

Document: Proposed Rule

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**TITLE 328 UNDERGROUND STORAGE TANK
FINANCIAL ASSURANCE BOARD**

Proposed Rule
LSA Document #00-135

DIGEST

Amends 328 IAC 1, which governs the administration of the Underground Storage Tank Excess Liability Trust Fund (ELTF) and the payment of claims thereunder, to reflect the expiration of the 1998 deadline for upgrade of underground petroleum storage tanks (USTs), amends the cost schedule for reimbursement, and adds updates of statutory references. Repeals 328 IAC 1-1-5, 328 IAC 1-1-11, and 328 IAC 2. Effective 30 days after filing with the secretary of state.

HISTORY

First Notice of Comment Period: July 1, 2000, Indiana Register (23 IR 2614).

Second Notice of Comment Period and Notice of First Hearing: February 1, 2001, Indiana Register (24 IR 1520).

Date of First Hearing: March 20, 2001.

PUBLIC COMMENTS UNDER IC 13-14-9-4.5

IC 13-14-9-4.5 states that a board may not adopt a rule under IC 13-14-9 that is substantively different from the draft rule published under IC 13-14-9-4 until the board has conducted a third comment period that is at least twenty-one (21) days long.

Because this proposed rule is not substantively different from the draft rule published February 1, 2001, at 24 IR 1520, the Indiana Department of Environmental Management (IDEM) is not requesting additional comment on this proposed rule.

SUMMARY/RESPONSE TO COMMENTS FROM THE SECOND COMMENT PERIOD

IDEM requested public comment from February 1, 2001, through March 5, 2001, on IDEM's draft rule language. IDEM received comments from the following parties:

Steven Wilcox, Astbury Environmental Engineering Inc. (AEE)

Catherine Gibbs, Lee and Ryan Environmental Consulting Inc. (L & R)

Jeffrey Nee, P.E. and Jennifer Sprunger, Quality Environmental Professionals Inc. (QEPI)

Steve Gray, CPG, ARCADIS Geraghty and Miller Inc. (ARCADIS)

David Steiger, ATC Associates, Inc. (ATC)

Following is a summary of the comments received and IDEM's responses thereto:

Comment: 328 IAC 1-1-5.1. A better definition of the term "Emergency Measures" is needed. Also, what/who defines approval of these remedial actions? It has been AEE's experience that true emergency conditions (i.e., immediate threat to human health or the environment) relating to LUST incidents are not that common. It is much more common and appropriate for the Rules and ELTF (Excess Liability Trust Fund) to address conditions that are not an emergency but do warrant what is often termed Interim Remedial Action (IRA). We have had many cases justifying IRA operations to cease plume movement and/or mitigate free product—prior to CAP approval or authorization from the IDEM. These IRA measures are extremely effective in source reduction, alleviating environmental impact, cutting overall project costs, and moving more rapidly to project closure. However, current IDEM procedures make it prohibitive for owner/operators and consultants to implement IRA measures due to the undefined, subjective determination(s) of ELF reimbursable costs. It often takes months or years to process claims and receive financial reimbursement for IRA costs due to the agency's misunderstanding of the necessity of these measures. (AEE)

Response: IDEM believes that the definition of "Emergency Measures" adequately covers those situations that are truly an "emergency". IC 13-23-8-4(b)(1) describes an "emergency action" situation in accordance with the proposed definition of "emergency measures". Under this statute, only certain specific measures are reimbursable prior to ISC (initial site characterization) or CAP (corrective action plan) approval. The ELTF rule cannot exceed the authority or scope delineated by the ELTF statute on the issue of what measures are reimbursable by the ELTF prior to CAP approval. A further clarification of reimbursable "emergency measures" costs can be found on ELTF web site located at www.state.in.us/idem/olq/programs/eltf. It is the IDEM project manager's decision as to whether conditions warrant "emergency" measures.

Comment: 328 IAC 1-3-4. Senate Bill 408 proposes to raise the cap of \$1,000,000 per occurrence. If this bill passes, this rule should be amended to reflect the same. (L & R)

Response: The final adoption hearing for this rule will be scheduled after the regular 2001 legislative session is completed. Due to publishing deadlines, the rule language contained in the February 2001 Indiana Register was written to conform to the draft legislation on the ELTF before it was introduced. After the legislative session, IDEM will amend the rule to conform to ELTF legislation passed in this session.

Comment: 328 IAC 1-3-5. Under Site Restoration, Backfill Material, \$10 per ton/stone, ARCADIS Geraghty and Miller propose a reimbursable rate of \$12 per ton. This is based on our experience purchasing #8 stone, #2 stone, and pea gravel, all of which typically cost more than \$10/ton, not including markup.

We also wish to suggest rates to the ELF rule concerning Monitored Natural Attenuation (MNA) sampling. Several of the analytical parameters and equipment required to correctly perform MNA sampling were omitted from the draft rule. Since this method of remediation is increasing in popularity, ARCADIS Geraghty and Miller provides draft language on applicable costs and requests it be included in the rule. (ARCADIS)

Response: The “costs” external work group for this rule will review and discuss all comments on the proposed reimbursable expenditures after the preliminary adoption of this rule. All appropriate revisions will be made to 328 IAC 1-3-5 before final adoption of the rule.

Comment: 328 IAC 1-3-5. “Bail and sample” and “Check and record water”, which include labor costs, are listed at per well rates. Labor performed at a facility will be invoiced at appropriate hourly rates. It is not reasonable to expect those costs to be separated from other labor costs.

The cost of freon used for the extraction process during analysis of TPH by method 418.1 is rising because of decreased availability. The proposed rate of \$75 per sample may not cover the cost of that analysis in the near future. The proposed reimbursement rate should be increased.

The proposed reimbursement rate for dissolved methane is \$50 per sample. An analytical method is not specified. When ATC requested price quotes from laboratories, a variety of methods and prices are quoted. We have not been quoted a price below \$100 per sample. The proposed reimbursement rate should be increased.

A rate of \$85 per hour for Project manager would more accurately reflect the current labor market.

A rate of \$40 per hour for Technician would more accurately reflect the current labor market.

A rate of \$40 per hour for Drafting person would more accurately reflect the current labor market and the level of skill necessary to produce a product of appropriate quality.

A rate of \$30 per hour for Word processor/clerical would more accurately reflect the current labor market.

Lodging and per diem should be referenced to the current State travel policy to provide for timely updates to those rates.

It is not wise to specify rates for construction related expenses. Demolition, excavation, transportation, disposal, and restoration costs are more closely related to general economic conditions in the construction market place than to the environmental marketplace. Fuel, labor, and regulatory compliance costs can result in rapid fluctuations in construction expenses. A more reliable method to determine reasonable costs for a specific project at a specific time and location is by solicitation and comparison of multiple bids.

A daily rental rate of \$25 is more reasonable for a water level indicator.

Some equipment needed for pilot testing remedial alternatives require generating capacity much greater than 5 kW at a rental rate of more than \$90 per day. For example, the daily rental rate from one vendor for a 3 phase 60 kW generator is \$150. Provision should be made to allow for reimbursement of the actual rental rate of specialty equipment with vendor invoice backup. (ATC)

Response: The “costs” external work group for this rule will review and discuss all comments on the proposed reimbursable expenditures after the preliminary adoption of this rule. All appropriate revisions will be made to 328 IAC 1-3-5 before final adoption of the rule.

Comment: 328 IAC 1-3-5. Regarding appropriate allowable expenditures, AEE has the following suggestions:

(a) The \$175 per well for labor (install, develop, and survey) is too low, especially for deeper wells.

(b) AEE for labor (install, develop, and survey) is too low, especially for deeper wells.

(c) Flush-grade well covers should be allowed at cost +15%.

(d) It is unclear what constitutes “air monitoring”.

(e) Reimbursement for trailer rental, power, water, phone, etc. varies significantly from site to site and completely dependent upon site specific conditions—should be cost +15%.

(f) Regarding laboratory analysis pricing, AEE is most notably concerned about the SVOCs method 8270 pricing. Virtually all (reputable) laboratories charge twice as much as is listed for soil and ground water testing. AEE suggests that a minimum of \$425 per sample (which is still extremely low for the market) would be more appropriate. The SVOC 8270 analysis has approximately twice as many compounds as the VOC scan and sample prep is far more complex and labor intensive. There are certainly no basis for pricing these tests at \$185 (soils) and \$200 (ground water). Another perplexing issue regarding lab pricing is that the pricing

for BTEX/MTBE by 8260 is the same as the pricing for VOCs by 8260—BTEX/MTBE are a small subset of the total VOCs and pricing these tests the same makes no sense.

(g) Regarding the leasing or rental of equipment, especially AEE's mobile remediation systems, AEE respectfully requests that IDEM consider the following primary points:

(1) AEE's rental rates are at or below industry averages for similar equipment from other equipment vendors (we are prepared to document this by presenting proposals from other equipment vendors).

(2) If it becomes prohibitive for AEE to purchase, implement, and rent our own remediation equipment, then we will be forced to lease from other vendors and seek reimbursement at cost +15%, which will be more expensive on a weekly or monthly basis and will ultimately cost our clients and the fund more than using our own equipment.

(3) If it is prohibitive for AEE to purchase, implement, and rent our own remediation equipment, then we will be unable to be as responsive to emergency response, interim remedial action, and pilot testing projects—as this equipment is very difficult to locate for rental or leasing. (AEE)

Response: The "costs" external work group for this rule will review and discuss all comments on the proposed reimbursable expenditures after the preliminary adoption of this rule. All appropriate revisions will be made to 328 IAC 1-3-5 before final adoption of the rule.

Comment: 328 IAC 1-3-5(a)(7). The words "of litigation" should be deleted. Allowing recovery of attorney's fees only in cases where litigation has been brought does not promote early settlement, which is less costly and more efficient. (L & R)

Response: IDEM disagrees. IC 13-23-8-1(3)(B) limits recovery of reasonable attorney's fees to the litigation stage of a claim.

Comment: 328 IAC 1-3-5(c). Regarding laboratory services, this rule contains references to various analytical methods of the different constituents. Therefore, this rule should include a reference to the U.S. EPA guidance document (Test Methods for Evaluating Solid Waste, Physical/Chemical Methods, SW-846, Third Edition, November, 1986), which establishes these analytical methods. (L & R)

Response: IDEM agrees and will develop specific language to reference the Test Methods as updated.

Comment: 328 IAC 1-3-5(c). The allowable cost for travel and per diem is the "current federal rate." However, a separate rate for per diem is then established at \$26 per day. This is confusing and should be clarified. A separate rate for mileage should be explicitly stated. The current federal rate for mileage is acceptable. (L & R)

Comment: A mileage rate is not provided. If the current federal rate is intended, a reference should be cited. (ATC)

Response: IDEM agrees with the proposed change. The language should read "mileage" instead of "travel and per diem".

Comment: 328 IAC 1-3-5(c). Regarding personnel costs, the proposed rule requires the name of the individual performing the task for reimbursement. However, the personnel classifications are reimbursed on the basis of the type of task being done, not the individual's qualifications. The name of the individual is therefore irrelevant, unnecessary and should be deleted. In addition, we suggest appropriate tasks for each personnel classification and staff project person. (L & R)

Response: IDEM has reviewed the suggested changes to the language regarding personnel classifications and appropriate tasks and feels that the name of the individual performing the task is relevant. IDEM feels that including the name of the individual performing the task will help IDEM track site costs better and deter consultants/contractors from duplicate billing.

Comment: Regarding the statement concerning reimbursement rates for personnel that reads "When submitting a claim for reimbursement the claimant shall be required to give the personnel classification, task being performed and the name of the individual performing the task. Rates will be paid based on the task performed by an employee rather than the qualifications of the employee," we would like clarification that ELF will reimburse more than one Project Manager Level employee per site based on the task being performed. ARCADIS Geraghty and Miller routinely assign engineers to design remediation systems while geologists will interpret the geology while either professional may write their respective portions of the report. In the past, IDEM ELF did not reimburse the Project Manager rate if more than one person appeared on an invoice or claim at the Project Manager rate. (ARCADIS)

Response: The intent of the language is to clarify the work being performed and who is performing that work. Therefore, with proper justification, IDEM would reimburse the tasks being performed rather than reimburse based on the qualifications of the employee performing the task.

Comment: Regarding the allowable rates for different personnel classifications, AEE believes that there should be an allowance for statisticians, and that Principals allowable tasks should include project management, technical report preparation/review, and modeling. (AEE)

Response: The "costs" external work group for this rule will review and discuss all comments on the proposed reimbursable expenditures after the preliminary adoption of this rule. All appropriate revisions will be made to 328 IAC 1-3-5 before final adoption of the rule.

Comment: 328 IAC 1-3-5(c). Approved technologies should be changed to recognize that, in some instances, the lowest bid may not be justified. Requiring the owner or operator to select the lowest bid could affect the quality of the project and consequently, operation and maintenance costs would increase. In addition, a number of tasks associated with implementation of the corrective action plan are standard. One of these tasks is the installation of horizontal wells. A specific rate should be established for this task.

(L & R)

Response: As to the horizontal wells, the “costs” external work group for this rule will review and discuss all comments on the proposed reimbursable expenditures after the preliminary adoption of this rule. All appropriate revisions will be made to 328 IAC 1-3-5 before final adoption of the rule. As to the “lowest bid” issue, IDEM currently addresses this on an individual, case by case basis, but feels that added language would be beneficial. IDEM will draft new language for the ELTF rule work group to review and amend the rule as appropriate prior to final adoption.

Comment: 328 IAC 1-3-5(c). It should be clear that the list of equipment under the heading “Equipment Rental” is not exclusive and that reasonable rental rates will be paid for other types of equipment. (L & R)

Response: The “costs” external work group for this rule will review and discuss all comments on the proposed reimbursable expenditures after the preliminary adoption of this rule. All appropriate revisions will be made to 328 IAC 1-3-5 before final adoption of the rule.

Comment: 328 IAC 1-5-1. The proposed rule that claims cannot be submitted for less than \$5,000 unless the claim is for costs incurred longer than 6 months is unreasonable to owner/operators. It is our understanding that IDEM is trying to make the claims process more efficient; however, owner/operators should not be penalized by delaying reimbursement and holding up their ELF eligible funds. Many of the “smaller” LUST projects do not incur costs much greater than \$500 to \$1,000 per month. Further, some owner/operators may incur several bills from smaller projects—and none may exceed \$5,000 for several months. However, the combined cost to the owner may be as high as \$40,000 or more for these smaller projects. Perhaps two to three months is more reasonable and fair to the owner/operators, while still allowing ELF to more efficiently process the claims. (AEE)

Comment: 328 IAC 1-5-1(a)(2). This section indicates a single claim application may not be submitted to the fund for reimbursement in an amount less than \$5,000. How was this dollar amount determined? This may not allow for the submittal of a reimbursement application for several months. The motives for establishing an application minimum are certainly understandable. However, we believe the proposed minimum of \$5,000 may be excessive and could actually inhibit the progress of investigation and/or remediation activities of small UST owners. We request that the IDEM reconsider the \$5,000 application minimum, especially for those sites where monitored natural attenuation (MNA) has been IDEM-approved as the appropriate remedial technology. (QEPI)

Response: The IDEM believes that this change will not result in a delay of reimbursement. By requiring a \$5,000 or six month limit, IDEM will reduce the number of small dollar claims that are costly and time consuming to review. Therefore, the turn around time for reimbursement will be reduced.

Comment: 328 IAC 1-5-1 Sec. 1 (d) states that the initial claim may not be for less than the deductible amount. Review and approval of a CAP can be delayed by more than a year if submitted to the LUST section without an associated claim, and the LUST section expects responsible parties to proceed with corrective actions while awaiting review. A responsible party who intends to submit a claim application but has not met the deductible prior to submitting a CAP will be reluctant to proceed with CAP implementation before obtaining approval from IDEM. Doing so could result in incurring expenses for actions that are not approved and not reimbursable. Therefore, claim applications should be allowed after CAP submittal without regard to the deductible, thereby providing a mechanism for timely CAP review in accordance with IC 13-23-8-4. (ATC)

Response: IDEM agrees that 328 IAC 1-5-1(d) may delay the review of a CAP. IDEM will develop specific language to address this issue and present it to the ELTF rule group.

Comment: 328 IAC 1-6-2(d)(1). This language should be modified to reflect that personnel costs associated with obtaining off-site access will be reimbursed through the normal claims process. For example, the time that a Project Manager spends getting access to an off-site property should be reimbursed at the appropriate personnel rate and should be submitted to IDEM as part of the normal claim process, without first being reviewed by the Attorney General. (L & R)

Response: IDEM has reviewed the suggested changes to the rule language provided by the commentor and sees that clarification is needed on this comment. The proposed language still includes review by the Attorney General of these types of claims.

Comment: The rule amendments do not address the issue of tank fee receipts. Currently, an owner or operator must produce copies of receipts for all years between 1988 and the year of the release. For example, if the release was in the year 2000, the owner or operator must produce 12 years of receipts. This is becoming increasingly cumbersome. As the number of years for which receipts must be produced increases, the greater the likelihood that the receipts have been lost or destroyed. Therefore, the requirement that all tank fee receipts must be produced should be amended so that the owner or operator need only produce receipts for the seven years preceding the release.

Also, it is generally believed that IDEM’s fee payment records for the years 1988, 1989 and 1990 are not reliable. The rule could be amended to establish a rebuttable presumption in favor of the owner or operator that fee payments were made for 1988, 1989 and 1990 unless IDEM could produce evidence to the contrary. (L & R)

Response: Under IC 13-23-12-5 all tank fee receipts must be maintained and produced for inspection upon request, so the requirement of production to IDEM is entirely consistent with that statutory obligation. IDEM also disagrees that the burden of showing that fees were not paid should rest with IDEM, as that proposal violates the clear intent of IC 13-23-12. In addition, the proposed production of evidence by IDEM of nonpayment is not a workable solution.

SUMMARY/RESPONSE TO COMMENTS RECEIVED AT THE FIRST PUBLIC HEARING

On March 20, 2001, the Underground Storage Tank Financial Assurance Board conducted the first public hearing/board meeting concerning the development of amendments to 328 IAC 1 and 328 IAC 2. Comments were made by the following parties:

C. Michael Pitts, Executive Director, Indiana Petroleum Marketers and Convenience Store Association (IPCA).

Following is a summary of the comment received and IDEM’s responses thereto:

Comment: We, as an organization, are very supportive overall of the general thrust of this rule making. I do want to thank the IDEM staff for a lot of hard work on this. It really has been a great example of a collaborative effort as we’ve worked on both statutory changes as well as rule changes. The cost work group is going to continue to meet, as I understand it. I just saw the comments on the draft rule today for the first time, so I really haven’t had a chance to digest them fully. But just at a glance, there’s several things for discussion. These include tank fee receipts and whether owners should still have to go back to 1988 to produce documentation. It’s something we’ve talked about, but based on the comment, I’m not sure we’ve fully resolved yet. The attorneys fees comments, the definition of litigation is some thing that I believe still needs to be looked at.

Also, RISC, we’ve been talking about the RISC program as something out there in the future, and lo and behold it actually began in February after several years of development. But I think we are still a little uncomfortable with the way the rule reads in terms of reimbursement for RISC costs. I think our understanding was that some of the expenses that an owner might go through to determine whether they clean up according to RISC or they clean up under the existing standards would be something that’s reimbursable, and I’m not sure that’s the way the rule reads now.

In any event, I would urge that the work group, the broader work group, not just the cost work group, but the broader group, get back together fairly soon and evaluate some of these comments that we have and see where we’re at on everything. As has been referenced, there’s several important things in the statute such as the change to the CAPs that will also need to be reflected in these rules ultimately. I think we’re on a good path.

Response: Concerning tank fee receipts and how far back an owner or operator would have to retain records, IDEM maintains that under IC 13-23-12-5, the owner or operator must retain all fee receipts and produce them for inspection upon request.

Regarding the recovery of attorney fees outside of litigation under 328 IAC 1-3-5(a)(7), IDEM staff has agreed to reexamine that issue.

Regarding concerns with implementing the RISC program and RISC costs incurred and subsequently reimbursed, the agency has developed a nonrule policy document on the RISC program which addresses these issues.

In response to the issue of legislative changes reflected within this rule, IDEM will amend the rule to conform to ELTF legislation passed in this session. Therefore, the final adoption hearing will be scheduled after the regular 2001 legislative session.

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| 328 IAC 1-1-1 | 328 IAC 1-3-1 |
| 328 IAC 1-1-2 | 328 IAC 1-3-2 |
| 328 IAC 1-1-3 | 328 IAC 1-3-3 |
| 328 IAC 1-1-3.1 | 328 IAC 1-3-4 |
| 328 IAC 1-1-4 | 328 IAC 1-3-5 |
| 328 IAC 1-1-5 | 328 IAC 1-3-6 |
| 328 IAC 1-1-5.1 | 328 IAC 1-4-1 |
| 328 IAC 1-1-6 | 328 IAC 1-5-1 |
| 328 IAC 1-1-7 | 328 IAC 1-5-2 |
| 328 IAC 1-1-8 | 328 IAC 1-5-3 |
| 328 IAC 1-1-9 | 328 IAC 1-6-1 |
| 328 IAC 1-1-9.1 | 328 IAC 1-6-2 |
| 328 IAC 1-1-10 | 328 IAC 1-7-1 |
| 328 IAC 1-1-11 | 328 IAC 1-7-2 |
| 328 IAC 1-2-1 | 328 IAC 1-7-3 |
| 328 IAC 1-2-2 | 328 IAC 2 |
| 328 IAC 1-2-3 | |

SECTION 1. 328 IAC 1-1-1 IS AMENDED TO READ AS FOLLOWS:

ARTICLE 1. PAYMENT OF CORRECTIVE ACTION AND THIRD PARTY LIABILITY CLAIMS FROM THE EXCESS LIABILITY TRUST FUND

328 IAC 1-1-1 Application of definitions

Authority: IC 13-23-8-1; IC 13-23-8-4.5; IC 13-23-8-5; IC 13-23-11-7
Affected: IC 13-11-2; IC 13-23

Sec. 1. The definitions in this rule IC 13-11-2 apply throughout to this article. All other words and phrases used in this article have the same meaning as those defined in IC 13-7-20 and 42 U.S.C. 6991 through 42 U.S.C. 6991i (and all regulations related thereto). **In addition to the definitions in IC 13-11-2, the definitions in this rule apply throughout this article.** (*Underground Storage Tank Financial Assurance Board; 328 IAC 1-1-1; filed Dec 4, 1992, 11:00 a.m.: 16 IR 1051; readopted filed Jan 10, 2001, 3:21 p.m.: 24 IR 1534*)

SECTION 2. 328 IAC 1-1-2 IS AMENDED TO READ AS FOLLOWS:

328 IAC 1-1-2 “Administrator” defined

Authority: IC 13-23-8-1; IC 13-23-8-4.5; IC 13-23-8-5; IC 13-23-11-7
Affected: IC 13-23

Sec. 2. “Administrator” refers to the administrator of the ~~excess liability~~ fund. (*Underground Storage Tank Financial Assurance Board; 328 IAC 1-1-2; filed Dec 4, 1992, 11:00 a.m.: 16 IR 1051; readopted filed Jan 10, 2001, 3:21 p.m.: 24 IR 1534*)

SECTION 3. 328 IAC 1-1-3 IS AMENDED TO READ AS FOLLOWS:

328 IAC 1-1-3 “Corrective action” defined

Authority: IC 13-23-8-1; IC 13-23-8-4.5; IC 13-23-8-5; IC 13-23-11-7
Affected: IC 13-23

Sec. 3. “Corrective action” means action taken to minimize, contain, eliminate, remediate, mitigate, or clean up a release, including emergency measures taken as part of an initial response ~~Corrective action does not include repair or replacement of an underground storage tank or its associated equipment, as specified in IC 13-7-20-33(a)(1);~~ **to the release under 329 IAC 9-5-2.** (*Underground Storage Tank Financial Assurance Board; 328 IAC 1-1-3; filed Dec 4, 1992, 11:00 a.m.: 16 IR 1051; readopted filed Jan 10, 2001, 3:21 p.m.: 24 IR 1534*)

SECTION 4. 328 IAC 1-1-3.1 IS ADDED TO READ AS FOLLOWS:

328 IAC 1-1-3.1 “Corrective action plan” or “CAP” defined

Authority: IC 13-23-8-1; IC 13-23-8-4.5; IC 13-23-8-5; IC 13-23-11-7
Affected: IC 13-23-7; IC 13-23-8-3

Sec. 3.1. “Corrective action plan” or “CAP” means the corrective action plan described by 329 IAC 9-5-7(a) and 329 IAC 9-5-7(b). (*Underground Storage Tank Financial Assurance Board; 328 IAC 1-1-3.1*)

SECTION 5. 328 IAC 1-1-4 IS AMENDED TO READ AS FOLLOWS:

328 IAC 1-1-4 “Deductible amount” defined

Authority: IC 13-23-8-1; IC 13-23-8-4.5; IC 13-23-8-5; IC 13-23-11-7
Affected: IC 13-23-7; IC 13-23-8-3

Sec. 4. “Deductible amount” means the amount set forth in IC 13-23-8-3 applicable to each incident number assigned by the department, to be paid by the owner or operator before being entitled to payment from the fund: **any person who may apply to the fund under 328 IAC 1-3-1.** (*Underground Storage Tank Financial Assurance Board; 328 IAC 1-1-4; filed Dec 4, 1992, 11:00 a.m.: 16 IR 1051; filed Jan 9, 1997, 4:00 p.m.: 20 IR 1103; readopted filed Jan 10, 2001, 3:21 p.m.: 24 IR 1534*)

SECTION 6. 328 IAC 1-1-5.1 IS ADDED TO READ AS FOLLOWS:

328 IAC 1-1-5.1 “Emergency measures” defined

Authority: IC 13-23-8-1; IC 13-23-8-4.5; IC 13-23-8-5; IC 13-23-11-7
Affected: IC 13-23

Sec. 5.1. “Emergency measures” means any action that is taken at or near a petroleum release to abate an immediate threat of harm to human health, property, or the environment. The actions taken must be approved by the department prior to payment from the fund. (*Underground Storage Tank Financial Assurance Board; 328 IAC 1-1-5.1*)

SECTION 7. 328 IAC 1-1-6 IS AMENDED TO READ AS FOLLOWS:

328 IAC 1-1-6 “Fund” defined

Authority: IC 13-23-8-1; IC 13-23-8-4.5; IC 13-23-8-5; IC 13-23-11-7
Affected: IC 13-23-7-1; IC 13-23-8

Sec. 6. “Fund” means the **underground petroleum storage tank** excess liability trust fund established at IC 13-23-7-1. (*Underground Storage Tank Financial Assurance Board; 328 IAC 1-1-6; filed Dec 4, 1992, 11:00 a.m.: 16 IR 1051; filed Jan 9, 1997, 4:00 p.m.: 20 IR 1103; readopted filed Jan 10, 2001, 3:21 p.m.: 24 IR 1534*)

SECTION 8. 328 IAC 1-1-7 IS AMENDED TO READ AS FOLLOWS:

328 IAC 1-1-7 “Occurrence” defined

Authority: IC 13-23-8-1; IC 13-23-8-4.5; IC 13-23-8-5; IC 13-23-11-7
Affected: IC 13-23

Sec. 7. “Occurrence” means an incident ~~including continuous or repeated conditions~~, that results in a release of petroleum, **including a continuous or repeated release of petroleum**, from an underground storage tank system. (*Underground Storage Tank Financial Assurance Board; 328 IAC 1-1-7; filed Dec 4, 1992, 11:00 a.m.: 16 IR 1051; readopted filed Jan 10, 2001, 3:21 p.m.: 24 IR 1534*)

SECTION 9. 328 IAC 1-1-8 IS AMENDED TO READ AS FOLLOWS:

328 IAC 1-1-8 “Reasonable costs” defined

Authority: IC 13-23-8-1; IC 13-23-8-4.5; IC 13-23-8-5; IC 13-23-11-7
Affected: IC 13-23

Sec. 8. “Reasonable costs” means a monetary amount or range, as determined by the department, which is commensurate with a ~~response~~ **corrective** action when the **corrective** action was taken. Reasonable costs shall be determined by the department by a review of the following:

- (1) The activities outlined in the **approved or deemed approved** corrective action plan and those activities in fact performed.
- (2) The approved site characterization and those activities in fact performed.**
- (3) The emergency measures and those activities in fact performed.**
- ~~(2)~~ **(4)** The scope, complexity, and timing of the **response corrective action** activities.
- ~~(3)~~ **(5)** The fair market value of the costs for services or goods within the particular market or industry where the work is performed as provided, in part, in 328 IAC 1-3-5(c).

(*Underground Storage Tank Financial Assurance Board; 328 IAC 1-1-8; filed Dec 4, 1992, 11:00 a.m.: 16 IR 1051; filed Nov 1, 1995, 8:30 a.m.: 19 IR 342; readopted filed Jan 10, 2001, 3:21 p.m.: 24 IR 1534*)

SECTION 10. 328 IAC 1-1-8.5 IS ADDED TO READ AS FOLLOWS:

328 IAC 1-1-8.5 “Site characterization” defined

Authority: IC 13-23-8-1; IC 13-23-8-4.5; IC 13-23-8-5; IC 13-23-11-7
Affected: IC 13-23

Sec. 8.5. “Site characterization” means the initial site characterization described in 329 IAC 9-5-5.1 and investigations described in 329 IAC 9-5-6 and may include, as necessary, quarterly monitoring and pilot studies to determine the feasibility of remediation alternatives. (*Underground Storage Tank Financial Assurance Board; 328 IAC 1-1-8.5*)

SECTION 11. 328 IAC 1-1-9 IS AMENDED TO READ AS FOLLOWS:

328 IAC 1-1-9 “Substantial compliance” defined

Authority: IC 13-23-8-1; IC 13-23-8-4.5; IC 13-23-8-5; IC 13-23-11-7

Affected: IC 13-23-8-4

Sec. 9. “Substantial compliance” means that, at the time a release was discovered, ~~the tank was registered under IC 13-7-20 and the owner or operator had taken affirmative steps to meet the requirements of the following underground petroleum storage tank laws:~~

~~(1) IC 13-7-20;~~

~~(2) Rules adopted under IC 7-20;~~

~~(3) 42 U.S.C. 6991 through 42 U.S.C. 6991i;~~

~~(4) Regulations adopted under 42 U.S.C. 6991 through 42 U.S.C. 6991i.~~

Proof of substantial compliance includes, but is not limited to, evidence of contractual agreements or other verifiable actions undertaken sufficiently in advance of a compliance date to provide a reasonable probability of meeting the terms of the statute or regulation. **comply with the requirements of IC 13-23-8-4.** (*Underground Storage Tank Financial Assurance Board; 328 IAC 1-1-9; filed Dec 4, 1992, 11:00 a.m.: 16 IR 1052; filed Nov 1, 1995, 8:30 a.m.: 19 IR 343; readopted filed Jan 10, 2001, 3:21 p.m.: 24 IR 1534*)

SECTION 12. 328 IAC 1-1-10 IS AMENDED TO READ AS FOLLOWS:

328 IAC 1-1-10 “Third party liability” defined

Authority: IC 13-23-8-1; IC 13-23-8-4.5; IC 13-23-8-5; IC 13-23-11-7

Affected: IC 13-23

Sec. 10. “Third party liability” is the damage a tank owner or operator is legally obligated to pay for injury, **expense, and damage** suffered by a third party as the result of a release. Third party liability includes ~~bodily~~ **personal** injury and property damage. **Third party liability does not include punitive or exemplary damages.** (*Underground Storage Tank Financial Assurance Board; 328 IAC 1-1-10; filed Dec 4, 1992, 11:00 a.m.: 16 IR 1052; readopted filed Jan 10, 2001, 3:21 p.m.: 24 IR 1534*)

SECTION 13. 328 IAC 1-2-1 IS AMENDED TO READ AS FOLLOWS:

328 IAC 1-2-1 Applicability

Authority: IC 13-23-8-1; IC 13-23-8-4.5; IC 13-23-8-5; IC 13-23-11-7

Affected: IC 13-23

Sec. 1. This article implements provisions of ~~IC 13-7-20~~ **IC 13-23** for the administration of the ~~underground petroleum storage tank excess liability~~ fund. This article establishes procedures by which ~~eligible owners or operators of underground petroleum storage tanks~~ **persons listed in 328 IAC 1-3-1** may apply to the ~~excess liability~~ fund for payment of corrective action costs and third party liability claims arising from petroleum releases. (*Underground Storage Tank Financial Assurance Board; 328 IAC 1-2-1; filed Dec 4, 1992, 11:00 a.m.: 16 IR 1052; readopted filed Jan 10, 2001, 3:21 p.m.: 24 IR 1534*)

SECTION 14. 328 IAC 1-2-2 IS AMENDED TO READ AS FOLLOWS:

328 IAC 1-2-2 Fund management

Authority: IC 13-23-8-1; IC 13-23-8-4.5; IC 13-23-8-5; IC 13-23-11-7

Affected: IC 13-23

Sec. 2. The ~~underground storage tank financial assurance board~~ **administrator of the fund** shall prepare an annual report ~~of fund administration to be delivered to the environmental policy commission~~ **financial assurance board** by September 1 of each year. The report shall include the following:

(1) A financial statement detailing information for the management and oversight of the fund, including facts concerning the amount of money currently in the fund, the amount of money obligated for corrective actions and third party liability claims, and estimates of future revenue for and demands on the fund.

(2) An overview of the fund claims process.

(3) A report of the number of claims made against the fund that were approved and denied during the reporting year.

(*Underground Storage Tank Financial Assurance Board; 328 IAC 1-2-2; filed Dec 4, 1992, 11:00 a.m.: 16 IR 1052; readopted filed Jan 10, 2001, 3:21 p.m.: 24 IR 1534*)

SECTION 15. 328 IAC 1-2-3 IS AMENDED TO READ AS FOLLOWS:

328 IAC 1-2-3 Obligation of monies

Authority: IC 13-23-8-1; IC 13-23-8-4.5; IC 13-23-8-5; IC 13-23-11-7

Affected: IC 13-23

Sec. 3. (a) ~~Monies shall be obligated from the fund based on the procedures listed under 328 IAC 1-4; however, not all claims on the priority list shall be paid each claims processing period. Claims shall be paid in the order of priority ranking as the department processes them. The department shall not forward claims for payment to the auditor of state more than sixty (60) days after the closing date for receiving claims as specified in 328 IAC 1-4. received unless the procedure set forth in 328 IAC 1-4-1 is applicable.~~

(b) At the beginning of each **state** fiscal year, the administrator shall obligate sufficient monies for administering the fund. This amount shall be approved by the financial assurance board. ~~and based upon a budget prepared in accordance with guidelines provided by the state budget agency. (Underground Storage Tank Financial Assurance Board; 328 IAC 1-2-3; filed Dec 4, 1992, 11:00 a.m.: 16 IR 1052; filed May 25, 1999, 4:31 p.m.: 22 IR 3103; readopted filed Jan 10, 2001, 3:21 p.m.: 24 IR 1534)~~

SECTION 16. 328 IAC 1-3-1 IS AMENDED TO READ AS FOLLOWS:

328 IAC 1-3-1 Fund access

Authority: IC 13-23-8-1; IC 13-23-8-4.5; IC 13-23-8-5; IC 13-23-11-7

Affected: IC 13-23-7

Sec. 1. (a) ~~Only eligible tank owners or operators~~ **The following persons** may apply to the fund for payment of expenditures arising from corrective action and for indemnification of third party liability:

(1) **Eligible tank owners and operators.**

(2) **Persons designated by eligible tank owners and operators.**

(3) **Subsequent owners of the property upon which tanks were located if the previous tank owner or operator was eligible.**

(b) ~~Corrective action costs and third party liability claims arising from releases reported or discovered before April 1, 1988, are not eligible for payment from the fund.~~

(c) ~~Corrective action costs and third party liability claims arising out of intentional or reckless acts of the owner or operator, or their agents and employees, are not eligible for payment from the fund. (Underground Storage Tank Financial Assurance Board; 328 IAC 1-3-1; filed Dec 4, 1992, 11:00 a.m.: 16 IR 1053; filed Jan 9, 1997, 4:00 p.m.: 20 IR 1103; readopted filed Jan 10, 2001, 3:21 p.m.: 24 IR 1534)~~

SECTION 17. 328 IAC 1-3-2 IS AMENDED TO READ AS FOLLOWS:

328 IAC 1-3-2 Fund coverage

Authority: IC 13-23-8-1; IC 13-23-8-4.5; IC 13-23-8-5; IC 13-23-11-7

Affected: IC 13-23-8-4; IC 13-23-9-3

Sec. 2. (a) Monies may be disbursed from the fund to ~~the eligible owner or operator persons listed in section 1 of this rule, for the following activities related to payment of corrective action costs in compliance with IC 13-23-8-4(a)(5) through IC 13-23-8-4(c) and IC 13-23-9-2(a) through IC 3-23-9-2(c). Site characterization costs may be disbursed from the fund to persons listed in section 1 of this rule prior to an approved or deemed approved CAP, if the work for which payment is sought is completed in accordance with 329 IAC 9 or the Risk Integrated System of Closure (RISC) standards.~~

(1) ~~Investigation and environmental assessment of sites contaminated by a release of petroleum.~~

(2) ~~The rehabilitation of sites contaminated by a release of petroleum including, but not limited to, the clean-up of affected soils and waters using methods approved by the department.~~

(3) ~~The temporary replacement and permanent restoration of potable water supplies.~~

(b) Monies may be disbursed to ~~owners or operators~~ **persons listed in section 1 of this rule** for payment of claims of liability to third parties ~~upon proper application to the administrator and approval of the claim by the attorney general. in compliance with IC~~

13-23-9-3.

(e) ~~Monies shall be placed in a reserve fund for the upgrade loan guaranty program established at IC 13-7-20-33.3. (Underground Storage Tank Financial Assurance Board; 328 IAC 1-3-2; filed Dec 4, 1992, 11:00 a.m.: 16 IR 1053; readopted filed Jan 10, 2001, 3:21 p.m.: 24 IR 1534)~~

SECTION 18. 328 IAC 1-3-3 IS AMENDED TO READ AS FOLLOWS:

328 IAC 1-3-3 Eligibility requirements

Authority: IC 13-23-8-1; IC 13-23-8-4.5; IC 13-23-8-5; IC 13-23-11-7

Affected: IC 6-8.1-10-1; IC 13-23-7; IC 13-23-8-4; IC 13-23-12

Sec. 3. (a) All **tank** owners or operators of underground storage tanks must do the following to be eligible for reimbursement from the fund:

(1) Meet the requirements set forth in ~~IC 13-23-8-4~~; **IC 13-23-8-4(a)(1) through IC 13-23-8-4(a)(4)**.

(2) In accordance with 329 IAC 9-4 and ~~327 IAC 2-6-2.1~~ **327 IAC 2-6.1** communicate a spill report to the department of environmental management.

(3) Current **tank** owners or operators who have failed to pay all tank fees that are due under IC 13-23-12-1 by the date that the fees are due shall be eligible for reimbursement from the fund in accordance with subsection (b) upon payment of all past due fees and interest.

(4) A person who acquires ownership in accordance with subsection (e) shall be eligible for reimbursement from the fund upon timely payment of all past due tank fees, interest, and penalties in accordance with subsection (h).

(b) ~~An A tank~~ **A tank** owner or operator who fails to pay all tank fees that are due under IC 13-23-12-1 by the date that the fees are due shall be eligible for reimbursement from the fund according to the following formula:

(1) Determine the number of payments that were owed under IC 13-23-12-1 on all regulated tanks at the facility from which a release occurred, beginning with the date that the fees for each tank first became due under IC 13-23-12 and continuing until the date on which the release occurred.

(2) Determine the number of payments actually made under IC 13-23-12-1 on all regulated tanks at the facility from which a release occurred, beginning with the date each tank became regulated under IC 13-23 and continuing until the date on which the release occurred. Divide the number of payments actually made by the number of payments due as determined in subdivision (1).

(3) Determine the amount of money ~~an owner or operator~~ **the person** would have received from the fund if all payments due on the date the release occurred had been paid when due, and multiply the amount by:

(A) the percentage determined in subdivision (2), if the percentage is fifty percent (50%) or more; or

(B) zero (0), if the percentage determined in subdivision (2) is less than fifty percent (50%).

(c) Payments that were made or could have been paid four (4) times per year under IC 13-23-12-3 count as one (1) payment for purposes of this section. Each payment made or due on each tank at a facility shall count as an additional payment for purposes of this section in figuring the total payments made or due.

(d) ~~An owner or operator~~ **Persons listed in 328 IAC 1-3-1** who ~~has~~ **have** had a claim denied for failure to register an underground petroleum storage tank from which a release has occurred or for failure to pay all registration fees that are due under IC 13-23-12-1 by the date the fees are due may resubmit the claim, regardless of whether the denial was appealed, under subsection (a). The resubmission must be in the form of a letter providing the facility identification number, the incident number, and, if an appeal was filed, a copy of a document indicating that the appeal was dismissed. The department has the option to settle any pending appeals **and resubmitted claims** based on the current regulations. ~~The settlement may be considered under 328 IAC 1-4-1 during the next available claims period.~~ **rules.**

(e) A person who acquires ownership or operation of an underground petroleum storage tank ~~after the expiration of P.L. 69-1996, SECTION 7 as a result of:~~ **under IC 13-23-8-4.5(2)**

(1) a bona fide, good faith transaction, negotiated at arm's length, between parties under separate ownership and control;

(2) a foreclosure or a deed transferred in lieu of a foreclosure;

(3) the exercising of the person's lien rights; or

(4) inheritance;

may become eligible for reimbursement from the fund by complying with subsection (f).

(f) A person described under subsection (e) may become eligible for reimbursement from the fund for any releases reported after the date that IDEM receives the "Intent to Acquire UST and Reinstate Eligibility" form by doing the following:

(1) Submitting an Excess Liability Trust Fund "Intent to Acquire UST and Reinstate Eligibility" form (Form) as prescribed by the commissioner at least sixty (60) days prior to acquiring ownership or operation of an UST. This form will be kept confidential up to the earlier of the following:

(A) The date of the transfer of the property.

(B) IDEM's receipt of the monies provided in subsection (g). ~~or~~

(C) For up to ninety (90) days after the projected date of closure listed in the Form.

The department will provide a listing of environmental penalties, interest due to the Excess Liability Trust Fund, and fees due, to the prospective purchaser and the property owner within forty-five (45) days of receipt of the Form.

(2) Paying all applicable tank fees, including past due fees, interest, and penalties for each tank not more than thirty (30) days after the transaction whereby the person acquires ownership or operation of each tank.

(3) The seller of the UST site is liable for any and all unpaid tank fees, interest, and penalties that are assessed by IDEM in accordance with subsection (g). Within thirty (30) days after the purchaser's acquisition of the UST identified in the Form, the purchaser is to collect all past due tank fees, interest, and penalties from the noncompliant seller and remit to IDEM the full amount of the assessment for the subject UST provided by IDEM in accordance with subsection (g). The timely remittance of these monies is a condition of fund eligibility for the purchaser.

(g) ~~An owner or operator~~ **Persons listed in section 1 of this rule and** described in subsection (e) who ~~fails fail~~ to pay tank fees when due ~~is are~~ subject to pay interest and penalties on those fees in order to become eligible for the fund under subsection (f). Interest and penalties due will include the following:

(1) Penalties and interest due the department of revenue.

(2) All past due underground storage tank fees under IC 13-23-12.

(3) An environmental penalty as specified in subsection (h)(2). This penalty will be distributed into the ~~Excess Liability Trust~~ fund and into the Petroleum Trust Fund in accordance with IC 13-23-12-7(b).

(4) Interest will be charged for the missed fee(s) at the percent per year based on subsection (h) and ~~IC 6-8-1-5-2; IC 6-8.1-10-1~~ until all fees due have been paid in full for each tank. This interest will be deposited into the ~~Excess Liability Trust~~ fund.

Payment of all fees, interest, and penalties due within thirty (30) days of the date of transfer of the subject property is a requirement for ~~Excess Liability~~ fund eligibility for the purchaser.

(h) In addition to all past due fees owed, the amount of interest and penalties owed by a particular owner or operator is to be determined by the following formula:

(1) Interest **as follows:**

Number of Delinquent Days × Daily Interest Rate = Interest Due

| Year | Annual Percentage | Daily Interest Rate |
|-----------------|-------------------|---------------------|
| 1990 | 10% | .000273 |
| 1991 | 10% | .000273 |
| 1992 | 8% | .000219 |
| 1993 | 8% | .000219 |
| 1994 | 7% | .000191 |
| 1995 | 6% | .000164 |
| 1996 | 5% | .000136 |
| 1997 | 7% | .000191 |

~~Other years~~² Interest will be calculated according to ~~IC 6-8-1-5-2; IC 6-8.1-10-1~~.

(2) Penalty **as follows:**

(A) For sites that were never registered, or sites for which no tank fees were paid when due, the penalty will be calculated at ~~forty dollars (\$50)~~ **two thousand dollars (\$2,000)** per petroleum underground storage tank ~~per day; for each year the fee was due.~~

(B) For all other sites, the penalty will be calculated at ~~ten one thousand dollars (\$10)~~ **(\$1,000)** per petroleum underground storage tank ~~per day; for each year the fee was due.~~

(C) The penalty will be assessed from the day that the tank fee was due, until the day that the fee was paid, for each occurrence of late fee payment. Separate incidents of late or incomplete tank fee payments will be cumulative.

*Copies of the Code of Federal Regulations (CFR) referenced may be obtained from the Government Printing Office, Washington, D.C. 20402 or the Indiana Department of Environmental Management, Indiana Government Center-North, 100 North Senate Avenue, Indianapolis, Indiana 46204. Copies of the Indiana Department of Environmental Management Underground Storage Tank Manual

(1994) may be inspected and purchased from the Department of Environmental Management, Office of Environmental Response, Western Select Properties, 2525 North Shadeland Avenue, Indianapolis, Indiana. (*Underground Storage Tank Financial Assurance Board; 328 IAC 1-3-3; filed Dec 4, 1992, 11:00 a.m.: 16 IR 1053; filed Jan 9, 1997, 4:00 p.m.: 20 IR 1104; errata, 20 IR 1593; readopted filed Jan 10, 2001, 3:21 p.m.: 24 IR 1534*)

SECTION 19. 328 IAC 1-3-4 IS AMENDED TO READ AS FOLLOWS:

328 IAC 1-3-4 Amount of coverage

Authority: IC 13-23-8-1; IC 13-23-8-4.5; IC 13-23-8-5; IC 13-23-11-7

Affected: IC 13-23

Sec. 4. (a) The fund may pay for costs incurred by ~~an owner or operator~~ **persons listed in section 1 of this rule**, for corrective action and third party liability as specified in ~~IC 13-7-20-33(a)~~: **IC 13-23-8-1.**

(b) Regardless of the number of eligible ~~owners or operators~~ **persons listed in section 1 of this rule** at one (1) site, no more than one million dollars (\$1,000,000) less the applicable deductible amount may be applied to the costs, including third party liability claims, associated with a single occurrence. (*Underground Storage Tank Financial Assurance Board; 328 IAC 1-3-4; filed Dec 4, 1992, 11:00 a.m.: 16 IR 1054; readopted filed Jan 10, 2001, 3:21 p.m.: 24 IR 1534*)

SECTION 20. 328 IAC 1-3-5 IS AMENDED TO READ AS FOLLOWS:

328 IAC 1-3-5 Reimbursable expenditures

Authority: IC 13-23-8-1; IC 13-23-8-4.5; IC 13-23-8-5; IC 13-23-11-7

Affected: IC 13-23-3-2

Sec. 5. (a) ~~A tank owner or operator~~ **Persons listed in section 1 of this rule** may seek payment from the fund for the following costs related to necessary costs actually incurred in the performance of corrective action:

- (1) Investigation, which includes research, field time, report writing, and clerical support.
- (2) Travel, lodging, and per diem. These costs will be paid in accordance with the most current Indiana department of administration financial management circular covering state travel policies and procedures.
- (3) ~~An owner or operator~~ **Persons listed in section 1 of this rule** may employ a certified contractor under IC 13-23-3-2 or may use the owner's or operator's personnel to perform all or part of a corrective action. ~~If applicable, personnel working on-site must be trained in accordance with the requirements in 29 CFR 1910.120*.~~
- (4) Soil and water sampling for petroleum and petroleum constituents shall be performed in accordance with ~~department guidelines.~~ **with 329 IAC 9 or the Risk Integrated System of Closure (RISC) standards.**
- (5) Expenditures for machinery and equipment must be prorated based on the normal expected life of the item and the length of time the item was used for a single corrective action. In no event will the fund pay for purchases of machinery and equipment in excess of the market cost of leasing the item for a corrective action. Examples of equipment charges which can be made to the fund are disposable bailers and sample bottles.
- (6) ~~An owner or operator~~ **Persons listed in section 1 of this rule** may be reimbursed for expenditures for materials and supplies, such as disposable protective equipment, building materials (piping, cement), and preservatives.
- (7) Attorney fees, not to exceed ~~ten~~ **fifteen** percent (~~10%~~) (**15%**) of the total claim or ~~twenty~~ **thirty** thousand dollars (~~\$20,000~~); (**\$30,000**), whichever is less, shall only be payable if incurred by the owner or operator in defense of litigation in a third party liability claim.
- (8) Governmental administrative fees for local, state, or federal permits necessary for corrective action.
- (9) Provision of alternate water supply. This cost must have been previously approved by the department.
- (10) Any other **reasonable** costs the department finds to be ~~reasonable and~~ necessary for corrective action or payment of a third party liability claim.
- (11) **Costs associated with transitioning a site to RISC will be paid if these costs would be less than the costs to complete the remediation under 329 IAC 9.**
- (12) **Mark-up of no more than fifteen percent (15%) will be reimbursed on all eligible costs except for the following:**
 - (A) **Travel costs, including mileage, per diem, and lodging.**
 - (B) **Personnel costs.**
 - (C) **Utilities for temporary facilities.**
 - (D) **Governmental administrative fees for local, state, or federal permits.**

(E) Equipment and supplies not purchased or rented specifically for use at a facility or that are not part of the approved remedial technology.

(b) The following expenditures are ineligible for reimbursement from the fund:

- (1) Costs incurred before April 1, 1988.
- (2) Costs of repair, upgrading, or replacement of an underground petroleum storage tank or its associated equipment.
- (3) Costs of environmental investigation and remediation not directly related to a release from a qualifying underground storage tank. Ineligible costs include the cost of testing for nonpetroleum contamination and the cost of vapor or ground water monitoring devices that are not associated with corrective action.
- (4) The cost of equipment purchases other than those expenditures routinely required to implement a corrective action plan. Examples of equipment purchases ~~which that~~ cannot be charged to a specific site include drilling rigs, earth moving equipment, photoionization detectors, explosimeters, and hand tools.
- (5) The cost of cosmetic improvements, including the repair or replacement of blacktop or concrete, unless directly associated with corrective action.
- (6) Lost income or reduced property values, unless part of a third party liability claim.
- (7) Interest or finance charges.
- (8) Contractor costs not directly related to corrective action activities, such as preparing cost estimates.
- (9) Fines or penalties imposed by local, state, or federal governmental agencies.
- (10) Punitive or exemplary damages.
- (11) Any costs for remediation of contamination not shown to be above the concentrations listed in the Indiana Department of Environmental Management Underground Storage Tank Guidance Manual (1994), ~~Eust Site Cleanup Objectives*~~ **329 IAC 9, and the RISC standards.**
- (12) Any costs related to the excavation and disposal of more than one thousand (1,000) cubic yards of soil, unless:
 - (A) alternative remediation techniques have been considered;
 - (B) excavation and disposal was shown to be the most cost effective remediation option; and
 - (C) the soil removal is part of a ~~Corrective Action Plan CAP~~ approved or deemed approved by the commissioner.
- (13) Any other cost not directly related to corrective action or third party liability or otherwise determined not to be reimbursable under this rule as a result of a financial or technical review.

(c) Appropriate expenditures which may be considered for reimbursement are set forth in the following reimbursable expenditure chart:

| Activity | Cost Range or Amount |
|---|---------------------------------------|
| SITE INVESTIGATION | |
| Mobilization and demobilization within a 50 mile radius. This includes the cost of moving general contractor owned equipment, set-up, and removing equipment. | Maximum \$200 \$300 |
| Soil borings | |
| Number of feet in incremental amounts | |
| Less than 16 feet | \$20 per foot |
| 16 through less than 26 feet | \$25 per foot |
| 26 feet or more | \$30 per foot |
| Decontamination and equipment cleaning | \$10 per each 5 feet of boring |
| Cutting holes in concrete or asphalt (12 inches in diameter) | \$90 per hole |
| Monitoring wells | |
| Installation, which includes including labor for completing soil boring as a monitoring well, surveying, and well development. Add to the cost of soil borings and materials. | \$175 per well |
| Materials | |
| Well casing and screen (including riser) filter pack, annular and surface seal: | |
| 2 inch well | \$10 per foot |
| 4 inch well | \$12 per foot |
| 6 inch well | \$15 per foot |

| | |
|---|--|
| Flush-grade well covers | \$75 per cover |
| Sampling, which includes including on-site labor for site preparation, decontamination, sampling, and the cost for dispensable equipment such as ropes and plastic sheeting. Lab analyses, reports, mileage, per diem, and travel time are separate. | |
| Bail and sample | \$50 per well |
| Check and record water | Add \$5 per well |
| Laboratory services, which includes including containers, packaging, and postage. | |
| Soil analysis | |
| TPH -8015 | \$125 \$75 per sample |
| TPH-G only | \$105 per sample |
| TPH-F0 only | \$150 per sample |
| TPH-418.1 | \$75 per sample |
| VOC -8260 | \$250 \$200 per sample |
| SVOC - 8270 | \$185 per sample |
| PAH -8310 | \$485 \$185 per sample |
| PCB -8080 | \$125 \$110 per sample |
| Metals -(13) | \$150 \$170 per sample |
| BTEX/MTBE-8020/8021 | \$75 per sample |
| BTEX/MTBE-8260 | \$200 per sample |
| Water analysis | |
| TPH -8015 | \$125 \$75 per sample |
| VOC -8260 | \$250 \$200 per sample |
| BTEX/MTBE -8020/8021 | \$125 \$75 per sample |
| BTEX/MTBE-8260 | \$200 per sample |
| SVOC -8270 | \$485 \$275 per sample |
| PAH -8310 | \$185 per sample |
| Metals -(13) | \$125 \$170 per sample |
| Monitored natural attenuation parameters | |
| Nitrates | \$15 per sample |
| Nitrites | \$15 per sample |
| Sulfate | \$15 per sample |
| Dissolved methane | \$50 per sample |
| *RISC will require DQO-Level IV, including raw data, internal chain of custody, and QA/QC. | 20% markup allowed per sample |
| Personnel costs which include costs for report preparation, analysis, and field work. Personnel costs must be documented. When submitting a claim for reimbursement, the claimant shall be required to give the personnel classification, task being performed, and the name of the individual performing the task. Rates will be paid based on the task performed by an employee rather than the qualifications of the employee. Refer to subsection (d) for task descriptions for personnel classifications. | |
| Principal | \$110 per hour |
| Senior project manager geologist, engineer, hydrogeologist | \$90 \$102 per hour |
| Project manager | \$73 \$83 per hour |
| Staff project person | \$60 \$70 per hour |
| Senior technician | \$50 \$55 per hour |

| | |
|--|---|
| Technician | \$34 \$38 per hour |
| Drafting person | \$31 \$35 per hour |
| Word processor/processor/clerical | \$24 \$28 per hour |
| Other clerical support | \$20 per hour |
| Toxicologist | \$125 per hour |
| Travel and per diem | |
| Mileage | current federal rate |
| Travel accommodations. Luxury and resort accommodations not reimbursable. | \$0.25 \$79 per mile day/ plus tax |
| Per diem Luxury and resort accommodations not reimbursable. | \$24 \$26 per day (must include overnight stay and supporting documentation) |

INITIAL ABATEMENT AND FREE PRODUCT REMOVAL

Except where provided in this rule, approval of costs will be on a case-by-case basis.

Air monitoring \$50 per day

SITE SET-UP PREPARATION

Trailer rental \$300 per month (\$10 per day)

Portable toilet \$150 per month (\$5 per day)

Utility check, the date and time of the utility check must be documented. \$200 flat amount

Utilities for temporary facilities

Temporary power \$500 per month (\$16.67 per day)

Temporary water \$150 per month (\$5 per day)

Temporary phone \$200 per month (\$6.67 per day)

DEMOLITION

Concrete and asphalt removal

Saw concrete, prices are per linear foot

| | 4 inch <u>concrete</u> | 6 inch <u>concrete</u> |
|------------------------|--|--|
| Under 200 feet | \$1.20 \$1.60 per foot | \$1.78 \$2.00 per foot |
| 200 through 400 feet | \$1.10 \$1.40 per foot | \$1.63 \$1.81 per foot |
| 400 through 600 feet | \$1.06 \$1.33 per foot | \$1.53 \$1.70 per foot |
| 600 through 1,000 feet | \$0.96 \$1.20 per foot | \$1.49 \$1.66 per foot |
| Over 1,000 feet | \$0.86 \$1.08 per foot | \$1.44 \$1.60 per foot |

Saw asphalt, prices are per linear foot

| | 3 inch <u>asphalt</u> | 4 inch <u>asphalt</u> | 6 inch <u>asphalt</u> |
|------------------------|--|--|--|
| Under 450 feet | \$0.34 \$1.75 per foot | \$0.44 \$1.90 per foot | \$0.55 \$3.00 per foot |
| 450 through 600 feet | \$0.34 \$1.50 per foot | \$0.42 \$1.75 per foot | \$0.63 \$2.75 per foot |
| 600 through 1,000 feet | \$0.29 \$1.35 per foot | \$0.39 \$1.50 per foot | \$0.60 \$2.25 per foot |
| Over 1,000 feet | \$0.27 \$1.25 per foot | \$0.34 \$1.35 per foot | \$0.58 \$2.00 per foot |

Concrete removal, ~~which includes~~ **including** the cost of loading and hauling to a legal landfill within 6 miles, but does not include landfill fees

| | |
|--------------------------------|---|
| 4 inch concrete | \$1.86 \$3.00 per square yard ton |
| 6 inch concrete | \$3.58 \$5.77 per square yard ton |
| 7 inch through 9 inch concrete | \$9.08 \$17.47 per square yard ton |
| 10 inch and over | \$28.92 \$43.96 per square yard ton |
| With rebar | Add 15% |
| For less than 500 square feet | Add 35% |
| Concrete curb | \$5.04 per linear foot |

Asphalt removal, ~~which includes~~ **including** the cost of loading and hauling to a legal landfill within 6 miles, but does not include landfill fees

| | |
|--------------------------------|---|
| Removal asphalt pad (3 inches) | \$0.16 \$0.25 per square foot |
| Removal asphalt curb | \$1.41 per linear foot |
| For less than 500 square feet | Add 35% |

EXCAVATION

| | |
|---------------------------|---------------------------------------|
| Equipment costs and labor | \$2.22 per cubic yard ton |
| Mobilization | Maximum \$200 \$300 |

Supplies, for example, visqueen, receipts must be included.

| | |
|--------------------------|---------------------------|
| Stockpiling soil on-site | \$1.34 per cubic yard ton |
|--------------------------|---------------------------|

Tank removal, decommissioning, cutting, and disposal are not eligible for reimbursement unless necessary as part of corrective action.

Costs for pumping, testing, and disposal of tank contents are not eligible for reimbursement

| | |
|------------------------------|------------------|
| Under 1,000 gallons | \$1,000 per tank |
| 1,000 through 4,999 gallons | \$1,500 per tank |
| 5,000 through 10,000 gallons | \$2,000 per tank |
| Above 10,000 gallons | \$2,500 per tank |

TRANSPORTATION

| | |
|-------------------------------------|---|
| Loading | \$1.34 per cubic yard ton |
| Hauling, mileage must be documented | \$7.32 \$0.37 per cubic yard ton for each 20 miles mile |

DISPOSAL OF SOIL, GROUND WATER, AND TRASH

Landfill fees
 Sampling required by landfill. Must include receipts and analytical results from local municipality.
 Sanitary sewer, if approved for disposal of treated ground water. Must include receipts.

Contaminated or disposable equipment and decon fluids.

Landfill reimbursement will be based on the least expensive combination of documented transportation costs and documented disposal costs at a permitted landfill certified to accept special waste.

| | |
|-------|-------------------------|
| Trash | \$15 per cubic yard ton |
|-------|-------------------------|

APPROVED TECHNOLOGIES

Reimbursement for corrective action costs will be reimbursed on the basis of the lowest of 3 competitive bids on the work specified in the corrective action plan that is approved or deemed approved by the department.

Lease or rental on equipment will not be reimbursed above the purchase price.

SITE RESTORATION

| | |
|---|---|
| Backfill hauling | \$2.22 \$0.37 per cubic yard ton for each mile |
| Backfill material | \$10 \$10.00 per cubic yard ton/stone \$6.50 per ton/soil |
| Backfill placement, compaction, and density verification | \$4.00 per ton |

| | |
|---|--|
| Resurfacing | |
| 4 inch concrete | \$2.41 \$3.25 per square foot |
| For each additional inch of concrete | Add \$0.23 \$0.40 per square foot |
| For rebar | Add 15% |
| Asphalt pad, 4 inch thickness | \$6.60 \$2.15 per square yard foot |
| Asphalt curb and gutter | \$3.95 \$4.75 per linear foot |

| | |
|---------------------------------------|--------------------------------------|
| Island forms | |
| 4 feet by 10 feet with 2 foot bumpers | \$485 \$725 each |
| 4 feet by 16 feet with 2 foot bumpers | \$675 \$1,100 each |

*Copies of the Indiana Department of Environment Management Underground Storage Tank Manual (1994) may be inspected and purchased from the Department of Environmental Management, Office of Environmental Response, Western Select Properties, 2525 North Shadeland Avenue, Indianapolis, Indiana.

| | |
|---|--------------|
| Equipment rental (based on daily rate) | |
| Decon equipment (bucket, brushes, detergent) | \$10 |
| Power auger | \$50 |
| Hand auger sampling kit (hand auger/ brass sleeves) | \$35 |
| Slide hammer core sampler | \$35 |
| Photoionization detector | \$75 |
| Flame ionization detector | \$95 |
| LEL/O2 meter | \$50 |
| pH and conductivity meter | \$20 |
| Dissolved oxygen meter | \$30 |
| 2" submersible pump | \$115 |
| 4" submersible pump | \$95 |
| Steam cleaner/pressure washer | \$75 |
| Water level indicator | \$12 |
| Oil/water interface probe | \$55 |
| Bailer rental | \$15 |
| Anemometer | \$35 |
| Carbon dioxide meter | \$25 |
| Portable generator, generator ≤ 5kW | \$50 |
| Portable generator, generator > 5kW | \$90 |

(d) The following categories describe the personnel classification activity descriptions:

(1) Principal will do the following:

- (A) Supervise professional staff.
- (B) Serve as technical expert on sites.
- (C) Provide final review of project documents.
- (D) Limit site visits on projects.
- (E) Handle legal matters.
- (F) Coordinate with attorneys.

(2) Senior project manager (includes professional geologist, engineer, and hydrogeologist) will provide the following:

- (A) Project management/oversight.
- (B) Technical document preparation/review.
- (C) Coordination with agency, client, and contractors.
- (D) Hydrogeologic and contaminate modeling.
- (E) Supervision of investigation/remediation activities.

- (F) Site access/permitting.
- (3) Project manager will provide the following:
 - (A) Remediation work plan preparation (CAP, ISC, FSI, pilot study).
 - (B) Site work preparation and planning.
 - (C) Supervision of remediation activities.
 - (D) Oversight of waste characterization, transportation, and disposal.
 - (E) RISC statistics and equations.
 - (F) Coordination of subcontractor work (drillers, plumbers, and electricians).
 - (G) Coordination of heavy equipment mobilization.
- (4) Staff project person will do the following:
 - (A) Implement remediation system installation, operation, and maintenance.
 - (B) Conduct site mapping.
 - (C) Assist with waste characterization, transportation, and disposal.
 - (D) Oversee installation of soil borings and monitoring wells.
 - (E) Provide on-site supervision and/or perform site characterization and remediation activities.
 - (F) Oversee well water records searches.
 - (G) Define site utilities marked.
 - (H) Survey wells.
 - (I) Oversee free product removal.
 - (J) Conduct quarterly sampling.
 - (K) Provide drilling/sampling support.
- (5) Senior technician will oversee the following:
 - (A) Activities associated with operation and maintenance of remediation system.
 - (B) Equipment installation.
- (6) Field technician will oversee the following:
 - (A) Well purging and development.
 - (B) Sample collection.
 - (C) Drum labeling/disposal.
 - (D) Decontamination/site clean-up tasks.
 - (E) Sample prep and delivery.
- (7) Drafting person will do the following:
 - (A) Provide CADD work.
 - (B) Generate drawings, maps and plans, boring logs, and monitoring well installation logs.
 - (C) Revise drawings and maps and plans.
- (8) Word processor/clerical will provide the following:
 - (A) Word processing/data input.
 - (B) General clerical duties.
 - (C) Documentation reproduction, report binding, and filing.
 - (D) Proofreading/editing.
- (9) Toxicologist will provide guidance for nondefault risk-based closures utilizing nondefault toxicological parameters.

(Underground Storage Tank Financial Assurance Board; 328 IAC 1-3-5; filed Dec 4, 1992, 11:00 a.m.: 16 IR 1054; filed Nov 1, 1995, 8:30 a.m.: 19 IR 343; filed Jan 9, 1997, 4:00 p.m.: 20 IR 1105; readopted filed Jan 10, 2001, 3:21 p.m.: 24 IR 1534)

SECTION 21. 328 IAC 1-3-6 IS AMENDED TO READ AS FOLLOWS:

328 IAC 1-3-6 Limitation of liability

Authority: IC 13-23-8-1; IC 13-23-8-4.5; IC 13-23-8-5; IC 13-23-11-7

Affected: IC 13-23

Sec. 6. The application for or receipt of payment for corrective action does not limit the legal responsibility of a ~~tank owner or operator~~ **persons listed in section 1 of this rule** for damages incurred by another person as a result of a release. *(Underground Storage Tank Financial Assurance Board; 328 IAC 1-3-6; filed Dec 4, 1992, 11:00 a.m.: 16 IR 1055; readopted filed Jan 10, 2001, 3:21 p.m.: 24 IR 1534)*

SECTION 22. 328 IAC 1-4-1 IS AMENDED TO READ AS FOLLOWS:

328 IAC 1-4-1 General procedure

Authority: IC 13-23-8-1; IC 13-23-8-4.5; IC 13-23-8-5; IC 13-23-11-7

Affected: IC 13-23

Sec. 1. (a) **The procedure set forth in this rule shall be followed in the event the unencumbered balance of funds in the fund falls below twenty-five million dollars (\$25,000,000) or by the discretion of the administrator.**

(a) (b) Each qualifying claim shall be assigned a priority score based on a ranking system designed to address the following:
 (1) Initial prioritization of all claims shall be based on the degree of environmental threat existing at the time the occurrence was discovered. The administrator shall assign a priority score upon evaluation of the following technical criteria (listed in descending order, from highest priority to lowest priority, clause (A) having the highest priority):

- (A) Impacts to public and private water supply.
- (B) Type of petroleum.
- (C) Health standards and explosivity hazard.
- (D) Corrective action taken.
- (E) Number of gallons released.
- (F) Degree of access to contaminated soil.
- (G) Designated use of surface water.
- (H) Site geology and hydrology.

(2) For purposes of scoring claims resulting from occurrences before the effective date of this article, and after March 31, 1988, the administrator shall give additional consideration for when the corrective action was taken.
 (3) Scoring of claims shall be determined by application of the following site assessment model:

Site Assessment Scoring Model for Prioritization of Claims

| Criteria | Value |
|--|--|
| Site assessment information. | |
| Public drinking water supply or well within 1 mile: | |
| Is contamination present in drinking water? | YES 15 |
| | NO 1 |
| Number of wells within 1 mile | |
| | 1 1 |
| | 2 through 3 2 |
| | 4 through 6 3 |
| | 6 or more 4 |
| | Public water total _____ times 24 equals _____ |
| Private drinking water supply or well within 1 mile: | |
| Is contamination present in drinking water? | YES 15 |
| | NO 0 |
| Number of wells within 1 mile | |
| | 1 through 10 1 |
| | 11 through 25 2 |
| | 26 through 100 3 |
| | greater than 100 4 |
| | Private drinking water total _____ times 12 equals _____ |
| Type of petroleum | |
| Mixed products or waste oil | 15 |
| Leaded gasoline | 13 |
| Gasoline | 12 |
| Jet fuels | 10 |
| Diesel fuels | 9 |
| Heating fuels | 8 |
| Kerosene fuels | 7 |
| Crude oil | 5 |
| Other | — |
| | Type of petroleum total _____ times 10 equals _____ |

| | |
|--|--|
| Health standards and explosivity hazards | |
| Contamination phase | |
| Vapors present at the time release discovered | 10 |
| Free product present at the time the release was discovered | 7 |
| Surface contamination present at the time the release was discovered | 5 |
| Structures affected | |
| Residential housing | 7 |
| Municipal, commercial, or industrial | 5 |
| Utility lines or trenches | 1 |
| Area designation | |
| Large municipality or urban area | 7 |
| Small municipality or suburban area | 5 |
| Rural, agricultural, or livestock area | 1 |
| | Health standards total _____ times 6 equals _____ |
| Corrective action taken | |
| Corrective action complete | 5 |
| Corrective action over 50% complete | 5 |
| Corrective action initiated | 5 |
| Corrective action approved by IDEM | 5 |
| Site characterization complete | 5 |
| Release response measures complete | 5 |
| | Corrective action total _____ times 4 equals _____ |
| Number of gallons released | |
| Over 12,000 | 10 |
| 5,000 through 11,999 | 8 |
| 2,000 through 4,999 | 6 |
| 500 through 1,999 | 4 |
| 100 through 500 | 2 |
| Under 100 | 1 |
| | Number of gallons released total _____ times 5 equals _____ |
| Degree of access to contaminated soil | |
| Contamination access | |
| Surface (0 to 2 feet below surface) | 10 |
| Subsurface (over 2 feet below surface) | 5 |
| | Access total _____ times 4 equals _____ |
| Designated use of surface water | |
| Surface waters within ½ mile | |
| Lake or river | 3 |
| Swamp or wetlands | 3 |
| Pond or canal | 2 |
| Stream, creek, or active drainage ditch | 1 |
| Distance to surface waters | |
| Under 500 feet | 3 |
| 500 feet to ¼ mile | 2 |
| Over ¼ mile | 1 |
| Designated use of surface water | |
| Drinking water | 4 |
| Recreational or full body human contact | 3 |
| Aquatic, wildlife, or partial human contact | 3 |
| Agriculture or livestock | 2 |
| | Designated use of surface water total _____ times 4 equals _____ |
| Site geology and hydrogeology | |
| Soil type | |
| Sand | 4 |
| Clay | 1 |

| | | |
|---|--|---|
| Depth to water table in feet | | |
| 0 through 10 | | 4 |
| 11 through 20 | | 3 |
| 21 through 40 | | 2 |
| Over 40 | | 1 |
| Unusual geologic factors, for example, fractured bedrock, sand or gravel veins, perched aquifers, or geological outcroppings | YES | 5 |
| | NO | 0 |
| | Site geology and hydrogeology total ___ times 3 equals ___ | |

(b) (c) To assure the efficient administration of the fund, the administrator may reclassify a claim at any time that it is determined a claim has been incorrectly ranked.

(e) (d) Placement of a claim on a priority list does not constitute a commitment to reimburse corrective action or third party liability costs. *(Underground Storage Tank Financial Assurance Board; 328 IAC 1-4-1; filed Dec 4, 1992, 11:00 a.m.: 16 IR 1055; filed Nov 1, 1995, 8:30 a.m.: 19 IR 347; readopted filed Jan 10, 2001, 3:21 p.m.: 24 IR 1534)*

SECTION 23. 328 IAC 1-5-1 IS AMENDED TO READ AS FOLLOWS:

328 IAC 1-5-1 Applications for payment of corrective action
Authority: IC 13-23-8-1; IC 13-23-8-4.5; IC 13-23-8-5; IC 13-23-11-7
Affected: IC 13-23

Sec. 1. (a) Claim applications for reimbursement of corrective action costs shall be submitted on forms adopted by the administrator. Claimants shall itemize all charges as required by the application package. Documentation of expenses as required by the administrator must be submitted as part of the application.

(b) The application shall contain the following statement, which shall be signed and attested by the ~~owner or operator~~ **person applying to the fund**:
 "I swear or affirm to the best of my knowledge and belief that the costs presented herein represent the actual costs incurred in the performance of corrective action related to this site during the period of time indicated on this application. I also swear or affirm that all charges presented as part of this application were necessary to the performance of corrective action."

(c) Two (2) copies of all documents required by the administrator shall be submitted by the ~~owner or operator~~ **person applying to the fund** to support the application. Original documents must be kept by the ~~owner or operator~~ **person applying to the fund** for a minimum of four (4) years after the date the application for payment was submitted, or four (4) years after completion of corrective action, whichever is later.

- (d) **A single claim application may not be submitted to the fund for reimbursement in an amount less than the following:**
- (1) **Initial claim, the deductible amount applicable to the incident number.**
 - (2) **Subsequent claims, five thousand dollars (\$5,000) unless the claim is:**
 - (A) **the final application for that incident;**
 - (B) **for a third party liability claim; or**
 - (C) **for costs incurred over a period of six (6) months or longer.**
 - (3) **Persons applying to the fund may resubmit claims in any amount if the costs were disallowed for lack of back-up documentation.**

Persons applying to the fund shall identify the final application as such. *(Underground Storage Tank Financial Assurance Board; 328 IAC 1-5-1; filed Dec 4, 1992, 11:00 a.m.: 16 IR 1056; filed Nov 1, 1995, 8:30 a.m.: 19 IR 349; readopted filed Jan 10, 2001, 3:21 p.m.: 24 IR 1534)*

SECTION 24. 328 IAC 1-5-2 IS AMENDED TO READ AS FOLLOWS:

328 IAC 1-5-2 Fund payment procedures for corrective action
Authority: IC 13-23-8-1; IC 13-23-8-4.5; IC 13-23-8-5; IC 13-23-11-7

Affected: IC 13-23-9-2

Sec. 2. (a) Contingent on the availability of monies as determined by 328 IAC 1-2-3, the administrator shall authorize payment upon determining that the requirements of IC 13-23-9-2 have been met.

(b) Processing and payment of claims are contingent upon the availability of monies.

(c) When ~~an owner or operator~~ **a person applying to the fund** submits an application under section 1 of this rule, which includes expenses for which ~~the owner or operator~~ **that person** has not made payment, then payment shall be made by check jointly to the ~~eligible owner or operator~~ **person applying to the fund** and the contractor.

(d) When ~~an eligible owner or operator~~ **a person applying to the fund** submits documentation verifying that ~~the owner or operator~~ **that person** has paid for costs of corrective action, payment shall be made by check directly to ~~the eligible owner or operator~~ **that person**.

(e) ~~An eligible owner or operator~~ **A person who may apply to the fund under 328 IAC 1-3-1** may seek preapproval of ~~costs related a site's eligibility to have~~ corrective action costs reimbursed from the ~~department~~ **fund**. (*Underground Storage Tank Financial Assurance Board; 328 IAC 1-5-2; filed Dec 4, 1992, 11:00 a.m.: 16 IR 1056; filed May 25, 1999, 4:31 p.m.: 22 IR 3103; readopted filed Jan 10, 2001, 3:21 p.m.: 24 IR 1534*)

SECTION 25. 328 IAC 1-5-3 IS ADDED TO READ AS FOLLOWS:

328 IAC 1-5-3 Deemed approved; reimbursement of costs

Authority: IC 13-23-8-1; IC 13-23-8-4.5; IC 13-23-8-5; IC 13-23-11-7

Affected: IC 13-23-8-4

Sec. 3. "Deemed approved", under IC 13-23-8-4, means that the department shall consider the CAP approved solely for purposes of reimbursement of reasonable costs from the fund. A CAP having been deemed approved shall, in no way, relieve the person applying to the fund of the obligation to comply with all applicable rules or department standards. (*Underground Storage Tank Financial Assurance Board; 328 IAC 1-5-3*)

SECTION 26. 328 IAC 1-6-1 IS AMENDED TO READ AS FOLLOWS:

328 IAC 1-6-1 Applications for payment of third party liability claims

Authority: IC 13-23-8-1; IC 13-23-8-4.5; IC 13-23-8-5; IC 13-23-11-7

Affected: IC 13-23-8-3

Sec. 1. (a) Applications for reimbursement of third party liability claims against owners or operators shall be submitted on approved forms established by the department. The claimant must attach either a certified copy of a legally enforceable final judgment against the owner or operator or a reasonable settlement between the owner or operator and the third party.

(b) The owner or operator must submit proof of payment of the deductible amount under ~~IC 13-7-20-33(c)~~ **IC 13-23-8-3**.

(c) When submitting an application to the administrator under subsection (a), the owner or operator must also forward a copy of the request to the attorney general. (*Underground Storage Tank Financial Assurance Board; 328 IAC 1-6-1; filed Dec 4, 1992, 11:00 a.m.: 16 IR 1057; readopted filed Jan 10, 2001, 3:21 p.m.: 24 IR 1534*)

SECTION 27. 328 IAC 1-6-2 IS AMENDED TO READ AS FOLLOWS:

328 IAC 1-6-2 Fund payment procedures for third party liability

Authority: IC 13-23-8-1; IC 13-23-8-4.5; IC 13-23-8-5; IC 13-23-11-7

Affected: IC 13-23-9-3

Sec. 2. (a) If the attorney general determines that the requirements under ~~IC 13-7-20-38~~ **IC 13-23-9-3** have been met, the attorney general shall approve a request for indemnification of a third party not later than sixty (60) days after receiving the request:

- (1) if sufficient monies exist after other obligations have been met under 328 IAC 1-2-3;
- (2) based upon priority ranking of the site under 328 IAC 1-4; and
- (3) if the administrator determines that the owner or operator is in compliance with the requirements of ~~IC 13-7-20~~ **IC 13-23** and rules adopted thereunder.

(b) When an owner or operator submits an acceptable application for indemnification of a third party but the claim has not already been paid by the owner or operator, then payment shall be made jointly by check to the eligible owner or operator and the third party.

(c) When an eligible owner or operator submits an acceptable application for indemnification of a third party along with documentation verifying that the owner or operator has paid the third party liability claim, payment shall be made directly to the eligible owner or operator.

(d) Third party liability claims subject to review by the attorney general shall include the reasonable costs associated with obtaining necessary:

- (1) access to properties not controlled by the claimant; and**
- (2) institutional controls, including, but not limited to, deed restrictions required by Risk Integrated System of Closure (RISC).**

(Underground Storage Tank Financial Assurance Board; 328 IAC 1-6-2; filed Dec 4, 1992, 11:00 a.m.: 16 IR 1057; readopted filed Jan 10, 2001, 3:21 p.m.: 24 IR 1534)

SECTION 28. 328 IAC 1-7-1 IS AMENDED TO READ AS FOLLOWS:

328 IAC 1-7-1 Financial assurance certificate

Authority: IC 13-23-8-1; IC 13-23-8-4.5; IC 13-23-8-5; IC 13-23-11-7

Affected: IC 13-23

Sec. 1. (a) In accordance with 40 CFR 280.101, the department shall issue a certificate of financial assurance **upon request** to each eligible tank owner or operator, as defined in 328 IAC 1-3-3, within sixty (60) days after the effective date of this rule. Under ~~40 CFR 281.37; IC 13-23 and the rules promulgated thereunder~~, this state issued certificate shall fulfill the federal financial assurance requirements.

(b) The certificate of financial assurance shall contain the following information:

- (1) Facility name and address.
- (2) Facility identification number issued by the department.
- (3) Amount of funds for corrective action and compensating third parties that is assured by the fund.

(c) The owner or operator shall maintain the certificate of financial assurance ~~at the underground storage tank site or the owner's or operator's place of business. Records maintained off-site must be made available immediately upon request of the department.~~ **in compliance with 329 IAC 9-8-21.** *(Underground Storage Tank Financial Assurance Board; 328 IAC 1-7-1; filed Dec 4, 1992, 11:00 a.m.: 16 IR 1055; readopted filed Jan 10, 2001, 3:21 p.m.: 24 IR 1534)*

SECTION 29. 328 IAC 1-7-2 IS AMENDED TO READ AS FOLLOWS:

328 IAC 1-7-2 Termination of financial assurance by the department

Authority: IC 13-23-8-1; IC 13-23-8-4.5; IC 13-23-8-5; IC 13-23-11-7

Affected: IC 13-23

Sec. 2. If, after consultation with the financial assurance board, the department determines that insufficient monies exist to provide owners or operators evidence of financial assurance, the department shall notify all fund participants by certified mail. ~~Excess liability~~ **The fund coverage will continue for sixty (60) days after notice of termination of coverage. Owners or operators shall have sixty (60) days after receipt of termination of financial assurance to acquire financial assurance by other means.** *(Underground Storage Tank Financial Assurance Board; 328 IAC 1-7-2; filed Dec 4, 1992, 11:00 a.m.: 16 IR 1057; readopted filed Jan 10, 2001, 3:21 p.m.: 24 IR 1534)*

SECTION 30. 328 IAC 1-7-3 IS AMENDED TO READ AS FOLLOWS:

328 IAC 1-7-3 Revocation of certificate by the department

Authority: IC 13-23-8-1; IC 13-23-8-4.5; IC 13-23-8-5; IC 13-23-11-7

Affected: IC 13-23

Sec. 3. If the department determines that the owner or operator has not maintained eligibility for participation in the ~~excess liability~~ fund, the certificate of financial assurance issued by the department shall be revoked. The owner or operator shall have fifteen (15) days after revocation of a certificate to reinstate eligibility. (*Underground Storage Tank Financial Assurance Board; 328 IAC 1-7-3; filed Dec 4, 1992, 11:00 a.m.: 16 IR 1058; readopted filed Jan 10, 2001, 3:21 p.m.: 24 IR 1534*)

SECTION 31. THE FOLLOWING ARE REPEALED: 328 IAC 1-1-5; 328 IAC 1-1-11; 328 IAC 2.

Notice of Public Hearing

Under IC 4-22-2-24, IC 13-14-8-6, and IC 13-14-9, notice is hereby given that on July 10, 2001 at 1:30 p.m., at the Indiana Government Center-South, 402 West Washington Street, Conference Center Rooms 4 and 5, Indianapolis, Indiana the Underground Storage Tank Financial Assurance Board will hold a public hearing on proposed amendments to 328 IAC 1 and the repeal of 328 IAC 2.

The purpose of this hearing is to receive comments from the public prior to final adoption of these rules by the board. All interested persons are invited and will be given reasonable opportunity to express their views concerning the proposed amendments. Oral statements will be heard, but for the accuracy of the record, all comments should be submitted in writing. Procedures to be followed at this hearing may be found in the April 1, 1996, Indiana Register, page 1710 (19 IR 1710).

Additional information regarding this action may be obtained from Pam Koons, Rules, Planning and Outreach Section, Office of Land Quality, (317) 232-8899 or (800) 451-6027 (in Indiana).

Individuals requiring reasonable accommodations for participation in this event should contact the Indiana Department of Environmental Management, Americans with Disabilities Act coordinator at:

Attn: ADA Coordinator

Indiana Department of Environmental Management

100 North Senate Avenue

P.O. Box 6015

Indianapolis, Indiana 46206-6015

or call (317) 233-6947 (V) or (317) 232-6565 (TDD). Please provide a minimum of 72 hours' notification.

Copies of these rules are now on file at the Underground Storage Tank Branch, Indiana Government Center-North, 100 North Senate Avenue, Twelfth Floor West and Legislative Services Agency, One North Capitol, Suite 325, Indianapolis, Indiana and are open for public inspection.

Mary Beth Tuohy
Assistant Commissioner
Office of Land Quality