sections 33.1-24-08-50 through 33.1-24-08-57, the guarantor upon written instructions from the department shall fund a standby trust fund in accordance with the provisions of section 33.1-24-08-102, in an amount not to exceed the coverage limits specified above.

If [owner or operator] fails to satisfy a judgment or award based on a determination of liability for bodily injury or property damage to third parties caused by ["sudden" and/or "nonsudden"] accidental releases arising from the operation of the above-identified tank or tanks, or fails to pay an amount agreed to in settlement of a claim arising from or alleged to arise from such injury or damage, the guarantor, upon written instruction from the department, shall fund a standby trust in accordance with the provisions of section 33.1-24-08-102, satisfy such judgment(s), award(s), or settlement agreement(s) up to the limits of coverage specified above.

- (4) Guarantor agrees to notify [owner or operator] by certified mail of a voluntary or involuntary proceeding under Title 11 (Bankruptcy) United States Code naming guarantor as debtor, within ten days after commencement of the proceeding.
- (5) Guarantor agrees to remain bound under this guarantee notwithstanding any modification or alteration of any obligation of [owner or operator] pursuant to chapter 33.1-24-08.
- (6) Guarantor agrees to remain bound under this guarantee for so long as [local government owner or operator] must comply with the applicable financial responsibility requirements of sections 33.1-24-08-80 through 33.1-24-08-106, for the above-identified tank or tanks, except that guarantor may cancel this guarantee by sending notice by certified mail to [owner or operator], such cancellation to become effective no earlier than one hundred twenty days after receipt of such notice by [owner or operator], as evidenced by the return receipt.
- (7) The guarantor's obligation does not apply to any of the following:
  - (a) Any obligation of [local government owner or operator] under a workers' compensation, disability benefits, or unemployment compensation law or other similar law;
  - (b) Bodily injury to an employee of [insert: local government owner or operator] arising from, and in the course of, employment by [insert: local government owner or operator];
  - (c) Bodily injury or property damage arising from the ownership, maintenance, use, or entrustment to others of any aircraft, motor vehicle, or watercraft;
  - (d) Property damage to any property owned, rented, loaned to, in the care, custody, or control of, or occupied by [insert: local government owner or operator] that is not the direct result of a release from a petroleum underground storage tank; or
  - (e) Bodily injury or property damage for which [insert: owner or operator] is obligated to pay damages by reason of the assumption of liability in a contract or agreement other than a contract or agreement entered into to meet the requirements of section 33.1-24-08-83.
- (8) Guarantor expressly waives notice of acceptance of this guarantee by department, by any or all third parties, or by [local government owner or operator].

I hereby certify that the wording of this guarantee is identical to the wording specified in subsection 4 of section 33.1-24-08-96 as such rules were constituted on the effective date shown immediately below.

Effective date: \_\_\_\_\_

[Name of guarantor]

[Authorized signature for guarantor]

[Name of person signing]

[Title of person signing]

Signature of witness or notary: \_\_\_\_\_

If the guarantor is a local government, the local government guarantee with standby trust must be worded exactly as follows, except that instructions in brackets are to be replaced with relevant information and the brackets deleted:

#### LOCAL GOVERNMENT GUARANTEE WITH STANDBY TRUST MADE BY A LOCAL GOVERNMENT

Guarantee made this [date] by [name of guaranteeing entity], a local government organized under the laws of North Dakota, herein referred to a guarantor, to the department, and to any and all third parties, and obliges, on behalf of [local government owner or operator].

Recitals.

- (1) Guarantor meets or exceeds [select one: the local government bond rating test requirements of section 33.1-24-08-94, the local government financial test requirements of section 33.1-24-08-95, or the local government fund under subsection 1, 2, or 3 of section 33.1-24-08-97.
- (2) [Local government owner or operator] owns or operates the following underground storage tank or tanks covered by this guarantee: [List the number of tanks at each facility and the name(s) and address(es) of the facility(ies) where the tanks are located. If more than one instrument is used to assure different tanks at any one facility, for each tank covered by this instrument, list the tank identification number provided in the notification submitted pursuant to chapter 33.1-24-08, and the name and address of the facility.] This guarantee satisfies sections 33.1-24-08-80 through 33.1-24-08-106 requirements for assuring funding for [insert: "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"; if coverage is different for different tanks or locations, indicate the type of coverage applicable to each tank or location] arising from operating the above-identified underground storage tank or tanks in the amount of [insert: dollar amount] per occurrence and [insert: dollar amount] annual aggregate.
- (3) Incident to our substantial governmental relationship with [local government owner or operator], guarantor guarantees to the department and to any and all third parties that:

In the event that [local government owner or operator] fails to provide alternative coverage within sixty days after receipt of a notice of cancellation of this guarantee and the department has determined or suspects that a release has occurred at an underground storage tank covered by this guarantee, the guarantor, upon instructions from the department shall fund a standby trust fund in accordance with the provisions of section 33.1-24-08-102 in an amount not to exceed the coverage limits specified above.

In the event that the department determines that [local government owner or operator] has failed to perform corrective action for releases arising out of the operation of the above-identified tank or tanks in accordance with sections 33.1-24-08-50 through 33.1-24-08-57, the guarantor upon written instructions from the department shall fund a standby trust fund in accordance with the provisions of section 33.1-24-08-102, in an amount not to exceed the coverage limits specified above.

If [owner or operator] fails to satisfy a judgment or award based on a determination of liability for bodily injury or property damage to third parties caused by ["sudden" and/or "nonsudden"] accidental releases arising from the operation of the above-identified tank or tanks, or fails to pay an amount agreed to in settlement of a claim arising from or alleged to arise from such injury or damage, the guarantor, upon written instructions from the department shall fund a standby trust in accordance with the provisions of section

33.1-24-08-102 to satisfy such judgment(s), award(s), or settlement agreement(s) up to the limits of coverage specified above.

- (4) Guarantor agrees that, if at the end of any fiscal year before cancellation of this guarantee, the guarantor fails to meet or exceed the requirements of the financial responsibility mechanism specified in paragraph 1, guarantor shall send within one hundred twenty days of such failure, by certified mail, notice to [local government owner or operator], as evidenced by the return receipt.
- (5) Guarantor agrees to notify [owner or operator] by certified mail of a voluntary or involuntary proceeding under Title 11 (Bankruptcy) United States Code naming guarantor as debtor, within ten days after commencement of the proceeding.
- (6) Guarantor agrees to remain bound under this guarantee notwithstanding any modification or alteration of any obligation of [owner or operator] pursuant to chapter 33.1-24-08.
- (7) Guarantor agrees to remain bound under this guarantee for so long as [local government owner or operator] must comply with the applicable financial responsibility requirements of sections 33.1-24-08-80 through 33.1-24-08-106 for the above-identified tank or tanks, except that guarantor may cancel this guarantee by sending notice by certified mail to [owner or operator], such cancellation to become effective no earlier than one hundred twenty days after receipt of such notice by [owner or operator], as evidenced by the return receipt.
- (8) The guarantor's obligation does not apply to any of the following:
  - (a) Any obligation of [local government owner or operator] under a workers' compensation, disability benefits, or unemployment compensation law or other similar law;
  - (b) Bodily injury to an employee of [insert: local government owner or operator];
  - (c) Bodily injury or property damage arising from the ownership, maintenance, use, or entrustment to others of any aircraft, motor vehicle, or watercraft;
  - (d) Property damage to any property owned, rented, loaned to, in the care, custody, or control of, or occupied by [insert: local government owner or operator] that is not the direct result of a release from a petroleum underground storage tank; or
  - (e) Bodily injury or property damage for which [insert: owner or operator] is obligated to pay damages by reason of the assumption of liability in a contract or agreement other than a contract or agreement entered into to meet the requirements of section 33.1-24-08-83.
- (9) Guarantor expressly waives notice of acceptance of this guarantee by the department, by any or all third parties, or by [local government owner or operator].

I hereby certify that the wording of this guarantee is identical to the wording specified in subsection 4 of section 33.1-24-08-96 as such rules were constituted on the effective date shown immediately below.

Effective date: \_\_\_\_\_

[Name of guarantor]

[Authorized signature for guarantor]

[Name of person signing]

[Title of person signing]

Signature of witness or notary: \_\_\_\_\_

5. If the guarantor is a state, the local government guarantee without standby trust must be worded exactly as follows, except that instructions in brackets are to be replaced with relevant information and the brackets deleted:

#### LOCAL GOVERNMENT GUARANTEE WITHOUT STANDBY TRUST MADE BY A STATE

Guarantee made this [date] by North Dakota, herein referred to as guarantor, to the department and to any and all third parties, and obligees, on behalf of [local government owner or operator].

Recitals.

- (1) Guarantor is a state.
- (2) [Local government owner or operator] owns or operates the following underground storage tank or tanks covered by this guarantee: [list the number of tanks at each facility and the name(s) and address(es) of the facility(ies) where the tank or tanks are located. If more than one instrument is used to assure different tanks at any one facility, for each tank covered by this instrument, list the tank identification number provided in the notification submitted pursuant to chapter 33.1-24-08, and the name and address of the facility]. This guarantee satisfies sections 33.1-24-08-80 through 33.1-24-08-106 requirements for assuring funding for [insert: "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"; if coverage is different for different tanks or locations, indicate the type of coverage applicable to each tank or location] arising from operating the above-identified underground storage tank or tanks in the amount of [insert: dollar amount] per occurrence and [insert: dollar amount] annual aggregate.
- (3) Guarantor guarantees to the department and to any and all third parties and obligees that:

In the event that [local government owner or operator] fails to provide alternative coverage within sixty days after receipt of a notice of cancellation of this guarantee and the department has determined or suspects that a release has occurred at an underground storage tank covered by this guarantee, the guarantor, upon written instructions from the department shall make funds available to pay for corrective actions and compensate third parties for bodily injury and property damage in an amount not to exceed the coverage limits specified above.

In the event that the department determines that [local government owner or operator] has failed to perform corrective action for releases arising out of the operation of the above-identified tank or tanks in accordance with sections 33.1-24-08-50 through 33.1-24-08-57, the guarantor, upon written instructions from the department, shall make funds available to pay for corrective actions in an amount not to exceed the coverage limits specified above.

If [owner or operator] fails to satisfy a judgment or award based on a determination of liability for bodily injury or property damage to third parties caused by ["sudden" and/or "nonsudden"] accidental releases arising from the operation of the above-identified tank or tanks, or fails to pay an amount agreed to in settlement of a claim arising from or



alleged to arise from such injury or damage, the guarantor, upon written instructions from the department, shall make funds available to compensate third parties for bodily injury and property damage in an amount not to exceed the coverage limits specified above.

- (4) Guarantor agrees to notify [owner or operator] by certified mail of a voluntary or involuntary proceeding under Title 11 (Bankruptcy) United States Code naming guarantor as debtor, within ten days after commencement of the proceeding.
- (5) Guarantor agrees to remain bound under this guarantee notwithstanding any modification or alteration of any obligation of [owner or operator] pursuant to chapter 33.1-24-08.
- (6) Guarantor agrees to remain bound under this guarantee for so long as [local government owner or operator] must comply with the applicable financial responsibility requirements of sections 33.1-24-08-80 through 33.1-24-08-106, for the above-identified tank or tanks, except that guarantor may cancel this guarantee by sending notice of certified mail to [owner or operator], such cancellation to become effective no earlier than one hundred twenty days after receipt of such notice by [owner or operator], as evidenced by the return receipt. If notified of a probable release, the guarantor agrees to remain bound to the terms of this guarantee for all charges arising from the release, up to the coverage limits specified above, notwithstanding the cancellation of the guarantee with respect to future releases.
- (7) The guarantor's obligation does not apply to any of the following:
  - (a) Any obligation of [local government owner or operator] under a workers' compensation, disability benefits, or unemployment compensation law or other similar law;
  - (b) Bodily injury to an employee of [insert: local government owner or operator] arising from, and in the course of, employment by [insert: local government owner or operator];
  - (c) Bodily injury or property damage arising from the ownership, maintenance, use, or entrustment to others of any aircraft, motor vehicle, or watercraft;
  - (d) Property damage to any property owned, rented, loaned to, in the care, custody, or control of, or occupied by [insert: local government owner or operator] that is not the direct result of a release from a petroleum underground storage tank; or
  - (e) Bodily injury or property damage for which [insert: owner or operator] is obligated to pay damages by reason of the assumption of liability in a contract or agreement other than a contract or agreement entered into to meet the requirements of section 33.1-24-08-83.
- (8) Guarantor expressly waives notice of acceptance of this guarantee by the department, by any or all third parties, or by [local government owner or operator].

I hereby certify that the wording of this guarantee is identical to the wording specified in subsection 5 of section 33.1-24-08-96 as such rules were constituted on the effective date shown immediately below.

Effective date: \_\_\_\_\_

[Authorized signature for guarantor]

[Name of person signing]

[Title of person signing]

Signature of witness or notary: \_\_\_\_\_

If the guarantor is a local government, the local government guarantee without standby trust must be worded exactly as follows, except that instructions in brackets are to be replaced with relevant information and the brackets deleted:

#### LOCAL GOVERNMENT GUARANTEE WITHOUT STANDBY TRUST MADE BY A LOCAL GOVERNMENT

Guarantee made this [date] by [name of guaranteeing entity], a local government organized under the laws of North Dakota, herein referred to as guarantor, to the department and to any and all third parties, and obligees, on behalf of [local government owner or operator].

Recitals.

- (1) Guarantor meets or exceeds [select one: the local government bond rating test requirements of section 33.1-24-08-94, the local government financial test requirements of section 33.1-24-08-95, or the local government fund under subsection 1, 2, or 3 of section 33.1-24-08-97].
- (2) [Local government owner or operator] owns or operates the following underground storage tank or tanks covered by this guarantee: [List the number of tanks at each facility and the name(s) and address(es) of the facility(ies) where the tanks are located. If more than one instrument is used to assure different tanks at any one facility, for each tank covered by this instrument, list the tank identification number provided in the notification submitted pursuant to chapter 33.1-24-08, and the name and address of the facility.] This guarantee satisfies sections 33.1-24-08-80 through 33.1-24-08-106 requirements for assuring funding for [insert: "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"; if coverage is different for different tanks or locations, indicate the type of coverage applicable to each tank or location] arising from operating the above-identified underground storage tank or tanks in the amount of [insert: dollar amount] per occurrence and [insert: dollar amount] annual aggregate.
- (3) Incident to our substantial governmental relationship with [local government owner or operator], guarantor guarantees to the department and to any and all third parties and obligees that:

In the event that [local government owner or operator] fails to provide alternative coverage within sixty days after receipt of a notice of cancellation of this guarantee and the department has determined or suspects that a release has occurred at an underground storage tank covered by this guarantee, the guarantor, upon written instructions from the department shall make funds available to pay for corrective actions and compensate third parties for bodily injury and property damage in an amount not to exceed the coverage limits specified above.

In the event that the department determines that [local government owner or operator] has failed to perform corrective action for releases arising out of the operation of the above-identified tank or tanks in accordance with sections 33.1-24-08-50 through 33.1-24-08-57, the guarantor, upon written instructions from the department, shall make funds available to pay for corrective actions in an amount not to exceed the coverage limits specified above.

If [owner or operator] fails to satisfy a judgment or award based on a determination of liability for bodily injury or property damage to third parties caused by ["sudden" and/or "nonsudden"] accidental releases arising from the operation of the above-identified tank or tanks, or fails to pay an amount agreed to in settlement of a claim arising from or alleged to arise from such injury or damage, the guarantor, upon written instructions from the department, shall make funds available to compensate third parties for bodily injury and property damage in an amount not to exceed the coverage limits specified above.

- (4) Guarantor agrees that if at the end of any fiscal year before cancellation of this guarantee, the guarantor fails to meet or exceed the requirements of the financial responsibility mechanism specified in paragraph 1, guarantor shall send within one hundred twenty days of such failure, by certified mail, notice to [local government owner or operator], as evidenced by the return receipt.
- (5) Guarantor agrees to notify [owner or operator] by certified mail of a voluntary or involuntary proceeding under Title 11 (Bankruptcy) United States Code naming guarantor as debtor, within ten days after commencement of the proceeding.
- (6) Guarantor agrees to remain bound under this guarantee notwithstanding any modification or alteration of any obligation of [owner or operator] pursuant to chapter 33.1-24-08.
- (7) Guarantor agrees to remain bound under this guarantee for so long as [local government owner or operator] must comply with the applicable financial responsibility requirements of sections 33.1-24-08-80 through 33.1-24-08-106 for the above-identified tank or tanks, except that guarantor may cancel this guarantee by sending notice by certified mail to [owner or operator], such cancellation to become effective no earlier than one hundred twenty days after receipt of such notice by [owner or operator], as evidenced by the return receipt. If notified of a probable release, the guarantor agrees to remain bound to the terms of this guarantee for all charges arising from the release, up to the coverage limits specified above, notwithstanding the cancellation of the guarantee with respect to future releases.
- (8) The guarantor's obligation does not apply to any of the following:
  - (a) Any obligation of [local government owner or operator] under a workers' compensation, disability benefits, or unemployment compensation law or other similar law;
  - (b) Bodily injury to an employee of [insert: local government owner or operator] arising from, and in the course of, employment by [insert: local government owner or operator];
  - (c) Bodily injury or property damage arising from the ownership, maintenance, use, or entrustment to others of any aircraft, motor vehicle, or watercraft;
  - (d) Property damage to any property owned, rented, loaned to, in the care, custody, or control of, or occupied by [insert: local government owner or operator] that is not the direct result of a release from a petroleum underground storage tank; or
  - (e) Bodily injury or property damage for which [insert: owner or operator] is obligated to pay damages by reason of the assumption of liability in a contract or agreement other than a contract or agreement entered into to meet the requirements of section 33.1-24-08-83.
- (9) Guarantor expressly waives notice of acceptance of this guarantee by the department, by any or all third parties, or by the [local government owner or operator].

I hereby certify that the wording of this guarantee is identical to the wording specified in subsection 5 of section 33.1-24-08-96 as such rules were constituted on the effective date shown immediately below.

Effective date: \_\_\_\_\_

[Name of guarantor]

[Authorized signature for guarantor]

[Name of person signing]

[Title of person signing]

Signature of witness or notary: \_\_\_\_\_

**History:** Effective January 1, 2019.

**General Authority:** NDCC 23.1-04-03, 23.1-04-06; S.L. 2017, ch. 199, § 1

**Law Implemented:** NDCC 23.1-04-06; S.L. 2017, ch. 199, § 19

### **33.1-24-08-97. Local government fund.**

A local government owner or operator may satisfy the requirements of section 33.1-24-08-83 establishing a dedicated fund account that conforms to the requirements of this section. Except as specified in subsection 2, a dedicated fund may not be commingled with other funds or otherwise used in normal operations. A dedicated fund will be considered eligible if it meets one of the following requirements:

1. The fund is dedicated by state constitutional provision, or local government statute, charter, ordinance, or order to pay 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 and is funded for the full amount of coverage required under section 33.1-24-08-83 or funded for part of the required amount of coverage and used in combination with other mechanism or mechanisms that provide the remaining coverage.
2. The fund is dedicated by state constitutional provision, or local government statute, charter, ordinance, or order as a contingency fund for general emergencies, including taking corrective action and compensating third parties for bodily injury and property damage caused by accidental releases arising from the operation of petroleum underground storage tanks, and is funded for five times the full amount of coverage required under section 33.1-24-08-83, or funded for part of the required amount of coverage and used in combination with other mechanisms that provide the remaining coverage. If the fund is funded for less than five times the amount of coverage required under section 33.1-24-08-83, the amount of financial responsibility demonstrated by the fund may not exceed one-fifth the amount in the fund.
3. The fund is dedicated by state constitutional provision, or local government statute, charter, ordinance, or order to pay 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. A payment is made to the fund once every year for seven years until the fund is fully funded. This seven-year period is hereafter referred to as the "pay-in-period". The amount of each payment must be determined by this formula:

$$\frac{\text{TF} - \text{CF}}{\text{Y}}$$

Where TF is the total required financial assurance for the owner or operator, CF is the current amount in the fund, and Y is the number of years remaining in the pay-in-period, and:

- a. The local government owner or operator has available bonding authority, approved through voter referendum (if such approval is necessary prior to the issuance of bonds), for an amount equal to the difference between the required amount of coverage and the amount held in the dedicated fund. This bonding authority shall be available 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; or
  - b. The local government owner or operator has a letter signed by the appropriate state attorney general stating that the use of the bonding authority will not increase the local government's debt beyond the legal debt ceilings established by the relevant state laws. The letter must also state that prior voter approval is not necessary before use of the bonding authority.
4. To demonstrate that it meets the requirements of the local government fund, the chief financial officer of the local government owner or operator or guarantor, or both, must sign a letter worded exactly as follows, except that the instructions in brackets are to be replaced by the relevant information and the brackets deleted:

#### LETTER FROM THE CHIEF FINANCIAL OFFICER

I am the chief financial officer of [insert: name and address of local government owner or operator, or guarantor]. This letter is in support of the use of the local government fund mechanism to demonstrate financial responsibility for [insert: "taking corrective action" and/or "compensating third parties for bodily injury and property damage"] caused by [insert: "sudden accidental releases" or "nonsudden accidental releases" or "accidental releases"] in the amount of at least [insert: dollar amount] per occurrence and [insert: dollar amount] annual aggregate arising from operating (an) underground storage tank(s).

Underground storage tanks at the following facilities are assured by this local government fund mechanism: [list for each facility: the name and address of the facility where tanks are assured by the local government fund].

[Insert: "The local government fund is funded for the full amount of coverage required under section 33.1-24-08-83, or funded for part of the required amount of coverage and used in combination with other mechanism(s) that provide the remaining coverage", or "The local government fund is funded for five times the full amount of coverage required under section 33.1-24-08-83, or funded for part of the required amount of coverage and used in combination with other mechanism(s) that provide the remaining coverage", or "A payment is made to the fund once every year for seven years until the fund is fully funded and [name of local government owner or operator] has available bonding authority, approved through voter referendum, of an amount equal to the difference between the required amount of coverage and the amount held in the dedicated fund" or "A payment is made to the fund once every year for seven years until the fund is fully funded and I have attached a letter signed by the state attorney general stating that (1) the use of the bonding authority will not increase the local government's debt beyond the legal debt ceilings established by the relevant state laws and (2) that prior voter approval is not necessary before use of the bonding authority"].

The details of the local government fund are as follows:

Amount in fund (market value of fund at the close of last fiscal year): \$ \_\_\_\_\_  
[if fund balance is incrementally funded as specified in subsection 3, insert:

Amount added to fund in the most recently completed fiscal year: \$ \_\_\_\_\_

[Number of years remaining in the pay-in-period:]

A copy of the state constitutional provision, or local government statute, charter, ordinance or order dedicating the fund is attached.

I hereby certify that the wording of this letter is identical to the wording specified in subsection 4 of section 33.1-24-08-97, as such rules were constituted on the date shown immediately below:

[Date]

[Signature]

[Name]

[Title]

**History:** Effective January 1, 2019.

**General Authority:** NDCC 23.1-04-03, 23.1-04-06; S.L. 2017, ch. 199, § 1

**Law Implemented:** NDCC 23.1-04-06; S.L. 2017, ch. 199, § 19

### **33.1-24-08-98. Substitution of financial assurance mechanisms by owner or operator.**

1. An owner or operator may substitute any alternate financial assurance mechanisms as specified in sections 33.1-24-08-80 through 33.1-24-08-106, provided that at all times the owner or operator maintains an effective financial assurance mechanism or combination of mechanisms that satisfies the requirements of section 33.1-24-08-83.
2. After obtaining alternate financial assurance as specified in sections 33.1-24-08-80 through 33.1-24-08-106, an owner or operator may cancel a financial assurance mechanism by providing notice to the provider of financial assurance.

**History:** Effective January 1, 2019.

**General Authority:** NDCC 23.1-04-03, 23.1-04-06; S.L. 2017, ch. 199, § 1

**Law Implemented:** NDCC 23.1-04-06; S.L. 2017, ch. 199, § 19

### **33.1-24-08-99. Cancellation or nonrenewal by a provider of financial assurance.**

1. 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.
  - a. Termination of a guarantee, a surety bond, or a letter of credit may not occur until one hundred twenty days after the date on which the owner or operator receives the notice of termination, as evidenced by the return receipt.
  - b. Termination of insurance or risk retention group coverage, except for nonpayment or misrepresentation by the insured, or state-funded assurance may not occur until sixty days after the date on which the owner or operator receives the notice of termination, as evidenced by the return receipt. Termination for nonpayment of premium or misrepresentation by the insured may not occur until a minimum of ten days after the date on which the owner or operator receives the notice of termination, as evidenced by the return receipt.
2. If a provider of financial responsibility cancels or fails to renew for reasons other than incapacity of the provider as specified in section 33.1-24-08-104, the owner or operator must obtain alternate coverage as specified in this section within sixty days after receipt of the

notice of termination. If the owner or operator fails to obtain alternate coverage within sixty days after receipt of the notice of termination, the owner or operator must notify the department of such failure and submit:

- a. The name and address of the provider of financial assurance;
- b. The effective date of termination; and
- c. The evidence of the financial assistance mechanism subject to the termination maintained in accordance with subsection 2 of section 33.1-24-08-101.

**History:** Effective January 1, 2019.

**General Authority:** NDCC 23.1-04-03, 23.1-04-06; S.L. 2017, ch. 199, § 1

**Law Implemented:** NDCC 23.1-04-06; S.L. 2017, ch. 199, § 19

### **33.1-24-08-100. Reporting by owner or operator.**

1. An owner or operator must submit the appropriate forms listed in subsection 2 of section 33.1-24-08-101 documenting current evidence of financial responsibility to the department:
  - a. Within thirty days after the owner or operator identifies a release from an underground storage tank required to be reported under section 33.1-24-08-43 or 33.1-24-08-51;
  - b. If the owner or operator fails to obtain alternate coverage as required by sections 33.1-24-08-80 through 33.1-24-08-106, within thirty days after the owner or operator receives notice of:
    - (1) Commencement of a voluntary or involuntary proceeding under Title 11 (Bankruptcy) United States Code, naming a provider of financial assurance as a debtor;
    - (2) Suspension or revocation of the authority of a provider of financial assurance to issue a financial assurance mechanism;
    - (3) Failure of a guarantor to meet the requirements of the financial test; or
    - (4) Other incapacity of a provider of financial assurance; or
  - c. As required by subsection 7 of section 33.1-24-08-85 and subsection 2 of section 33.1-24-08-99.
2. An owner or operator must certify compliance with the financial responsibility requirements of chapter 33.1-24-08 as specified in the new tank notification form when notifying the department of the installation of a new underground storage tank under section 33.1-24-08-12.
3. The department may require an owner or operator to submit evidence of financial assurance as described in subsection 2 of section 33.1-24-08-101 or other information relevant to compliance with sections 33.1-24-08-80 through 33.1-24-08-106 at any time.

**History:** Effective January 1, 2019.

**General Authority:** NDCC 23.1-04-03, 23.1-04-06; S.L. 2017, ch. 199, § 1

**Law Implemented:** NDCC 23.1-04-06; S.L. 2017, ch. 199, § 19

### **33.1-24-08-101. Recordkeeping.**

1. Owners or operators must maintain evidence of all financial assurance mechanisms used to demonstrate financial responsibility under sections 33.1-24-08-80 through 33.1-24-08-106 for

an underground storage tank until released from the requirements of sections 33.1-24-08-80 through 33.1-24-08-106 under section 33.1-24-08-103. An owner or operator must maintain such evidence at the underground storage tank site or the owner's or operator's place of business. Records maintained offsite must be made available upon request of the department.

2. An owner or operator must maintain the following types of evidence of financial responsibility:
  - a. An owner or operator using an assurance mechanism specified in sections 33.1-24-08-85 through 33.1-24-08-90, or section 33.1-24-08-92, or sections 33.1-24-08-94 through 33.1-24-08-97, must maintain a copy of the instrument worded as specified;
  - b. An owner or operator using a financial test or guarantee, or a local government financial test, or a local government guarantee supported by a 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 one hundred twenty days after the close of the financial reporting year;
  - c. 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;
  - d. A local government owner or operator using a local government guarantee under subsection 4 of section 33.1-24-08-96 must maintain a copy of the signed standby trust fund agreement and copies of any amendments to the agreement;
  - e. A local government owner or operator using the local government bond rating test under section 33.1-24-08-94 must maintain a copy of its bond rating published within the last twelve months by Moody's or Standard and Poor's;
  - f. A local government owner or operator using the local government guarantee under section 33.1-24-08-96, where the guarantor's demonstration of financial responsibility relies on the bond rating test under section 33.1-24-08-94 must maintain a copy of the guarantor's bond rating published within the last twelve months by Moody's or Standard and Poor's;
  - g. 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;
  - h. 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 subsection 4 of section 33.1-24-08-91;
  - i. An owner or operator using a local government fund under section 33.1-24-08-97 must maintain the following documents:
    - (1) A copy of the state constitutional provision or local government statute, charter, ordinance or order dedicating the fund;
    - (2) Year-end financial statements for the most recent completed financial reporting year showing the amount in the fund. If the fund is established under subsection 3 of section 33.1-24-08-97 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; and



- (3) If the fund is established under subsection 3 of section 33.1-24-08-97 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 a voter referendum, under subdivision a of subsection 3 of section 33.1-24-08-97, or attestation by the state attorney general as specified under subdivision b of subsection 3 of section 33.1-24-08-97;
- j. 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; or
- k. An owner or operator using an assurance mechanism specified in sections 33.1-24-08-85 through 33.1-24-08-97 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 sections 33.1-24-08-80 through 33.1-24-08-106.

The financial assurance mechanism(s) used to demonstrate financial responsibility under sections 33.1-24-08-80 through 33.1-24-08-106 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).

**History:** Effective January 1, 2019.

**General Authority:** NDCC 23.1-04-03, 23.1-04-06; S.L. 2017, ch. 199, § 1

**Law Implemented:** NDCC 23.1-04-06; S.L. 2017, ch. 199, § 19

**33.1-24-08-102. Drawing on financial assurance mechanisms.**

- 1. Except as specified in subsection 4, the department shall require the guarantor, surety, or institution issuing a letter of credit to place the amount of funds stipulated by the department, up to the limit of funds provided by the financial assurance mechanism, into the standby trust if:

- a. The following conditions exist:
    - (1) The owner or operator fails to establish alternate financial assurance within sixty days after receiving notice of cancellation of the guarantee, surety bond, letter of credit, or, as applicable, other financial assurance mechanisms; and
    - (2) The department determines or suspects that a release from an underground storage tank covered by the mechanism has occurred and so notifies the owner or operator or the owner or operator has notified the department pursuant to sections 33.1-24-08-40 through 33.1-24-08-43 or 33.1-24-08-50 through 33.1-24-08-57 of a release from an underground storage tank covered by the mechanism; or
  - b. The conditions of subdivision a of subsection 2 or paragraph 1 or 2 of subdivision b of subsection 2 are satisfied.
2. The department may draw on a standby trust fund when:
- a. The department makes a final determination that a release has occurred and immediate or long-term corrective action for the release is needed, and the owner or operator, after appropriate notice and opportunity to comply, has not conducted corrective action as required under sections 33.1-24-08-50 through 33.1-24-08-57; or
  - b. The department has received either:
    - (1) Certification from the owner or operator and the third-party liability claimant or claimants and from attorneys representing the owner or operator and the third-party liability claimant or claimants that a third-party liability claim should be paid. The certification must be worded as follows, except that instructions in brackets are to be replaced with the relevant information and the brackets deleted:

**Certification of Valid Claim**

The undersigned, as principals and as legal representatives of [insert owner or operator] and [insert name and address of third-party claimant], hereby certify that the claim of bodily injury [and/or] property damage caused by an accidental release arising from operating [owner's or operator's] underground storage tank should be paid in the amount of \$[\_\_\_\_\_].

[Signatures]

Owner or Operator

Attorney for Owner or Operator

[Notary]

Date

[Signature(s)]

Claimant(s)

Attorney(s) for Claimant(s)

[Notary]

Date \_\_\_\_\_ or

- (2) A valid final court order establishing a judgment against the owner or operator for bodily injury or property damage caused by an accidental release from an underground storage tank covered by financial assurance under sections 33.1-24-08-80 through 33.1-24-08-106 and the department determines that the owner or operator has not satisfied the judgment.
3. If the department determines that the amount of corrective action costs and third-party liability claims eligible for payment under subsection 2 may exceed the balance of the standby trust fund and the obligation of the provider of financial assurance, the first priority for payment shall be corrective action costs necessary to protect human health and the environment. The department shall pay third-party liability claims in the order in which the department receives certifications under paragraph 1 of subdivision b of subsection 2 and valid court orders under paragraph 2 of subdivision b of subsection 2.
4. A government entity acting as guarantor under subsection 5 of section 33.1-24-08-96, the local government guarantee without standby trust, shall make payments as directed by the department under the circumstances described in subsections 1, 2, and 3.

**History:** Effective January 1, 2019.

**General Authority:** NDCC 23.1-04-03, 23.1-04-06; S.L. 2017, ch. 199, § 1

**Law Implemented:** NDCC 23.1-04-06; S.L. 2017, ch. 199, § 19

### **33.1-24-08-103. Release from requirements.**

An owner or operator is no longer required to maintain financial responsibility under sections 33.1-24-08-80 through 33.1-24-08-106 for an underground storage tank after the tank has been permanently closed or undergoes a change-in-service or, if corrective action is required, after corrective action has been completed and the tank has been permanently closed or undergoes a change-in-service as required by sections 33.1-24-08-60 through 33.1-24-08-64.

**History:** Effective January 1, 2019.

**General Authority:** NDCC 23.1-04-03, 23.1-04-06; S.L. 2017, ch. 199, § 1

**Law Implemented:** NDCC 23.1-04-06; S.L. 2017, ch. 199, § 19

### **33.1-24-08-104. Bankruptcy or other incapacity of owner or operator or provider of financial assurance.**

1. Within ten days after commencement of a voluntary or involuntary proceeding under Title 11 (Bankruptcy) United States Code, naming an owner or operator as debtor, the owner or operator must notify the department by certified mail of such commencement and submit the appropriate forms listed in subsection 2 of section 33.1-24-08-101 documenting current financial responsibility.
2. Within ten days after commencement of a voluntary or involuntary proceeding under Title 11 (Bankruptcy) United States 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 section 33.1-24-08-86.
3. Within ten days after commencement of a voluntary or involuntary proceeding under Title 11 (Bankruptcy) United States Code, naming a local government owner or operator as debtor, the local government owner or operator must notify the department by certified mail of such commencement and submit the appropriate forms listed in subsection 2 of section 33.1-24-08-101 documenting current financial responsibility.
4. Within ten days after commencement of a voluntary or involuntary proceeding under Title 11 (Bankruptcy) United States 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 section 33.1-24-08-96.

5. 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 sections 33.1-24-08-80 through 33.1-24-08-106 within thirty days after receiving notice of such an event. If the owner or operator does not obtain alternate coverage within thirty days after such notification, the owner or operator must notify the department.
6. Within thirty 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.

**History:** Effective January 1, 2019.

**General Authority:** NDCC 23.1-04-03, 23.1-04-06; S.L. 2017, ch. 199, § 1

**Law Implemented:** NDCC 23.1-04-06; S.L. 2017, ch. 199, § 19

**33.1-24-08-105. Replenishment of guarantees, letters of credit, or surety bonds.**

1. If at any time after a standby trust is funded upon the instruction of the department with funds drawn from a guarantee, local government, letter of credit, or surety bond, and the amount in the standby trust is reduced below the full amount of coverage required, the owner or operator shall by the anniversary date of the financial mechanism from which the funds were drawn:
  - a. Replenish the value of financial assurance to equal the full amount of coverage required;  
or
  - b. Acquire another financial assurance mechanism for the amount which funds in the standby trust have been reduced.
2. For purposes of this section, the full amount of coverage required is the amount of coverage to be provided by section 33.1-24-08-83. If a combination of mechanisms was used to provide the assurance funds which were drawn upon, replenishment shall occur by the earliest anniversary date among the mechanisms.

**History:** Effective January 1, 2019.

**General Authority:** NDCC 23.1-04-03, 23.1-04-06; S.L. 2017, ch. 199, § 1

**Law Implemented:** NDCC 23.1-04-06; S.L. 2017, ch. 199, § 19

**33.1-24-08-106. [Reserved].**

**33.1-24-08-107. [Reserved].**

**33.1-24-08-108. [Reserved].**

**33.1-24-08-109. [Reserved].**

**33.1-24-08-110. [Reserved].**

**33.1-24-08-111. [Reserved].**

**33.1-24-08-112. [Reserved].**

**33.1-24-08-113. [Reserved].**

**33.1-24-08-114. [Reserved].**

**33.1-24-08-115. Definitions (lender liability).**

1. "Borrower, debtor, or obligor" is a person whose underground storage tank or underground storage tank system or facility or property on which the underground storage tank or underground storage tank system is located is encumbered by a security interest. These terms may be used interchangeably.
2. "Holder" is a person who, upon the effective date of this rule, or in the future, maintains indicia of ownership, as defined in subsection 3, primarily to protect a security interest, as defined in subdivision a of subsection 6, in a petroleum underground storage tank or underground storage tank system or facility or property on which a petroleum underground storage tank or underground storage tank system is located. A holder includes the initial holder (such as a loan originator); any subsequent holder (such as a successor-in-interest or subsequent purchaser of the security interest on the secondary market); a guarantor of an obligation, surety, or any other person who holds ownership indicia primarily to protect a security interest; or a receiver or other person who acts on behalf or for the benefit of a holder.
3. "Indicia of ownership" means evidence of a secured interest, evidence of an interest in a security interest, or evidence of an interest in real or personal property securing a loan or other obligation, including any legal or equitable title or deed to real or personal property acquired through or incident to foreclosure. Evidence of such interests include mortgages, deeds of trust, liens, surety bonds and guarantees of obligations, title held pursuant to a lease financing transaction in which the lessor does not select initially the leased property (hereinafter "lease financing transaction"), and legal or equitable title obtained pursuant to foreclosure. Evidence of such interests also includes assignments, pledges, or other rights to or other forms of encumbrance against property that are held primarily to protect a security interest. A person is not required to hold title or a security interest in order to maintain indicia of ownership.
4. "Operation" means, for purposes of this section, the use, storage, filling, or dispensing of petroleum contained in an underground storage tank or underground storage tank system.
5. Petroleum production, refining, and marketing.
  - a. "Petroleum marketing" means the distribution, transfer, or sale of petroleum or petroleum products for wholesale or retail purposes.
  - b. "Petroleum production" means the production of crude oil or other forms of petroleum, as defined in section 33.1-24-08-03, as well as the production of petroleum products from purchased materials.
  - c. "Petroleum refining" means the cracking, distillation, separation, conversion, upgrading, and finishing of refined petroleum or petroleum products.
6. "Primarily to protect a security interest" means that the holder's indicia of ownership are held primarily for the purpose of securing payment or performance of an obligation.
  - a. "Primarily to protect a security interest", as used in sections 33.1-24-08-115 through 33.1-24-08-130, does not include indicia of ownership held primarily for investment

purposes, nor ownership indicia held primarily for purposes other than as protection for a security interest. A holder may have other, secondary reasons for maintaining indicia of ownership, but the primary reason why any ownership indicia are held must be as protection for a security interest.

- b. "Security interest" means an interest in a petroleum underground storage tank or underground storage tank system or in the facility or property on which a petroleum underground storage tank or underground storage tank system is located, created, or established for the purpose of securing a loan or other obligation. Security interests include mortgages, deeds of trusts, liens, and title pursuant to lease financing transactions. Security interests may also arise from transactions such as sale and leasebacks, conditional sales, installment sales, trust receipt transactions, certain assignments, factoring agreements, accounts receivable financing arrangements, and consignments, if the transaction creates or establishes an interest in an underground storage tank or underground storage tank system or in the facility or property on which the underground storage tank or underground storage tank system is located, for the purpose of securing a loan or other obligation.
7. "Underground storage tank technical standards", as used in sections 33.1-24-08-115 through 33.1-24-08-130, refers to the underground storage preventative and operating requirements under sections 33.1-24-08-10 through 33.1-24-08-35, sections 33.1-24-08-60 through 33.1-24-08-64, and section 33.1-24-08-40.

**History:** Effective January 1, 2019.

**General Authority:** NDCC 23.1-04-03, 23.1-04-06; S.L. 2017, ch. 199, § 1

**Law Implemented:** NDCC 23.1-04-06; S.L. 2017, ch. 199, § 19

**33.1-24-08-116. [Reserved].**

**33.1-24-08-117. [Reserved].**

**33.1-24-08-118. [Reserved].**

**33.1-24-08-119. [Reserved].**

**33.1-24-08-120. Participation in management (lender liability).**

The term "participating in the management of an underground storage tank or underground storage tank system" means that, subsequent to December 6, 1995, the holder was engaging in decisionmaking control of, or activities related to, operation of the underground storage tank or underground storage tank system, as defined herein.

1. Actions that are participation in management.
  - a. Participation in the management of an underground storage tank or underground storage tank system means, for purposes of sections 33.1-24-08-115 through 33.1-24-08-130, actual participation by the holder in the management or control of decisionmaking related to the operation of an underground storage tank or underground storage tank system. Participation in management does not include the mere capacity or ability to influence or the unexercised right to control underground storage tank or underground storage tank system operations. A holder is participating in the management of the underground storage tank or underground storage tank system only if the holder either:

- (1) Exercises decisionmaking control over the operational (as opposed to financial or administrative) aspects of the underground storage tank or underground storage tank system, such that the holder has undertaken responsibility for all or substantially all of the management of the underground storage tank or underground storage tank system; or
    - (2) Exercises control at a level comparable to that of a manager of the borrower's enterprise, such that the holder has assumed or manifested responsibility for the overall management of the enterprise encompassing the day-to-day decisionmaking of the enterprise with respect to all, or substantially all, of the operational (as opposed to financial or administrative) aspects of the enterprise.
  - b. Operational aspects of the enterprise relate to the use, storage, filling, or dispensing of petroleum contained in an underground storage tank or underground storage tank system, and include functions such as that of a facility or plant manager, operations manager, chief operating officer, or chief executive officer. Financial or administrative aspects include functions such as that of a credit manager, personnel manager, controller, chief financial officer, or similar functions. Operational aspects of the enterprise do not include the financial or administrative aspects of the enterprise, or actions associated with environmental compliance, or actions undertaken voluntarily to protect the environment in accordance with applicable requirements in chapter 33.1-24-08.
2. Actions that are not participation in management preforeclosure.
- a. Actions at the inception of the loan or other transaction. No act or omission prior to the time that indicia of ownership are held primarily to protect a security interest constitutes evidence of participation in management within the meaning of sections 33.1-24-08-115 through 33.1-24-08-130. A prospective holder who undertakes or requires an environmental investigation (which could include one or more of the following: a site assessment, inspection, or audit) of the underground storage tank or underground storage tank system or facility or property on which the underground storage tank or underground storage tank system is located (in which indicia of ownership are to be held), or requires a prospective borrower to clean up contamination from the underground storage tank or underground storage tank system or to comply or come into compliance (whether prior or subsequent to the time that indicia of ownership are held primarily to protect a security interest) with any applicable law or regulation, is not by such action considered to be participating in the management of the underground storage tank or underground storage tank system or facility or property on which the underground storage tank or underground storage tank system is located.
  - b. Loan policing and work out. Actions that are consistent with holding ownership indicia primarily to protect a security interest do not constitute participation in management for purposes of sections 33.1-24-08-115 through 33.1-24-08-130. The authority for the holder to take such actions may, but need not, be contained in contractual or other documents specifying requirements for financial, environmental, and other warranties, covenants, conditions, representations, or promises from the borrower. Loan policing and work out activities cover and include all such activities up to foreclosure, exclusive of any activities that constitute participation in management.
    - (1) Policing the security interest or loan.
      - (a) A holder who engages in policing activities prior to foreclosure will remain within the exemption provided that the holder does not together with other actions participate in the management of the underground storage tank or underground storage tank system as provided in subsection 1. Such policing actions include requiring the borrower to clean up contamination from the

underground storage tank or underground storage tank system during the term of the security interest; requiring the borrower to comply or come into compliance with applicable federal, state, and local environmental and other laws, rules, and regulations during the term of the security interest; securing or exercising authority to monitor or inspect the underground storage tank or underground storage tank system or facility or property on which the underground storage tank or underground storage tank system is located (including onsite inspections) in which indicia of ownership are maintained, or the borrower's business or financial condition during the term of the security interest; or taking other actions to adequately police the loan or security interest (such as requiring a borrower to comply with any warranties, covenants, conditions, representations, or promises from the borrower).

- (b) Policing activities also include undertaking by the holder of underground storage tank environmental compliance actions and voluntary environmental actions taken in compliance with chapter 33.1-24-08, provided that the holder does not otherwise participate in the management or daily operation of the underground storage tank or underground storage tank system as provided in subsection 1 of section 33.1-24-08-120 and section 33.1-24-08-130. Such allowable actions include release detection and release reporting, release response and corrective action, temporary or permanent closure of an underground storage tank or underground storage tank system, underground storage tank upgrading or replacement, and maintenance of corrosion protection. A holder who undertakes these actions must do so in compliance with the applicable requirements in chapter 33.1-24-08. A holder may directly oversee these environmental compliance actions and voluntary environmental actions, and directly hire contractors to perform the work, and is not by such action considered to be participating in the management of the underground storage tank or underground storage tank system.
- (2) Loan work out. A holder who engages in work out activities prior to foreclosure will remain within the exemption provided that the holder does not together with other actions participate in the management of the underground storage tank or underground storage tank system as provided in subsection 1. For purposes of this rule, "work out" refers to those actions by which a holder, at any time prior to foreclosure, seeks to prevent, cure, or mitigate a default by the borrower or obligor; or to preserve, or prevent the diminution of, the value of the security. Work out activities include restructuring or renegotiating the terms of the security interest; requiring payment of additional rent or interest; exercising forbearance; requiring or exercising rights pursuant to an assignment of accounts or other amounts owing to an obligor; requiring or exercising rights pursuant to an escrow agreement pertaining to amounts owing to an obligor; providing specific or general financial or other advice, suggestions, counseling, or guidance; and exercising any right or remedy the holder is entitled to by law or under any warranties, covenants, conditions, representations, or promises from the borrower.
- 3. Foreclosure on an underground storage tank or underground storage tank system or facility or property on which an underground storage tank or underground storage tank system is located, and participation in management activities postforeclosure.
    - a. Foreclosure.
      - (1) Indicia of ownership that are held primarily to protect a security interest include legal or equitable title or deed to real or personal property acquired through or incident to foreclosure. For purposes of sections 33.1-24-08-115 through 33.1-24-08-130, the



term "foreclosure" means that legal, marketable, or equitable title or deed has been issued, approved, and recorded, and that the holder has obtained access to the underground storage tank, or underground storage tank system, underground storage tank facility, and property on which the underground storage tank or underground storage tank system is located, provided that the holder acted diligently to acquire marketable title or deed and to gain access to the underground storage tank, underground storage tank system, underground storage tank facility, and property on which the underground storage tank or underground storage tank system is located. The indicia of ownership held after foreclosure continue to be maintained primarily as protection for a security interest provided that the holder undertakes to sell, release an underground storage tank or underground storage tank system or facility or property on which the underground storage tank or underground storage tank system is located, held pursuant to a lease financing transaction (whether by a new lease financing transaction or substitution of the lessee), or otherwise divest itself of the underground storage tank or underground storage tank system or facility or property on which the underground storage tank or underground storage tank system is located, in a reasonably expeditious manner, using whatever commercially reasonable means are relevant or appropriate with respect to the underground storage tank or underground storage tank system or facility or property on which the underground storage tank or underground storage tank system is located, taking all facts and circumstances into consideration, and provided that the holder does not participate in management as defined in subsection 1 prior to or after foreclosure.

- (2) For purposes of establishing that a holder is seeking to sell, release pursuant to a lease financing transaction (whether by a new lease financing transaction or substitution of the lessee), or divest in a reasonably expeditious manner an underground storage tank or underground storage tank system or facility or property on which the underground storage tank or underground storage tank system is located, the holder may use whatever commercially reasonable means as are relevant or appropriate with respect to the underground storage tank or underground storage tank system or facility or property on which the underground storage tank or underground storage tank system is located, or may employ the means specified in subdivision b of subsection 3. A holder that outbids, rejects, or fails to act upon a written bona fide, firm offer of fair consideration for the underground storage tank or underground storage tank system or facility or property on which the underground storage tank or underground storage tank system is located, as provided in subdivision b of subsection 3, is not considered to hold indicia of ownership primarily to protect a security interest.
- b. Holding foreclosed property for disposition and liquidation. A holder, who does not participate in management prior to or after foreclosure, may sell, release, pursuant to a lease financing transaction (whether by a new lease financing transaction or substitution of the lessee), an underground storage tank or underground storage tank system or facility or property on which the underground storage tank or underground storage tank system is located, liquidate, wind up operations, and take measures, prior to sale or other disposition, to preserve, protect, or prepare the secured underground storage tank or underground storage tank system or facility or property on which the underground storage tank or underground storage tank system is located. A holder may also arrange for an existing or new operator to continue or initiate operation of the underground storage tank or underground storage tank system. The holder may conduct these activities without voiding the security interest exemption, subject to the requirements of sections 33.1-24-08-115 through 33.1-24-08-130.

- (1) A holder establishes that the ownership indicia maintained after foreclosure continue to be held primarily to protect a security interest by, within twelve months following foreclosure, listing the underground storage tank or underground storage tank system or the facility or property on which the underground storage tank or underground storage tank system is located, with a broker, dealer, or agent who deals with the type of property in question, or by advertising the underground storage tank or underground storage tank system or facility or property on which the underground storage tank or underground storage tank system is located, as being for sale or disposition on at least a monthly basis in either a real estate publication or a traded or other publication suitable for the underground storage tank or underground storage tank system or facility or property on which the underground storage tank or underground storage tank system is located, or a newspaper of general circulation (defined as one with a circulation more than ten thousand, or one suitable under any applicable federal, state, or local rules of court for publication required by court order or rules of civil procedure) covering the location of the underground storage tank or underground storage tank system or facility or property on which the underground storage tank or underground storage tank system is located. For purposes of this provision, the twelve-month period begins to run from December 6, 1995, or from the date that the marketable title or deed has been issued, approved and recorded, and the holder has obtained access to the underground storage tank or underground storage tank system, underground storage tank facility and property on which the underground storage tank or underground storage tank system is located, whichever is later, provided that the holder acted diligently to acquire marketable title or deed and to obtain access to the underground storage tank or underground storage tank system, underground storage tank facility and property on which the underground storage tank or underground storage tank system is located. If the holder fails to act diligently to acquire marketable title or deed or to gain access to the underground storage tank or underground storage tank system, the twelve-month period begins to run from December 6, 1995, or from the date on which the holder first acquires either title to or possession of the secured underground storage tank or underground storage tank system, or facility or property on which the underground storage tank or underground storage tank system is located, whichever is later.
- (2) A holder that outbids, rejects, or fails to act upon an offer of fair consideration for the underground storage tank or underground storage tank system or the facility or property on which the underground storage tank or underground storage tank system is located, establishes by such outbidding, rejection, or failure to act, that the ownership indicia in the secured underground storage tank or underground storage tank system or facility or property on which the underground storage tank or underground storage tank system is located are not held primarily to protect the security interest, unless the holder is required, in order to avoid liability under federal or state law, to make a higher bid, to obtain a higher offer, or to seek or obtain an offer in a different manner.
  - (a) Fair consideration, in the case of a holder maintaining indicia of ownership primarily to protect a senior security interest in the underground storage tank or underground storage tank system or facility or property on which the underground storage tank or underground storage tank system is located, is the value of the security interest as defined in this section. The value of the security interest includes all debt and costs incurred by the security interest holder, and is calculated as an amount equal to or in excess of the sum of the outstanding principal (or comparable amount in the case of a lease that constitutes a security interest) owed to the holder immediately preceding the acquisition of full title (or possession in the case of a lease financing

transaction) pursuant to foreclosure, plus any unpaid interest, rent, or penalties (whether arising before or after foreclosure). The value of the security interest also includes all reasonable and necessary costs, fees, or other charges incurred by the holder incident to work out, foreclosure, retention, preserving, protecting, and preparing, prior to sale, the underground storage tank or underground storage tank system or facility or property on which the underground storage tank or underground storage tank system is located, release, pursuant to a lease financing transaction (whether by a new lease financing transaction or substitution of the lessee), of an underground storage tank or underground storage tank system or facility or property on which the underground storage tank or underground storage tank system is located, or other disposition. The value of the security interest also includes environmental investigation costs (which could include one or more of the following: a site assessment, inspection, or audit of the underground storage tank or underground storage tank system or facility or property on which the underground storage tank or underground storage tank system is located), and corrective action costs incurred under sections 33.1-24-08-41 through 33.1-24-08-57, or any other costs incurred as a result of reasonable efforts to comply with any other applicable federal, state, or local law or regulation; less any amounts received by the holder in connection with any partial disposition of the property and any amounts paid by the borrower (if not already applied to the borrower's obligations) subsequent to the acquisition of full title (or possession in the case of a lease financing transaction) pursuant to foreclosure. In the case of a holder maintaining indicia of ownership primarily to protect a junior security interest, fair consideration is the value of all outstanding higher priority security interests plus the value of the security interest held by the junior holder, each calculated as set forth in this subparagraph.

- (b) Outbids, rejects, or fails to act upon an offer of fair consideration means that the holder outbids, rejects, or fails to act upon within ninety days of receipt, a written, bona fide, firm offer of fair consideration for the underground storage tank or underground storage tank system or facility or property on which the underground storage tank or underground storage tank system is located received at any time after six months following foreclosure, as defined in subsection 3. A "written, bona fide, firm offer" means a legally enforceable, commercially reasonable, cash offer solely for the foreclosed underground storage tank or underground storage tank system or facility or property on which the underground storage tank or underground storage tank system is located, including all material terms of the transaction, from a ready, willing, and able purchaser who demonstrates to the holder's satisfaction the ability to perform. For purposes of this provision, the six-month period begins to run from December 6, 1995, or from the date that marketable title or deed has been issued, approved and recorded to the holder, and the holder has obtained access to the underground storage tank or underground storage tank system, underground storage tank facility and property on which the underground storage tank or underground storage tank system is located, whichever is later, provided that the holder was acting diligently to acquire marketable title or deed or to gain access to the underground storage tank or underground storage tank system, underground storage tank facility and property on which the underground storage tank or underground storage tank system is located. If the holder fails to act diligently to acquire marketable title or deed or to gain access to the underground storage tank or underground storage tank system, the six-month period begins to run from December 6,

1995, or from the date on which the holder first acquires either title to or possession of the secured underground storage tank or underground storage tank system, or facility or property on which the underground storage tank or underground storage tank system is located, whichever is later.

- c. Actions that are not participation in management postforeclosure. A holder is not considered to be participating in the management of an underground storage tank or underground storage tank system or facility or property on which the underground storage tank or underground storage tank system is located when undertaking actions under chapter 33.1-24-08, provided that the holder does not otherwise participate in the management or daily operation of the underground storage tank or underground storage tank system as provided in subsection 1 of section 33.1-24-08-120 and section 33.1-24-08-130. Such allowable actions include release detection and release reporting, release response and corrective action, temporary or permanent closure of the underground storage tank or underground storage tank system, underground storage tank upgrading or replacement, and maintenance of corrosion protection. A holder who undertakes these actions must do so in compliance with the applicable requirements in chapter 33.1-24-08. A holder may directly oversee these environmental compliance actions and voluntary environmental actions, and directly hire contractors to perform the work, and is not by such action considered to be participating in the management of the underground storage tank or underground storage tank system.

**History:** Effective January 1, 2019.

**General Authority:** NDCC 23.1-04-03, 23.1-04-06; S.L. 2017, ch. 199, § 1

**Law Implemented:** NDCC 23.1-04-06; S.L. 2017, ch. 199, § 19

**33.1-24-08-121. [Reserved].**

**33.1-24-08-122. [Reserved].**

**33.1-24-08-123. [Reserved].**

**33.1-24-08-124. [Reserved].**

**33.1-24-08-125. Ownership of an underground storage tank or underground storage tank system or facility or property on which an underground storage tank or underground storage tank system is located (lender liability).**

A holder is not an "owner" of a petroleum underground storage tank or underground storage tank system or facility or property on which a petroleum underground storage tank or underground storage tank system is located for purposes of compliance with the underground storage tank technical standards as defined in subsection 1, the underground storage tank corrective action requirements under sections 33.1-24-08-41 through 33.1-24-08-57, and the underground storage tank financial responsibility requirements under sections 33.1-24-08-80 through 33.1-24-08-101, provided the person:

1. Does not participate in the management of the underground storage tank or underground storage tank system as defined in section 33.1-24-08-120; and
2. Does not engage in petroleum production, refining, and marketing as defined in section 33.1-24-08-115.

**History:** Effective January 1, 2019.

**General Authority:** NDCC 23.1-04-03, 23.1-04-06; S.L. 2017, ch. 199, § 1

**33.1-24-08-126. [Reserved].**

**33.1-24-08-127. [Reserved].**

**33.1-24-08-128. [Reserved].**

**33.1-24-08-129. [Reserved].**

**33.1-24-08-130. Operating an underground storage tank or underground storage tank system (lender liability).**

1. Operating an underground storage tank or underground storage tank system prior to foreclosure. A holder, prior to foreclosure, as defined in subsection 3 of section 33.1-24-08-120, is not an "operator" of a petroleum underground storage tank or underground storage tank system for purposes of compliance with the underground storage tank technical standards as defined in section 33.1-24-08-115, the underground storage tank corrective action requirements under sections 33.1-24-08-41 through 33.1-24-08-57, and the underground storage tank financial responsibility requirements under sections 33.1-24-08-80 through 33.1-24-08-101, provided that, after December 6, 1995, the holder is not in control of or does not have responsibility for the daily operation of the underground storage tank or underground storage tank system.
2. Operating an underground storage tank or underground storage tank system after foreclosure. The following provisions apply to a holder who, through foreclosure, as defined in subsection 3 of section 33.1-24-08-120, acquires a petroleum underground storage tank or underground storage tank system or facility or property on which a petroleum underground storage tank or underground storage tank system is located.
  - a. A holder is not an "operator" of a petroleum underground storage tank or underground storage tank system for purposes of compliance with chapter 33.1-24-08 if there is an operator, other than the holder, who is in control of or has responsibility for the daily operation of the underground storage tank or underground storage tank system, and who can be held responsible for compliance with applicable requirements of chapter 33.1-24-08.
  - b. If another operator does not exist, as provided for under subdivision a, a holder is not an "operator" of the underground storage tank or underground storage tank system, for purposes of compliance with the underground storage tank technical standards as defined in section 33.1-24-08-115, the underground storage tank corrective action requirements under sections 33.1-24-08-41 through 33.1-24-08-57, and the underground storage tank financial responsibility requirements under sections 33.1-24-08-80 through 33.1-24-08-101, provided that the holder:
    - (1) Empties all of its known underground storage tanks or underground storage tank systems within sixty calendar days after foreclosure or within sixty calendar days after December 6, 1995, whichever is later, or another reasonable time period specified by the department, so that no more than two and one-half centimeters [1 inch] of residue, or three-tenths of one percent by weight of the total capacity of the underground storage tank system, remains in the system; leaves vent lines open and functioning; and caps and secures all other lines, pumps, manways, and ancillary equipment; and

- (2) Empties those underground storage tanks and underground storage tank systems that are discovered after foreclosure within sixty calendar days after discovery or within sixty calendar days after December 6, 1995, whichever is later, or another reasonable time period specified by the department, so that no more than two and one-half centimeters [1 inch] of residue, or three-tenths of one percent by weight of the total capacity of the underground storage tank system, remains in the system; leaves vent lines open and functioning; and caps and secures all other lines, pumps, manways, and ancillary equipment.
- c. If another operator does not exist, as provided for under subdivision a, in addition to satisfying the conditions under subdivision b, the holder must either:
- (1) Permanently close the underground storage tank or underground storage tank system in accordance with sections 33.1-24-08-61 through 33.1-24-08-64, except subsection 2 of section 33.1-24-08-62; or
  - (2) Temporarily close the underground storage tank or underground storage tank system in accordance with the following applicable provisions of section 33.1-24-08-60:
    - (a) Continue operation and maintenance of corrosion protection in accordance with section 33.1-24-08-21;
    - (b) Report suspected releases to the department; and
    - (c) Conduct a site assessment in accordance with subsection 1 of section 33.1-24-08-62 if the underground storage tank system is temporarily closed for more than twelve months and the underground storage tank system does not meet either the performance standards in section 33.1-24-08-10 for new underground storage tank systems or the upgrading requirements in section 33.1-24-08-11, except that the spill and overflow equipment requirements do not have to be met. The holder must report any suspected releases to the department. For purposes of this provision, the twelve-month period begins to run December 6, 1995, or from the date on which the underground storage tank system is emptied and secured under subdivision b, whichever is later.
- d. The underground storage tank system can remain in temporary closure until a subsequent purchaser has acquired marketable title to the underground storage tank or underground storage tank system or facility or property on which the underground storage tank or underground storage tank system is located. Once a subsequent purchaser acquires marketable title to the underground storage tank or underground storage tank system or facility or property on which the underground storage tank or underground storage tank system is located, the purchaser must decide whether to operate or close the underground storage tank or underground storage tank system in accordance with applicable requirements in chapter 33.1-24-08.

**History:** Effective January 1, 2019.

**General Authority:** NDCC 23.1-04-03, 23.1-04-06; S.L. 2017, ch. 199, § 1

**Law Implemented:** NDCC 23.1-04-06; S.L. 2017, ch. 199, § 19

## Appendix I

NOTE: The Notification for Underground Storage Tanks SFN-10980 form can be found at <https://deq.nd.gov/Forms/WM/NotificationForUndergroundStorageTanks.pdf> or can be requested by contacting the Department of Environmental Quality, Division of Waste Management - UST Program at 918 East Divide Avenue, Bismarck ND 58501-1947, calling 701-328-5166, or by electronic mail at [ndust@nd.gov](mailto:ndust@nd.gov).

## **Appendix II**

### **Statement for Shipping Tickets and Invoices**

NOTE: A federal law (the Resource Conservation and Recovery Act (RCRA), as amended (Pub. L. 98-616)) requires owners of certain underground storage tanks to notify designated state or local agencies by May 8, 1986, of the existence of their tanks. Notifications for tanks brought into use after May 8, 1986, must be made within thirty days. Consult the environmental protection agency's regulations, issued on November 8, 1985, (40 CFR part 280) to determine if you are affected by this law.