CHAPTER 23.1-10
ENVIRONMENTAL EMERGENCY COSTS

23.1-10-01. Environmental emergency cost recovery.

Repealed by S.L. 2021, ch. 212, § 19.

23.1-10-02. Environmental quality restoration fund - Continuing appropriation.

There is established an environmental quality restoration fund into which the funds recovered in this chapter may be deposited. The fund is to be administered by the department of environmental quality and may be used by the department for costs of environmental assessment, removal, corrective action, or monitoring as determined on a case-by-case basis. All moneys placed in the fund under this section and section 23.1-10-05 are appropriated to the department on a continuing basis. If, on the first day of July in any year, the amount of uncommitted or unrestricted money in the environmental quality restoration fund is more than five million dollars, the amount in excess of five million dollars must be transferred to the general fund.

23.1-10-03. Rules adoption.

The department of environmental quality may adopt rules to implement this chapter.

23.1-10-04. Definitions.

As used in this chapter, unless the context otherwise requires:

1. "Containment unit" means any one or a combination of containers, vessels, and enclosures, including structures and appurtenances connected to them, which is or has been used to contain or dispense a regulated substance and is either stationary or attached to a motor vehicle. The definition includes pipeline facilities that transport and store regulated substances.
2. "Corrective action" means an action taken to investigate, minimize, contain, eliminate, remediate, mitigate, monitor, or clean up a release including any necessary emergency remedial effort.
3. "Corrective action cost" means any cost incurred by the department in conducting or overseeing corrective actions performed on a release; or the performance of reasonable measures undertaken to prevent or mitigate damage to the public health, public safety, public welfare, or environment of the state.
4. "Department" means the department of environmental quality.
5. "Emergency remedial effort" means an action taken to protect the public health, public safety, or environment from imminent danger resulting from a release, and an action taken to contain a release that, if not contained, will pose in time a greater threat to the public health, public safety, or environment than if the action is not taken immediately.
6. "Environment" means land, including public and private property, surface and underground waters, fish, wildlife, biota, air, and other similar resources within the state.
7. "Fund" means the environmental quality restoration fund.
8. "Institutional controls" and "activity and use limitations" are restrictions on the use and management of real property, including buildings or fixtures, containing or preventing migration of regulated substances or other pollution or contamination, or protecting receptors from exposure or the threat of exposure to regulated substances or other pollution or contamination. Institutional controls may apply:
    a. During environmental remediation activities; or
    b. To residual regulated substances, pollutants, or other pollution or contamination or the byproducts of residual regulated substances, pollutants, or other pollution or contamination which may remain on property after active environmental remediation activities are concluded or while natural attenuation of regulated substances or other pollution or contamination is occurring.

9. "Potentially responsible party" means a person identified as a possible cause of, or contributor to, contamination or pollution on a site or property.
10. "Regulated substance" means a compound designated by the department, including pesticides and fertilizers regulated by the department of agriculture; the hazardous substances designated by the Federal Water Pollution Control Act [Pub. L. 80-845; 62 Stat. 1155; 33 U.S.C. 1251 et seq.]; the toxic pollutants designated by the Federal Water Pollution Control Act and the Toxic Substances Control Act [Pub. L. 94-469; 90 Stat. 2003; 15 U.S.C. 2601 et seq.]; the hazardous substances designated by the federal Comprehensive Environmental Response, Compensation, and Liability Act [Pub. L. 96-510; 94 Stat. 2767; 42 U.S.C. 9601 et seq.]; petroleum, petroleum substances, oil, gasoline, kerosene, fuel oil, oil sludge, oil refuse, production water, oil mixed with other wastes, crude oils, substances, or additives to be utilized in refining or blending crude petroleum or petroleum stock; any other oil or petroleum substance; solid waste regulated under chapter 23.1-08; and technologically enhanced naturally occurring radioactive material regulated under chapter 23.1-03. Radioactive material other than technologically enhanced naturally occurring radioactive material is not a regulated substance under this chapter.
11. "Release" means an intentional or unintentional act or omission that results in the discharge, spill, leak, emission, escape, or disposal of a regulated substance into the environment and harms or threatens harm to public health or public safety or the environment.
12. "Responsible party" means a person that causes or contributes to an onsite or offsite release or threatened release, or that is responsible for an illegal or unpermitted storage, of a regulated substance that results in the contamination or pollution of a property or site.

23.1-10-05. Revenue to the fund.

Revenue from the following sources must be deposited in the state treasury and credited to the fund:

1. Moneys recovered by the department in an action or administrative proceeding based on violation of the state's environmental statutes, including actions for administrative expense recoveries, civil penalties, compensatory damages; and money paid pursuant to any agreement, stipulation, or settlement. This section does not limit the department's ability to agree to a supplemental environmental project as part of a settlement.
2. Moneys donated to the department for the purposes of this chapter.
3. Transfers from the abandoned oil and gas well plugging and site reclamation fund under subdivision f of subsection 2 of section 38-08-04.5.
4. Moneys received from a federal agency for the purpose of this section.
5. Any other moneys as may be deposited in the fund for use in carrying out the purposes of this chapter.

23.1-10-06. Release of regulated substance prohibited - Exception.

The release of a regulated substance is prohibited. This section does not apply to releases of regulated substances pursuant to and in compliance with the conditions of a federal or state environmental permit.

23.1-10-07. Releases from petroleum tanks.

Releases from petroleum tanks are subject to this chapter, but the department may expend moneys in the fund to address releases from petroleum tanks only if there are no available moneys in the petroleum tank release compensation fund under chapter 23.1-12.

23.1-10-08. Responsible parties.

1. If the department determines a release has occurred, the department shall identify the responsible party.

2. If no other viable responsible party can be located after the department's reasonable investigation, the department shall consider a person that became an owner of the property after the release to be a responsible party, subject to the limitations in this section.
   a. Notwithstanding any other provision of law and except as expressly provided by federal law, a person that acquires property is not liable for an existing regulated substance on the property if the person:
      (1) Acquired the property after the disposal or placement of the regulated substance on, in, or at the property; and at the time the property was acquired did not know and had no reason to know a regulated substance was disposed of on, in, or at the property;
      (2) Is a governmental entity that acquired the property by escheat, by tax sale, by foreclosure, through any other involuntary transfer or acquisition, or through the exercise of eminent domain authority by purchase or condemnation; or
      (3) Acquired the property by inheritance or bequest, and did not know a regulated substance was disposed of on, in, or at the property; or is the owner of the surface estate and the regulated substance was released as a result of oil or gas drilling and production operations, or other operation authorized by chapter 38-08, and the owner of the surface estate is not and has never been an operator of oil and gas wells permitted under chapter 38-08.
   b. To establish the person had no reason to know a regulated substance was disposed of on, in, or at the property, the person must have undertaken, at the time of acquisition, all appropriate inquiries into the previous ownership and uses of the property consistent with good commercial or customary practice in an effort to minimize liability. For purposes of this requirement, the department shall take into account any specialized knowledge or experience on the part of the person, the relationship of the purchase price to the value of the property as uncontaminated, commonly known or reasonably ascertainable information about the property, the obviousness of the presence or likely presence of regulated substances at the property, and the ability to detect the regulated substances by appropriate inspection.
   c. A person that has acquired real property may establish a rebuttable presumption the person has made all appropriate inquiries if the person establishes the person performed an investigation of the property, conducted by an environmental professional immediately before or at the time of acquisition, to determine or discover the obviousness of the presence or likely presence of a release or threatened release of regulated substances on the property.
   d. The presumption does not arise unless the person has maintained a compilation of the information reviewed during the investigation.
   e. This section does not diminish the liability of a previous owner or operator of the property which otherwise would be liable under this chapter, and nothing in this section affects the liability under this chapter of a person that, by any act or omission, caused or contributed to the release or threatened release of a regulated substance that is the subject of the action relating to the property.
   f. As used in this section, "environmental professional" means an individual, or entity managed or controlled by an individual, such as an engineer, environmental consultant, and attorney, who, through academic training, occupational experience, and reputation, can objectively conduct one or more aspects of an environmental investigation.
3. A lender-owner is liable for a release or threatened release of a regulated substance only as provided in chapter 32-40.1.

23.1-10-09. Duty to provide information - Inspections.

1. When requested by the department, a responsible or potentially responsible party, or owner of real property where a release or threatened release is located or where response actions are proposed to be taken, shall furnish to the department any information the person may have or reasonably may obtain which is relevant to the release or threatened release.
2. The department, upon presentation of credentials, may:
   a. Examine and copy any books, papers, records, memoranda, or data of any person that has a duty to provide information to the department under subsection 1; and
   b. Enter upon any property, public or private, to take action authorized by this chapter, including obtaining information from a person that has a duty to provide the information under subsection 1, conducting surveys or investigations, and taking removal or remedial action.

23.1-10-10. Authority to establish and enforce remediation requirements.

In determining the appropriate standards to be achieved by corrective actions taken or requested under this chapter to protect public health and welfare and the environment from a release or threatened release, the department shall consider the planned use of the property where the release or threatened release is located. This chapter does not limit the authority of the department to establish environmental standards for remediation of air, soil, or water pollution pursuant to this title or chapters 61-28 and 61-28.1, or to enforce site-specific environmental remediation requirements in particular cases.

23.1-10-11. Action to compel performance - Injunctive relief.

1. The department may make a request for corrective action to a responsible party. A request must be in writing, state the action requested, the reasons for the action, and reasonable times for the action to begin and be completed taking into account the urgency of the action for protection of the public health or welfare or the environment.
2. If a person responsible for a release or threatened release of a regulated substance fails to take corrective actions or make reasonable progress in completing corrective actions requested under subsection 1, the department may bring an action to compel performance of the requested corrective actions. If any person having any right, title, or interest in and to the real property where the containment unit is located or where corrective actions are proposed to be taken is not a person responsible for the release or threatened release, the person may be joined as an indispensable party in an action to compel performance to assure the requested corrective actions can be taken on that property by the responsible parties.
3. The release or threatened release of a regulated substance may constitute a public nuisance and may be enjoined in an action brought by the department.

23.1-10-12. Cost recovery.

The department may recover its reasonable and necessary expenses incurred under this chapter, including all corrective action costs and administrative and legal expenses, in a civil action brought against a responsible party. The department's certification of expenses is prima facie evidence the expenses are reasonable and necessary. The department shall provide written notice to a responsible party before incurring costs, except when prior notice is not possible because the identity of the responsible party is unknown or situations require emergency remedial efforts.

23.1-10-13. Corrective action costs as lien - Filing of notice of lien - Contents - Attachment priority.

All corrective action costs expended from the fund pursuant to this chapter constitute a lien on all property owned by the responsible party when a notice of lien is filed with the recorder in the county where the property is located. The notice of lien must contain a description of the

property of the responsible party upon which the lien is made, a description of the property upon which corrective action or emergency remedial efforts were made, and a statement of the corrective action costs expended from the fund. Upon entry, the lien must attach to all real property of the responsible party. The lien has priority over all other claims or liens on the property, except those perfected before the department's filing of the notice of lien.

23.1-10-14. Other remedies.

This chapter does not limit the powers of the department or preclude the pursuit of any other administrative, civil, injunctive, or criminal remedies by the department or any other person. Administrative remedies do not need to be exhausted to proceed under this chapter. The remedies provided by this chapter are in addition to those provided under other statutory or common law.

23.1-10-15. Voluntary response actions - Liability protection - Procedures.

1. Subject to the provisions of this section, a person that is not otherwise responsible under this chapter or another environmental law for a release or threatened release is not responsible solely because the person undertakes and completes response actions to remove or remedy releases or threatened releases at an identified area of real property in accordance with a voluntary cleanup agreement.
2. A person requesting liability protection under this section shall submit an application in the form required by the department. The requestor also shall submit a voluntary response action plan that includes an investigation report prepared by an appropriate professional describing the methods and results of an investigation of the releases and threatened releases at the identified area of real property, methods of investigation, and the analytical results and professional's evaluation of the reported information. The department may approve the application only if the department determines the nature and extent of the releases and threatened releases at the identified area of real property have been identified and evaluated adequately in the investigation report. The department's approval also must be based on consideration of the following:
   a. If reuse or development of the property is proposed, the voluntary response action plan provides for all response actions required to carry out the proposed reuse or development;
   b. The response actions and the activities associated with any reuse or development proposed for the property will not aggravate or contribute to releases or threatened releases that are not required to be removed or remedied under the voluntary response action plan, and will not interfere with or substantially increase the cost of response actions to address the remaining releases or threatened releases; and
   c. The owner of the property or other relevant person agrees to cooperate with the department or other persons acting at the department's direction in taking response actions necessary to address remaining releases or threatened releases, and to avoid any action that interferes with the response actions.
3. If the department approves the application, the department and requestor shall enter a voluntary cleanup agreement in which the department agrees to take no action under title 23.1 and chapters 61-28 and 61-28.1 against the requestor and those persons identified in subsection 5 so long as the plan is implemented pursuant to the agreement's terms and with the exercise of due care. As part of the agreement, the department may require the owner, requestor, or other relevant person agrees to any of the following conditions:
   a. To provide access to the property;
   b. To allow reasonable and necessary activities at the property, including placement of borings, wells, equipment, and structures on the property; and
   c. To enter an environmental covenant for the property containing institutional controls under chapter 47-37. Alternatively, institutional controls may be imposed on the property using zoning regulations under section 23.1-10-16.

4. Response actions taken under a voluntary cleanup agreement are not complete until the department certifies completion in writing. The department shall issue a certificate of completion if the parties demonstrate to the department's satisfaction the response action is complete. If a voluntary response action plan does not require removal or remedy of all regulated substances, the department may condition the certificate of completion on the owner's, requestor's, or other relevant person's continued compliance with conditions in the voluntary cleanup agreement or other conditions deemed necessary by the department.
5. In addition to the person that undertakes and completes a voluntary response action pursuant to a voluntary cleanup agreement, the liability protection provided by this section applies to the following persons so long as the persons comply with any conditions imposed by the department under subsection 4:
   a. The owner of the identified property, if the owner is not responsible for any release or threatened release identified in the approved voluntary response action plan;
   b. A person providing financing to the person that undertakes and completes the response actions or that acquires or develops the identified property;
   c. A fiduciary that arranges for the undertaking and completion of response actions; and
   d. A successor or assignee of a person to which the liability protection applies.
6. Notwithstanding subsection 1, when a person that is responsible for a release or threatened release undertakes and completes response actions, the protection from liability provided by this section applies to persons described in subsection 5 if the response actions are undertaken and completed in accordance with the following:
   a. The response actions must be undertaken and completed in accordance with a voluntary cleanup agreement.
   b. When the department issues a certificate of completion for response actions completed by a responsible party, the department and the responsible party may enter an agreement that resolves the responsible party's future liability to the department for the release or threatened release addressed by the response actions.
7. The protection from liability provided by this section does not apply to a person that:
   a. Aggravates or contributes to a release or threatened release that was not remedied under an approved voluntary response action plan; or
   b. Obtains the department's approval of a voluntary cleanup agreement for purposes of this section by fraud or misrepresentation or by knowingly failing to disclose material information, or that knows the approval was so obtained before taking an action that would have made the person subject to the protection of this section.
8. This section does not affect the authority of the department to exercise any powers or duties with respect to a new or additional release or threatened release of a regulated substance on a property or site regulated under this section, or the right of the department or any other person to seek legal or equitable relief against a person not subject to a liability protection provided under this section.

23.1-10-16. Zoning regulations establishing institutional controls.

1. If an area made subject to institutional controls involves two or more property owners and an area larger than either one city block or ten acres [4.05 hectares], the department and the political subdivision having zoning authority over the property may agree to institutional controls relating to the identified area impacted by the release or threatened release. Before the institutional controls become effective, the controls must be the subject of a public hearing and be established in the same manner as zoning regulations are established by that political subdivision. The political subdivision shall provide all notices under this subdivision, but any public hearing must be held jointly by the political subdivision and the department.

2. The department shall consider the factors in subsection 2 of section 23.1-10-15 before agreeing to institutional controls under this section.
3. Institutional controls may be terminated or amended at any time by written agreement between the department and the relevant political subdivision.

23.1-10-17. Liability protections issued before August 1, 2021.

This chapter does not affect liability protections related to releases or threatened releases of regulated substances issued by the department before August 1, 2021. These liability protections remain in effect, subject to any conditions that were imposed by the department and the statutes in effect on the date issued.