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

**Proposed Rule**  
LSA Document #02-204

**DIGEST**

Amends 328 IAC 1 concerning the excess liability trust fund (ELTF) to provide for additional cost accountability by claimants, to maintain the ELTF, to amend the method for prioritization of claims in the event of a fund balance near or at \$25 million, to clarify the definition of “third party liability”, to clarify the fund access and to include access to the fund by multiple owners and operators, and to revise and update the schedule of specific costs allowed to be reimbursed. Effective 30 days after filing with the secretary of state.

**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).

Second Notice of Comment Period: December 1, 2003 Indiana Register (27 IR 952).

Notice of First Hearing: December 1, 2003 Indiana Register (27 IR 952).

Date of First Hearing: March 11, 2004, continued to April 8, 2004.

**PUBLIC COMMENTS UNDER IC 13-14-9-4.5**

Because this proposed rule is not substantively different from the draft rule published on December 1, 2003 at 27 IR 952, the Indiana Department of Environmental Management (IDEM) is not requesting additional comment on this proposed rule.

**SUMMARY/RESPONSE TO COMMENTS FROM THE SECOND COMMENT PERIOD**

The Indiana Department of Environmental Management (IDEM) requested public comment from December 1, 2003, through January 8, 2004, on IDEM’s draft rule language. IDEM received comments from the following parties:

Christopher J. Braun, General Counsel to the Indiana Petroleum (PSRB)

Marketers and Convenience Store Association

Maggie McShane, Executive Director, Indiana Petroleum Council (IPC)

Catherine Gibbs, Lee & Ryan (L & R)

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

*Comment:* The IPCA certainly appreciates the extensive amount of time and effort invested by representatives from the ELTF, IDEM, UST owners and the environmental consulting community during the past several months to develop a consensus on various amendments to the ELTF’s rules. The IPCA supports the overall goal of this rulemaking, which has been to ensure that the monies from the Fund are being wisely spent by the UST owner, environmental consultant and IDEM in undertaking reasonable, cost effective cleanups. The IPCA believes that this goal has been accomplished in this rulemaking in several positive ways: (a) further clarification of the rules to avoid the “open checkbook” approach of UST investigations and cleanups; (b) minimizing the potential for claims and billing excesses by tightening certain rules; (c) more carefully evaluating what constitutes “cost effective” site investigations and cleanups and “reasonable” costs; (d) reducing the amounts of certain reimbursable costs; (e) further integration of RISC in determining an appropriate level of cleanup standards for sites, including a cost benefit analysis of operation and maintenance costs for long-term monitoring of sites; and (f) the prioritization of sites based on the actual environmental risks to human health and the environment.

These changes are certainly needed. Since its high water mark in June 2001 when its balance peaked at more than \$87,000,000, the ELTF’s balance has rapidly declined, to \$68,000,000 in June 2002, \$52,000,000 in June 2003 and \$37,000,000 as of October 31, 2003. The reasons for this situation are many and are more fully reflected in the article recently published in the IPCA’s Fueling Indiana magazine, a copy of which is attached hereto at **Tab 1** and

incorporated herein. Moreover, the consolidation within the petroleum marketing industry continues, as the large number of mergers and acquisitions of UST operations has resulted in numerous site investigations and cleanups as part of the transfer of the properties, with the total amount of claims being paid by the ELTF nearly tripling in two years, as they increased from roughly \$16,000,000 in 2001 to more than \$47,000,000 in 2003. During this same period, the annual revenue levels derived from UST payments and the oil inspection fee ranged from a low of \$26,649,319 to a high of \$37,612,959. At the current pace of claim submission and payment, it is anticipated that by mid-2004 the ELTF will be depleted to the range of \$25,000,000, at which point the ELTF's administrator is authorized to invoke restrictive procedures under a priority claim and payment process.

The IPCA believes that the draft rules are a significant and positive step forward in addressing the above concerns. Subject to the handful of changes listed below, the IPCA fully supports these rulemaking changes. These changes, if adopted, would clarify certain areas of the ELTF, would be consistent with the legislative purpose set forth in the governing statutes, and would provide greater protection to ensure that the ELTF remains a fiscally responsible, viable funding mechanism for our members' UST liabilities for many years to come. (PSRB)

*Response:* The department thanks the association for its comment and its support of this rulemaking.

*Comment: 328 IAC 1-1-8.3:* "Reasonable" means that the **site characterization and corrective action** are appropriate and performed only as necessary to meet the cleanup objectives. The term also means that corrective action and site characterization are consistent with 328 IAC 1-3-5(a) through 328 IAC 1-3-5(e).

Change made to be consistent with other provisions in rulemaking and to avoid later confusion over the application of the term "reasonable." (PSRB)

*Response:* IDEM agrees and this was changed as specified.

*Comment: 328 IAC 1-1-10:(a)* "Third party liability" means the damages a tank owner or operator is legally obligated to pay for injury, costs, and damage suffered by a third party as the result of a release. The term includes bodily injury and property damage.

(b) The term does not include the following:

(1) Punitive or exemplary damages.

(2) Claims arising on behalf of or in favor of a claimant, **owner or operator except that in the event of a third party claim being asserted either by an owner of a site with USTs against the operator of the site or by an operator of a site with USTs against the owner of the site, then the owner and operator would only be able to assert a first party claim and would have no greater rights to recover from the Fund than a claimant asserting a first party claim to the Fund.**

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

The IPCA is willing to accept the proposed language to exclude from the definition of third party liability: (a) claims arising on behalf of or in favor of a claimant; and (b) costs that were previously determined ineligible for reimbursement. However, for the following reasons, the IPCA cannot accept the proposed change to exclude new owners and operators from third party liability. Instead, to balance the needs of the IPCA, the ELTF and IDEM on this important issue, for future claims the IPCA is willing to accept limiting the types of damages that can be recovered in this situation to that of a first party claim, namely, site characterization and corrective action costs. By placing the owner and operator on the same footing with a first party claimant this would require the payment of a deductible and not allow the recovery of various damages eligible to be recovered in a third party claim, such as lost rent, interest, attorney fees, and diminution in property value due to contamination. This type of limitation would place an owner/operator of a UST site on equal footing with an owner who leases its UST site to an operator. Also, these owner/operator claims would be subject to the same requirements imposed on first party claims, such as UST registration, payment of UST fees, payment of a deductible, timely reporting of a release, etc. Absent such language, the IPCA will have no choice but to oppose IDEM's proposed language to exclude owners and operators from third party liability coverage, for the following reasons. Contrary to the statement in IDEM's comments to the rules, the revisions to third party liability proposed by the Indiana Attorney General to specifically exclude owners and operators is not a clarification, but, rather, a substantial change that is objectionable and will have far-reaching consequences.

First, the proposed language to exclude owners and operators is completely contrary to the position taken by the Financial Assurance Board on this very issue at its June 12, 2003 meeting. In the **Resolution Adopted by the Financial Assurance Board, dated June 12, 2003**, the FAB adopted the following position on this issue:

**...WHEREAS, Indiana Code §13-23-8-1 and §13-23-9-3, and the regulations or rules thereunder, do not define "third party" or "third parties" to mean any third party except owners and/or operators; and**

**"BE IT HEREBY RESOLVED, to accomplish the Fund's purposes of encouraging environmental cleanups and payment of first party and third party environmental liabilities arising from underground storage tanks,**

**under Ind. Code §13-23-8-1 and §13-23-9-3 and any regulation or rule arising thereunder, “third party” and “third parties” are to be construed broadly to include any and all such third party claims against an owner or operator of an underground storage tank, including an owner or operator of a site with underground storage tanks.”**

For ease of review, a copy of the Board’s Resolution is attached at **Tab 2**. Given that the FAB is responsible for the Fund and its administration, the IPCA believes that IDEM should reflect the position of its client, the FAB, not the Attorney General, on this issue.

Second, excluding the USTs that are owned by the major oil companies, the IPCA members own, operate and/or supply petroleum products to a majority of the remaining USTS in Indiana that are subject to Indiana’s Underground Storage Tank program and the ELTF. The IPCA members have hundreds, if not thousands, of UST locations around the State of Indiana where they have entered into contractual arrangements to lease sites to operators who depend on the ELTF to pay for any liabilities arising from the UST operations and related environmental liabilities. As a result, IPCA members and their lessees, dealers and otherwise, routinely face substantial first party and third party liability claims due to UST contamination and will face such claims in the future. Cleanups from leaking USTs typically range in the six figures up to seven-figure range and pose a major liability and expense for UST owners and operators. To suddenly narrow the third party liability coverage available to UST owners would impose a fiscal impact on the regulated community far greater than \$500,000. This change would also force UST owners, lessors and lessees throughout the State of Indiana to renegotiate hundred or existing dealer agreements, site and operational leases and other contractual arrangements to address this newly unfunded environmental liability.

Third, since the Fund was enacted in 1988, the IPCA and its members have relied upon the Fund to provide complete first party and third party liability protection and have entered into countless contractual agreements and transactions based on this understanding. Due to the Careful management of these sites throughout the State of Indiana and cooperative efforts of UST owners and operators through the cleanup stage, it is the IPCA’s understanding that **only three (3) claims involving a UST owner and operator have ever been submitted to the Fund in its 15-year existence. Moreover, of the more than \$158,000,000 in claims paid during the 15-year history of the Fund, only one such claim for less than \$111,000 has even been paid by the Fund.** Consequently, under the existing language there has been no abuse of the Fund by UST owners and operators on this issue, further supporting the lack of support for changing the existing language. Simply stated, the Fund has **not** experienced a significant number of claims or drain on its resources as a result of the existing language and the IPCA members have continued to rely on this Fund coverage in negotiating dealer agreements, site and operational leases and other transactional documents. To change the status quo now by narrowing the definition of third party to exclude owners and operators would leave a significant, unfunded environmental exposure. This would also be contrary to the state and federal requirements which require a financial assurance mechanism to demonstrate financial responsibility of \$1,000,000 per site. (PSRB)

*Response:* The department appreciates the association proposing compromise language on this issue. The concepts discussed in the draft language have been placed at 328 IAC 1-3-1, Fund Access.

*Comment:* **328 IAC 1-3-1.3 Cost Effectiveness of Corrective Action. 1.3(a)(2)(C)** if appropriate, a demonstration that the remediation approach will substantially reduce or eliminate **first party and/or** third party liability.

Change made to clarify that in determining the cost effectiveness of a corrective action, it is appropriate to consider the reduction and/or elimination of both first party and third party liability. (PSRB)

*Response:* The department agrees that the projected costs of the selected remediation approach should be included in the cost effectiveness analysis. A change was made to 328 IAC 1-3-1.3(b)(1) to include this factor.

*Comment:* **328 IAC 1-3-1.3(b)(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 **328 IAC 1-3-5(a) and (c) of this rule.**

Change made to be consistent with other provisions in the rulemaking. (PSRB)

*Response:* IDEM considered this change and added 5(a). IDEM disagrees that reimbursable costs are designated in 328 IAC 1-3-5 (c).

*Comment:* **328 IAC 1-3-1.3(b)(5)** A demonstration that the remediation approach will substantially reduce or eliminate **first party and** third party liability.

Change made to clarify that in determining the cost effectiveness of a corrective action, it is appropriate to consider the reduction and/or elimination of both first party and third party liability. (PSRB)

*Response:* The department agrees that the projected costs of the selected remediation approach should be included in the cost effectiveness analysis. A change was made to 328 IAC 1-3-1.3(b)(1) to include this factor.

*Comment:* **328 IAC 1-3-1.6 Preapproval of Costs. (c)** The administrator will send a preapproval letter to the owner

or operator stating how much of the cost for each item is preapproved as reasonable and cost effective. This preapproval is not a determination on **fund** eligibility.

Change made to avoid confusion that preapproval of costs does not extend to a determination of a UST owner's eligibility under the fund, which is a separate consideration. (PSRB)

*Response:* IDEM agrees and this was changed as specified.

*Comment:* **328 IAC 1-3-3 Eligibility Requirements. (a) (4)** A person who acquires ownership in accordance with subsection (d) and has made timely payment of all past due tank fees, interest and penalties in accordance with subsection (g) for any site characterizations or corrective action related to **the discovery of a release that is reported** after the payment of all past and currently due fees, interest and penalties.

Under the existing regulations, a buyer who submits payment for any past due tank fees, interest and penalties within 30 days of acquiring the site is eligible under the Fund for UST petroleum related claims subsequently discovered and reported to IDEM. Given the subsurface nature of the USTS and the fact that many UST releases occur slowly over long periods of time, the emphasis should be on when the petroleum release is discovered and reported to IDEM, not when first began occurring, which could have been before the date the buyer acquired the site unbeknownst to the seller and buyer. (PSRB)

*Response:* IDEM agrees and a change was made to refer to a release "first suspected, discovered or confirmed" to this subdivision.

*Comment:* **328 IAC 1-3-3(d)** IDEM deleted this entire section dealing with a tank owner's right to appeal and resubmit a denied claim yet it does not appear that IDEM replaced or referenced as alternative method for such rights of appeal and resubmission, which need to be provided to UST owners who do not agree with a decision by IDEM/ELTF to deny a claim. (PSRB)

*Response:* The right to appeal is addressed in 328 IAC 1-5-2. The resubmission of claims process is still being considered by the department because additional costs to the fund are involved.

*Comment:* **328 IAC 1-3-3(f)** The purchaser is to collect all past due tank fees, interest and penalties from the noncompliant seller and remit to the administrator the full amount of the assessment for the subject underground petroleum storage tank provided by the administrator in accordance with subsection (f) prior to an occurrence **being reported to IDEM**.

Under existing regulations, a buyer who submits payment for any past due tank fees, interest and penalties within 30 days of acquiring the site is eligible under the Fund for UST petroleum related claims subsequently discovered and reported to IDEM. Given the subsurface nature of the USTs and the fact that many UST releases occur slowly over long periods of time, the change is made to properly place the emphasis on when the petroleum release is discovered and reported to IDEM, not when it first began occurring, which would have been before the date the buyer acquired the site. (PSRB)

*Response:* Subsection (f) is now 328 IAC 1-3-3-(d). IDEM has changed "occurrence" to "release".

*Comment:* **328 IAC 1-3-3(g)(2)(A)** For sites that were never registered, or sites for which no tanks were **ever** 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 tanks per year that passes after each year's fee is due.

Change made to clarify that the \$2,000 penalty applies to UST owners who never registered or who never paid any fees for any USTs at a site. In addition, both of the tables that follow this provision appear to have incorrect totals. For example, in the first table, three years of missed tank fees for one UST at \$2,000 per year equal \$6,000, not \$12,000. In the second table involving a UST owner who has made some but not all payments, three years of missed tank fees for one UST at \$1,000 per year equals \$3,000, not \$6,000. (PSRB)

*Response:* The penalties increase exponentially under this provision. This is meant to meaningfully deter persons who fail to register their tanks or timely pay fees. The rule language is based on IC 13-23-12-7.

*Comment:* **328 IAC 1-3-4 Amount of Coverage. (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 site characterization and corrective action costs** and third party liability claims as specified in IC 13-23-8-1.

Change made to be consistent with other provisions in the regulations and this rulemaking. (PSRB)

*Response:* IDEM believes that this change is unnecessary and redundant. Reimbursable costs are specifically described in 328 IAC 1-3-5(a).

*Comment:* **328 IAC 1-3-5 Costs. (a)(2)(B)** The work performed was consistent with site characterization or an approved **or deemed approved** CAP.

Change made to ensure that both approved and deemed approved CAPS are covered by this provision. (PSRB)

*Response:* An "approved" CAP does include a "deemed approved" CAP, subject to 328 IAC 1-5-3. No change to the

existing language was made.

*Comment: 328 IAC 1-3-5(b)(10)* Any other reimbursable costs the administrator finds to be necessary. Payment of a third party liability claim the administrator **approves pursuant to IC §13-23-3**.

Change is made to be consistent with other provisions in the regulations and this rulemaking. (PSRB)

*Response:* This provision is now at 328 IAC 1-3-5(b)(9). IDEM has made changes to 328 IAC 1-6-2 to clarify that the Attorney General approves requests for payment of third party liability claims. 328 IAC 1-3-5 now deals only with reimbursable costs, not third party liability claims.

*Comment: 328 IAC 1-3-5(b)(13)* The cost is consistent with an approved **or deemed approved** CAP where projected costs for the work to be completed under the CAP are reviewed by the **administrator** to determine whether the costs are reimbursable costs.

Change is made to ensure that both approved and deemed approved CAPS are covered by this provision and to be consistent with other references to the administrator rather than commissioner. (PSRB)

*Response:* The concepts contained in the provision are now part of 328 IAC 1-3-5(a). This subsection now includes, in essence, the language proposed in this comment.

*Comment: 328 IAC 1-3-5(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 **the actual costs incurred** are reimbursable under this rule.

These changes are consistent with other provisions in this rulemaking to ensure that IDEM's approval of an ISC or CAP is limited to these items and does not extend to the actual costs incurred, which are subject to a separate consideration later by the Fund. (PSRB)

*Response:* IDEM agrees and this was changed as specified.

*Comment: 328 IAC 1-3-5(d)(14)(B)* excavation and disposal were shown to be **most cost-effective** remediation option.

Change made to be consistent with the cost-effective language and definition adopted in this rulemaking, which includes a number of considerations. (PSRB)

*Response:* IDEM agrees and this was changed as specified.

*Comment: 328 IAC 1-3-5(d)(14)(C)* the soil removal is part of a CAP approved or deemed approved by the **administrator**.

Change made to be consistent with other references to the administrator rather than commissioner. (PSRB)

*Response:* IDEM agrees and this was changed as specified.

*Comment: 328 IAC 1-4-1 General Procedure* There needs to be a timetable for claims to be classified by IDEM, such as 30 days after submission, so the UST owner and its consultant have a priority determination and an understanding of the likelihood of reimbursement at an early stage of a site investigation and remediation and can plan and budget accordingly. (PSRB)

*Response:* The department is considering development of a timetable or some other feasible alternative.

*Comment: 328 IAC 1-4-1(1)(b)* Most, if not all, emergency situations require immediate response by the UST owner. As such, these situations do not afford the luxury of time to first submit the necessary documentation to IDEM to obtain preapproval of expenditures and proposed tasks by IDEM and/or the Fund Administrator before undertaking the work and incurring the expenses. Thus, it is unclear why this category is separately listed. Instead, the IPCA suggests that either the word "preapproved" be deleted from the first sentence of (b) or, alternatively, that these claims and expenditures be included in the Category 1 list of claims. (PSRB)

*Response:* There is no 1-4-1(1)(b). There is a 1-4-1(b) and the word "preapproved" does not appear anywhere in this section.

*Comment: 328 IAC 1-4-1(2)* Given the potential third party liability claims that exist and the need to move forward more urgently when off-site soil and groundwater contamination is encountered, the IPCA suggests that these claims be moved up from Category 3 (see (3)(A) and (B)) to Category 2 claims. (PSRB)

*Response:* IDEM believes that higher prioritization should be given to the most immediate and significant threats to the environment. This is a requirement of IC 13-23-8. However, third party liability is categorized as the site is categorized in the current draft rule.

*Comment: 328 IAC 1-4-3 Reclassification of Releases.*

**(a)(3)** If the administrator approves placement in a **different** category, the applicant may seek reimbursement under the new category for any costs incurred subsequent to the placement.

Change is made to allow the administrator flexibility to reclassify a claim to either a higher or lower category. For example, a claim may initially be classified as a low priority claim, such as Category 3, but then further investigation

reveals high levels of free product or significant off-site contamination that would warrant a higher priority claim classification. (PSRB)

*Response:* IDEM agrees and will change to word “lower” to “different”.

*Comment:* **328 IAC 1-4-4 Monthly Reimbursement. (a)** The total amount reimbursed from the fund **each month** must not exceed ten percent (10%) of the fund balance based on the average fund balance of the previous fiscal quarter...

Change made to clarify that the limitation on the amount reimbursed is on a monthly basis. (PSRB)

*Response:* IDEM agrees and the language was changed.

*Comment:* **328 IAC 1-5-1 Applications for payment of reimbursable costs. (b)** The application shall contain the following statement, which shall be signed and attested by the person applying to the fund and the owner **or** operator: “I swear or affirm...”

Given that the owner and operator are often two distinct corporate entities, only one of which has the USTs registered in its name at the time a claim is submitted, the sworn statement should be signed by the entity responsible for the UST registration, UST payment and claim for reimbursement. (PSRB)

*Response:* 328 IAC 1-5-1(b) has been revised to clarify this issue.

*Comment:* On behalf of the Indiana Petroleum Council, I would like to submit the following comments regarding the proposed amendments to rules concerning the Excess Liability Trust Fund. The Council is a trade association representing oil suppliers and refiners that have assets in the state of Indiana. Some of our member companies also own and operate underground storage tanks in the state, and thus, are very concerned with the solvency of the Excess Liability Trust Fund (ELTF) and the continued success of Indiana’s UST program. A healthy fund balance in the Excess Liability Trust fund is a major priority for the Council and its members. Unlike some other states that have seen their fund run dry, Indiana has established a long history of support for the ELTF by the industry, legislators and regulators alike. This partnership is critical in order for the ELTF to continue to be a viable entity in the future. (IPC)

*Response:* The department thanks the Council for its support. IDEM agrees that the viability of the fund must continue to be supported by all stakeholders.

*Comment:* First, I would like to compliment IDEM staff on their hard work conducting the numerous public work group meetings regarding the proposed amendments. The Council applauds the efforts by the department to take the necessary steps to ensure that the fund is used for its intended purpose and claims made against the fund are cost effective and reasonable in nature. Also, with the prospect that the fund may for the first time dip below the \$25 million mark, it is important to clarify the prioritization scheme for claims so that those sites posing the most significant threat are given priority in payment. (IPC)

*Response:* IDEM believes that the proposed prioritization scheme presented in 328 IAC 1-4 is much clearer and more specific than the current rule language. Sites posing the most immediate and significant threats to the environment will receive top priority.

*Comment:* The Council supports several of the definitional changes proposed by the department, which we believe provide some necessary clarity to the rules. For example, the Council believes the changes in the definition of “substantial compliance” in 328 IAC 1-1-9 are positive. With more and more pressure on the fund balance, the Council does not believe it is appropriate to reward tank owners and operators who do not comply with existing regulatory or statutory requirements and deadlines over those who comply with all applicable requirements. The language proposed by the department is a positive addition to the rule and clarifies the existing, somewhat vague, current language. (IPC)

*Response:* IDEM thanks the Council for its support of these changes to definition of “substantial compliance”.

*Comment:* The Council also supports the department’s proposed changes to the definition of “reasonable” in 328 IAC 1-1-8.3. The Council, however, is concerned about the manner in which the new definition may be applied to work already submitted in a claim in the past that may have been deemed reasonable at the time but is now no longer deemed reasonable. The Council asks that the Department use caution in applying this new definition retroactively, which could potentially have an adverse effect on site that where the work is already in progress and a CAP has already been approved. (IPC)

*Response:* It is not the department’s intention to deny reimbursement for costs for work that was previously approved as reasonable. There may be circumstances, however, where IDEM denies claims for work previously performed that IDEM did not review.

*Comment:* In addition, the Council supports the Department’s efforts to further define “cost effectiveness of corrective action,” which we believe is an important step toward keeping a check on clean up costs that will, in turn, help protect the fund balance. However, this new step additional step for the fund administrator should not result in adding any unnecessary delays to the claims review process. In addition, the Council requests that the Department consider that in certain cases where a third party may be impacted the third party may request that the impacted property

be cleaned up to a more stringent clean up criteria. A third party may have a future plan for a parcel currently zoned commercial that involves more than commercial use. Third party claims should be granted an exception in this case and reimbursement should be allowed for corrective action that goes further than what might be acceptable for the current use if requested by a third party. (IPC)

*Response:* The department does not believe there will be unnecessary delays. Generally the fund cannot pay for higher cleanup levels for a speculative future use. Please see the current draft language at 328 IAC 1-3-5(d)(13).

*Comment:* The Department has added a new definition of “third party” in the proposed rule, which excludes an owner or operator. The Council requests that IDEM add language to the proposed draft that would allow a property owner who did not own or operate USTs at a particular site to be allowed eligibility to the fund in the same manner they would if they owned or operated tanks at the site. This would protect an innocent landowner who leased his property to another tank owner/operator, but did not cause the release. In essence, this would allow for multiple first party claims at a site and would not leave a property owner stranded with a release he did not cause at a site that had been ELTF eligible, but with no chance of reimbursement from the fund. As a member of the Financial Assurance Board, I also believe this approach to be consistent with the intent of the FAB when it passed a resolution on this matter last June. (IPC)

*Response:* IDEM agrees that UST owners, UST operators, and owners of property containing USTs, should be able to access the fund if they meet the eligibility requirements. The department also agrees that more one or more of these parties should be able to access the fund. Based on these comments and comments received from others, IDEM modified 328 IAC 1-3-1 Fund access, to further clarify and ensure that this may occur.

*Comment:* **328 IAC 1-1-8.3 “Reasonable” defined:** Lee & Ryan believes that this rule should include a specific reference to the requirements under 329 IAC 9-4, 9-5 and 9-6. As all corrective action, including site characterization, must meet these requirements, any costs associated with the work required by these rules must be presumed to be reasonable. In addition, as 328 IAC 1-3-5 refers only to the costs of corrective action, the rule needs to be clarified. Lee & Ryan suggests the following changes to the proposed rule language:

**Sec. 8.3. “Reasonable” means that the corrective action is appropriate and performed as necessary to meet the cleanup objectives for the site and the requirements under 329 IAC 9 and other applicable federal and state regulations and local ordinances. The term also means that the costs associated action and site characterization are consistent with 328 IAC 1-3-5 (b) through IAC 1-3-5(e). (L & R)**

*Response:* IDEM agrees with most of the changes proposed in this comment and has made changes to the definition accordingly.

*Comment:* **328 IAC 1-1-9 “Substantial compliance” defined** The reference to the “spill reporting rule” is somewhat vague and references to the actual rules should be included. Also, IDEM had originally proposed allowing a grace period of 30 days rather than 7. For purposes of determining ELTF eligibility, 30 days is more reasonable. In addition, “threatens to harm” is very vague. In theory, any release of petroleum to the environment presents a “threat”. For purposes of ELTF reimbursement, Lee & Ryan believes that actual harm to the environment should be shown in order to deny reimbursement to an otherwise eligible owner or operator. (If IDEM chooses to punish an owner or operator for failing to report in a timely manner, it has enforcement authority.) Lee & Ryan suggests the following changes to subsection (b), rule language:

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

- (1) has not been reported, under the spill reporting rule either 329 IAC 9-4-1 or 327 IAC 2-6.1 as applicable at the time of the release, within ~~seven (7)~~ thirty (30) 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 either 329 IAC 9-4-1 or 327 IAC 2-6.1 as applicable at the time of the release. (L & R)**

*Response:* Seven days is sufficient time for “substantial compliance” when a spill is required to be reported within twenty-four (24) hours under the law.

*Comment:* **328 IAC 1-2-1 Applicability.** The date for determining the *applicable* cost should be the date the work is performed, not the date of the invoice, regardless of whether *the work* is performed by a subcontractor or the *owner or operator*. If the work is conducted over a period of days *and overlaps* the effective date of the rules, the date for determining which cost should be applied should be the date the work began.

Lee & Ryan suggests *that* the language remain essentially the same:

**(2) The applicable cost range or amount of the 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.* (L & R)**

*Response:* The applicable cost is based on the date the cost was incurred. If it is a cost incurred by the owner, operator or assignee, it is the actual date the work is performed or completed. However, if it is a cost for which subcontractor

performs work for a contractor in an assignment situation or if a contractor performs work for an owner or operator, that cost is not incurred until an invoice is generated.

*Comment: 328 IAC 1-3-1.3 Cost Effectiveness of Corrective Action.* The proposed language in 328 IAC 1-3-1.3(a) states *that*, “the Administrator will not make a determination on cost effectiveness before a CAP is approved.” It is unclear why the Administrator will not make this decision at this point in time. Delaying this determination only serves to delay the corrective action as the owner or operator must, upon receiving CAP approval, resubmit all of this *information* in order to get a determination regarding cost effectiveness. Lee & Ryan suggests deleting this language. (L & R)

*Response:* IDEM agrees that the department should take whatever steps possible to ensure timely approval of work to be performed. However, before the work can be evaluated for cost effectiveness, the department must first determine that the proposed CAP is appropriate or will indeed work. As a practical matter, these approvals should occur simultaneously. IDEM does not expect significant delays or resubmittals as a result of this process. Both CAPS and budgets should be submitted together and will be reviewed concurrently.

*Comment: 328 IAC 1-3-1.6 Preapproval of costs.* It is important that IDEM provide guidance as to how this provision will be implemented. It is likely that this procedure will be used frequently. There is a strong possibility that this could slow down the remediation of sites if IDEM does not have a process in place for implementing this. It should be clear that preapproval means that the costs will be deemed reimbursable under 328 IAC 1-3-5(a). It is important *that* the regulated community know that even through CAP approval does not “necessarily mean that costs are reimbursable costs under the rule “ (328 IAC 1-3-5(c)), that there is a mechanism by which the owner/operator can get a definitive response from IDEM regarding which costs will be reimbursed. It is equally important that this response be timely. Lee & Ryan suggests the following language:

**328 IAC 1-3-1.6 Preapproval of reimbursable costs**

**Sec. 1.6 (a) Persons described in section 1 of this rule may submit to the administrator a request for a preapproval of reimbursable 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) Costs preapproved under this section shall be deemed to be reimbursable under 328 IAC 1-3-5(a).**

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

**(c)(d) The administrator will send a preapproval letter 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 of eligibility.**

**(e) The administrator shall review any requests for preapproval within sixth (60) days of receipt. (L & R)**

*Response:* Further discussions with the workgroup may be necessary to finalize changes to this section.

*Comment: 328 IAC 1-3-5(a)(12) Mark up.* As the primary contractor on an ELTF project, Lee and Ryan incurs various costs related to its business as a whole, and not specifically chargeable to the project in particular. These expenses include: administrative salaries, insurance costs, office rent, utilities and taxes, telephone communications, office equipment and supplies, health care benefits for employees and other such customary corporate expenses. As the company adds additional projects, the overhead costs rise as well. The company's revenue stream must be sufficient to cover these expenses. This is true whether the environmental work, such as drilling, sample analysis or system operation and maintenance, is handled internally or subcontracted to other parties. In addition the general overhead costs, the costs to obtain liability insurance, prepare ELTF claims, purchase equipment, handle data processing needs, process invoices and bills and other such administrative responsibilities must be performed related to the ELTF project, but aren't reimbursed. The projects' net profit margin needs to be sufficient to cover these expenses. A 15% mark-up allows the corporation to recover these costs with very minimal additional profit. Since the cost will not decrease as the mark-up is reduced, reducing the mark-up on subcontractor revenues to 10% will result in the consulting firms failing to recover their overhead costs. If consultants cannot make a profit from ELTF work, they will be reluctant to take on such projects. This may result in a delay in cleanups. Lee and Ryan suggest that the mark-up remain 15%. (L & R)

*Response:* IDEM disagrees that the markup should remain at 15%. After review of several other state fund programs, about 90% allow a 10% markup. Often, the costs for larger purchases such as building a corrective action system are incurred by the subcontractor or owner/operator and not the contractor or assignee. In addition, consultants make profits in other ways, particularly with labor rates. Finally, when a Lee & Ryan representative asked if any other consultant had an issue with this change at the January 29, 2004 stakeholder meeting, only one contractor out of about 20 supported

this position. One contractor said that 10% is acceptable. The department believes that contractors can still make a fair profit with a lower markup.

*Comment:* 328 IAC 1-3-5(c). There is still a great deal of uncertainty regarding what cost would not be reimbursable under an approved CAP. IDEM has provided no guidance on this issue. At the very least, a non-rule policy document must be drafted to provide some direction to the regulated community as to which costs may be denied under this provision. In addition, the rule should contain a requirement that IDEM notify an owner or operator as soon as they have information that the owner or operator intends to incur costs which are not reimbursable. This notification should include the reasons why IDEM made this determination. Lee and Ryan does not believe it is in our clients' best interest to incur costs which will not be reimbursed. If IDEM cannot provide some standards through which the regulated community can determine if the costs they intend to incur are reimbursable, then this provision should be stricken. Lee and Ryan suggests the following language:

**(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 means that costs are reimbursable under this rule except as follows. The following costs will be deemed reimbursable:**

**(1) Costs preapproved under 329 IAC 1-3-1.6.**

**(2) Costs incurred for work requested by the administrator. (L & R)**

*Response:* IDEM believes that the current draft rule language adequately addresses this comment. However, IDEM is willing to further discuss the possibility of developing additional guidance at a future date.

*Comment:* **328 IAC 1-3-5(d)(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.**

Discussions held at the external workgroups revealed that the purposed behind this rule is to discourage owners or operators from initiating cleanups for business reasons, such as the sale of the property. The reason why an owner or operator begins an investigation is not relevant to its eligibility for reimbursement. There is a certain amount of information that should be collected prior to initiating actual site work. This information must be included in the site characterization report pursuant to 329 IAC 9. Whether the information is obtained before a release is reported or after is irrelevant. Lee and Ryan suggests deleting this provision. (L & R)

*Response:* Fund access for work performed cannot be obtained until a release is suspected, discovered or confirmed. That is verified by a release report to the department. IDEM will not reimburse costs incurred prior to that date with the exception noted which acknowledges the reporting requirements of 24 hours.

*Comment:* 328 IAC 1-3-5(d)(6) Labor Costs. This provision references "the cost of labor and equipment purchases other than those costs routinely required to implement a corrective action plan." No examples of such labor costs are given. For Clarification purposes, examples should be given. (L & R)

*Response:* There are no references to "labor" in the current draft rule, this was deleted.

*Comment:* 328 IAC 1-3-5(d)(13). Use of Industrial Levels. Lee and Ryan agrees with IDEM that the use of industrial clean-up levels may be appropriate on the majority of ELTF sites. The following situation should also be included as an exception to this rule: (1) private drinking water wells are contaminated and (2) the properties down gradient are residential. Lee and Ryan suggest the following language:

**(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) Groundwater contamination affecting a public or private drinking water well on-site or off-site.**

**(B) Contamination at concentrations exceeding RISC residential cleanup standards off-site, not including roadways.**

**(C) Contamination at concentrations exceeding RISC residential cleanup standards on-site where the properties immediately down gradient of the site are residential properties.**

**(D) Contamination at concentrations exceeding RISC residential cleanup standards on-site where the future land use will be residential. (L & R)**

*Response:* IDEM agrees with adding items (A) and (B). IDEM disagrees with items (C) and (D). The RISC program is specifically designed to ensure that contaminants are not migrating onto neighboring properties beyond a perimeter of compliance above acceptable levels such as residential levels. If there is no likelihood of contamination migrating to a neighboring property no matter what the land use is, there is no justification for requiring stricter cleanup objectives. The ELTF was not created for property improvements or development.

*Comment:* 328 IAC 1-3-5(d)(14)(B) Excavation. In 328 IAC 1-3-1.3, IDEM has proposed adding a definition of "cost

effective” and requires that the proposed corrective action be cost effective. 328 IAC 1-3-5(d)(14)(B) proposes to exempt excavation from this requirement. There is no reason why excavation and disposal of contaminated soil should not meet the same criteria as any other corrective action. Lee and Ryan suggests the following language for subparagraph (B):

(B) excavation and disposal was shown to be the most effective pursuant to 328 IAC 1-3-1.3 **least costly and quickest** remediation option; and (L & R)

*Response:* IDEM agrees with the reasoning of the comment and this provision has been revised. The phrase “cost effective” has been added to the provision. However, it should be noted that 328 IAC 1-3-1.3 is not a definition, but delineates an analysis for cost effective of remediation alternatives. The phrase “cost effective” in 328 IAC 1-3-5(d)(14)(B) should be given its plain and ordinary meaning.

*Comment:* 328 IAC 1-3-5(e) Drilling costs. Per foot rate for use of hollow stem auger vs. per day for use of direct push: Lee and Ryan does not agree that there should be a separate rate for soil borings that depends upon the method used to install the soil borings. Typically, the use of a direct push is more time efficient and generates less waste. Allowing a per foot rate for the auger seems to be rewarding the use of a less efficient method. In addition, given the rate for the direct push is listed under equipment rental rates, is it now acceptable for the drilling subcontractor to charge hourly labor rates for the installation of soil borings in addition to the daily equipment rental? Lee and Ryan is also concerned about IDEM’s policy in deciding which rate to use, either the half-day or full day rate. The rule does not provide any guidance on this matter. In particular, Lee and Ryan would like to point out that, given certain geological conditions, it is possible to spend a significant amount of time working on a site using the direct push and completing on a small number of borings. If the appropriate rate is dependent upon the number of feet drilled in one day, then Lee and Ryan would request that IDEM take the difficulty of drilling in account also. (L & R)

*Response:* IDEM agrees and has added a statement was added to the rule that says “Direct push technology must be used when it is more appropriate to the site and costs less than other drill methods.”

*Comment:* The costs for an on-site delineation should be reimbursed upon IDEM’s approval of the on-site characterization. Frequently, completing the site characterization is difficult if off-site issues arise and the owner or operator must seek access to the off-site properties. This may take a significant amount of time. If the owner or operator were reimbursed for the on-site work, this would ease the financial burden on the owner or operator. (L & R)

*Response:* The current draft rule describes how costs are reimbursed. Some level of detail is beyond the scope of the rule.

*Comment:* IDEM required that a licensed professional geologist, registered professional engineer, certified hazardous materials manager or professional soil scientist sign the technical reports, such as the Corrective Action Plan or Initial Site Characterization Report. However, there is no requirement that the IDEM staff reviewing these documents have the same qualifications. It would seem logical that if such qualifications are necessary to write the reports, then the same qualification are necessary to adequately review the reports. (L & R)

*Response:* These rule regulate persons applying to the excess liability trust fund for repayment of cleanup costs at underground storage tank sites. It also lays out the penalties for non-payment of underground storage tank fees. The rule outlines a prioritization scheme for when the fund payments must be prioritized. This rule implements the statute at IC 13-23-8 and IC 13-23-9. There is no statutory authority for only licensed professional geologists, registered professional engineers, certified hazardous materials managers or professional soil scientists to review technical reports even though many of the department staff do have those credentials.

## **SUMMARY/RESPONSE TO COMMENTS RECEIVED AT THE FIRST PUBLIC HEARING**

On April 8, 2004, the financial assurance board (board) conducted the first public hearing/board meeting concerning the development of amendments to 328 IAC 1. Comments were made by the following parties:

Miriam Smulevitz Dant, counsel to Lee and Ryan (L & R)  
Christopher Braun, General Counsel to the Indiana  
Petroleum Marketers and Convenience Store Association (PSRB)  
Kim Forester, Active Environmental (AE)  
Fred Nichols, Astbury Environmental Engineering (AEEI)

*Comment:* I would like to thank IDEM for making the workgroup process so productive. There have been many improvements in the rule since the original draft and a good dialogue has taken place. It is clear that all interested parties share the same goals of protecting human health and our environment and keeping the fund solvent so it can continue to serve as the required financial assurance. (L & R) (PSRB)

*Response:* Without the interested parties, many of the rule improvements might not have been recognized. IDEM

appreciates the participation of the interested parties in the workgroup meetings.

*Comment:* The current version of the rule does many positive things. For example, it adds some helpful definitions and improves the accountability and efficiency of the ELTF. (L & R) (PSRB)

*Response:* Yes, IDEM agrees several helpful definitions were added and it does improve the accountability and efficiency of the rule.

*Comment:* But the fact of the matter is that regardless of what the rule does or does not do, the fund is being depleted, we are likely going to go into priority payment mode, and the environmental consulting industry will bear some of the brunt of these circumstances. There are still some provisions in the proposed rule that could make this difficult situation worse. I will address just a few of the concerns that we raised in the written comments we submitted to IDEM during the official comment period. (L & R)

*Response:* The department is trying to maintain the integrity of the fund for financial assurance for underground storage tank owners and operators and avoid the priority payment mode for as long as possible. As the cleanups are still required to be completed, it seems to the department that the brunt of the circumstances caused by the reduction of the fund are borne by the owners and operators of the leaking tanks.

*Comment:* 328 IAC 1-2-1.3 (Cost effectiveness of corrective action)- The proposed language says that the Administrator will not make a determination on cost effectiveness of the corrective action until after the corrective action plan (CAP) is approved. This concerns us because it could lead to delays in corrective action and possible duplication of information to be submitted to IDEM. In IDEM's response to our comments, the agency said that as a practical matter, both approvals should occur simultaneously, and that IDEM does not expect significant delays or resubmittals. We are encouraged by this response and request the addition of language that reflects IDEM's intentions and expectations regarding this part of the process. (L & R)

*Response:* The department's intentions are already stated in the last sentence of 328 IAC 1-3-1.3(a). The information required by 328 IAC 1-3-1.3(a)(2)(A) and (C) will usually be submitted to the department simultaneously with the CAP for which approval is requested; IDEM can then be reviewing this information as it evaluates the CAP for approval. It would be an inefficient use of time and fund resources for the department to make a cost effectiveness determination on a CAP that is not yet approved. The section on cost effectiveness does not require duplicate information to be submitted to IDEM.

*Comment:* 328 IAC 1-3-1.6 (Preapproval of costs) Under this proposed section of the rule, an applicant can request that IDEM preapprove costs for work to be performed under an approved CAP. We are concerned because this preapproval is not a final determination of fund eligibility. In our comments on that language, Lee and Ryan propose language that would deem preapproved costs to be reimbursable, and would require IDEM to review requests for preapproval within 60 days. Much like a patient waiting for preapproval from its health insurer who sees his or her condition worsen and become more costly while waiting for an answer, we are concerned that cleanups will become more expensive and environmental damage more extensive if parties have to wait too long for preapproval of costs, and then still face uncertainty as to whether those costs will ultimately be paid out of the fund. In IDEM's response to our concerns, the agency said that further workgroup discussions may be necessary on this section. We wholeheartedly agree and look forward to working with IDEM and the workgroup on this important issue. (L & R)

*Response:* Preapproval of costs is solely for cost effectiveness and reasonableness of the work to be performed. (See IC 13-23-9-2(c).) Fund eligibility is determined under a different section of the rule, 328 IAC 1-3-3. Preapproved costs are not automatically reimbursable costs; for example, only costs actually incurred may be reimbursed. The department is willing to discuss how preapproval will be accomplished during the next workgroup meeting, as this comment appears to show an uncertainty about how IDEM will implement this section.

*Comment:* 328 IAC 1-1-9 (Definition of substantial compliance) We are also concerned about the proposed changes to the definition of "substantial compliance." Specifically, we believe a more reasonable and attainable definition would allow a 30 day grace period for reporting releases, rather than the seven day period that is proposed, and that IDEM should look at "actual harm" to public health and the environment rather than releases that "threaten to harm" human health or the environment. Our concerns raise the question of how IDEM will proceed against owner/operators that are not in substantial compliance, and to what extent will eligibility for the ELTF be impacted? (L & R)

*Response:* By statute, if the owner/operator is not in substantial compliance then the owner/operator is not eligible for reimbursement from the ELTF. Whether or not enforcement action will be taken against the owner/operator that is not in substantial compliance is outside the scope of this rulemaking. The department believes that 7 (seven) days allows adequate time to comply with the spill reporting requirements that were designed to be complied with within 24 (twenty-four) hours of a spill. The agency selected seven (7) days because timely response to a release is critical to an effective and efficient response action.

*Comment:* Pursuant to the IPCA's comments at today's FAB hearing and our follow-up discussion after today's FAB meeting, this e-mail sets forth the IPCA's three comments on the draft rule: 1. 328 IAC 1-3-3(a). The language needs to be clarified to confirm the existing policy that a UST owner/operator can submit a third party liability claim and have it paid by the ELTF prior to the date that the UST owner/operator has obtained an approved ISC or approved CAP from IDEM. (PSRB)

*Response:* The department can only reimburse from the ELTF fund (for reimbursable costs and third party claims) if there is an approved CAP, as per the Indiana statute at IC 13-23-8-4(a) and IC 13-23-8-4(a)(4). A claim can be submitted but will not be paid until the CAP is approved. IDEM is unaware of any existing policy that addresses payment of third party claims prior to CAP approval.

*Comment:* 2. 328 IAC 1-3-3(f). For a UST owner who has never registered his UST or who has registered his UST but never paid any fees, the penalty will be \$2,000 per tank per year, and \$1,000 per tank per year for the UST owner who is in partial compliance. However, there cannot be any compounding of the annual penalty and there needs to be notice of the balance from prior years of unpaid fees, interest and penalties provided to the UST owner when the annual UST fee assessment is mailed to the UST owner. (PSRB)

*Response:* The statute at IC 13-23-12-7(a) states that a penalty shall be assessed of not more than \$2,000 per tank for each year that passes after the fee becomes due and before the fee is paid. The statute allows for compounding. Furthermore, the department believes that this will deter owners/operators from not paying their tank fees. The penalty also helps make it financially unfeasible for tank owners and operators who have never paid tank fees to gain access to the fund to get money to pay for a cleanup. The compounding penalty structure will ensure that the fund is preserved as a financial assurance mechanism under 40 CFR 280 and to reimburse owners and operators, as opposed to being a source of money to clean up abandoned, contaminated sites. However, there may be some specific, limited situations where application of the compounded penalty contained in the rule for partial compliance may not be appropriate. The department is interested in working with the regulated community to address this situation.

The Department of Revenue does send notice to owner/operators with delinquent fees, however, in the case of an illegally, unregistered tank, neither IDEM nor the Department of Revenue can be expected to identify or provide notice to the tank owners/operators.

*Comment:* 3. 328 IAC 1-7-2. The language needs to be clarified that the administrator will notify the UST owners when the ELTF goes into priority payment mode, but that the trigger of the priority payment mode will not result in the termination of financial assurance nor does priority payment mode constitute insufficient funds to provide for financial assurance. (PSRB)

*Response:* You have addressed two totally different concepts; the prioritization scheme under 329 IAC 1-4 and cessation of the ELTF as a financial assurance for underground storage tanks under state rules at 329 IAC 9 and federal law at 40 CFR 280. In order to assure the viability of the fund, prioritization is required when the fund falls below \$25,000,000. Invoking the prioritization scheme is done to maintain a level of funding that would reasonably ensure continuation of the ELTF as a financial assurance mechanism under state and federal law. However, continued recognition of the fund as a financial assurance mechanism under federal law is not entirely under the control of the state administrator or the department. The notification provision of 328 IAC 1-7-2 relates only to a situation where the ELTF has been determined to no longer provide owners and operators with the financial assurance required by 40 CFR 280 and the state rules. The department will propose clarifying language to distinguish these concepts for the next workgroup meeting.

*Comment:* We were a part of the workgroup, which has made much progress in putting together an acceptable rule. We hope the board will preliminarily adopt the rule. (AE) (AEEI)

*Response:* The department agrees and hopes to continue use of the workgroup as a forum for help with changes to the rule and gain consensus for the rule.

328 IAC 1-1-2	328 IAC 1-3-2
328 IAC 1-1-3	328 IAC 1-3-3
328 IAC 1-1-4	328 IAC 1-3-4
328 IAC 1-1-5.1	328 IAC 1-3-5
328 IAC 1-1-7.5	328 IAC 1-3-6
328 IAC 1-1-8	328 IAC 1-4-1
328 IAC 1-1-8.3	328 IAC 1-4-3
328 IAC 1-1-8.5	328 IAC 1-4-4
328 IAC 1-1-9	328 IAC 1-5-1
328 IAC 1-1-10	328 IAC 1-5-2
328 IAC 1-2-1	328 IAC 1-5-3
328 IAC 1-2-3	328 IAC 1-6-1
328 IAC 1-3-1	328 IAC 1-6-2
328 IAC 1-3-1.3	328 IAC 1-7-2
328 IAC 1-3-1.6	328 IAC 1-7-3

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~~ **commissioner** of the ~~fund~~ **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 as defined under section 3.1 of this rule and rules of the solid waste management board at 329 IAC 9-1-14.7, 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 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 13-12-3-2; 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. The actions taken must be approved by the department prior to payment from the fund: work described under IC 13-23-8-4(b)(1). The term only includes the necessary work performed to directly abate the following conditions related to a release:

- (1) Regulated substances are detected in indoor air in an inhabitable building greater than short term risk-based concentrations under IC 13-12-3-2 for the contaminants of concern.
- (2) Regulated substances, greater than ten percent (10%) of the measured lower explosive limits, are detected anywhere in conduits, such as sewers.
- (3) Regulated substances are detected as free product or sheen in conduits or surface water.
- (4) Regulated substances are detected as free product off-site, not including easements or rights-of-way.
- (5) Regulated substances are detected at or above the maximum contamination levels (MCLs) or RISC residential ground water cleanup objectives under IC 13-12-3-2 in a drinking water well. The regulated substances are detected at those levels at the point of compliance or at the tap.
- (6) Regulated substances in the ground water are detected at or above the MCLs or RISC residential ground water cleanup objectives under IC 13-12-3-2 within one (1) year time of travel from a public drinking water well and are in imminent danger of impacting drinking water.
- (7) Any other abatement action required by the department.

(*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 1-1-7.5 IS ADDED TO READ AS FOLLOWS:

**328 IAC 1-1-7.5 “Off-site” defined**

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

**Affected:** IC 13-23

Sec. 7.5. “Off-site” means property other than the following:

- (1) The parcel of real estate that contains the UST that is the cause of the release.
- (2) Other parcels owned by a person described in 328 IAC 1-3-1(a).

(*Underground Storage Tank Financial Assurance Board; 328 IAC 1-1-7.5*)

SECTION 6. 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 site characterization and corrective action are 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 the requirements of 329 IAC 9, other applicable state and federal laws and regulations, and 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 7. 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 8. 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 **first discovered or confirmed:**

(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 or release reporting rule applicable at the time the release was discovered or confirmed, within seven (7) days of a suspicion, discovery, or confirmation of the release; or**

(2) **harms 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 9. 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~~ **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 for injury, costs, or damages arising on behalf or in favor of a person listed in 328 IAC 1-3-1.**

(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 10. 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 under the rule in effect on the date the expense was initially of the invoice for the work and the costs so incurred unless the work is performed by the owner, operator, or applicant, to the fund; in which case, it is the date the work was completed.~~

*(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 11. 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 12. 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. (a) 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~~ **a person** as described in ~~IC 13-23-8-4, section 3(d) of this rule.~~

(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, **as specified in IC 13-23-8-4(e).**

(b) **Any or all persons listed under subsection (a)(1) or (a)(3) may apply to the fund for payment of reimbursable costs or third party liability claims if the following have occurred:**

(1) **The payment for the applicable deductible amount for the release has been made.**

(2) **A claim for the same costs has not been submitted to or paid by the fund. A claim for the same costs will not be paid more than once by the fund.**

(c) **The department may determine the identity of the tank owner or tank operator based on the notification submitted under 329 IAC 9-2-2. The department may require an affirmation that a claimant is a person, as described in section 3(d) of this rule, or a subsequent owner of the property, as specified in subsection (a)(3).**

**(d) A person who owns property with a tank is considered a tank owner.** (*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 13. 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 in a form or format approved by the administrator:**

**(A) for each of the remediation alternatives 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 alternative will substantially reduce or eliminate third party liability;**

**the administrator will determine if the work to be performed or the work already performed, or a portion thereof, 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 projected costs of the selected remedial alternative compared to the other remedial approaches.**

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

**(3) The appropriateness of the length of time it will take to achieve the cleanup objectives based on the remediation approach considering actual impacts to human health and the environment.**

**(4) 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(a), 5(b), and 5(e) of this rule.**

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

**(6) A demonstration that the remediation alternative will substantially reduce or eliminate third party liability.**

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

**(d) At any time, if the administrator finds that the approved CAP will not achieve or is not achieving the cleanup objectives, then the administrator may determine that the work to be performed under the approved CAP is no longer cost effective. The administrator will give notice to the claimant of this determination.** (*Underground Storage Tank Financial Assurance Board; 328 IAC 1-3-1.3*)

SECTION 14. 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 projected costs for work to be performed under the approved CAP. The request and any**

additional information requested by the administrator must be in a form or format approved by the administrator. The administrator's preapproval will be based on a determination of the following:

- (1) Cost effectiveness under section 1.3 of this rule.
- (2) That the costs are reasonable and within the amounts allowed under section 5(e) of this rule.

(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 final determination on fund eligibility. (*Underground Storage Tank Financial Assurance Board; 328 IAC 1-3-1.6*)

SECTION 15. 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(c) 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: as specified under section 5 of this rule.

(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 16. 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~~ **Demonstrate that** the requirements ~~set forth~~ in IC 13-23-8-4(a)(1) through IC 13-23-8-4(a)(4) **have been met.** The CAP as required by IC 13-23-8-4(a)(4) **must be submitted with a budget that describes in detail the costs for work to be completed under the CAP. The budget must be in a form or format approve by the administrator.**

(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.~~

(2) **Demonstrate that the tank owner or operator was in substantial compliance with the spill reporting rule or law applicable at the time of the release is discovered.**

(3) ~~Current tank owners or operators who have failed to pay all tank fees that are when they were due under IC 13-23-12-1, by the date that the fees are due shall be eligible for reimbursement from the fund in accordance with subsection (b) upon but who have now made payment of all past and currently due fees, interest, and penalties.~~ **If any fees have not been paid, the person shall pay all past and currently due fees, interest, and penalties.**

(4) ~~A person who acquires ownership in accordance with subsection (c) shall be eligible for reimbursement from the fund upon (d) must make timely payment of all past due tank fees, interest, and penalties in accordance with subsection (b) (f) to make a claim for reimbursable costs for any site characterization or corrective action~~

related to a release that is first suspected, discovered, or confirmed 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 is discovered or confirmed 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.**

**(6) The claimant is in compliance with the requirements of IC 13-23, 329 IAC 9, and this title.**

(b) ~~★~~ **An eligible tank owner or tank operator under this section**, 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 **to apply to the fund** 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).~~

~~(f)~~ **A person described under subsection (e) may become eligible for reimbursement from the fund** for any releases reported after the date that the **department commissioner** 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)~~ **(e)**. 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)~~ **(e)** prior to ~~an occurrence: a release.~~ The timely remittance of these monies is a condition of fund eligibility for the purchaser.

~~(g)~~ **(e)** Persons listed in section 1 of this rule and described in subsection ~~(e)~~ **(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)~~ **(d)**. Interest and penalties due ~~will~~ include the following:

- (1) Penalties and interest due the department of ~~state~~ revenue.
  - (2) All past due underground storage tank fees under IC 13-23-12.
  - (3) An environmental penalty as specified in subsection ~~(h)(2)~~ **(f)(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)~~ **(f)** 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)~~ **(f)** 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 tanks~~ **sites tanks** that were never registered, or ~~sites tanks~~ **sites tanks** 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.
- $Y_0$**  = 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.

$$(2000) \left( \sum_{j=Y_0}^m \left( \sum_{i=1}^n Y_{i,j} \right) \right) = \text{penalty}$$

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 that were registered and not all fees have been completely paid**, 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 quarterly 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 17. 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 18. 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 13-12-3-4; 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 or incurred 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 each of 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:

(i) site characterization;

(ii) an approved CAP; or

(iii) emergency measures, as defined in 328 IAC 1-1-5.1.

(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).

~~(a)~~ (b) Persons listed in section 1 of this rule may seek payment from the fund for the following ~~costs related to necessary costs actually incurred in the performance of corrective action:~~ **reimbursable of the type described as**

follows:

(1) ~~Investigation~~, **Site characterization**, which includes:

- (A) research;
- (B) field time;
- (C) report writing; and
- (D) clerical support;

**but only after the site characterization has been approved by the administrator.**

(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, **effective in either 1998 or 2004**, or the risk integrated system of closure (RISC) standards **under IC 13-12-3-4, 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:

- (A) disposable protective equipment;
- (B) building materials, **such as:**
  - (i) piping; and
  - (ii) cement; and
- (C) 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) (7) Governmental administrative fees for local, state, or federal permits necessary for corrective action.~~

~~(9) (8) Provision of alternate water supply. This cost must have been previously approved by the department administrator.~~

~~(10) (9) Any other reasonable reimbursable costs the department administrator finds to be necessary. for corrective action or payment of a third party liability claim.~~

~~(11) (10) 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) (11) Markup of no more than fifteen ten percent (15%) (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.

**(12) The fair market value of the cost to obtain access to off-site property if necessary for site characterization or corrective action can be reimbursable costs.**

**(13) Emergency measures include the following as determined to be appropriate by the administrator:**

- (A) Evacuation and relocation of a building resident or residents.
- (B) Ventilation of a building or conduit.
- (C) Installation and maintenance of an alternate water or treatment system for contaminated drinking water.
- (D) Recovery of free product as necessary to eliminate a release to a conduit.

- (E) Installation of a system to mitigate free product migration, actual or potential drinking water impacts, or vapor intrusion into a building or a conduit.
- (F) Other emergency measures required by the department.

(c) The approval of the site characterization and the corrective action plan under rules of the solid waste management board at 329 IAC 9 is not a determination that the actual costs incurred under the site characterization or the CAP are reimbursable costs under this rule.

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

(1) Costs incurred from releases occurring before April 1, 1988.

(2) Costs incurred more than twenty-four (24) hours prior to the date and time the suspected, discovered, or 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 incurred pursuant to an approved CAP.

~~(4)~~ (6) The cost of equipment purchases other than those ~~expenditures~~ costs routinely required to implement a corrective action plan. **Although the following items are not reimbursable**, examples of equipment purchases that cannot be charged to a specific site include:

(A) drilling rigs;

(B) earth moving equipment;

(C) photoionization detectors;

(D) explosimeters; and

(E) 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 at concentrations exceeding the RISC industrial cleanup standards with the following exceptions:

(A) Ground water contamination affecting a public or private drinking water well on-site or off-site.

(B) Contamination at concentrations exceeding RISC residential cleanup standards off-site, not including roadways and railroads.

~~(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 remediation option; and

(C) the soil removal is part of a CAP approved or deemed approved by the ~~commissioner~~ administrator.

~~(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.

(17) Any costs to purchase equipment, which was previously purchased and the cost was previously reimbursed from the fund.

(18) Any costs incurred after receipt of notice by the administrator under section 1.3(d) of this rule that the

approved CAP is not successfully remediating the site, except the following costs necessary, until such time as the modified CAP is approved, to:

(A) Develop the modified CAP, including pilot studies or additional investigation.

(B) Demobilize the corrective action system currently at the site.

(C) Abandon monitoring, extraction, or other wells associated with the CAP.

(D) Maintain compliance with applicable regulations and permits, including quarterly ground water monitoring.

(E) Maintain the corrective action system.

(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 HIA (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
<b>SITE INVESTIGATION CHARACTERIZATION</b>	
<b>Direct push technology</b>	<b>\$1,200 (between &gt;100 and ≤ 200 feet \$750 (up to 100 feet)</b>
<b>Rate allowed for drilling greater than 200 feet using direct push technology in a single day</b>	<b>\$6 per foot</b>
Mobilization and demobilization. <del>within a 50 mile radius.</del> This includes the cost of moving general contractor owned equipment, set-up, and removing equipment.	\$300
<b>Soil borings, for purposes of soil or ground water sampling or monitoring well installation when using a hollow stem auger.</b>	
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
<b>These amounts may only be charged one (1) time per borehole. Sample collection is part of well installation. Direct push technology must be used when it is most appropriate to the site and cost effective.</b>	
<b>Blind drilling using a hollow stem auger when well borings have already been logged within 5 feet.</b>	
<b>0-50 feet</b>	<b>\$6.50 per foot</b>
<b>&gt; 50 feet</b>	<b>\$8.50 per foot</b>
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	<del>\$10</del> \$7 per foot
4 inch well	\$12 per foot
6 inch well	<del>\$15</del> \$22 per foot
Flush-grade well covers	\$75 per cover
Laboratory services, including containers, packaging, and postage.	
Soil analysis methods	
TPH-8015 GRO	<del>\$75</del> \$60 per sample
TPH-8015 DRO	\$60 per sample

<b>TPH-8015 ERO</b>	<b>\$60 per sample</b>
TPH-418.1	<del>\$100</del> <b>\$95 per sample</b>
<b>TRPH-HEM-1664/9071B</b>	<b>\$60 per sample</b>
VOC-8260	<del>\$200</del> <b>\$150 per sample</b>
SVOC-8270	<del>\$325</del> <b>\$250 per sample</b>
<b>PAH-8270SIM</b>	<b>\$110 per sample</b>
PAH-8310	<del>\$185</del> <b>\$150 per sample</b>
<del>PCB-8080</del> <b>PCB-8082</b>	<del>\$110</del> <b>\$110 per sample</b>
Metals- <del>(13)</del> <b>7 barium, cadmium, chromium, lead, mercury, nickel, zinc</b>	<del>\$170</del> <b>\$100 per sample</b>
BTEX/MTBE-8021	<del>\$75</del> <b>\$60 per sample</b>
BTEX/MTBE-8260	<del>\$200</del> <b>\$100 per sample</b>
<b>Ignitability</b>	<b>\$30 per sample</b>
<b>Fractional organic carbon</b>	<b>\$70 per sample</b>
Water analysis methods	
TPH-8015 <b>GRO</b>	<del>\$75</del> <b>\$60 per sample</b>
<b>TPH-8015 DRO</b>	<b>\$60 per sample</b>
<b>TPH-8015 ERO</b>	<b>\$60 per sample</b>
<b>TPH-8015 methane</b>	<b>\$60 per sample</b>
<b>TRPH-HEM-1664</b>	<b>\$60 per sample</b>
VOC-8260	<del>\$200</del> <b>\$100 per sample</b>
BTEX/MTBE-8021	<del>\$75</del> <b>\$60 per sample</b>
BTEX/MTBE-8260	<del>\$200</del> <b>\$100 per sample</b>
SVOC-8270	<del>\$325</del> <b>\$250 per sample</b>
<b>PAH-8270 SIM</b>	<b>\$130 per sample</b>
PAH-8310	<del>\$185</del> <b>\$140 per sample</b>
Metals- <del>(13)</del> <b>7 barium, cadmium, chromium, lead, mercury, nickel, zinc</b>	<del>\$170</del> <b>\$80 per sample</b>
<b>Metal-soluble iron</b>	<b>\$25 per sample</b>
<del>Monitored natural attenuation parameters</del>	
Nitrates	<del>\$15</del> <b>\$25 per sample</b>
<del>Nitrites</del>	<del>\$15</del> <b>per sample</b>
Sulfate	<del>\$15</del> <b>\$25 per sample</b>
<b>Sulfide</b>	<b>\$25 per sample</b>
<del>Dissolved methane</del>	<del>\$50</del> <b>per sample</b>
<b>COD</b>	<b>\$20 per sample</b>
<b>BOD<sub>5</sub></b>	<b>\$40 per sample</b>
<b>Total suspended solids</b>	<b>\$12 per sample</b>
Air analysis methods	
<b>VOC-TO-15</b>	<b>\$400 per sample</b>
Other Methods	
<b>TCLP-lead</b>	<b>\$110 per sample</b>
Use of RISC will require DQO-Level IV; If the commissioner requires all quality assurance/quality control (QA/QC), including raw data and internal chain of custody and QA/QC necessary to validate analytical results.	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.	<del>\$400</del> <b>\$600</b>
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

##### **Mobilization**

**\$300 per trailer**

Concrete and asphalt removal

Saw concrete, prices are per linear foot

	4 i n c h	6 i n c h
	concrete	concrete
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

	3 inch asphalt	4 inch asphalt	6 inch asphalt
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 within 6 miles, but does not include landfill fees

4 inch concrete	<del>\$3</del> per ton
6 inch concrete	<del>\$5.77</del> per ton
7 inch through 9 inch concrete	<del>\$17.47</del> per ton
10 inch and over	<del>\$43.96</del> per ton
With rebar	Add +5%

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 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%
<b>Hauling</b>	<b>\$70 per hour per truck</b>
<b>EXCAVATION</b>	
Equipment costs and labor	\$2.22 per ton
Mobilization	\$300 per trailer
Supplies, for example, visqueen, plastic sheeting	
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
<b>TRANSPORTATION</b>	
Loading	\$1.34 per ton
<b>Mobilization</b>	<b>\$300 per trailer</b>
Hauling, mileage must be documented	<b>\$0.37 per ton for each mile \$70 per hour per truck</b>
<b>For excavation, stockpiling, and loading of less than 300 tons in a single day.</b>	<b>\$1,000 per day or the current rate if less than \$1,000 per day</b>
<b>DISPOSAL OF SOIL, GROUND WATER, AND TRASH</b>	
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 not exceed the least expensive combination of documented transportation hauling 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 and willing to accept the applicant's waste.	
Trash	\$15 per ton
<b>APPROVED CORRECTIVE ACTION TECHNOLOGIES</b>	

**Reimbursement** The maximum costs for the work done for corrective action, ~~costs except excavation~~, will be ~~reimbursed~~ **allowed** 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	<del>\$0.37 per ton for each mile</del> <b>\$70 per hour per truck</b>
Backfill material	\$13 per ton <b>of</b> stone
	\$6.50 per ton <b>of</b> 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, <b>and</b> 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
<del>LEL/O2</del> <b>LED/O2</b> meter	\$50
pH and conductivity meter	\$20
Dissolved oxygen meter	\$30
<b>Oxidation/reduction meter (REDOX)</b>	<b>\$35</b>
<b>Multiparameter water quality meter including pH, dissolved oxygen, temperature, and conductivity</b>	<b>\$50</b>
<b>Ferrous iron field test</b>	<b>\$6 per sample</b>
<b>Hydrogen sulfite field test</b>	<b>\$6 per sample</b>
<b>Digital camera</b>	<b>\$10</b>
<b>Geographic positioning system (GPS) unit for site mapping to one foot accuracy</b>	<b>\$95</b>
2" inch submersible pump	\$115
4" inch submersible pump	\$95
<del>Direct push technology</del>	<del>\$1,200 per day</del>
	<del>\$750 per ½ day</del>

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 $\leq 5\text{kW}$	\$50
<del>Portable generator, generator <math>&gt; 5\text{kW}</math></del>	<del>\$90</del>
Portable generator, generator $\leq 10\text{kW}$	\$100
Portable generator, generator $> 10\text{kW}$	\$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 cleanup 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 19. 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. *(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 20. 328 IAC 1-4-1 IS AMENDED TO READ AS FOLLOWS:

### **328 IAC 1-4-1 General procedure for prioritization**

**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 for reimbursable costs and third party liability 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 for reimbursable costs and third party liability, 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 1/2 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 1/4 mile	2
Over 1/4 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 _____

(e) 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 to abate an emergency measure, as defined under 328 IAC 1-1-5.1, will be paid first. If the administrator determines that the work performed was not an emergency measure as defined under 328 IAC 1-1-5.1, the work performed will be paid according to the category of the release as determined in subsection (c).

(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 all claims for reimbursement of costs and third party liability 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 subsection (b):

(A) Regulated substances in a structure or a conduit, such as a storm sewer, sanitary sewer, or utility conduit that exceeds ten percent (10%) lower explosive limit (LEL).

(B) Vapors for regulated substances are detected in an inhabitable building in levels greater than long term, risk-based exposure for contaminants of concern.

(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.

(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 subdivision (1):

(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 subdivision (2):

(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 subdivision (3):

(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) All claims submitted under identical categories will be paid by priority ranking in chronological order 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 unreimburseable 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 21. 328 IAC 1-4-3 IS AMENDED TO READ AS FOLLOWS:

**328 IAC 1-4-3 Recategorization 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. If a higher category, the claimant has fifteen (15) days after the notification to submit current costs 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 different number category, the applicant may seek reimbursement under the new category for any costs incurred subsequent to the placement in the new category.**

**(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 led 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 led 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 22. 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) In any calendar month, 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 23. 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 administrator 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: "I swear or affirm to the best of my knowledge and belief that the costs presented herein represent the ~~actual~~ **reimbursable costs actually** 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." **If the person applying has been assigned the right to reimbursement under this rule, the person who assigned that right shall also sign and attest the application.**

(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) For 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 categorized to a higher category, with one (1) being the highest category, 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:~~

**(3) 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 24. 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~~ **reimbursable 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 reimbursable costs, of 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 25. 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 26. 328 IAC 1-6-1 IS AMENDED TO READ AS FOLLOWS:

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

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

**Affected:** IC 13-23-8-3

Sec. 1. (a) Applications for reimbursement of third party liability claims against owners or operators shall be submitted on approved forms established by the ~~department~~ **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 27. 328 IAC 1-6-2 IS AMENDED TO READ AS FOLLOWS:

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

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

**Affected:** IC 13-23-9-3; 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~~ **payment** of a third party **liability claim** 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.

**The administrator shall thereafter pay the approved third party liability claim in accordance with this rule.**

(b) When ~~an owner or operator submits an acceptable application for indemnification of~~ a third party **liability claim is approved by the attorney general** 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 liability claim is approved by the attorney general and the owner or operator submits to the administrator~~ 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~~ **approval** by the attorney general shall include the reasonable fees or compensation paid to ~~obtain:~~ **for any of the following:**

- (1) Access to ~~off-site~~ properties not controlled by the claimant.
- (2) Institutional ~~and engineered~~ controls ~~for off-site properties~~, including, but not limited to, ~~deed restrictions required by risk integrated system of closure (RISC); or restrictive covenants as defined under IC 13-11-2-193.5.~~
- (3) subdivisions (1) and (2)
- (3) Attorney's 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.**

*(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 28. 328 IAC 1-7-2 IS AMENDED TO READ AS FOLLOWS:

**328 IAC 1-7-2 Termination of financial assurance**

**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~~ **administrator may determine** that ~~insufficient monies exist to the fund~~ **does not** provide owners or operators evidence of financial assurance. The ~~department administrator~~ 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 to provide for financial assurance.** Owners or operators shall have ~~sixty (60)~~ **thirty (30)** days after receipt of the notice of ~~termination of~~

~~financial assurance insufficient funds to acquire financial assurance by other means; as required under 329 IAC 9-8.~~  
**Owners and operators shall provide proof of financial responsibility to the department.** (*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 Public Hearing***

*These rules are not scheduled for hearing at this time. When the public hearing is scheduled, it will be noticed in the Change in Notice of Public Hearing section of the Indiana Register.*

*Additional information regarding this action may be obtained from Lynn West, Rules, Outreach and Planning Section, Office of Land Quality, Indiana Department of Environmental Management, Indiana Government Center-North, 100 North Senate Avenue, Eleventh Floor, Indianapolis, Indiana, (317) 232-3593 or (800) 451-6027 (in Indiana).*

*Copies of these rules are now on file at the Office of Land Quality, Indiana Government Center-North, 100 North Senate Avenue, Eleventh Floor and Legislative Services Agency, One North Capitol, Suite 325, Indianapolis, Indiana and are open for public inspection.*

Bruce H. Palin  
Deputy Assistant Commissioner  
Office of Land Quality