

## ARTICLE 33.1-04 ENVIRONMENTAL RESTORATION

### Chapter

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### CHAPTER 33.1-04-01 GENERAL PROVISIONS

#### Section

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#### **33.1-04-01-01. Scope.**

Nothing in this article is intended to limit the Department from using the fund for any purpose consistent with North Dakota Century Code chapter 23.1-10, even if such purpose is not addressed in these rules. The Department reserves the right to take any action necessary to protect human health and the environment available to it under any statutory authority.

#### **33.1-04-01-02. Definitions.**

The terms used throughout this article have the same meaning as in North Dakota Century Code chapter 23.1-10, except:

1. "Applicant" means any person seeking, by site, the use of environmental quality restoration fund monies or seeking Department approval of a voluntary response action plan under North Dakota Century Code section 23.1-10-15.
2. "Approvable action" means any action for which the Director may approve the use of environmental quality restoration fund monies.
3. "Contaminant of concern" refers to the regulated substance leading to a site's contamination.
4. "Contaminant source" means a containment unit, process, or any activity which contributed to, solely or in part, a release of a regulated substance to the environment.
5. "Delisted site" means any site removed from the North Dakota Environmental Priorities List.

6. “Director” means the North Dakota Department of Environmental Quality Director, or their designated representative.
7. “Environmental hazard” means any condition existing at a site that may represent a hazard to human or environmental health.
8. “Listed site” means any property included in the North Dakota Environmental Priorities List.
9. “North Dakota Environmental Priorities List” is a list of contaminated sites that the Department has determined may be subject to Department response using the environmental quality restoration fund.
10. “Priority” means a qualitative ranking of a listed site.
11. “Recognized environmental condition” means the presence, or likely presence, of any regulated substances in, on, or at a property due to a release to the environment; conditions indicative of a release to the environment; or under conditions that pose a threat of a future release to the environment.
12. “Subject property” means any property that is the subject of any remedial action, restoration, assessment, corrective action, mitigation, or monitoring, being conducted with environmental quality restoration fund monies or under voluntary response action conditions.
13. “Unlisted site” means any site that has not been added to the North Dakota Environmental Priorities List.

### **33.1-04-01-03. Actions approvable for funding.**

The Director must approve any use of monies from the environmental quality restoration fund. Approvable actions include:

1. ***Assessment.*** Assessment activities gather information about current conditions at a site.
2. ***Abatement.*** Abatement activities are conducted to reduce or remove environmental hazards at a subject site. Abatement activities may or may not remove all environmental hazards or contaminant sources. Disposal of waste materials is included in this action.
3. ***Contaminant source removal.*** Contaminant source removal involves the removal and disposal of a contaminant source. This may or may not remove all environmental hazards. Contaminant source removal is not likely to address existing contamination.
4. ***Emergency remedial efforts.*** Emergency remedial efforts are activities taken to address imminent danger or the threat of imminent danger.
5. ***Institutional controls.*** Institutional controls may be engineered systems (such as vapor mitigation systems), land use requirements (through zoning or environmental covenants), or binding legal agreements that reduce the risk of human or environmental health being negatively impacted by contamination at a subject property.

6. ***Mitigation.*** Mitigation involves activities to avoid, reduce, or minimize environmental damage resulting from a release. These activities may be taken at the subject property or another property.
7. ***Monitoring.*** Monitoring involves collecting environmental data at a site over a period of time. Monitoring may be conducted to determine the effectiveness of remedial efforts, the effectiveness of institutional controls, and other activities. Monitoring activities may be conducted jointly, or in addition to, remediation or monitoring activities of responsible parties.
8. ***Remediation.*** Remediation involves all activities conducted to reduce, remove, or repair environmental contamination at a subject property. Disposal of contaminated media is included in this action.

#### **33.1-04-01-04. Use of fund for actions at contaminated sites.**

Chapter 33.1-04-02 contains the procedures for using environmental quality restoration fund monies at sites on the North Dakota Environmental Priorities List. Generally, at contaminated or potentially contaminated sites not on the North Dakota Environmental Priorities List, the Department will only use environmental quality restoration fund monies to fund emergency remedial actions or investigative activities to determine whether listing is appropriate.

#### **33.1-04-01-05. Use of fund for mitigation activities.**

The Department may use the fund for activities to mitigate environmental damage at the location of the release or at another appropriate location where the Department determines that harm caused by the release necessitates mitigation. The Department will determine on a case-by-case basis if a location is appropriate for mitigation activities. Mitigation locations are not included on the North Dakota Environmental Priorities List.

#### **33.1-02-01-06. Cost recovery.**

The Department reserves the right to conduct cost recovery activities in accordance with North Dakota Century Code section 23.1-10-12, where appropriate. Nothing in this article is intended to limit the Department's ability to recover costs.

#### **33.1-04-01-07. Identifying responsible parties.**

The Department shall undertake reasonable efforts to identify responsible parties for subject properties, including examining property records, reviewing historical spill information and other documents, conducting site investigations and sampling, and requesting information from relevant persons. A person that acquires property may show that they made "all appropriate inquiries into the previous ownership" under North Dakota Century Code 23.1-10-08 by providing documentation that they

followed the process for assessing the environmental conditions of a property presented in the United States environmental protection agency's All Appropriate Inquiries Final Rule, 40 C.F.R. Part 312, or ASTM International's Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process (E 1527-13).

## **CHAPTER 33.1-04-02**

### **NORTH DAKOTA ENVIRONMENTAL PRIORITIES LIST**

#### Section

33.1-04-02-01	Purpose
33.1-04-02-02	Eligibility
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33.1-04-02-04	Delisting sites
33.1-04-02-05	Actions at listed sites
33.1-04-02-06	Cost-sharing agreements

#### **33.1-04-02-01. Purpose.**

This chapter contains the procedures the Department will generally follow when determining whether to list or delist a site. Such decisions are wholly within the Department's discretion and do not convey any legal right or interest to any person.

#### **33.1-04-02-02. Eligibility.**

The Department may add a site to the North Dakota Environmental Priorities List on its own initiative or upon application from a person that is not a responsible person for the site. In determining whether to add a site to the North Dakota Environmental Priorities List, the Department will consider the following criteria:

1. The contaminant of concern at the subject property should be identified. If no contaminant of concern has been identified, there should be at least one recognized environmental condition documented at the site.
2. The subject property must be assessed by the Department to determine if the site conditions support the listing of the site, and to determine the priority of the listed site.
3. The subject property must not be eligible for, or should have exhausted, any other state or federal funding sources. Private funding sources may still be available.
4. The responsible party must be identified, if possible.

5. Any other information the Department deems relevant.

#### **33.1-04-02-03. Adding sites to the North Dakota Environmental Priorities List.**

1. The Department may add eligible sites to the North Dakota Environmental Priorities List on a case-by-case basis.
2. The Department must complete a priority determination for a listed site. Sites that the Department determines have a higher potential for environmental harm generally will be given higher priority for corrective action by the Department, though the Department may consider other factors such as local priorities.
3. The inclusion of a site on the North Dakota Environmental Priorities List does not guarantee any funding or corrective action will be completed.
4. The Department will post on its website the North Dakota Environmental Priorities List and any revisions to the list. When a new site is listed, the Department will post on its website an eligibility determination, priority determination, and site summary. The site summary must include:
  - a. The county in which the site is located;
  - b. The nearest incorporated city;
  - c. The name of the applicant, if applicable; and
  - d. Contact information including the name, phone number, mailing address, and e-mail address of the applicant point of contact, if applicable.

#### **33.1-04-02-04. Delisting sites.**

The Department may remove sites from the North Dakota Environmental Priorities List based on new information or revision of Department priorities. Delisting does not relieve any person liable from the responsibility to complete corrective action or from compliance with any environmental law.

#### **33.1-04-02-05. Actions at listed sites.**

The environmental quality restoration fund may be used to fund approvable actions at listed sites. The Department has discretion to determine the amount of funding that will be used at a site and types of approvable actions that will be funded. The Department may seek cost recovery from responsible parties. Listed sites will be addressed according to the site's ranking on the North Dakota Environmental Priorities List, but the Department reserves the right at any time to:

1. Modify the order of processing, payment, and approval of activities;  
or
2. Modify the ranking of sites based on new information or revision of Department priorities.

### 33.1-04-02-06. Cost-sharing agreements.

The Department may enter into a cost-sharing agreement with an owner of a listed site that is not a responsible party. Cost-sharing agreements involve the site owner conducting Department-approved activities and receiving partial reimbursement from the Department for the costs of those approved activities.

1. ***Eligibility.*** The following criteria must be met for a site owner to be eligible for a cost-sharing agreement:
  - a. The cost-sharing activities are approvable actions;
  - b. The listed site owner has prepared a voluntary response action plan meeting the requirements of North Dakota Century Code section 23.1-10-15;
  - c. The Department and listed site owner have entered into a voluntary cleanup agreement under North Dakota Century Code section 23.1-10-15;
  - d. The approvable actions will be conducted in accordance with the voluntary response action plan; and
  - e. The Department has no open enforcement actions involving the site owner or an entity controlled by the site owner.
2. ***Agreement.*** The Department and a site owner may enter into a cost-sharing agreement if the eligibility requirements of subsection 1 are met. The cost-sharing agreement must include:
  - a. A description of the approvable actions planned for the site;
  - b. A cost-estimate for the approvable actions;
  - c. Statement of maximum Department contribution amount, not to exceed fifty percent of the total real cost of the approvable actions; and
  - d. Any terms or conditions required by the Department to enter into the agreement.
  - e. A certificate of completion for the voluntary response actions is issued to the listed site owner within an approved timeline.
  - f.
3. ***Violation of cost-sharing requirements.*** The site owner must repay cost-share funds to the Department if:
  - a. Response actions have been conducted in a way or manner that is not in compliance with the voluntary response action plan;
  - b. The site owner has failed to comply with, or violated, the voluntary cleanup agreement;
  - c. The site owner fails to comply with the terms and conditions of the cost-sharing agreement;
  - d. The site owner's remedial actions cause, or contribute to, additional contamination of the listed property; or
  - e. The site owner's remedial actions cause, or contribute to, contamination at properties other than the subject property.