

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

**SECOND NOTICE OF COMMENT PERIOD
#02-204(FAB)**

**DEVELOPMENT OF AMENDMENTS TO RULES CONCERNING THE UNDERGROUND STORAGE TANK
LIABILITY TRUST FUND**

PURPOSE OF NOTICE

The Indiana Department of Environmental Management (IDEM) has developed draft rule language for amendments to 328 IAC 1 concerning clarifications of the rules governing the excess liability trust fund. By this notice, IDEM is soliciting public comment on the draft rule language. IDEM seeks comment on the affected citations listed and any other provisions of Title 328 that may be affected by this rulemaking.

HISTORY

First Notice of Comment Period: August 1, 2002, Indiana Register (25 IR 3906).

Continuation of First Notice of Comment Period: February 1, 2003, Indiana Register (26 IR 1744).

CITATIONS AFFECTED: 328 IAC 1.

AUTHORITY: IC 13-23-8-1; IC 13-23-8-4; IC 13-23-8-5; IC 13-23-11-7.

SUBJECT MATTER AND BASIC PURPOSE OF RULEMAKING

Basic Purpose and Background

Amendments are being proposed to the Excess Liability Trust Fund (ELTF) rule that would provide for additional cost accountability by claimants to the fund to ensure that the ELTF is reimbursing costs only for cost effective and reasonable remediation of releases of regulated substances and closure of tanks. The ELTF is used by owners and operators of underground storage tanks to show financial assurance under state and federal law. The ELTF has been drawn down in the past several years and may be reduced to \$25 (twenty-five) million dollars within the next year. Reduction of the ELTF to this amount could endanger the solvency of the fund that in turn creates two problems: continuing payment of claims, and maintaining the ELTF as a financial assurance mechanism for owners and operators. It is a state and federal requirement that owners and operators show one million dollars in financial responsibility if an owner has 1-100 tanks and to show two million dollars in financial responsibility if an owner has more than 100 tanks. There are other amendments in the rulemaking that are proposed to maintain the ELTF. The method for prioritization of claims in the event of a fund balance near or at \$25 (twenty-five) million dollars is proposed to be amended so that claims associated with releases that pose an immediate and significant threat to the environment are given priority in payment. The definition of "third party liability" is clarified.

The schedule of specific costs allowed to be reimbursed has also been revised and updated.

IC 13-14-9-4 Identification of Restrictions and Requirements Not Imposed Under Federal Law

The Indiana Underground Storage Tank (UST) Program is currently pending federal authorization. The rules of the Indiana and Federal UST program include requirements for financial responsibility and financial assurance for UST systems. The Excess Liability Trust Fund (ELTF) is a financial assurance mechanism under the Indiana UST rule at 329 IAC 9. The ELTF is evaluated for viability as a financial assurance mechanism as part of the evaluation for authorization of the UST program. No element of the draft rule imposes either a restriction or a requirement on persons to whom the draft rule applies that is not prescribed under federal law. See IC 13-23-1-2(c)(6) and IC 13-23-4-1(6).

Potential Fiscal Impact

This rule will not impose any requirements that cause the regulated community a fiscal impact of more than \$500,000.

Public Participation and Workgroup Information

An external workgroup has been established to discuss issues involved in this rulemaking. The workgroup is made up of IDEM staff and a cross-section of stakeholders. The stakeholders consist of consultants, associations representing underground storage

tank owners and operators, various contractors performing remediation, and owners and operators of underground storage tanks. Meetings were held on July, 8, 2003, July, 29, 2003, August 19, 2003, September 9, 2003, September 30, 2003, October 20, 2003, and November 5, 2003, to discuss issues proposed in the First Notice and the Continuation of the First Notice, related issues, and various ways of resolving those issues. Additional meetings may be held after the second notice is published. If you wish to provide comments to the workgroup on the rulemaking, attend meetings, or have suggestions related to the workgroup process, please contact Lynn West, Rules, Outreach and Planning Section, Office of Land Quality at (317) 232-3593 or (800) 451-6027 (in Indiana) or by e-mail at lw@dem.state.in.us. Please provide your name, phone number and email address, if applicable, where you can be contacted. The public is also encouraged to submit comments and questions to members of the workgroup who represent their particular interests in the rulemaking.

SUMMARY/RESPONSE TO COMMENTS FROM THE FIRST COMMENT PERIOD

IDEM requested public comment from August 1, 2002, through September 6, 2002, on alternative ways to achieve the purpose of the rule and suggestions for the development of draft rule language. IDEM received comments from the following parties by the comment period deadline:

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

Patrick M. Gorman, Facilitator, Indiana Steel Environmental Group, (ISEG)

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

Comment: The notice states that the risk integrated system of closure (RISC) guidance is now effective and the RISC provisions are being added to the underground storage tank (UST) rules. This notice proposes to revise the rules for the liability trust fund to expedite payment to eligible parties required to use RISC for tank closures. The IPCA questions the accuracy of the above statements. RISC is a non-rule policy statement that allows the use of a variety of clean-up procedures. No one is required to use RISC. While IDEM did propose in the June 1 Indiana Register to revise the UST regulations to add references to RISC, this proposal has not received any public discussion and has not been adopted by the Solid Waste Management Board. An August 28, 2002 letter from LUST Section Chief Craig Schroer indicates that nearly 3,800 active sites may still use the 1994 UST Guidance Manual. If references to RISC are included in the ELTF rules, it is important to clarify that the use of RISC is an option for remediation, not a requirement. (ISEG) (IPCA)

Response: IDEM expanded the costs listed under 328 IAC 1-3-5 to include additional analytical costs that can be reimbursed when an owner or operator uses RISC for corrective action or closure. Otherwise the draft rule does not require the use of any one remediation option.

SUMMARY/RESPONSE TO COMMENTS FROM THE CONTINUATION OF THE FIRST COMMENT PERIOD

IDEM requested public comment from February 1, 2003, through March 5, 2003, on alternative ways to achieve the purpose of the rule and suggestions for the development of draft rule language. IDEM received comments from the following parties by the comment period deadline:

David B. Steiger, Engineering and Fire Investigations, (EFI)

Catherine Gibbs, Lee and Ryan, (L&R)

Fred W. Nichols, Steven B Wilcox, Astbury Environmental Engineering, Inc., (AEEI)

Christopher J. Braun, Indiana Petroleum Marketers and Convenience Store Association, (IPCA)

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

Comment: I am please to provide comments regarding the development of amendments to rules concerning the Underground Storage Tank Liability Trust Fund. I have several comments regarding, Item (4) on the submission of corrective action plan (CAP) budgets for approval prior to implementation of the CAP. The CAP approval process currently can take several months, especially if IDEM rejects the initially proposed CAP or if amendments are required. A final budget cannot be developed until the CAP is approved, especially if subcontractor bids, based on the approved scope or system, are required. The owner/operator may not realize reimbursement is available until after a CAP is implemented. Would failure to submit the CAP budget for pre-approval make all CAP implementation costs ineligible? The workload on the technical review staff is currently so high as to result in significant delays in the progress of projects. Adding budget approval to the responsibilities of the review staff could further delay the review and approval of all aspects of remediation projects. There is often a need to make last minute changes to a budget due to unanticipated site conditions. Would such "change orders" also require pre-approval, further delaying progress? Budgets for long-term remediation projects, such as O & M costs, are usually proposed on an annual basis. Would approval of annual O&M budgets be required as well? Finally, some of the allowable rates published in the ELFT rule are below the rates a consultant may need to charge the client to cover costs, such as mileage, per diem, or certain rental and subcontractor costs. The client is aware that such costs may not be fully reimbursed. Would IDEM, reject a CAP budget that contains such costs? Would IDEM approval of such a budget indicate approval, and therefore reimbursability of such costs? If not, I see little reason for IDEM to delay the progress of a CAP and

potentially interfere with the financial relationship between the consultant and the client for the sake of a non-binding budget review. (EFI)

Response: Projected costs will be utilized by the department as shown in the draft rule. (328 IAC 1-3-3.1; 328 IAC 1-3-5(b)(13)) Minor changes in the corrective action will not require a new set of projected costs. The submission of projected costs will be a tool for IDEM to expedite the reimbursement of claims.

Comment: In summary, I foresee several difficulties with regard to pre-approval of CAP budgets. Although the control of CAP implementation costs, thereby extending the life of the Fund, is a worthy goal, I do not believe that adding this step to IDEM's oversight activities will go very far toward that goal. Unlike the situation in some states with a budget review process, Indiana has published extensive lists of eligible and ineligible expenses and allowable unit rates, which are reviewed during the claim process. It does not appear that pre-approval would add much to the cost-control efforts. Implementation of random audits, or audits targeted at inconsistent or irregular claims, may be a more efficient method of deterring abuse of the fund. (EFI)

Response: The requirement of demonstrating cost effectiveness under 328 IAC 1-3-1.3, and the requirement that reimbursable costs be reasonable, will aid in deterring use of the fund for unnecessary costs.

Comment: (1) Additional information to justify an expense may be requested by the Commissioner before payment is made. COMMENT: As Lee & Ryan believes that the Indiana Department of Environmental Management (IDEM) has this authority now, this seems to be an unnecessary change. (L&R)

Response: This change was made to clearly state that authority in the rule.

Comment: (4) Submission to the commissioner for approval of *the budget* for the corrective action plan (CAP) prior to the implementation of any clean-up activities at the sites for which a claim for reimbursement would be submitted to the department. COMMENT: Lee & Ryan is concerned that this will further delay the remediation process by adding new requirements not contemplated by the legislature. Lee & Ryan's opposition to this change will largely depend upon the specific language proposed by IDEM. (L&R)

Response: The submission of projected costs will not delay reimbursement but help to expedite the reimbursement of claims. The claimant should be aware of which costs may be reimbursed and the amount under 328 IAC 1-3-5. The legislature granted IDEM the authority to develop criteria to determine the cost effectiveness of corrective action under IC 13-23-9-2.

Comment: (5) Clarification that eligible reimbursable costs include only reasonable labor and project costs. COMMENT: Unless IDEM intends to specify exactly what it considers to be "reasonable labor and project costs", Lee & Ryan does not see the necessity for such a clarification as the statutes, under which the Excess Liability Trust Fund (ELFT) functions currently, provide this authority. Any modification that leaves the definition of "reasonable" to the discretion of individual Project Managers is unacceptable and does not provide the certainty that the regulated community must have in order to maintain compliance with the rules. (L&R)

Response: The department has defined the term "reasonable" in the draft rule. The term is used in the statute at IC 13-23-9-2(b)(2) and (c) in that the administrator makes a determination that the work or part of the work that has been performed is reasonable and cost effective. This determination is made before the administrator may approve payment of a claim.

Comment: (6) That the commissioner or representatives of the commissioner may request and audit, under appropriate provisions for confidentiality, the financial records of persons employed by or are under contract to the owner or operator and that pertain to the corrective action of a site prior to payment of a claim. COMMENT: The financial records of any company are highly confidential and any attempt by the State to acquire this information can only be justified upon a showing of overwhelming State interests. Even the promise of confidentiality is not sufficient to alleviate the concerns most companies would have regarding such a provision. Lee & Ryan opposes any attempt by IDEM to seek the confidential financial records of companies simply because that company may perform ELFT work. Such a requirement would not afford the company its due process rights. If IDEM wishes to review such information, it has other ways to obtain such information. (L&R)

Response: There is no provision in the draft rule that would allow IDEM to audit financial records, however, the applicant must submit information to justify costs. IDEM will only seek information necessary to justify payment of claims.

Comment: (7) In addition to the person applying to the fund for reimbursement, the owner and operator must sign the statement under 328 IAC 1-5-1 (b) on the claim application. COMMENT: It is unclear what IDEM hopes to achieve with this requirement except to further delay the claims process. (L&R)

Response: IDEM has no interest in delaying the claim process. The change will help reduce incorrect or incomplete claims by the person applying for payment by requiring both the owner/operator and the assignee to stand behind the claim submitted. Ultimately, it is the owner/operator's responsibility for conducting corrective action connected to the release, not the assignee.

Comment: (8) Clarification that the approval of the initial site characterization and the corrective action plan, under 329 IAC 9, does not necessarily mean that costs incurred are reasonable and eligible for payment under 328 IAC 1. COMMENT: Lee & Ryan believes that such a rule would be contrary to the statutory authority under which the ELFT operates. (L&R)

Response: IDEM disagrees. The legislature granted IDEM the authority to develop criteria to determine the cost effectiveness

of corrective action under IC 13-23-9-2. The administrator has the authority to determine that work performed is reasonable and cost effective, also under IC 13-23-9-2.

Comment: It appears as if one of the objectives of the proposed changes is to prevent consultants and contractors from making a profit through ELFT work. IDEM currently controls labor rates and most expenses associated with ELFT work. Consultants and contractors must be able to operate at a profit if IDEM expects any to continue to do such work. (L&R)

Response: It is not IDEM's intention to prevent consultants or contractors from making a profit. IDEM believes that the revision will still allow consultants and contractors to make a profit while ensuring that expenses are cost effective and reasonable to ensure solvency of the excess liability trust fund. IDEM has taken significant steps to provide an opportunity for comments from interested parties to discuss the potential impact of all the proposed changes.

Comment: Lee & Ryan believes that this rulemaking effort should include a review of the costs under 328 IAC 1-3-5, Reimbursable Expenditures, to ensure that these rules reflect current costs associated with corrective action. Thank you for your consideration of these comments. (L&R)

Response: A Cost Sub-workgroup was formed as part of this rulemaking process. The sub-workgroup is examining all the costs to make sure that the costs reflect the true costs of site investigation and corrective action. The draft rule reflects the work of this sub-workgroup to date. Some costs have been raised and some lowered based on input from the group.

Comment: (1) Additional information to justify an expense may be requested by the commissioner before payment is made: What kind of "information" does this refer to? How would this affect the time-frame for claim processing? Would the claim stay in the system while additional information is being gathered and submitted, or would the claim start all over like a re-submittal? Does "commissioner" mean Navigant, ELFT, or who? This proposed amendment may not be necessary or appropriate given the current and proposed structure of the ELFT Rules. (AEEI)

Response: To effectively administer the fund, IDEM must have sufficient information to justify payment of the claim. The specific additional information requested depends on the nature of the claim. If the additional information is minor, the claim would be continue to be processed. If major deficiencies are noted, the claim would be denied. "Commissioner" has been changed to "administrator" of the fund. The "administrator" is the commissioner of the department or her agents.

Comment: (2) Definitions may be added or be revised for "third party", "calendar year" or "fiscal year". No comments. (AEEI)

Response: The revision of the definition of "third party liability" was requested by the Indiana Attorney General. A change was made at 328 IAC 1-1-10 to clarify the definition.

Comment: (3) Revisions to 328 IAC 1-3-3 to specify how the penalties would be calculated and perhaps allow flexibility in adjusting the penalties for specific situations. Need to see more to comment. (AEEI)

Response: Tables and a formula were put into the rule to clarify the calculations of the penalties.

Comment: (4) Submission to the commissioner for approval of the budget for the corrective action plan (CAP) prior to the implementation of any clean-up activities at the site for which a claim for reimbursement would be submitted to the department. Notwithstanding any immediate remedial activities necessary to protect human health and the environment. This amendment may be better stated; "Submission to the commissioner for approval of the corrective action plan (CAP), including the budgetary figures to complete the CAP". It is our opinion that it may be beneficial to adopt policies that require much more specific remediation technology evaluation and cost benefit analysis by the consultants. The CAP Report would have to include very specific remediation system performance criteria and equipment specifications and include budgetary cost estimates (more detail than is now required) for the technologies considered. More specific costs would be required for the implementation of the selected remedial approach including, for example - in the case of a MPE system installation, estimates would be provided in the CAP for the three (3) primary phases for implementation, remediation system/equipment, MPE recovery well installation, and remediation system installation. Copies of subcontractor/vendor bids (minimum of 3 for each phase) would be submitted as an appendix to the CAP - similar to the way claims are submitted now for remediation costs already incurred. Submitting this information up-front in the CAP would allow IDEM and Navigant personnel to better evaluate the proposed remedial approach and prevent potential financial abuses to the Fund. It is important that the projected costs be looked at as budgetary estimates - there needs to be flexibility with respect to actual costs incurred and changes orders - so long as the specifications are followed and the approach, vendors, and subcontractors are pre-approved. The primary purpose of the budgetary estimates would be to ensure that the engineers have done their homework, evaluated and bid primary associated remediation vendor and subcontractor costs, provided a cost-effective solution to the incident, and that there is a general technology specification, work plan, and budget for which they can be held accountable. It is also important that the parties involved are not handcuffed by the IDEM or Navigant during CAP implementation. There are Frequently changes to the CAP project that require adjustments in the equipment fabrication, well installation, well-head construction, piping layout, site restoration, electrical connection, etc., so it will be imperative that the IDEM have some flexibility with respect to these costs - so long as the appropriate supporting change order information or justification is provided. An efficient means of oversight and IDEM involvement needs to be put in place so these projects can be efficiently completed. This approach will require more engineering time and cost during the planning/design and CAP preparation phase. In the long run, however, the costs to the Fund

should be reduced by requiring better planning, greater accountability, better engineered remedial plans (and quicker cleanup), etc. Furthermore., these changes would improve the claim review process, which currently can involve excessive individual interpretation and opinion-based decision making. Owners/operators and consulting engineers are concerned in some instances that the personnel reviewing the technical aspects of the LUST/ELFT projects are not sufficiently trained or experienced. This can result in inefficiencies that ultimately cost the Fund more due to unnecessary and time-consuming technical correspondence. It is important that the agency have the resources needed to properly evaluate pilot test data, ensure that the proposed system correlates with the pilot test data, geology/hydrogeology, contaminant mass, and extent of the contaminant plume. (AEEI)

Response: IDEM agrees with the more specific evaluation proposed in this comment and has made changes to the draft rule accordingly. IDEM has adopted a remedy evaluation process in 328 IAC 1-3-1.3 including a requirement for project costs to be submitted.

Comment: (5) Documentation and reporting, of any credits, rebates, refunds or other similar payments given to the owner or operator regarding the corrective action at a site. No comments. (AEEI)

Response: The draft rule requires documentation and reporting of any credits, rebates or refunds given to the owner or operator. Those amounts should not be, and will not be eligible for reimbursement.

Comment: (6) Clarification that eligible reimbursable costs include only reasonable labor and project costs. This is a valid concept, but how will “reasonable” be defined and by whom. The key to ensuring reasonable costs may lie in the concepts presented in the comments related to Item #4. (AEEI)

Response: “Reasonable” has been defined in the draft rule at 328 IAC 1-1-8.3 and “cost effective” is described in 328 IAC 1-3-1.3. Reimbursable costs must be reasonable and cost effective.

Comment: (7) That the commissioner or representatives of the commissioner may request and audit, under appropriate provisions for confidentiality, the financial records of persons employed by or are under contract to the owner or operator and that pertain to the corrective action of a site prior to payment of a claim. How will the audit process potentially affect the claim turnaround time-frame? What criteria are to be used to select when/where/who the audit will be done? (AEEI)

Response: There is no provision in the draft rule that would allow IDEM to audit financial records, however, the applicant must submit information to justify costs. (See 328 IAC 1-5-1.) IDEM will only seek information necessary to justify payment of claims.

Comment: (8) In addition to the person applying to the fund for reimbursement, the owner and operator must sign the statement under 328 IAC 1-5-1 (b) on the claim application. No comments. (AEEI)

Response: The department thanks you for considering the validity of this change.

Comment: (9) Clarification that the approval of the initial site characterization and the corrective action plan, under 329 IAC 9, does not necessarily mean that costs incurred are reasonable and eligible for payment under 328 IAC I. If an approved ISC and CAP are implemented in accordance with the cost guidelines and procedures established in the ELFT Rules, then there should be no basis for deeming these costs to be unreasonable. Any such judgement must be based on fact rather than opinion, thereby making it essential that all parties adhere strictly to the established rules and guidelines. The existing ELFT cost guidelines for site investigation expenses, and proposed amendments discussed in ITEM#4 should make the amendment discussed above in Item #9 unnecessary. (AEEI)

Response: IDEM has included language in the draft rule for a cost effectiveness analysis of corrective action. This is appropriate under IC 13-23-9-2.

Comment: (10) Revision that would allow access to the ELFT for a successor owner or operator for corrective action costs due to a prior owner or operator’s release. No comments. (AEEI)

Response: The department thanks you for considering the validity of this change.

Comment: (11) Other issues that need to be addressed amending the rule in conformance with IC 13-23 or to clarify the rule or to clarify the intent of the rule. No comments. (AEEI)

Response: The department thanks you for considering the validity of this change.

Comment: Regarding the section titled Statutory and Regulatory Requirements, AEE’s comments are as follows: Regarding the seven (7) items listed by the IDEM in this section, AEE sees a significant need for clarification of these concepts and the applicability to the ELFT program before more feedback can be given. Some of the wording and concepts appear to be somewhat vague for example: “Economic reasonableness of measuring or reducing any particular type of pollution”. (AEEI)

Response: These seven items are required by statute to be included in any environmental rulemaking notice. These standards are really designed for analysis of environmental rulemaking and so may not specifically address the issues in this rulemaking.

Comment: It is important that the remedial approach of soil excavation and disposal be officially recognized as an approved technology if this approach is deemed appropriate by the IDEM and the approved as part of the CAP. It is AEE’s position that soil excavation/disposal is an “approved technology “ and is recognized as such by our industry. If, after evaluation of all potentially feasible remedial options, excavation/disposal is deemed most cost-effective and is approved by ELFT, all associated costs with implementing this technology should be eligible for reimbursement in accordance with 328 IAC 1 3-5 (just as an in-situ technology

would be). (AEEI)

Response: Soil excavation and disposal is an approved technology that has unit rates, therefore bids are not required or necessary. See 328 IAC 1-3-5. IDEM has formed a cost sub-workgroup to examine and suggest appropriate changes to the unit rates.

Comment: In accordance with 328 IAC 1-3-5 (Reimbursable Expenditures - Approved Technologies), if the lowest qualified bid from a minimum of three (3) bidders is selected for the CAP implementation work, these costs should be reimbursed at cost +15%. Oftentimes, this has not been the case and ELFT/Navigant personnel have denied costs based upon unit rates. If the costs associated with this technology are reimbursed based only upon the unit rates, the selection of this technology becomes prohibitive for the responsible party because even under a competitive bid scenario and selection of the lowest qualified bidder, the responsible party will not receive adequate reimbursement (because the unit rates are too low). This could force the selection of a more expensive remediation option for which they could receive full reimbursement but would cost the Fund significantly more money. The cleanup may also take longer to complete corrective action goals. Under the current policy of denying costs for soil excavation and disposal, the responsible parties will be forced to lean much harder toward more expensive in-situ technologies to ensure a higher reimbursement percentage. Obviously, this is not desirable for anyone involved because it will cost the Fund significantly more. (AEEI)

Response: IDEM disagrees. Costs for soil excavation and disposal may be reimbursed. Soil excavation and disposal is an approved technology that has unit rates, therefore bids are not required or necessary. IDEM has formed a cost sub-workgroup to examine and suggest appropriate changes to the unit rates.

Comment: Again, it is our opinion that all costs associated with implementation of an IDEM-approved CAP or CAP Addendum should be reimbursed if the lowest qualified bid is selected for an "approved technology". (AEEI)

Response: IDEM disagrees. For instance, costs for soil excavation and disposal may be reimbursed. Soil excavation and disposal is an approved technology that has unit rates, therefore bids are not required or necessary. IDEM has formed a cost sub-workgroup to examine and suggest appropriate changes to the unit rates.

Comment: Interim Remedial Action--It has always been quite prohibitive for an owner/operator to conduct interim remedial action (IRA) activities at a LUST site with respect to feedback, support, and ELFT reimbursement from the IDEM. Oftentimes, it is imperative that remedial action be implemented immediately (prior to CAP approval) to mitigate and control a dissolved-phase contaminant plume due to extremely high contaminant levels and/or expansion of the contaminant plume. By conducting IRA operations, the extent of contamination and longer term costs and the potential for off-site impacts can be reduced. Despite the clear-cut benefits of this step, neither IDEM nor Navigant personnel have been supportive of IRA operations. If an owner/operator does not have the technical or financial support of the agency, the necessary response actions are less likely to be voluntarily undertaken by the responsible party. (AEEI)

Response: The owner/operator may request pre-approval of costs under the draft rule. Pending establishment of eligibility, pre-approval would allow the owner/operator to know the corrective action activities that will be reimbursed.

Comment: Clarify Conflicting Language on Assessment of Penalties for Late UST Fee. Ind. Code 13-23-12-7 provides that a UST owner who fails to pay the fee when due "shall be assessed a penalty of not more than \$2,000 per UST per year." This statutory language gives IDEM the discretion to waive all or part of the UST penalty. By comparison, the relevant regulation provides that for an owner who fails to pay the fee when due "the penalty will be calculated at \$2,000 per UST." 328 IAC 1-3-3. Thus, there is a conflict between the discretionary and mandatory language of the two laws, which needs to be resolved. The IPCA recommends that the IDEM be given the discretionary authority to assess reasonable penalties, which are more fully addressed in paragraphs 2 and 3 below. (IPCA)

Response: IDEM disagrees that there is a conflict between the rule and the statute. The current and draft rule language on penalties is certainly within the statutory authority granted to assess penalties and is therefore "reasonable". The Financial Assurance Board has chosen not to give the administrator the discretion to waive all or part of the penalty.

Comment: Modify the Timetable for the Assessment of Penalties for Late UST Fees. A UST owner recently reported to the Financial Assurance Board that he was three weeks late in submitting his annual tank payment of \$270 for 3 USTs and receive a notice from the Indiana Department of Revenue that he owed a \$6,000 penalty for being late. To lessen the harshness of this program, the IPCA recommends that the following changes being adopted: (a) if a UST payment deadline has been missed, the Indiana Department of Revenue will be required to send a follow-up written notice to the UST owner advising him/her that a UST payment has been missed and that a monthly late fee equal to 10% of the unpaid tank fee has been assessed and that failure to pay the UST fee within thirty (30) days of receipt of the late notice will result in an additional 10% penalty. If the payment is more than three months late and the UST owner has received and ignored the reminder notice, the Department of Revenue and IDEM should have the discretion to assess a penalty of up to \$2,000 per UST per year. (IPCA)

Response: IDEM generally agrees; the rule has been modified at 328 IAC 1-3-3(f) and (g).

Comment: Annual UST Assessments Should Reflect Any Unpaid Balances from Prior Years. Experience has shown that several years may pass after a missed UST payment. When the UST owner decides to sell his gas station, he discovers for the first time that

a UST payment was missed several years ago. The interest and penalties add up rather quickly and are very disruptive to the parties' expectations in the transaction. When a UST payment is missed, there currently is no reminder notice sent by the Department of Revenue to the UST owner. For these reasons, the IPCA recommends that the annual UST assessments include notices of any unpaid UST fees, interest and penalties for prior years. (IPCA)

Response: This comment exceeds the scope of this rulemaking.

Comment: Oppose Unauthorized Raiding of the Trust Fund and Prevent Breach of FAB's Fiduciary Duties to the Trust Fund. In the 2002-2003 fiscal year, the Indiana Budget Agency raided Indiana's Excess Liability Trust Fund by withdrawing \$475,422 to satisfy overall state budget shortfalls. In doing so, the Budget Agency relied on Indiana Code 4-12-1-13.5, which dates back to 1977. The Budget Agency representative also testified that the Agency intended to raid the Fund again in the 2003-2004 fiscal year. It is the IPCA's position that the Budget Agency's actions are improper and unlawful and its reliance on this statute is misplaced.

First, the ELTF may only be used for statutorily defined purposes. Ind. Code 13-23-7-1 enumerates the purposes of the ELTF. These purposes include providing money to owners and operators to satisfy liabilities, providing money to third parties to satisfy liabilities, and providing money to administer the fund. IC 13-23-7-1. Furthermore, the statute clearly states that money remaining in ELTF at the end of a year does not revert to the general fund. IC 13-23-7-6. Thus, it is unlawful for the Budget Agency to withdraw money from the Fund and use it for purposes not recognized by the statute or the Indiana Legislature.

Second, a few years ago the Indiana Legislature changed the Fund from simply a general dedicated fund to a dedicated trust fund, thereby providing the FAB and the ELTF greater protection and imposing on the FAB a higher fiduciary duty to serve as careful stewards of this Fund. This statute was enacted long after the Budget Agency's statute. Hence, it is presumed that the Legislature was fully aware of the budget law when it enacted the trust fund and built in its express purposes for use of funds. By removing money from the ELTF against the mandate of the Legislature, the Budget Director has overstepped his statutory authority and his constitutional role as an executive. The Budget Director is making a determination that belongs only to the legislature, which determination has already been made by the legislature. Article 3, Section I of the Indiana Constitution, the Distribution of Powers Article, prohibits the Budget Director from doing so.

Third, the appropriations statute appears to give the auditor the power to transfer money from "dedicated funds" to the state general fund, once the Budget Director so certifies. See IC 4-12-1-13.5(c). However, a dedicated fund does not include the ELTF, a trust fund. Generally, statutes are to be given their plain and obvious meaning. See North Miami Education Association v. North Miami Community Schools, 746 N.E.2d 380,382 (Ind.Ct. App. 2001). This meaning may not be expanded or contracted. See id. The IPCA was unable to find any statutory or case law authority supporting the Budget Director's position that the ELTF was a general dedicated fund. Thus, claiming that ELTF falls within the definition of "dedicated fund" has no basis in statute or case law and is an impermissible expansive reading of the appropriations statute.

Fourth, the appropriations statute gives the Budget Director the authority to transfer money away from one agency if that money "is attributable to the operations of other state agencies."

See IC 4-12-1-13.5(a). Pursuant to the fiscal report prepared for ELTF Financial Assurance Board, in 2002, approximately \$24.3 million was placed into ELTF coffers from oil inspections and UST tank fees. Another \$53,839 was placed in the ELTF coffers from "misc. revenue." Thus, it is not possible that the \$475,422 removed by the treasurer is "attributable" to other state agencies. At most, the \$53,839 could be attributable to other agencies. (IPCA)

Response: This comment exceeds the scope of this rulemaking.

Comment: IDEM and the ELTF Should Not Be Authorized to Conduct Financial Audits of Companies Conducting Environmental Cleanups of UST Sites. IDEM and the ELTF currently have sufficient authority to carefully review and approve any environmental data submitted by an environmental consultant on behalf of a UST owner, such as the Initial Site Characterization and the Corrective Action Plan. The ELTF currently has sufficient authority to review, approve and/or reject any and all costs and invoices associated with the investigation and remediation of UST sites. For example, if insufficient documentation is provided in support of an expense or if the costs exceed the Reasonable Cost Guidelines these costs are disallowed by the ELTF. It is the IPCA's position that there is no need for either IDEM or the ELTF to be given additional financial audit authority into environmental consultants' business affairs. Moreover, for a variety of reasons, it would be a costly and dangerous precedent to suddenly give the IDEM and ELTF audit authority like the Internal Revenue Service. (IPCA)

Response: IDEM has amended the draft rule under 328 IAC 1-5-1(a) to make clear that the administrator may request additional information to substantiate the payment of claims. The draft rule does not include a requirement for financial audits.

Comment: The IPCA Supports Reasonable, Cost-Effective Investigation and Remediation of UST Sites. To ensure the viability of the Fund for the long term, the IPCA supports cooperative efforts by UST owners, environmental consultants and IDEM personnel to undertake reasonable, cost-effective investigation and remediation of UST sites. This requires a careful and ongoing balancing of competing interests. IDEM has identified the types of cleanup technologies that may be approved and retains oversight authority to ensure that the site investigation and remediation of soil and groundwater, both on-site and off-site, are complete. Within those parameters, the UST owner and his environmental consultant need to have the flexibility to adopt, on a site-by-site basis, a

cost-effective investigation and remediation approach that meets the UST owner's needs while complying with the IDEM standards for UST cleanups. While the IPCA does not want to encourage overly expensive and aggressive cleanups which would unnecessarily deplete the ELTF, this does not mean that the cheapest cleanup approach is always the best. In light of the above competing interests, without adding unnecessary layers of paperwork, delay and bureaucracy, the IPCA would be willing to discuss with IDEM and ELTF ways that a proposed estimate of cleanup costs could be prepared in conjunction with the CAP submission.

Any discussion of a system for "costing out" projects, however, should be done in the context of the current system, which includes the following. At the "CAP" stage, any costs provided could only be looked at as 'estimates' since no formal bids are taken at that stage (until CAP approval, it would be a waste of time). Even after CAP approval, consultants usually obtain bids for remedial system installation, and IDEM typically approves the lowest bid. However, in some cases, the lowest bid is not necessarily the best bid, since the contractor who bids may have undercut estimates. There needs to be a mechanism that allows IDEM and the UST owner's consultant to negotiate which bid level is reasonable, to select based on contractor qualifications and the needs of the project, whether the consultant believes that the contractor was 'responsive' in his bid, and whether all items that are critical are included in the bid. Finally, at certain sites, particularly high priority sites where contamination poses a threat to reach critical receptors and related off-site concerns and 'emergency' status is granted, the UST owner and his consultant are required to undertake an expedited response. This usually requires working extended hours at night and on weekends in response to the situation, that some additional allowances be made for rates (including a higher level of senior personnel time to handle these delicate situations) and other considerations such as (1) overtime for more than 40 hours per week (normally that is at least time and a half for hourly employees), and (2) expedited costs (for example analytical costs, or contractor night and weekend rates). (IPCA)

Response: The cost effectiveness analysis language contained in the draft rule makes it clear that cost is only one factor considered in the determination that a corrective action plan (CAP) is cost effective. IDEM is only requesting projected costs for alternative remediation approaches, not a final budget. (See 328 IAC 1-3-1.3)

IDEM does not control the quality or consistency of the bids submitted to the owner/operator. If consistency is lacking the owner/operator may request a revised bid. The current rates take overtime into account. There is also some flexibility in IDEM's payment of subcontractor costs.

Comment: The ELTF Rules Should Be Modified to Ensure that Remediation of Abandoned Gas Station Sites May be Funded by the Petroleum Trust Fund. Abandoned gasoline station sites continue to plague many areas of the State of Indiana. Since the ELTF was created in 1988, 50% of the annual UST fee has been paid into the Petroleum Trust Fund, which currently enjoys a balance of more than \$4,200,000. While the Petroleum Trust Fund was created, in part; to address abandoned gas station sites, this aspect of the program has never been fully developed. In its absence, for the past several years an increasing amount of money has annually been used by IDEM for its internal personal services, contractual services, and program support; while some of these expenses and programs maybe worthwhile, these monies are being spent on abandoned gas station sites (i.e. in 2002 more than \$550,000 was spent on these items). Meanwhile there remain a tremendous number of abandoned gas stations around the State that continue to be pose environmental threats to the soil and groundwater supplies of their neighbors, are eyesores to their local communities, and do not contribute to the tax rolls of their communities. The IPCA would like to see rules developed that would encourage buyers of these sites, who have no affiliation with any prior owner of the site, to register the USTs, pay all back fees and interest (no penalties) and become ELTF eligible. This would allow for the acquisition and development of these sites, with environmental threats being removed from the neighborhoods, would generate tax revenues, and would foster the development of new jobs on these sites. (IPCA)

Response: This comment exceeds the scope of this rulemaking.

Comment: The IPCA Supports Allowing Access to the ELTF By A Successor Owner/Operator. The IPCA supports revisions that would allow access to the ELTF for a successor owner or operator for corrective action costs due to a prior owner or operator's release. Similar to current practice, the buyer would have to ensure that the back UST fees, interest and penalties are paid within thirty (30) days of closing, thereby making the buyer 100% ELTF eligible. The innocent buyer should not be penalized and rendered ineligible due to the prior acts and omissions of the former UST owner/operator. (IPCA)

Response: An "innocent buyer" has the opportunity to collect overdue fees, interest, and penalties from the seller or obtain a reduced purchase price. This type of ELTF access is not authorized by the statute, therefore the comment exceeds the scope of this rulemaking.

Comment: The IPCA Supports Allowing Access to the ELTF By a Landlord Who Did Not Own or Operate the UST System. For many of the same reasons, the IPCA supports allowing owners of real estate with USTs, but who do not own or operate the UST system, a similar arrangement whereby the landlord would ensure that the back UST fees, interest and penalties are paid, thereby making the innocent landlord 100% ELTF eligible so the site may be cleaned up. The innocent landlord should not be penalized and rendered ineligible due to the prior acts and omissions of the former UST owner/operator. This approach is similar to a third-party claim that both the Indiana Attorney General and IDEM had originally rejected but then approved in late 2002, thereby allowing the third party claim asserted by the landlord who did not own or operate the UST system to be paid in full by the ELTF. (IPCA)

Response: This type of ELTF access is not authorized by the statute, therefore the comment exceeds the scope of this rulemaking.

Comment: The IPCA Supports the FAB, Indiana Legislature and the Indiana Supreme Court in the Definition of “Third Party” Liability and Opposes Efforts by IDEM and The Indiana Attorney General to Narrow or Alter the Definition. As stated above, when the ELTF was created in 1988, Indiana’s Legislature decided that an express purpose of the Fund was to pay third party claims. Ind. Code 13-23-6-1, 13-23-7-1. Specifically, Indiana’s Legislature expressly provided in Ind. Code 13-23-7-1 that the Fund “is established for the following purposes:... (2) Providing a source of money to satisfy liabilities incurred by owners and operators of underground petroleum storage tanks under Ind. Code 13-23-13-8 and 42 U.S.C. 6991b(h)(6) for corrective action” (first party claims); and... (4) “Providing a source of money for the indemnification of third parties under Ind. Code 13-23-9-3 (third-party claims). Ind. Code 13-23-7-1(2), (4) (See also Ind. Code 13-23-8-1(1), (2) IDEM shall use money in the Fund to pay (first party) corrective action costs incurred by owners and operators of USTs and for payment of the (third party) liability of owners and operators of USTs to third parties under Ind. Code 13-23-9-3 and for the attorney fees incurred by the UST owner and operator in defending the third party liability claim).

The Legislature also created the underground storage tank financial assurance board (“FAB” or “Board”) to adopt rules, standards and procedures governing the administration of the Fund and the payment of claims. Ind. Code 13-23-11-1, et al., 13-23-8-4.5. For many years the Board has defined “third party liability” as follows:

“Third party liability” is the damage a tank owner or operator is legally obligated to pay for injury suffered by a third party as the result of a release. Third party liability includes bodily injury and property damage.”

The FAB has drawn distinctions between first party and third party claims in the types of damages and expenses that are eligible for reimbursement by the ELTF. For example, the FAB has promulgated a detailed list of expenditures associated with the performance of corrective action that may be recovered and those which cannot be recovered from the Fund. 328 IAC 1-3-5. Expenditures not eligible for reimbursement as a first party corrective action cost include items such as lost rent, lost income, diminution in property value, and attorneys’ fees. However, such expenses suffered by a third party are eligible for payment by the ELTF. Another distinction is that a first party (UST owner’s cleanup expenses) are subject to a deductible ranging up to \$35,000 while a third party claim has no deductible, as it serves as a liability policy with first dollar coverage.

The FAB’s current definition of “third party” does not exclude UST owners and operators as a “Third-Party.” Under the Fund’s statute and regulations, both UST owners and operators are eligible to coverage from the Fund to pay their respective third-party liabilities arising from a UST release. Nowhere, is third party liability defined to mean every claimant in the world except a UST owner or operator. Nor is “third party” defined as only those parties who do not have direct access to the Fund. Thus, there is no support, in the statute or the regulations, for the position recently taken by IDEM and the Indiana Attorney General that a UST owner and operator may not rely upon the Fund to pay the damages and expenses incurred by an owner or operator as a third party liability.

The IPCA’s position and the FAB’s existing definition are entirely consistent with the Indiana Supreme Court’s most recent opinion on the issue of UST liabilities. In Bourbon MiniMart and Robert E. Wanemacher v. Gast Fuel and Services, Inc. et al., (Ind. S. Ct. Feb. 14, 2003) (a copy of which is enclosed as Exhibit 1), the Indiana Supreme Court addressed, among other things, the issue of a party’s request for contribution under Indiana’s UST cleanup statute for costs of cleaning up petroleum contamination from leaking underground storage tanks. Ind. Code 13-7-20-21. The Court held that the UST statute authorizes an “owner or operator of a UST to recover from a third party amounts paid to the state or that the owner or operator itself incurred for corrective action (whether the corrective action was ordered by IDEM or undertaken voluntarily) from any ‘person who owned or operated the underground storage tank at the time the release occurred,’ not just those solely responsible for the contamination.” Op. at 17. The Court further held that “while the Amended Statute [enacted in 1991] expanded the class of corrective action for which owners and operators could seek recovery to include the costs of voluntary remediation, it also expanded the class of third persons from whom recovery could be sought.” Id. Finally, the Court held that “the Legislature expanded the class of third persons from whom recovery could be sought from those solely responsible for its contamination to include any other person who owned or operated an UST at the time the release occurred.” Id.

Thus, consistent with the IPCA’s position, the FAB, the Indiana Legislature and the Indiana Supreme Court support a broad interpretation of the definition of “third party” as applied to UST liabilities to include owners and operators.

The issue of the recent position taken by IDEM and the Indiana Attorney General to narrow the FAB’s definition of “third party” to exclude owners and operators has been fully briefed and is currently on appeal before the Office of Environmental Adjudication in a case styled as In The Matter of. Objection to the Denial of Excess Liability Fund Claim No. 9710523 Kiel Bros. Oil Co., Inc., Jefferson County Consolidated Cause No. 02-F-J-2851 and 02-F-J-2918. More detailed support for the position taken by the IPCA, FAB, Indiana Legislature and Indiana courts on this issue is set forth in the enclosed Petitioner’s Brief In Opposition to The Motions For Summary Judgment Filed by the Indiana Attorney General and IDEM and In Support of Petitioner’s Cross-Motion for Summary Judgment Regarding Payment of Petitioner’s Third Party Claim By Indiana’s Excess Liability Trust Fund, dated November 26, 2002 (See Exhibit 2); and Petitioner’s Reply Brief In Support of Its Cross-Motion for Summary Judgment Regarding Payment of Petitioner’s Third Party Claim By Indiana’s Excess Liability Trust Fund, dated February 13, 2003 (See Exhibit #3), which are hereby

referenced and incorporated herein as if fully restated. Also enclosed in support of the IPCA's position and incorporated herein as if fully redacted is the Reply Brief of Amicus Curiae Hukill Oil Co., Inc. To "Attorney General's Response to Kiel's Motion for Summary Judgment", dated February 12, 2003 (See Exhibit 4). (IPCA)

Response: IDEM agrees with the commentor that one of the fund's statutory purposes is to pay third party liability claims. The fund has consistently paid third party liability claims. IDEM has never tried to narrow or alter the plain meaning of the term "third party". IDEM recognizes that logically a first party cannot be considered a third party. As the administrator of the fund, the commissioner has taken the position in the above cited cases that is consistent with the law and consistent with the administrator's fiduciary duties to the fund.

Comment: The IPCA Supports the Current Level of Deductibles for First Party Expenses. The IPCA supports the existing requirement that a UST owner/operator is to first pay the applicable deductible, which ranges up to \$35,000, on an eligible ELTF claim. As more fully explained above, UST owners/operators and their consultants should also be encouraged to adopt reasonable, cost-effective investigations and remediations of impacted UST sites. Efforts to modify this approach should not encourage unnecessary expenditures. In light of the November 2001 increase in the Reasonable Cost Guidelines, these adjustments properly addressed the need to bring the level of reimbursements from 1993 levels in line with the updated costs associated with UST investigations and remediations in 2001.

The IPCA looks forward to continuing to work with the FAB, IDEM and other interested stakeholders in ensuring that the legislative goals and policies for addressing UST liabilities under the IDEM and ELTF programs are fulfilled. If you have any questions about the IPCA's comments do not hesitate to contact me. Otherwise, we appreciate your consideration of these important issues. (IPCA)

Response: IDEM agrees. It has been productive to craft proposed rule changes with interested stakeholders to ensure that the legislative goals and policies are met.

REQUEST FOR PUBLIC COMMENTS

This notice requests the submission of comments on the draft rule language, including suggestions for specific revisions to language to be contained in the draft rule. Mailed comments should be addressed to:

#02-204 (FAB)[ELTF Change Rule]

Marjorie Samuel

Rules, Outreach and Planning Section

Office of Land Quality

Indiana Department of Environmental Management

P.O. Box 6015

Indianapolis, Indiana, 46206-6015.

Hand delivered comments will be accepted by the receptionist on duty at the 11th floor reception desk, Office of Land Quality, 100 North Senate Avenue, Indianapolis, Indiana.

Comments may be submitted by facsimile at the IDEM fax number: (317) 232-3403, Monday through Friday, between 8:15 and 4:45 p.m. Please confirm the timely receipt of faxed comments by calling the Rules, Outreach and Planning Section at (317) 232-7995.

COMMENT PERIOD DEADLINE

Comments must be postmarked, faxed, or hand delivered by January 8, 2004.

Additional information regarding this action may be obtained from Lynn West, Rules, Outreach and Planning Section, Office of Land Quality, (317) 232-3593 or (800) 451-6027 (in Indiana).

DRAFT RULE

SECTION 1. 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 fund~~ **commissioner of the department**. (*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; filed Oct 17, 2001, 4:30 p.m.: 25 IR 787*)

SECTION 2. 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~~ **any or all work performed or to be performed, including all work performed or to be performed under a CAP, to:**

- (1) minimize;
- (2) contain;
- (3) eliminate;
- (4) remediate;
- (5) mitigate; or
- (6) clean up a release **caused by an occurrence;**

including emergency measures taken as part of an initial response to the ~~release~~ **occurrence** under rules of the solid waste management board at 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; filed Oct 17, 2001, 4:30 p.m.: 25 IR 787*)

SECTION 3. 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; IC 13-23-8-4

Sec. 4. “Deductible amount” means the amount ~~set forth~~ **specified** in IC 13-23-8-3 applicable to each incident number assigned by the department. A person applying to the fund under 328 IAC 1-3-1 must provide evidence of payment of the deductible amount under IC 13-23-8-4(a)(3). (*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; filed Oct 17, 2001, 4:30 p.m.: 25 IR 788*)

SECTION 4. 328 IAC 1-1-5.1 IS AMENDED 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 13-23-8-4

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.~~ **work described under IC 13-23-8-4(b)(1).** 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; filed Oct 17, 2001, 4:30 p.m.: 25 IR 788*)

SECTION 5. 328 IAC 1-1-8.3 IS ADDED TO READ AS FOLLOWS:

328 IAC 1-1-8.3 “Reasonable” 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. 8.3. “Reasonable” means that the corrective action is appropriate and performed only as necessary to meet the cleanup objectives for the site. The term also means that corrective action and site characterization are consistent with 328 IAC 1-3-5(b) through 328 IAC 1-3-5(e). (*Underground Storage Tank Financial Assurance Board; 328 IAC 1-1-8.3*)

SECTION 6. 328 IAC 1-1-8.5 IS AMENDED 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 **work performed under the** initial site characterization described in rules of the solid waste management board at 329 IAC 9-5-5.1 **and or work performed under further site** 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; filed Oct 17, 2001, 4:30 p.m.: 25 IR 788)*

SECTION 7. 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; IC 13-23-12

Sec. 9. (a) "Substantial compliance" means that, at the time a release was discovered:

(1) the owner or operator ~~had taken affirmative steps to comply with~~ **has met** the requirements of ~~IC 13-23-8-4~~ **IC 13-23-8-4(a), with the exception of minor violations of:**

(A) statutory deadlines;

(B) regulatory deadlines; or

(C) regulatory requirements;

that do not cause harm or threaten to harm human health or the environment; and

(2) registration fees have been paid as required under IC 13-23-12 and 328 IAC 1-3-3.

(b) An owner or operator is not in substantial compliance if the release:

(1) has not been reported, under the spill reporting rule applicable at the time of the release, within seven (7) days of the discovery of the release; or

(2) harms or threatens to harm public health or the environment and was not timely reported under the spill reporting rule applicable at the time of the release.

(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; filed Oct 17, 2001, 4:30 p.m.: 25 IR 789)

SECTION 8. 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. (a) "Third party liability" ~~is means~~ the damage a tank owner or operator is legally obligated to pay for injury, ~~expense,~~ **costs,** and damage suffered by a third party as the result of a release. ~~Third party liability~~ **The term** includes bodily injury and property damage. ~~Third party liability~~

(b) **The term** does not include the following:

(1) Punitive or exemplary damages.

(2) **Claims arising on behalf or in favor of a claimant, an owner, or an operator.**

(3) **Costs that were previously determined ineligible for reimbursement.**

(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; filed Oct 17, 2001, 4:30 p.m.: 25 IR 789)

SECTION 9. 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 13-23 for the administration of the fund. This article establishes procedures by which persons listed in 328 IAC 1-3-1 may apply to the fund for payment of ~~corrective action~~ **reimbursable** costs and third party liability claims. ~~arising from petroleum releases.~~ Payment of ~~corrective action~~ **reimbursable** costs and third party liability claims shall be made in accordance with the following:

- (1) 328 IAC 1-3-4(b) applies to any one (1) site upon which
 - (A) ~~an occurrence has not been reported to the department; or~~
 - (B) the corrective action has not been completed as of the effective date of this rule.
- (2) The **applicable** cost range or amount of the ~~expenditure to be reimbursed by the fund;~~ **reimbursable cost**, as set forth in 328 IAC 1-3-5, shall be determined as of the date ~~the expense was initially incurred by the applicant to the fund;~~ **of the invoice for the work and the costs so incurred unless the work is performed by the owner, operator, or applicant, in which case, it is the date the work was performed.**

(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; filed Oct 17, 2001, 4:30 p.m.: 25 IR 789)

SECTION 10. 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) Claims shall be paid in the order received by the ~~department~~ **administrator** 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. *(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; filed Oct 17, 2001, 4:30 p.m.: 25 IR 789)*

SECTION 11. 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; IC 13-23-8-4

Sec. 1. The following persons may apply to the fund for payment of ~~expenditures arising from corrective action and reimbursable costs or for indemnification of~~ third party liability **claims**:

- (1) Eligible tank owners and operators, including transferees as described in IC 13-23-8-4.
- (2) Persons assigned the right of reimbursement by any person described in subdivision (1).
- (3) Subsequent owners of the property upon which tanks were located, if the tanks were closed by a previous property owner, tank owner, or operator who is eligible.

(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; filed Oct 17, 2001, 4:30 p.m.: 25 IR 790)

SECTION 12. 328 IAC 1-3-1.3 IS ADDED TO READ AS FOLLOWS:

328 IAC 1-3-1.3 Cost effectiveness 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 13-23-7; IC 13-23-8-4

Sec. 1.3. (a) After the person described in section 1 of this rule has:

- (1) completed the initial site characterization under 329 IAC 9-5-5.1 and the further site investigation under 329 IAC 9-5-6 for the release at the site; and
- (2) submitted the information in clauses (A) through (C) to the administrator:
 - (A) for each of the remediation approaches as required by 329 IAC 9-5-6(d), details of the work to be performed and

the projected costs;

(B) the approved CAP; and

(C) if appropriate, a demonstration that the remediation approach will substantially reduce or eliminate third party liability;

the administrator will determine if the work to be performed or the work already performed under the approved CAP is cost effective. The administrator may review information concerning cost effectiveness while reviewing a CAP submitted for approval; however, the administrator will not make a determination on cost effectiveness before a CAP is approved.

(b) The administrator's determination for cost effectiveness will be based on the information in subsection (a) and the following criteria:

(1) The likelihood that the remediation approach will achieve the cleanup objectives as set forth in the approved CAP.

(2) The length of time it will take to achieve the cleanup objectives based on the remediation approach is appropriate, considering actual impacts to human health and the environment.

(3) The cost projections under subsection (a)(2)(A) for the remediation approaches and the work to be performed do not exceed the reimbursable costs allowed under section 5(b) and 5(e) of this rule.

(4) The cleanup objectives are sufficient, but no more stringent than necessary, for the current land use expected for the site.

(5) A demonstration that the remediation approach will substantially reduce or eliminate third party liability.

(Underground Storage Tank Financial Assurance Board; 328 IAC 1-3-1.3)

SECTION 13. 328 IAC 1-3-1.6 IS ADDED TO READ AS FOLLOWS:

328 IAC 1-3-1.6 Preapproval 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 13-23-7; IC 13-23-8-4

Sec. 1.6. (a) Persons described in section 1 of this rule may submit to the administrator a request for a preapproval of costs for work to be performed under the approved CAP. The administrator's preapproval will be based on the following:

(1) A determination of cost effectiveness under section 1.3 of this rule.

(2) Costs are reasonable.

(b) The administrator may ask for additional information to substantiate the projected work and projected costs.

(c) The administrator will send a preapproval letter to the owner or operator stating how much of the cost for each item of work is preapproved as reasonable and cost effective. This preapproval is not a determination on eligibility. *(Underground Storage Tank Financial Assurance Board; 328 IAC 1-3-1.6)*

SECTION 14. 328 IAC 1-3-2 IS AMENDED TO READ AS FOLLOWS:

328 IAC 1-3-2 Fund disbursement

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 13-23-9-2; IC 13-23-9-3

Sec. 2. (a) Monies may be disbursed from the fund to persons listed in section 1 of this rule for payment of ~~corrective action~~ **reimbursable costs**. ~~in compliance with IC 13-23-8-4(a)(4) through IC 13-23-8-4(e) and IC 13-23-9-2(a) through IC 13-23-9-2(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 rules of the solid waste management board at 329 IAC 9 or the risk integrated system of closure (RISC) standards.

(b) Monies may be disbursed to persons listed in section 1 of this rule for payment of ~~claims of liability to third parties~~ **party liability claims** in compliance with IC 13-23-9-3. *(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; filed Oct 17, 2001, 4:30 p.m.: 25 IR 790)*

SECTION 15. 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) ~~Persons~~ **A person** listed in section 1 of this rule ~~must do~~ **shall comply with** the following **for a claim for reimbursable costs or a third party liability claim** to be eligible ~~considered~~ for reimbursement from the fund ~~by the administrator:~~

(1) ~~Meet~~ The requirements ~~set forth~~ in IC 13-23-8-4(a)(1) through IC 13-23-8-4(a)(4) **have been met.**

(2) ~~In accordance with rules of the solid waste management board at 329 IAC 9-4 and rules of the water pollution control board at 327 IAC 2-6.1, communicate a spill report to the department of environmental management. The tank owner or operator must have been in substantial compliance with the spill reporting rule or law applicable at the time of the release.~~

(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 were~~ due, ~~shall be eligible for reimbursement from the fund in accordance with subsection (b) upon~~ **but who have now made** payment of all past **and currently** due fees, interest, and penalties.

(4) A person who acquires ownership in accordance with subsection ~~(e)~~ **shall be eligible for reimbursement from the fund upon (d) and has made** timely payment of all past due tank fees, interest, and penalties in accordance with subsection ~~(h)~~ **(g) for any site characterizations or corrective action related to an occurrence that occurs after the payment of all past and currently due fees, interest, and penalties.**

(5) The owner or operator must have registered the tank or tanks within thirty (30) days of the time the tank or tanks were first put into use, even if a release occurred before the tank or tanks were registered. Tanks are considered “in use” when the tank contains or has ever contained a regulated substance and has not been closed under 329 IAC 9-6.

(b) 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 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) Persons listed in section 1 of this rule who 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 demonstrating the resolution of the appeal. The department has the option to settle any pending appeals and resubmitted claims:~~

~~(e)~~ **(d)** A person who acquires ownership or operation of an underground petroleum storage tank under IC 13-23-8-4.5(2) may become eligible for reimbursement from the fund by complying with subsection ~~(f)~~ **(e).**

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

(1) Submitting a 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 underground petroleum storage tank. This form will be kept confidential up to the earlier of the following:

- (A) The date of the transfer of the property.
- (B) The ~~department’s~~ **administrator’s** receipt of the monies provided in subsection ~~(g): (f)~~.
- (C) For up to ninety (90) days after the projected date of closure listed in the Form.

The ~~department~~ **administrator** will provide a listing of environmental penalties, interest due to the 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 underground petroleum storage tank site is liable for any and all unpaid tank fees, interest, and penalties that are assessed by the ~~department~~ **administrator** in accordance with subsection ~~(g): (f)~~. The purchaser is to collect all past due tank fees, interest, and penalties from the noncompliant seller and remit to the ~~department~~ **administrator** the full amount of the assessment for the subject underground petroleum storage tank provided by the ~~department~~ **administrator** in accordance with subsection ~~(g): (f)~~ prior to an occurrence. The timely remittance of these monies is a condition of fund eligibility for the purchaser.

~~(g): (f)~~ Persons listed in section 1 of this rule and described in subsection ~~(c): (d)~~ who fail to pay tank fees when due are subject to payment of interest and penalties on those fees in order to become eligible for the fund under subsection ~~(f): (e)~~. 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): (g)(2)~~. This penalty will be distributed into the 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)~~ **fee or fees** at the percent per year based on subsection ~~(h): (g)~~ and 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 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 fund eligibility for the purchaser.

~~(h): (g)~~ 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
Interest will be calculated according to 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 two thousand dollars (\$2,000) under IC 13-23-12-7(a) per petroleum underground storage tank **per year that passes after each year’s fee is due. The table may be used or the following formula to calculate the penalty per tank:**

Where:

- n = total numbers of years late.**
- $Y_{i,j}$ = each year with an unpaid fee or a fee that was paid at least one (1) year late.**
- Y_o = first year a fee was unpaid or paid at least one (1) year late.**
- m = most recent year where tank fees were unpaid or paid at least one (1) year late.**

$$(2000) \left(\sum_{j=Y_o}^m \left(\sum_{i=1}^n Y_{i,j} \right) \right) = \text{penalty}$$

Year due	1 year past year due	2 years past year due	3 years past year due	4 years past year due
Year 1	2,000	2,000	2,000	2,000
Year 2		2,000	2,000	2,000
Year 3			2,000	2,000
Year 4				2,000
Total per tank	2,000	6,000	12,000	20,000

(B) For ~~all other~~ sites **where fees have not been consistently or completely paid, or both**, the penalty will be calculated at one thousand dollars (\$1,000) per petroleum underground storage tank for each year that passes after the fee becomes due and

before the fee is paid. The following table is an example of how penalties must be paid per tank:

Year due	1 year past year due	2 years past year due	3 years past year due	4 years past year due
Year 1	1,000	1,000	1,000	1,000
Year 2		1,000	1,000	1,000
Year 3			1,000	1,000
Year 4				1,000
Total per tank	1,000	3,000	6,000	10,000

(C) The penalty is incurred:

(i) nine (9) months after the fee is due; or

(ii) three (3) months after the final yearly installment is due.

Subsequent penalties are calculated yearly and are cumulative as specified in clause (B).

(D) Penalties will not be collected for fees due before December 1, 2001.

(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; filed Oct 17, 2001, 4:30 p.m.: 25 IR 790; errata filed Feb 27, 2002, 9:58 a.m.: 25 IR 2254)

SECTION 16. 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 13-23-8-8

Sec. 4. (a) After payment of the applicable deductible amount, the fund may pay for **reimbursable** costs incurred by persons listed in section 1 of this rule ~~for corrective action~~ and third party liability **claims** as specified in IC 13-23-8-1.

(b) Regardless of the number of eligible persons listed in section 1 of this rule at one (1) site, no more than two million dollars (\$2,000,000) may be reimbursed for the costs, including third party liability claims, associated with a single occurrence.

(c) An owner or operator may not receive payment for more than the allowable limits as specified in IC 13-23-8-8.

(d) For purposes of this section, “year” means a calendar year even if more than the maximum is received in any three hundred sixty-five (365) day period. *(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; filed Oct 17, 2001, 4:30 p.m.: 25 IR 792)*

SECTION 17. 328 IAC 1-3-5 IS AMENDED TO READ AS FOLLOWS:

328 IAC 1-3-5 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 13-23-3-2; IC 13-23-8-4

Sec. 5. (a) **Reimbursable costs, excluding third party liability claims, are actual monetary amounts paid for work performed:**

(1) consistent with an approved or deemed approved CAP or under one (1) or more of the provisions of IC 13-23-8-4(b); and

(2) subject to the following conditions:

(A) Credits, rebates, refunds, or other similar payments made to the owner or operator or received by the owner, operator, or claimant must be subtracted from the costs submitted for reimbursement.

(B) The work performed was consistent with site characterization or an approved CAP.

(C) The work performed under the CAP has been determined to be cost effective under section 1.3 of this rule.

(D) The work performed has been determined to be reasonable under 328 IAC 1-1-8.3.

(E) The work was performed as described in subsection (b) or (e), or both, and is not described in subsection (d).

(b) Persons listed in section 1 of this rule may seek payment from the fund for the following reimbursable costs or costs related

to necessary costs actually incurred in the performance of corrective action: **a third party liability claim of the type described as follows:**

- (1) ~~Investigation~~ **Site characterization**, which includes research, field time, report writing, and clerical support.
- (2) Lodging and per diem costs will be paid in accordance with the most current Indiana department of administration financial management circular covering state travel policies and procedures. Mileage shall be calculated at the federal rate for a privately owned automobile under 41 CFR 301-10.303, in effect on ~~September 6, 2000~~: **January 16, 2003, 68 FR 494**. Sales of the Code of Federal Regulations are handled by the Superintendent of Documents, ~~Government Printing Office, Washington, D.C. 20402~~: **P.O. Box 371954, Pittsburgh, PA 15250-7954**.
- (3) 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.
- (4) Soil and water sampling for petroleum and petroleum constituents shall be performed in accordance with rules of the solid waste management board at 329 IAC 9 or the risk integrated system of closure (RISC) standards **but not both**.
- (5) ~~Expenditures~~ **Costs** 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 that~~ can be made to the fund are disposable bailers and sample bottles.
- (6) Persons listed in section 1 of this rule may be reimbursed for ~~expenditures costs~~ for materials and supplies, such as disposable protective equipment, building materials, **such as piping and cement**, and preservatives.
- (7) Attorney fees, not to exceed twenty-five percent (25%) of the total claim or thirty thousand dollars (\$30,000), whichever is less, shall only be payable if incurred by the owner or operator in defense of 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~~: **administrator**.
- (10) Any other ~~reasonable reimbursable~~ costs the ~~department administrator~~ finds to be necessary. ~~for corrective action or~~ **Payment of a third party liability claim the administrator finds to be necessary.**
- (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 rules of the solid waste management board at 329 IAC 9.
- (12) Markup of no more than ~~fifteen percent (15%)~~ **ten percent (10%)** 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.
- (13) **The cost is consistent with an approved CAP where projected costs for the work to be completed under the CAP are reviewed by the commissioner to determine whether the costs are reimbursable costs.**

(c) The approval of the initial site characterization and the corrective action plan under rules of the solid waste management board at 329 IAC 9 does not necessarily mean that costs are reimbursable costs under this rule.

~~(b)~~ **(d)** The following ~~expenditures costs~~ are ~~ineligible for reimbursement~~: **not reimbursable** from the fund:

- (1) Costs incurred before April 1, 1988.
- (2) Costs incurred more than twenty-four (24) hours prior to the date and time the suspected or the confirmed release has been reported under the spill reporting rule in effect at the time of the release.**
- ~~(2)~~ **(3)** Costs of repair, upgrading, or replacement of an underground petroleum storage tank or its associated equipment.
- ~~(3)~~ **(4)** 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.
- (5) Costs that exceed reimbursable costs even if under an approved CAP.**
- ~~(4)~~ **(6)** The cost of **labor and** equipment purchases other than those ~~expenditures costs~~ routinely required to implement a corrective action plan. Examples of equipment purchases that cannot be charged to a specific site include drilling rigs, earth moving equipment, photoionization detectors, explosimeters, and hand tools.
- ~~(5)~~ **(7)** The cost of cosmetic improvements, including the repair or replacement of blacktop or concrete, unless directly associated with corrective action.

- (6) (8) Lost income or reduced property values unless part of a third party liability claim.
- (7) (9) Interest or finance charges.
- (8) (10) Contractor costs not directly related to corrective action activities, such as preparing cost estimates.
- (9) (11) Fines or penalties imposed by local, state, or federal governmental agencies.
- (10) (12) Punitive or exemplary damages.
- (11) (13) 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); rules of the solid waste management board at 329 IAC 9; and the RISC industrial cleanup standards with the following exceptions:
- (A) Ground water contamination affecting a public drinking water well on-site or off-site.
- (B) Contamination at concentrations exceeding RISC residential cleanup standards off-site, not including roadways.
- (12) (14) Any costs related to the excavation and disposal of more than one thousand five hundred (1,500) tons of soil unless:
- (A) alternative remediation techniques have been considered;
- (B) excavation and disposal was shown to be the most cost effective least costly and quickest remediation option; and
- (C) the soil removal is part of a CAP approved or deemed approved by the commissioner.
- (13) (15) Any other cost not directly related to site characterization, 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.
- (16) If a release has occurred before the tank or tanks were registered, and the tank or tanks were not registered within thirty (30) days from the time the tank or tanks were first put into use, a claim is not reimbursable from the fund by the administrator. Tanks are considered "in use" when the tank contains or has ever contained a regulated substance and has not been closed under 329 IAC 9-6.

(e) Appropriate expenditures which (e) Costs that may be considered for reimbursement, paid from the fund are set forth in the following: reimbursable expenditure chart. Sampling and analysis must be conducted in accordance with "Test Methods for Evaluating Solid Waste, Physical/Chemical Methods", United States Environmental Protection Agency Publication SW-846, Third Edition (November 1986) as amended by Updates I (July 1992); H (September 1994); HA (August 1993); HB (January 1995); HI (December 1996); and HHA (May 1999). Publication SW 846 is available from the Superintendent of Documents, Government Printing Office, Washington, D.C. 20402.

Activity	Cost Range or Maximum Amount
SITE INVESTIGATION CHARACTERIZATION	
Mobilization and demobilization. within a 50 mile radius. This includes the cost of moving general contractor owned equipment, set-up, and removing equipment.	\$300
Soil borings, for purposes of soil or ground water sampling or monitoring well installation when using a hollow stem auger.	
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
These amounts may only be charged one (1) time per borehole.	
Sample collection is part of well installation.	
Blind drilling using a hollow stem auger when well borings have already been logged within 5 feet.	
0-50 feet	\$6.50 per foot
> 50 feet	\$8.50 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
Materials	
Well casing and screen (including riser) filter pack, annular, and surface seal:	
2 inch well	\$10 \$7 per foot
4 inch well	\$12 per foot
6 inch well	\$15 \$22 per foot
Flush-grade well covers	\$75 per cover

Laboratory services, including containers, packaging, and postage.

Soil analysis methods

TPH-8015 **GRO**

~~\$75~~ **\$60 per sample**

TPH-8015 DRO

\$60 per sample

TPH-8015 ERO

\$60 per sample

TPH-418.1

~~\$100~~ **\$95 per sample**

TRPH-HEM-1664/9071B

\$60 per sample

VOC-8260

~~\$200~~ **\$150 per sample**

SVOC-8270

~~\$325~~ **\$250 per sample**

PAH-8270SIM

\$110 per sample

PAH-8310

~~\$185~~ **\$150 per sample**

~~PCB-8080~~ **PCB-8082**

\$110 per sample

Metals- ~~(13)~~ **7 barium, cadmium, chromium, lead, mercury, nickel, zinc**

~~\$170~~ **\$100 per sample**

TCLP-lead

\$110 per sample

BTEX/MTBE-8021

~~\$75~~ **\$60 per sample**

BTEX/MTBE-8260

~~\$200~~ **\$100 per sample**

Ignitability

\$30 per sample

Fractional organic carbon

\$70 per sample

Water analysis methods

TPH-8015 **GRO**

~~\$75~~ **\$60 per sample**

TPH-8015 DRO

\$60 per sample

TPH-8015 ERO

\$60 per sample

TPH-8015 Methane

\$60 per sample

TRPH-HEM-1664

\$60 per sample

VOC-8260

~~\$200~~ **\$100 per sample**

BTEX/MTBE-8021

~~\$75~~ **\$60 per sample**

BTEX/MTBE-8260

~~\$200~~ **\$100 per sample**

SVOC-8270

~~\$325~~ **\$250 per sample**

PAH-8270 SIM

\$130 per sample

PAH-8310

~~\$185~~ **\$140 per sample**

Metals- ~~(13)~~ **7 barium, cadmium, chromium, lead, mercury, nickel, zinc**

~~\$170~~ **\$80 per sample**

Metal-soluble iron

\$25 per sample

~~Monitored natural attenuation parameters~~

Nitrates

~~\$15~~ **\$25 per sample**

~~Nitrites~~

~~\$15~~ **per sample**

Sulfate

~~\$15~~ **\$25 per sample**

Sulfide

\$25 per sample

~~Dissolved methane~~

~~\$50~~ **per sample**

COD

\$20 per sample

BOD₅

\$40 per sample

Total suspended solids

\$12 per sample

Air analysis methods

VOC-TO-15

\$400 per sample

~~Use of RISC will require~~ **If the commissioner requires** DQO-Level IV, including raw data, internal chain of custody, and QA/QC.

20% markup allowed per sample

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)~~ **(f)** for task descriptions for personnel classifications.

Principal

\$110 per hour

Senior project manager	\$102 per hour
Project manager	\$83 per hour
Staff project person	\$70 per hour
Senior technician	\$55 per hour
Technician	\$38 per hour
Drafting person	\$35 per hour
Word processor/clerical	\$28 per hour
Toxicologist	\$125 per hour

INITIAL ABATEMENT AND FREE PRODUCT REMOVAL

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

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.	\$400 \$600
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

	<u>4 inch concrete</u>	<u>6 inch concrete</u>
Under 200 feet	\$1.60 per foot	\$2 per foot
200 through 400 feet	\$1.40 per foot	\$1.81 per foot
400 through 600 feet	\$1.33 per foot	\$1.70 per foot
600 through 1,000 feet	\$1.20 per foot	\$1.66 per foot
Over 1,000 feet	\$1.08 per foot	\$1.60 per foot

Saw asphalt, prices are per linear foot

	<u>3 inch asphalt</u>	<u>4 inch asphalt</u>	<u>6 inch asphalt</u>
Under 450 feet	\$1.75 per foot	\$1.90 per foot	\$3 per foot
450 through 600 feet	\$1.50 per foot	\$1.75 per foot	\$2.75 per foot
600 through 1,000 feet	\$1.35 per foot	\$1.50 per foot	\$2.25 per foot
Over 1,000 feet	\$1.25 per foot	\$1.35 per foot	\$2 per foot

Concrete removal, including the cost of loading and hauling to a ~~legal landfill~~ **land disposal facility permitted and willing to accept the waste** within 6 miles, but does not include landfill fees

4 inch concrete	\$3 per ton
6 inch concrete	\$5.77 per ton
7 inch through 9 inch concrete	\$17.47 per ton
10 inch and over	\$43.96 per ton
With rebar	Add 15%
For less than 500 square feet	Add 35%
Concrete curb	\$5.04 per linear foot

Asphalt removal, including the cost of loading and hauling to a ~~legal landfill~~ **land disposal facility permitted and willing to accept the waste** within 6 miles, but does not include landfill fees

Removal asphalt pad (3 inches)	\$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

Mobilization

Supplies, for example, visqueen.

\$2.22 per ton
\$300

Stockpiling soil on-site	\$1.34 per 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 ton
Hauling, mileage must be documented	\$0.37 per ton for each 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 decontamination fluids.	
Landfill reimbursement will be based on the least expensive combination of documented transportation costs and documented disposal costs at a permitted landfill. Applicant must submit a cost justification if the applicant does not use the nearest land disposal facility permitted to accept the applicant's waste.	
Trash	\$15 \$20 per ton
APPROVED TECHNOLOGIES	
Reimbursement The maximum costs for corrective action costs will be reimbursed approved on the basis of the lowest of three (3) comparable, competitive bids on for the work specified in the corrective action plan. that is approved or deemed approved by the department. If the claimant can provide sufficient technical justification for the selection of another bid, the corrective action costs associated with the higher bid will be reimbursed.	
Bids for the work specified in the CAP must include bids for installation and labor; however, separate bids may be obtained for cost of installation and labor. Copies of the request for proposal (RFP) for implementation of CAP that was sent to each vendor must be submitted. The administrator can approve costs based on less than three (3) bids if a demonstration is provided to the administrator that lower costs for the specified work is not possible or practical.	
Lease or rental on equipment will not be reimbursed above the purchase price.	
SITE RESTORATION	
Backfill hauling	\$0.37 per ton for each mile
Backfill material	\$13 per ton/stone
	\$6.50 per ton/soil
Backfill placement, compaction, and density verification	\$4 per ton
Resurfacing	
4 inch concrete	\$3.25 per square foot
For each additional inch of concrete	Add \$0.40 per square foot
For rebar	Add 15%
Asphalt pad, 4 inch thickness	\$2.15 per square foot
Asphalt curb and gutter	\$4.75 per linear foot
Island forms	
4 feet by 10 feet with 2 foot bumpers	\$725 each

4 feet by 16 feet with 2 foot bumpers	\$1,100 each
Equipment rental (based on daily rate; not an inclusive list)	
Decontamination 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 LED/O2 meter	\$50
pH and conductivity meter	\$20
Dissolved oxygen meter	\$30
Oxidation/reduction meter	\$35
Multiparameter water quality meter including pH, dissolved oxygen, temperature, and conductivity	\$50
Ferrous iron field test	\$6 per sample
Hydrogen sulfite field test	\$6 per sample
Digital camera	\$10
2" inch submersible pump	\$115
4" inch submersible pump	\$95
Direct push technology	\$1,200 per day \$750 per ½ day
Rate allowed for drilling greater than 200 feet using direct push technology in a single day	\$6 per foot
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
Portable generator, generator ≤ 10kW	\$100
Portable generator, generator > 10kW	\$125

~~(d)~~ (f) 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 the department, client, and contractors.
- (D) Hydrogeologic and contaminant 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~~ or perform site characterization and remediation activities, **or both**.
 - (F) Oversee well water records searches.
 - (G) Define how site utilities are 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 preparation 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; filed Oct 17, 2001, 4:30 p.m.: 25 IR 792; errata filed Feb 27, 2002, 9:58 a.m.: 25 IR 2255)

SECTION 18. 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~~ **reimbursable costs** does not limit the legal responsibility of persons listed in section 1 of this rule for damages incurred by another person as a result of ~~a release~~ **an occurrence**.
(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; filed Oct 17, 2001, 4:30 p.m.: 25 IR 798)

SECTION 19. 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 13-23-9-4

Sec. 1. (a) The procedure set forth in this rule shall be followed in the event the unencumbered balance, ~~of funds less the unpaid, approved claims,~~ in the fund falls below twenty-five million dollars (\$25,000,000). ~~or by the discretion of~~ The administrator may invoke these procedures prior to the unencumbered balance, but less the unpaid, approved claims, in the fund falling below twenty-five million dollars (\$25,000,000).

(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 December 4, 1992, 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 the department	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 _____	

(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:

(b) All claims submitted to the administrator for work performed as a preapproved emergency measure will be paid first. Any work not preapproved as an emergency measure will be paid according to the category of the release as determined in section 1(c) of this rule.

(c) After the initial site characterization, further site investigation, or a corrective action progress report is completed, the release will be placed in the lowest numbered category for which it qualifies as follows, and claims submitted under subsection (a) shall be paid in numerical order of the release category unless the release is recategorized under section 3 of this rule:

(1) If the administrator determines, based on the most recent information submitted to the administrator, that one (1) of the following has occurred and it is attributable to the release, then the release is considered a category 1 release and claims for that release shall be paid after all approved claims for emergency measures are paid as provided in section 1(a) of this rule:

(A) Vapors from regulated substances in a structure or a conduit, such as a storm sewer, sanitary sewer, or utility conduit, are detected at or above the lower explosive limit (LEL) using a properly calibrated combustible gas indicator (CGI).

(B) Vapors for regulated substances are detected in an inhabited or inhabitable building in levels greater than long term, risk-based exposure levels based on the use of the building.

(C) Regulated substances are detected in a drinking water well at or above maximum contamination levels (MCLs) or RISC residential ground water cleanup objectives at the point of compliance or at the tap.

(D) Regulated substances are detected in free phase in an underground conduit, such as a storm sewer, sanitary sewer, or utility conduit.

(E) Regulated substances are detected above maximum contamination levels (MCLs) or RISC residential ground water cleanup objectives within one (1) year time of travel of a wellhead of a public drinking water supply system.

(F) Regulated substances are detected in free phase in surface water.

(2) If the administrator determines, based on the most recent information submitted to the administrator, that one (1) of the following has occurred and is attributable to the release, then the release is considered a category 2 release and claims for that release shall be paid after all approved claims for category 1 releases are paid as provided in section 1(c)(1) of this rule:

(A) Regulated substances are detected in free phase in a thickness of at least one (1) foot in any one (1) well, or at least one (1) inch in two (2) or more wells where the wells are at least twenty (20) feet apart, provided that the wells are not screened in the UST cavity backfill.

(B) Regulated substances are detected in surface water above water quality standards under rules of the water pollution control board at 327 IAC 2.

(3) If the administrator determines, based on the most recent information submitted to the administrator, that one (1) of the following has occurred and is attributable to the release, then the release is considered a category 3 release and claims for that release shall be paid after all approved claims for category 2 releases are paid as provided in section 1(c)(2) of this rule:

(A) Regulated substances are detected at a location not on the site of the release in ground water at concentrations exceeding RISC cleanup standards appropriate for the land use of the off-site location.

(B) Regulated substances are detected at a location not on the site of the release in soil at concentrations exceeding RISC cleanup standards appropriate for the land use of the off-site location.

(C) Regulated substances are present in free phase in a thickness of at least one-sixteenth ($\frac{1}{16}$) inch in any well.

(4) If the administrator determines, based on the most recent information submitted to the administrator, that one (1) of the following has occurred and is attributable to the release, then the release is considered a category 4 release and claims for that release shall be paid after all approved claims for category 3 releases are paid as provided in section 1(c)(3) of this rule:

(A) Regulated substances are detected in on-site ground water at concentrations exceeding RISC industrial cleanup standards in two (2) or more wells, where the wells are at least twenty (20) feet apart, where neither well is screened in the UST cavity backfill.

(B) Regulated product is detected in on-site soil at concentrations exceeding RISC industrial cleanup standards in at least two (2) boring holes at least twenty (20) feet apart.

(5) A release that does not qualify as a category 1, 2, 3, or 4 category will be considered a category 5 release.

(6) Claims submitted under identical categories are prioritized according to the date and time received by the administrator, as indicated by the date and time stamped by the administrator on the claim submitted to the administrator.

(d) Initial releases shall be classified according to those conditions that existed at the time the release or occurrence was discovered.

(e) Claims determined to be unacceptable may be revised and resubmitted to the fund. The priority ranking process of the revised claim shall be based on the date and time that the fund administrator receives the revised claim, as indicated by the date and time stamped by the administrator on the claim submitted to the administrator.

(f) A claimant may request a review of a denial of payment using the procedures set forth in IC 13-23-9-4.

~~(d)~~ (g) Classification of a release or 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; filed Oct 17, 2001, 4:30 p.m.: 25 IR 799*)

SECTION 20. 328 IAC 1-4-3 IS AMENDED TO READ AS FOLLOWS:

328 IAC 1-4-3 Reclassification of releases

Authority: IC 13-14-8

Affected: IC 13-23-9-2; IC 13-23-9-4

Sec. 3. (a) Except for environmental emergencies, initial claims shall be ranked according to those conditions which existed at the time the corrective action was commenced. Claims determined to be of identical priority shall be ranked according to the date that an acceptable claim was received by the fund:

(b) Subsequent claims may be reprioritized based on the environmental threat present during the time period for which additional reimbursement is being claimed:

(c) The administrator shall notify claimants within sixty (60) days after the receipt of their claims whether their claims shall be approved for payment. If a claim is determined to be unacceptable or ineligible after reviewing the submitted information in accordance with IC 13-23-9-2, the administrator shall notify the owner or operator within ten (10) days of the denial and inform the claimant of the reasons for which the claim was rejected:

(d) Claims determined to be unacceptable may be revised and resubmitted to the fund. The priority ranking process of the revised claim shall be based on the date that the fund receives the revised claim:

(e) A claimant may request a review of a denial of payment using the procedures set forth in IC 13-23-9-4.

(a) To assure the efficient administration of the fund, the administrator may reclassify a release at any time that it is determined a claim release has been incorrectly classified:

- (1) The administrator will notify the applicant by mail of any new classification, and fifteen (15) days after the notification any new costs will be under the new category.
- (2) The applicant may petition the administrator to be put in a lower number category based on new information.
- (3) If the administrator approves placement in a lower number category, the applicant may seek reimbursement under the new category for any costs incurred subsequent to the placement.

(b) Releases may be recategorized based on:

- (1) the environmental threat present during the time period for which additional reimbursement is being claimed;
- (2) information indicating the elimination or abatement of the condition or conditions that lead to the placement of a release in a category;
- (3) other information is submitted to the administrator; or
- (4) the discovery of the event that lead to the placement in a higher category with category 1 being the highest.

(Underground Storage Tank Financial Assurance Board; 328 IAC 1-4-3; filed Dec 4, 1992, 11:00 a.m.: 16 IR 1055; filed May 25, 1999, 4:31 p.m.: 22 IR 3103; readopted filed Jan 10, 2001, 3:21 p.m.: 24 IR 1534)

SECTION 21. 328 IAC 1-4-4 IS ADDED TO READ AS FOLLOWS:

328 IAC 1-4-4 Monthly reimbursement

Authority: IC 13-14-8

Affected: IC 13-23-9-2; IC 13-23-9-4

Sec. 4. (a) The total amount reimbursed from the fund must not exceed ten percent (10%) of the fund balance based on the average fund balance of the previous fiscal quarter unless the unencumbered balance, less the unpaid approved claims, in the fund is equal to or greater than twenty-five million dollars (\$25,000,000).

(b) At no time will the fund balance be allowed to fall below twenty-five million dollars (\$25,000,000). *(Underground Storage Tank Financial Assurance Board; 328 IAC 1-4-4)*

SECTION 22. 328 IAC 1-5-1 IS AMENDED TO READ AS FOLLOWS:

Rule 5. Claims

328 IAC 1-5-1 Applications for payment of reimbursable 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

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~~ reimbursable costs as required by the application package. Documentation of ~~expenses~~ reimbursable costs as required by the administrator must be submitted as part of the application. The commissioner may request additional information and records to substantiate claims submitted including the following:

- (1) A copy of original employee time sheets.**
- (2) Invoices relating to purchase or other acquisition of equipment and supplies used for corrective action.**
- (3) Copies of requests for bids for work specified in the CAP.**

(b) The application shall contain the following statement, which shall be signed and attested by the person applying to the fund and the owner/operator, if not the same: "I swear or affirm to the best of my knowledge and belief that the costs presented herein represent the actual reimbursable costs incurred in the performance of site characterization or 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 site characterization or corrective action."

(c) Two (2) copies of all documents required by the administrator shall be submitted by the person applying to the fund to support the application. Original documents must be kept by the 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 may be submitted for any amount, including \$0/eligibility preapproval claims.~~

~~(2) Subsequent (1) All 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) (B) for costs incurred over a period of four (4) months or longer: six (6) months from the date of the last claim; or~~

~~(C) within fifteen (15) days of a release being classified under 328 IAC 1-4.~~

(2) Zero dollars (\$0)/eligibility preapproval claims.

(3) Persons applying to the fund may resubmit claims in any amount if the costs were disallowed for lack of backup documentation. Claims that had costs disallowed may be resubmitted with subsequent claims; however, the portion of the claim that was previously submitted must be identified as being previously submitted and include the dollar value of the original claim.

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; filed Oct 17, 2001, 4:30 p.m.: 25 IR 801*)

SECTION 23. 328 IAC 1-5-2 IS AMENDED TO READ AS FOLLOWS:

328 IAC 1-5-2 Fund payment procedures; eligibility preapproval

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; IC 13-23-9-4

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. **Payment will be made as follows:**

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

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

~~(d) (2) When a person applying to the fund submits documentation verifying that that the person has paid for incurred costs of for site investigation or corrective action, payment shall be made by check directly to that person.~~

(b) A determination under this rule is appealable under IC 13-23-9-4.

~~(c) (c) A person who may apply to the fund under 328 IAC 1-3-1 may seek preapproval of a site's eligibility to have corrective action reimbursable costs reimbursed or third party liability claims paid from the 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; filed Oct 17, 2001, 4:30 p.m.: 25 IR 801*)~~

SECTION 24. 328 IAC 1-5-3 IS AMENDED 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~~ **administrator** shall consider the CAP approved solely for purposes of reimbursement of ~~reasonable~~ **reimbursable** 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~~ **be in substantial compliance** with all applicable rules or department standards. **A deemed approved CAP shall be superseded by the administrator's issuance of a determination on the CAP.** (*Underground Storage Tank Financial Assurance Board; 328 IAC 1-5-3; filed Oct 17, 2001, 4:30 p.m.: 25 IR 802*)

SECTION 25. 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~~ **administrator**. 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 13-23-8-3.

(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.

(d) The minimum single claim amount contained in 328 IAC 1-5-1(d)(1) does not apply to third party liability claims.
(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; filed Oct 17, 2001, 4:30 p.m.: 25 IR 802)

SECTION 26. 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; IC 13-11-2-193.5

Sec. 2. (a) If the attorney general determines that the requirements under 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 if applicable; and
- (3) if the administrator determines that the owner or operator is in compliance with the requirements of 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 fees or compensation paid to obtain:

- (1) access to properties not controlled by the claimant;
- (2) institutional controls, including, but not limited to, ~~deed restrictions required by risk integrated system of closure (RISC)~~ **restrictive covenants as defined under IC 13-11-2-193.5;** or
- (3) subdivisions (1) and (2).

(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; filed Oct 17, 2001, 4:30 p.m.: 25 IR 802)

SECTION 27. 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~~ **may** 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

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 in compliance with rules of the solid waste management board at 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; filed Oct 17, 2001, 4:30 p.m.: 25 IR 802*)

SECTION 28. 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. The fund coverage will continue for sixty (60) days after notice of ~~termination of coverage.~~ **insufficient funds.** 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; filed Oct 17, 2001, 4:30 p.m.: 25 IR 803*)

SECTION 29. THE FOLLOWING ARE REPEALED: 328 IAC 1-1-8; 328 IAC 1-7-3.

Notice of First Meeting/Hearing

Under IC 4-22-2-24, IC 13-14-8-6, and IC 13-14-9, notice is hereby given that on March 11, 2004, at 1:30 p.m., Indiana Government Center-South, 402 West Washington Street, Conference Center Rooms 4 and 5, Indianapolis, Indiana, the Indiana Financial Assurance Board will hold a public hearing on amendments to 328 IAC 1.

The purpose of this hearing is to receive comments from the public prior to preliminary 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.

Additional information regarding this action may be obtained from Lynn C. West, Rules, Outreach and Planning Section, Office of Land Quality, (317) 232-3593 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) 233-0855. TDD: (317) 232-6565. Speech and hearing impaired callers may contact IDEM via the Indiana Relay Service at 1-800-743-3333. Please provide a minimum of 72 hours' notification.

Copies of these rules are now on file at the Office of Land Quality, Indiana Department of Environmental Management, Indiana Government Center-North, 100 North Senate Avenue, 11th Floor, Indianapolis, Indiana, and are open for public inspection.