

SENATE BILL NO. 355

INTRODUCED BY D. ANKNEY

1
2
3
4 A BILL FOR AN ACT ENTITLED: "AN ACT ~~REVISING~~ ESTABLISHING REQUIREMENTS FOR THE USE AND
5 REIMBURSEMENT OF FEDERAL PETROLEUM BROWNFIELDS MONEY AT ~~BROWNFIELDS SITES~~
6 PETROLEUM TANK RELEASE SITES; ESTABLISHING THE MONTANA PETROLEUM BROWNFIELDS
7 REVITALIZATION ACT; ESTABLISHING REQUIREMENTS TO BE USED BY THE DEPARTMENT OF
8 ENVIRONMENTAL QUALITY IN DETERMINING ELIGIBILITY FOR THE USE OF FEDERAL BROWNFIELDS
9 GRANTS AT PETROLEUM TANK RELEASE SITES; PROHIBITING THE DEPARTMENT FROM LIMITING THE
10 USE OF FEDERAL BROWNFIELDS MONEY AT PETROLEUM TANK RELEASE SITES UNDER CERTAIN
11 CONDITIONS; REQUIRING THE DEPARTMENT TO COORDINATE WITH CERTAIN ENTITIES WHEN USING
12 FEDERAL BROWNFIELDS GRANTS OBTAINED BY THE DEPARTMENT AT CERTAIN PETROLEUM TANK
13 RELEASE SITES; DEFINING TERMS; AMENDING ~~SECTION~~ SECTIONS 75-11-307 AND 75-11-309, MCA; AND
14 PROVIDING AN IMMEDIATE EFFECTIVE DATE."

15
16 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

(Refer to Introduced Bill)

Strike everything after the enacting clause and insert:

19
20 NEW SECTION. Section 1. Short title. [Sections 1 through 6] may be cited as the "Montana Petroleum
21 Brownfields Revitalization Act".

22
23 NEW SECTION. Section 2. Findings and intent -- purposes. The legislature finds that:

- 24 (1) real properties exist across the state where the stigma of petroleum contamination hinders the
- 25 development or best use of the property. These petroleum-contaminated properties may be eligible for petroleum
- 26 brownfields funding.
- 27 (2) the cleanup of petroleum brownfields sites should be encouraged and facilitated to reduce threats
- 28 to human health and the environment, prepare properties for reuse and redevelopment, and return property to
- 29 local tax rolls;
- 30 (3) the petroleum tank release cleanup fund established in 75-11-313 is not sufficient to immediately



1 address all petroleum tank release sites in Montana in a timely and comprehensive manner; and
2 (4) the department should encourage the use of federal brownfields money obtained by grant recipients
3 for assessment and remediation at eligible petroleum brownfields sites and to leverage federal funds and limit
4 costs imposed on Montana citizens.

5
6 **NEW SECTION. Section 3. Definitions -- application.** (1) The definitions used in [sections 1 through
7 6] are for the purpose of determining the eligibility of petroleum release sites to receive and expend federal
8 brownfields funding received by a grant recipient from the United States environmental protection agency under
9 the federal Brownfields Revitalization Act, Title II of Public Law 107-118.

10 (2) As used in [sections 1 through 6], the following definitions apply:

11 (a) "Department" means the department of environmental quality provided for in 2-15-3501.

12 (b) "Grant recipient" means a city, town, county, consolidated city-county, tribal government, economic
13 development organization, nonprofit organization, or state agency that has received federal brownfields money
14 from the environmental protection agency.

15 (c) "Person" means an individual, firm, trust, estate, partnership, company, association, joint-stock
16 company, syndicate, consortium, commercial entity, corporation, state government agency, or local government.

17 (d) "Petroleum brownfields sites" means real property where the expansion, redevelopment, or reuse
18 is or may be complicated by the presence or perceived presence of petroleum contamination.

19 (e) "Petroleum tank release site" means a site where there has been a release from a petroleum storage
20 tank and assessment, remediation, or both are being pursued in accordance with Title 75, chapter 11, part 3.

21 (f) "Potentially liable person" means a grant recipient who:

22 (i) dispensed or disposed of, or owned the site when others dispensed or disposed of, petroleum or
23 petroleum product at the site;

24 (ii) exacerbated existing petroleum contamination at the site; or

25 (iii) failed to take reasonable steps with regard to petroleum contamination at the site.

26 (g) "Reasonable steps" means, as appropriate, stopping continuing releases, preventing threatened
27 future releases, or preventing or limiting human, environmental, or natural resource exposure to earlier petroleum
28 or petroleum product releases. The term may include limiting access to the property, monitoring known
29 contaminants, and complying with state, local, or both state and local requirements.

30 (h) "Relatively low risk" refers to a petroleum tank release site that is not being assessed, investigated,

1 or cleaned up by the department using funds from the federal leaking underground storage tank trust fund and
2 is not subject to a response under the federal Oil Pollution Act.

3 (i) "Responsible party" means:

4 (i) a person who is responsible for conducting the assessment, investigation, and cleanup at a petroleum
5 tank release site as determined through:

6 (A) a judgment rendered in a court of law or an administrative order;

7 (B) an enforcement action by federal authorities or the department; or

8 (C) a citizen suit, contribution action, or other third-party claim brought against the current owner of the
9 petroleum tank release site; or

10 (ii) a current owner of a petroleum tank release site who:

11 (A) dispensed or disposed of petroleum or petroleum product contamination at the site;

12 (B) exacerbated existing petroleum contamination at the site;

13 (C) owned the site when any dispensing or disposal of petroleum by others took place; or

14 (D) failed to take reasonable steps with regard to petroleum contamination at the site.

15 (j) "Viable responsible party" means a responsible party who is determined by the department in
16 accordance with [section 4] to have the financial capability to conduct the assessment, investigation, or cleanup
17 activities at a petroleum tank release site.

18

19 **NEW SECTION. Section 4. Viability.** (1) For the purpose of determining the viability of a responsible
20 party, the department shall presume that:

21 (a) ongoing businesses or companies and government entities are viable unless there is information
22 suggesting that the presumption is not appropriate and the department determines the information is sufficient
23 to rebut the presumption in a particular case; and

24 (b) individuals and defunct or insolvent companies are not viable unless there is information suggesting
25 that the presumption is not appropriate and the department determines the information is sufficient to rebut the
26 presumption in a particular case.

27 (2) The department may not determine that a responsible party is viable based solely on the fact that
28 the owner or operator of the petroleum tank release site is eligible to be reimbursed by the petroleum tank release
29 compensation board established in 2-15-2108 from the petroleum tank release cleanup fund established in
30 75-11-313.

1 (3) It is a grant recipient's responsibility to provide the department with sufficient financial information
2 about a responsible party identified in a petroleum brownfields site eligibility application to determine whether the
3 responsible party is a viable responsible party.

4
5 **NEW SECTION. Section 5. Brownfields site eligibility at petroleum tank release sites --**

6 **determinations and limitations.** (1) Before a grant recipient may expend federal brownfields funds at a
7 petroleum tank release site, either the United States environmental protection agency or the department shall
8 make a written determination that:

9 (a) the petroleum tank release site is of relatively low risk compared to other petroleum-contaminated
10 sites;

11 (b) there is no viable responsible party for the petroleum tank release site;

12 (c) the petroleum tank release site will not be assessed, investigated, or cleaned up by a potentially liable
13 person; and

14 (d) the petroleum tank release site is not subject to an order under section 9003(h) of the federal Solid
15 Waste Disposal Act, 42 U.S.C. 6991b(h), or Title 75, chapter 11.

16 (2) After the department or the United States environmental protection agency determines that a
17 petroleum tank release site is eligible for federal brownfields funding, the department shall encourage and may
18 not limit the use of a grant recipient's federal petroleum brownfields funding at the site even if the site owner or
19 operator, as defined in 75-11-302, is eligible for funding from the petroleum tank release cleanup fund established
20 in 75-11-313.

21 (3) The department may not limit the use of money from the petroleum tank release cleanup fund
22 established in 75-11-313 when used as a commitment to a federal brownfields loan made by a grant recipient
23 for remediation at a petroleum tank release site.

24 (4) (a) Except as provided in subsection (4)(b), a determination made by the department or the United
25 States environmental protection agency that a petroleum tank release site is eligible for federal brownfields
26 funding does not limit or alter the owner's or operator's responsibility to assess or remediate the petroleum tank
27 release site in accordance with Title 75, chapter 11.

28 (b) If the department determines that a grant recipient has proposed to conduct a timely and
29 comprehensive remediation using federal brownfields funding at a petroleum tank release site that has been
30 determined by the department or the United States environmental protection agency to be eligible for petroleum

1 brownfields funding and the proposed remediation plan is expected to meet or exceed remediation standards
2 required by the department and financial commitments required by the petroleum tank release compensation
3 board pursuant to Title 75, chapter 11, the department shall approve the comprehensive remediation plan and
4 allow for the use of federal brownfields funding at the petroleum tank release site.

5
6 **NEW SECTION. Section 6. Use of petroleum brownfields funding acquired by state -- limitations.**

7 Prior to expending federal funds awarded to the state for the purpose of assessing or cleaning up petroleum tank
8 release sites that are eligible for petroleum brownfields funding from the United States environmental protection
9 agency under the federal Brownfields Revitalization and Environmental Restoration Act of 2001, Title II of Public
10 Law 107-118, the department shall make a reasonable effort to coordinate with a grant recipient who may intend
11 to expend federal brownfields funding to assess or remediate eligible petroleum brownfields sites in the grant
12 recipient's brownfields target area and to ensure that the grant recipient is not intending to expend petroleum
13 brownfields funding at the same eligible brownfields sites.

14
15 **Section 7.** Section 75-11-307, MCA, is amended to read:

16 **"75-11-307. Reimbursement for expenses caused by release.** (1) Subject to the availability of money
17 from the fund under subsection (6), an owner or operator who is eligible under 75-11-308 and who complies with
18 75-11-309 and any rules adopted to implement those sections must be reimbursed by the board from the fund
19 for the following eligible costs caused by a release from a petroleum storage tank:

20 (a) corrective action costs as required by a department-approved corrective action plan, except that if
21 the corrective action plan:

22 (i) addresses releases of substances other than petroleum products from an eligible petroleum storage
23 tank, the board may reimburse only the costs that would have reasonably been incurred if the only release at the
24 site was the release of the petroleum or petroleum products from the eligible petroleum storage tank; or

25 (ii) includes the establishment of a petroleum mixing zone, as defined in 75-11-503, the board may
26 reimburse the cost of an easement established pursuant to 75-11-508(3)(a); and

27 (b) compensation paid to third parties for bodily injury or property damage. The board may not reimburse
28 for property damage until the corrective action is completed.

29 (2) An owner or operator may not be reimbursed from the fund for the following expenses:

30 (a) corrective action costs or the costs of bodily injury or property damage paid to third parties that are

1 determined by the board to be ineligible for reimbursement;

2 (b) costs for bodily injury and property damage, other than corrective action costs, incurred by the owner
3 or operator;

4 (c) penalties or payments for damages incurred under actions by the department, board, or federal, state,
5 local, or tribal agencies or other government entities involving judicial or administrative enforcement activities and
6 related negotiations;

7 (d) attorney fees and legal costs of the owner, the operator, or a third party;

8 (e) costs for the repair or replacement of a tank or piping or costs of other materials, equipment, or labor
9 related to the operation, repair, or replacement of a tank or piping;

10 (f) expenses incurred before April 13, 1989, for owners or operators seeking reimbursement from the
11 petroleum tank release cleanup fund and expenses incurred before May 15, 1991, for owners or operators
12 seeking reimbursement from the petroleum tank release cleanup fund for a tank storing heating oil for
13 consumptive use on the premises where it is stored or for a farm or residential tank with a capacity of 1,100
14 gallons or less that is used for storing motor fuel for noncommercial purposes;

15 (g) expenses exceeding the maximum reimbursements provided for in subsection (4);

16 (h) costs for which an owner or operator has received reimbursement or payment from an insurer or
17 other third party, including a grantor; and

18 (i) expenses for work completed by or on behalf of the owner or operator more than 5 years prior to the
19 owner's or operator's request for reimbursement. This limitation does not apply to claims for compensation paid
20 to third parties for bodily injury or property damage. The running of the 5-year limitation period is suspended by
21 an appeal of the board's denial of eligibility for reimbursement. If a written request for hearing is filed under
22 75-11-309, the suspension of the 5-year limitation period is effective from the date of the board's initial eligibility
23 denial to the date on which the initial eligibility denial is overturned or reversed by the board, a district court, or
24 the state supreme court, whichever occurs latest. The board may grant reasonable extensions of this limitation
25 period if it is shown that the need for the extension is not due to the negligence of the owner or operator or agent
26 of the owner or operator.

27 (j) costs that the board has determined are not actual, reasonable, and necessary costs of responding
28 to the release and implementing the corrective action plan, as provided for in 75-11-309, including costs included
29 in a department-approved corrective action plan for the purpose of remediating the release in excess of
30 department standards.

1 (3) An owner or operator may designate a person, including a grantor, as an agent to receive the
2 reimbursement for eligible costs incurred by the person if the owner or operator remains legally responsible for
3 all costs and liabilities incurred as a result of the release.

4 (4) Subject to the availability of funds under subsection (6):

5 (a) for releases eligible for reimbursement from the fund that are discovered and reported on or after April
6 13, 1989, from a tank storing heating oil for consumptive use on the premises where it is stored or from a farm
7 or residential tank with a capacity of 1,100 gallons or less that is used for storing motor fuel for noncommercial
8 purposes, the board shall reimburse an owner or operator for:

9 (i) 100% of the eligible costs, up to a maximum total reimbursement of \$500,000, for properly designed
10 and installed double-walled tank system releases that were discovered and reported on or after October 1, 1993,
11 and before October 1, 2009; or

12 (ii) 50% of the first \$10,000 of eligible costs and 100% of subsequent eligible costs, up to a maximum total
13 reimbursement of \$495,000 for all other releases; and

14 (b) for all other releases eligible for reimbursement from the fund that are discovered and reported on
15 or after April 13, 1989, the board shall reimburse an owner or operator for:

16 (i) 100% of the eligible costs, up to a maximum total reimbursement of \$1 million, for properly designed
17 and installed double-walled tank system releases that were discovered and reported on or after October 1, 1993,
18 and before October 1, 2009; or

19 (ii) 50% of the first \$35,000 of eligible costs and 100% of subsequent eligible costs, up to a maximum total
20 reimbursement of \$982,500 for all other releases.

21 (5) If an insurer or grantor pays or reimburses an owner or operator for costs that qualify as eligible costs
22 under subsection (1), the costs paid or reimbursed by the insurer or grantor:

23 (a) are considered to have been paid by the owner or operator toward satisfaction of the 50% share
24 requirements of subsection (4)(a)(ii) or (4)(b)(ii) if the owner or operator receives the payment or reimbursement
25 before applying for reimbursement from the board;

26 (b) are not reimbursable from the fund unless the grantor is designated by the owner or operator as an
27 agent to receive the reimbursement for eligible costs incurred by the grantor; and

28 (c) except for the amount considered to have been paid by the owner or operator pursuant to subsection
29 (5)(a), are considered to have been reimbursed from the fund for purposes of determining when the board has
30 paid the maximum amount payable from the fund under subsection (4)(a)(ii) or (4)(b)(ii).

1 (6) If the fund does not contain sufficient money to pay approved claims for eligible costs, a
2 reimbursement may not be made and the fund and the board are not liable for making any reimbursement for the
3 costs at that time. When the fund contains sufficient money, eligible costs must be reimbursed subsequently in
4 the order in which they were approved by the board."
5

6 **Section 8.** Section 75-11-309, MCA, is amended to read:

7 **"75-11-309. Procedures for reimbursement of eligible costs -- corrective action plans.** (1) An owner
8 or operator seeking reimbursement for eligible costs and the department shall comply with the following
9 procedures:

10 (a) If an owner or operator discovers or is provided evidence that a release may have occurred from the
11 owner's or operator's petroleum storage tank, the owner or operator shall immediately notify the department of
12 the release and conduct an initial response to the release in accordance with state and federal laws and rules
13 to protect the public health and safety and the environment.

14 (b) Except for a tank for which a permit is sought under 75-11-308(1)(b)(iii) and that is closed within 120
15 days of discovery of the release, following discovery of the release, the petroleum storage tank must remain in
16 compliance with applicable state and federal laws and rules that the board determines pertain to prevention and
17 mitigation of petroleum releases.

18 (c) The owner or operator shall conduct a thorough investigation of the release, report the findings to
19 the department, and, as determined necessary by the department, prepare and submit for approval by the
20 department a corrective action plan that conforms with state, tribal (when applicable), and federal corrective
21 action requirements.

22 (d) (i) The department shall review the corrective action plan and forward a copy to a local government
23 office and, when applicable, a tribal government office with jurisdiction over a corrective action for the release.
24 The local or tribal government office shall inform the department if it wants any modification of the proposed plan.

25 (ii) Based on its own review and comments received from a local government, tribal government, or other
26 source, the department, subject to [section 5(4)(b)], may approve the proposed corrective action plan, make or
27 request the owner or operator to modify the proposed plan, or prepare its own plan for compliance by the owner
28 or operator. A plan finally approved by the department through any process provided in this subsection (1)(d) is
29 the approved corrective action plan.

30 (iii) After the department approves a corrective action plan, a local government or tribal government may

1 not impose different corrective action requirements on the owner or operator.

2 (e) A corrective action plan prepared by the owner, operator, or department for any petroleum storage
3 tank release may include the establishment of a petroleum mixing zone as defined in 75-11-503.

4 (f) The department shall notify the owner or operator of its approval of a corrective action plan and shall
5 promptly submit a copy of the approved corrective action plan to the board. Upon review, the board may request
6 that the corrective action plan be amended pursuant to 75-11-508 to include a petroleum mixing zone. If the
7 department finds that the conditions for establishment of a petroleum mixing zone in 75-11-508 are satisfied, the
8 corrective action plan must be amended to include a petroleum mixing zone.

9 (g) The owner or operator shall implement the corrective action plan or plans approved by the
10 department until the release is resolved. The department may oversee the implementation of the plan, require
11 reports and monitoring from the owner or operator, undertake inspections, and otherwise exercise its authority
12 concerning corrective action under Title 75, chapter 10, part 7, Title 75, chapter 11, part 5, and other applicable
13 law and rules.

14 (h) (i) The owner or operator shall document in the manner required by the board all expenses incurred
15 in preparing and implementing the corrective action plan. The owner or operator shall submit claims and
16 substantiating documents to the board in the form and manner required by the board.

17 (ii) The board shall review each claim and determine if the claims are actual, reasonable, and necessary
18 costs of responding to the release and implementing the corrective action plan.

19 (iii) If the board requires additional information to determine if a claimed cost is actual, reasonable, and
20 necessary, the board may request comment from the department and the owner or operator.

21 (iv) If the department determines that an owner or operator is failing to properly implement a corrective
22 action plan, it shall notify the board.

23 (i) The owner or operator shall document, in the manner required by the board, any payments to a third
24 party for bodily injury or property damage caused by a release. The owner or operator shall submit claims and
25 substantiating documents to the board in the form and manner required by the board.

26 (j) In addition to the documentation in subsections (1)(h) and (1)(i), when the release is claimed to have
27 originated from a properly designed and installed double-walled tank system, the owner or operator shall
28 document, in the manner required by the board, the following:

29 (i) the date that the release was discovered; and

30 (ii) that the originating tank was part of a properly designed and installed double-walled tank system.

1 (2) If an owner or operator is issued an administrative order for failure to comply with requirements
2 imposed by or pursuant to Title 75, chapter 11, part 5, or rules adopted pursuant to Title 75, chapter 11, part 5,
3 all reimbursement of claims submitted after the date of the order must be suspended. Upon a written
4 determination by the department that the owner or operator has returned to compliance with the requirements
5 of Title 75, chapter 11, part 5, or rules adopted pursuant to Title 75, chapter 11, part 5, suspended and future
6 claims may be reimbursed according to criteria established by the board. In establishing the criteria, the board
7 shall consider the effect and duration of the noncompliance.

8 (3) The board shall review each claim received under subsections (1)(h) and (1)(i), make the
9 determination required by this subsection, inform the owner or operator of its determination, and, as appropriate,
10 reimburse the owner or operator from the fund. Before approving a reimbursement, the board shall affirmatively
11 determine that:

12 (a) the expenses for which reimbursement is claimed:

13 (i) are eligible costs; and

14 (ii) were actually, necessarily, and reasonably incurred for the preparation or implementation of a
15 corrective action plan approved by the department or for payments to a third party for bodily injury or property
16 damage; and

17 (b) the owner or operator:

18 (i) is eligible for reimbursement under 75-11-308; and

19 (ii) has complied with this section and any rules adopted pursuant to this section. Upon a determination
20 by the board that the owner or operator has not complied with this section or rules adopted pursuant to this
21 section, all reimbursement of pending and future claims must be suspended. Upon a determination by the board
22 that the owner or operator has returned to compliance with this section or rules adopted pursuant to this section,
23 suspended and future claims may be reimbursed according to criteria established by the board. In establishing
24 the criteria, the board shall consider the effect and duration of the noncompliance.

25 (4) (a) If an owner or operator disagrees with a board determination under subsection (3), the owner or
26 operator may submit a written request for a hearing before the board.

27 (b) A written request for a hearing must be received by the board within 120 days after notice of the
28 board's determination is served on the owner or operator by certified mail. The notice of determination must
29 advise the owner or operator of the 120-day time limit for submitting a written request for a hearing to the board.
30 Not less than 50 days or more than 60 days after the board serves the notice of determination, the board shall

1 serve on the owner or operator a second notice by certified mail advising the owner or operator of the deadline
2 for requesting a hearing. Service by certified mail is complete on the date shown on the certified mail receipt.

3 (c) If a written request is received within 120 days, the hearing must be held at a meeting of the board
4 or as otherwise permitted under the Montana Administrative Procedure Act no later than 120 days following
5 receipt of the request or at a time mutually agreed to by the board and the owner or operator.

6 (d) If a written request is not received within 120 days, the determination of the board is final.

7 (5) The board shall obligate money for reimbursement of eligible costs of owners and operators in the
8 order that the costs are finally approved by the board.

9 (6) (a) The board may, at the request of an owner or operator, guarantee in writing the reimbursement
10 of eligible costs that have been approved by the board but for which money is not currently available from the fund
11 for reimbursement.

12 (b) The board may, at the request of an owner or operator, guarantee in writing reimbursement of eligible
13 costs not yet approved by the board, including estimated costs not yet incurred. A guarantee for payment under
14 this subsection (6)(b) does not affect the order in which money in the fund is obligated under subsection (5).

15 (c) When considering a request for a guarantee of payment, the board may require pertinent information
16 or documentation from the owner or operator. The board may grant or deny, in whole or in part, any request for
17 a guarantee."

18
19 **NEW SECTION. Section 9. Codification instruction.** [Sections 1 through 6] are intended to be codified
20 as an integral part of Title 75, chapter 11, and the provisions of Title 75, chapter 11, apply to [sections 1 through
21 6].

22
23 **NEW SECTION. Section 10. Saving clause.** [This act] does not affect rights and duties that matured,
24 penalties that were incurred, or proceedings that were begun before [the effective date of this act].

25
26 **NEW SECTION. Section 11. Severability.** If a part of [this act] is invalid, all valid parts that are
27 severable from the invalid part remain in effect. If a part of [this act] is invalid in one or more of its applications,
28 the part remains in effect in all valid applications that are severable from the invalid applications.

29
30 **NEW SECTION. Section 12. Effective date.** [This act] is effective on passage and approval.

31 - END -