

Chapter ATCP 35

AGRICULTURAL CHEMICAL CLEANUP PROGRAM

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Note: This chapter codifies the agricultural chemical cleanup program created under s. 94.73, Stats. Persons seeking information about the program, or wishing to file a claim for reimbursement of cleanup costs, may contact the agricultural cleanup program in the division of agricultural resource management, Wisconsin department of agriculture, trade and consumer protection, P.O. Box No. 8911, Madison, Wisconsin, 53708-8911.

ATCP 35.01 Definitions. In this chapter:

(1) "Active groundwater remediation" means active physical, biological or chemical manipulation of groundwater, or of the rock or soil media in which groundwater is situated, for the purpose of maintaining or improving groundwater quality. "Active groundwater remediation" includes treatment by means of aeration, bio-augmentation, planned nutrient loading or pump-and-treat methods.

(2) "Active soil remediation" means active physical, biological or chemical manipulation of soil for the purpose of reducing the amount of agricultural chemical contamination in soil. "Active soil remediation" includes treatment by means of excavation and landspreading, aeration, bio-augmentation or planned nutrient loading.

(3) "Agricultural chemical" means a substance that is a fertilizer or a nonhousehold pesticide, and that is a hazardous substance as defined in s. 144.01 (4m), Stats.

(4) "Agricultural chemical cleanup council" means the council created under s. 15.137 (4), Stats.

(5) "Approved corrective action costs" means eligible corrective action costs which the department has approved for reimbursement under s. ATCP 35.08 (4).

(6) "Approved workplan" means a workplan for corrective action that is approved by the department under s. ATCP 35.18.

(7) "Commercial application business" has the meaning given under s. 94.67 (5), Stats.

(8) "Contractor" means a person who contracts to perform all or part of a corrective action. "Contractor" includes a consultant, general contractor or subcontractor who contracts to perform all or part of a corrective action, but does not include a responsible person or an employe of a responsible person.

(9) "Contract services" means services provided by a contractor as part of a corrective action. "Contract ser-

VICES" includes generic services, laboratory services, professional consulting services, general contractor services and other services provided by contractors.

(10) "Corrective action" means an action, consisting of one or more corrective measures under sub. (12), that is taken or ordered in response to a discharge in this state, and that is necessary to restore the environment to the extent practicable and to minimize the harmful effects of the discharge to the air, lands or waters of this state. "Corrective action" includes an action taken or ordered by the department of natural resources under s. 144.76, Stats., in response to a discharge, but does not include an action ordered by the department of natural resources under s. 144.73 (1) or 144.735 (2), Stats. "Corrective action" does not include any action taken, or ordered to be completed, before January 1, 1989.

(11) "Corrective action costs" means reasonable costs that a responsible person has actually incurred for a necessary corrective action.

(12) "Corrective measures" means any of the following:

(a) Investigation to determine the extent and severity of environmental contamination caused by a discharge, including sampling and analysis of soils, groundwater or other media.

(b) Containment, removal, treatment or monitoring of environmental contamination caused by a discharge.

(c) Transportation, storage, land application or disposal of materials contaminated by a discharge.

(d) Other corrective measures approved or ordered by the department.

(13) "Department" means the state of Wisconsin department of agriculture, trade and consumer protection.

(14) "Discharge" means the discharge, as defined in s. 144.76 (1) (a), Stats., of an agricultural chemical.

Note: Under s. 144.76 (1) (a), Stats., "discharge" includes, but is not limited to, spilling, leaking, pumping, pouring, emptying, emitting or dumping.

(15) "Discharge site" means the area affected by one or more discharges that are the subject of a corrective action. If a discharge occurs at a site which a commercial application business or a distributor of agricultural chemicals

operates to store, mix or load agricultural chemicals, "discharge site" includes all contiguous land that is owned, leased or controlled by that commercial application business or distributor of agricultural chemicals at the time the discharge occurs, plus any other area affected by the discharge.

(16) "Eligible corrective action costs" means costs on which the department is authorized to pay reimbursement under this chapter.

(17) "Fiscal year" means the state fiscal year ending June 30.

(18) "General contractor" means a consultant or other contractor who, on behalf of a responsible person, secures or directs the services of other contractors related to a corrective action. "General contractor" includes a person who solicits or receives contract bids, prepares contracts, directs corrective measures performed by others, or enters into contracts with subcontractors to perform corrective measures.

(19) "Generic services" means any of the following contract services, including activities that are incidental to the provision of those services:

(a) Excavating.

(b) Trucking.

(c) Landspreading and disposal services.

(d) Drilling, including at-depth soil sampling and well installation.

(e) Backfilling and grading, including provision of backfill material.

(20) "Indirect cost" means any general cost of business that cannot be directly and exclusively attributed to a corrective action. "Indirect cost" includes costs for equipment, supplies, services, real estate, structures and improvements, overhead, managerial and staff support, taxes, insurance, financing and other items which are not directly and exclusively attributable to a corrective action or whose use is not limited to the corrective action.

(21) "Installment" means a payment by the department, under s. ATCP 35.28, of all or part of a reimbursement amount which the department has approved for payment under s. ATCP 35.08 (4) (c).

(22) "Laboratory services" means laboratory analysis and activities that are incidental to laboratory analysis.

(23) "Responsible person" means any of the following persons, or that person's successor in interest:

(a) A person who owns or controls an agricultural chemical that is discharged.

(b) A person who causes a discharge.

(c) A person on whose property an agricultural chemical is discharged.

History: Cr. Register, August, 1994, No. 464, eff. 9-1-94.

ATCP 35.02 Corrective action order. (1) **GENERAL.** The department may issue an order requiring a responsible person to take a corrective action. An order under this subsection shall include all of the following:

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(a) The name and address of the responsible person.

(b) A description of the property on which the responsible person is required to take corrective action.

(c) A description of the corrective action which the responsible person is required to take.

(d) A date by which the responsible person is required to complete the corrective action.

(e) Notice that the corrective action is required to comply with the following:

1. Applicable department rules under chs. ATCP 29 to 33.

2. Applicable rules of the department of natural resources under chs. NR 700, 708 and 712 to 726.

Note: For corrective actions under this chapter, the department is authorized to review compliance with chs. NR 700, 708, and 712 to 726, and to grant required approvals and variances under those chapters on behalf of the department of natural resources.

(2) **SUMMARY ORDER.** (a) The department may issue an order under sub. (1) on a summary basis, without prior notice or hearing, if the department determines that a summary order is necessary to prevent imminent harm to public health or safety or to the environment.

(b) If the recipient of a summary order under par. (a) requests a hearing on that order, the department shall hold an informal hearing within 10 days after the department receives the hearing request unless the order recipient consents to a later date for the informal hearing. If a contested matter is not resolved at the informal hearing, the order recipient is entitled to a class 2 contested case hearing under ch. 227, Stats., and ch. ATCP 1.

(c) The department is not required to stay a summary order issued under par. (a) pending the outcome of a hearing under par. (b). If, after a hearing under par. (b), the department determines that a summary order under par. (a) was not justified, the department shall reimburse the order recipient for reasonable corrective action costs necessarily incurred by the order recipient to comply with the unjustified order.

Note: See ch. ATCP 1 for procedure related to administrative orders and contested cases. Under s. 94.73 (13), Stats., a person who violates a corrective action order issued by the department under this section is subject to a civil forfeiture of not less than \$10 nor more than \$5,000 for each violation. Each day of continued violation is a separate offense.

History: Cr. Register, August, 1994, No. 464, eff. 9-1-94.

ATCP 35.04 Costs eligible for reimbursement. Subject to the provisions of this chapter, the department shall reimburse a responsible person for the following corrective action costs, and no others:

(1) The cost of qualified professional services needed for the effective planning and implementation of a corrective action, including engineering, hydrogeologic, field technician, hazardous waste disposal or general contractor services.

(2) Costs to sample and analyze soils, groundwater or other media. This may include costs for soil boring, installation of monitoring wells, sample collection, sample analysis and related activities.

(3) Costs to excavate contaminated soils and other contaminated materials, including backfilling and grading to restore the contours or drainage characteristics of land altered by the corrective action. This paragraph does not authorize the reimbursement of costs incurred for the removal of buildings or other fixtures, except paving materials that are necessarily removed in the course of excavation.

(4) Costs to collect, handle, transport, treat and dispose of contaminated soils, groundwater and other contaminated materials.

(5) Costs to remove a spill containment structure that was installed to comply with s. ATCP 29.151, 30.26, 32.03, 32.04, 33.03 or 33.04 if the department agrees that removal is necessary to complete, in the most cost-effective way, a corrective action ordered by the department or the department of natural resources. The cost to remove a containment structure under this paragraph may include its depreciated value, calculated as construction cost less depreciation claimed to date for tax purposes.

Note: Subject to the provisions of this chapter, the department may reimburse a responsible person for eligible corrective action costs under this section, regardless of whether the corrective action was taken on the responsible person's own initiative or was ordered or directed by the department or the department of natural resources.

(6) Interest on approved reimbursement amounts as calculated by the department under s. ATCP 35.25.

History: Cr. Register, August, 1994, No. 464, eff. 9-1-94.

ATCP 35.06 Application for reimbursement. (1) REQUIREMENT. A responsible person who seeks reimbursement of corrective action costs shall submit an application to the department. The application shall be made on a form provided by the department. The application shall include all of the following information, and any additional information required by the department:

(a) The applicant's name and address, and a statement indicating how the applicant qualifies as a responsible person under s. ATCP 35.01 (23).

(b) A statement indicating whether the applicant is any of the following, or was any of the following when the discharge occurred:

1. A pesticide manufacturer or labeler.
2. A distributor of agricultural chemicals.
3. A commercial application business.
4. A producer of agricultural products.
5. A common carrier.

(c) A certification that the responsible person has made a reasonable effort to notify other responsible persons as required under s. ATCP 35.20 (2). The application shall include the name and address of every other responsible person whom the applicant has notified or attempted to notify under s. ATCP 35.20 (2).

(d) The address or location of the discharge site.

(e) The nature of the discharges, the types of agricultural chemicals discharged or suspected of being discharged, and the dates or time period when the discharges occurred if known.

(f) A description of the corrective measures taken to date at the discharge site, and a description of any future corrective measures contemplated by the responsible person at that discharge site.

(g) A copy of any order issued to the responsible person by the department, or by the department of natural resources, ordering a corrective action at the discharge site.

(h) An approved workplan for the corrective action, if required under s. ATCP 35.18 (1).

(i) The name and address of the person directing the corrective action on behalf of the responsible person, if other than the responsible person.

(j) A statement indicating whether, to the applicant's knowledge, the department has previously reimbursed any corrective action costs related to the same discharge site.

(k) A specific description of the corrective action for which the responsible person seeks reimbursement of costs. The description shall specify the corrective measures taken, the dates when the corrective measures were taken, and the identity of the persons taking the corrective measures if other than the responsible person. The description may incorporate, by reference, contractors' invoices and other documents that describe the corrective measures.

(l) The eligible corrective action costs for which the applicant seeks reimbursement from the department. The statement of eligible corrective action costs shall include contractors' invoices or other documents that clearly document the cost claims. The statement shall also include canceled checks or other documents that clearly prove payment by the applicant.

Note: Under s. ATCP 35.08 (5) (b), if any person applies for reimbursement of an ineligible cost, the department may deduct twice the amount of that cost from that person's reimbursement claim. If a responsible person is not certain whether a corrective action cost is eligible for reimbursement under this chapter, the responsible person may contact the department for a preliminary opinion under s. ATCP 35.08 (1).

(m) A statement indicating whether any portion of the corrective action costs for which the applicant seeks reimbursement may arguably be covered by insurance. If any portion of the corrective action costs may arguably be covered by insurance, the application shall include documentation showing that the applicant has filed an insurance claim for those costs, and that the insurer has denied the claim.

(n) A statement indicating whether the applicant has applied or will apply to any other governmental agency for reimbursement of costs related to the investigation or repair of environmental contamination at the same discharge site.

(o) The applicant's social security number or federal employer identification number.

Note: Reimbursement paid to a responsible person under this chapter may be reportable, for tax purposes, as income received by that person.

(p) Information required under s. ATCP 35.16 (7).

(q) Any other information required by the department.

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Note: Applicable forms may be obtained from the Department of Agriculture, Trade & Consumer Protection, Agricultural Resource Management Division, P.O. Box 8911, Madison, WI 53708

(2) **APPLICATION FREQUENCY.** A responsible person may not submit more than one application under sub. (1) within any 12-month period for the same discharge site.

(3) **FALSE, DECEPTIVE OR MISLEADING REPRESENTATIONS.** (a) No person may make, or conspire with another person to make, any false, deceptive or misleading representation in connection with any reimbursement application under this section.

(b) Any person who makes, or conspires with another person to make any false, deceptive or misleading representation in connection with a reimbursement application under this section is ineligible for any reimbursement for that corrective action, and is also ineligible for reimbursement for any other corrective action taken or ordered at any discharge site within 5 years after the date of that application.

Note: Persons filing fraudulent claims may also be subject to criminal prosecution.

(c) If any person has reason to believe that he or she has received any reimbursement for which he or she is ineligible under this subsection, that person shall immediately notify the department and shall refund with the notification the full amount of any reimbursement for which the responsible person is ineligible.

(4) **FIRST DATE OF APPLICATION.** The department shall not accept any reimbursement application under this section prior to September 1, 1994.

History: Cr. Register, August, 1994, No. 464, eff. 9-1-94.

ATCP 35.08 Department action on reimbursement application. (1) **PRELIMINARY OPINION.** Before or after the department receives an application under s. ATCP 35.06, the department may issue a preliminary opinion on whether an applicant is eligible for reimbursement of corrective action costs. The preliminary opinion is not binding on the department.

(2) **NOTICE ACKNOWLEDGING APPLICATION.** Within 10 days after the department receives an application under s. ATCP 35.06, the department shall issue a notice to the applicant acknowledging the department's receipt of the application.

(3) **REQUEST FOR ADDITIONAL INFORMATION.** Following receipt of an application under s. ATCP 35.06, the department may require an applicant to submit any additional information which may be relevant to the department's review of the application.

(4) **DECISION.** Within 90 days after the department receives a complete application under s. ATCP 35.06, including any additional information required by the department under sub. (3), the department shall issue a written decision approving or disapproving the application. The department may approve an application in part, or approve an application subject to conditions specified by the department. In its decision, the department shall specify all of the following:

(a) The amount of eligible costs, if any, on which reimbursement may be paid.

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(b) The applicable rate of reimbursement under s. ATCP 35.22 or 35.24, if any.

(c) The total reimbursement amount, if any, that is approved for payment under s. ATCP 35.28. The decision shall specify that payment is subject to the terms and conditions specified under s. ATCP 35.28.

(d) If the department disapproves all or part of an application, the reasons for that disapproval. The department shall also explain any amounts deducted from the reimbursement application under sub. (5).

(5) **INELIGIBLE CLAIMS REJECTED.** (a) The department shall disapprove any portion of a reimbursement claim which the department finds to be ineligible for reimbursement under this chapter, and shall deduct any costs which the department finds to be ineligible for reimbursement.

(b) If, after consulting with the agricultural cleanup council, the department finds that any portion of an applicant's reimbursement claim is ineligible, and that the applicant knew or should have known that it was ineligible, the department shall deduct twice the amount of the ineligible claim from the applicant's total claim. Deductions under this paragraph may not exceed the total amount of the applicant's claim.

Note: The department will invoke sub. (5) in cases where a claim is clearly ineligible, either because it is clearly prohibited under s. ATCP 35.14 or because there is no plausible basis for claiming reimbursement under this chapter. Applicants may discuss questionable items with the department before submitting a claim.

(c) If, after consulting with the agricultural cleanup council, the department determines that the cost claimed for any goods or services is clearly unreasonable in relation to current market cost for those goods or services, the department may deny reimbursement of the excessive cost, and may reimburse a lesser cost which the department considers reasonable. In determining whether a cost is unreasonable, the department may consider the nature of the goods or services, the geographic location of the discharge site, the need for the goods or services, the availability of alternative goods or services, and other factors that may reasonably affect the cost of the goods or services.

History: Cr. Register, August, 1994, No. 464, eff. 9-1-94.

ATCP 35.10 Responsible person; eligibility for reimbursement. A responsible person is not eligible for reimbursement of corrective action costs unless all of the following requirements are met:

(1) The responsible person files with the department a reimbursement application that complies with s. ATCP 35.06.

(2) The responsible person complies with every corrective action order issued by the department under s. ATCP 35.02 or the department of natural resources under s. 144.76 (7) (c), Stats.

(3) The responsible person, upon discovering the discharge, promptly reports the discharge to the department or, if the responsible person is required to report the discharge under s. 144.76 (2), Stats., to the department of natural resources.

(4) If the responsible person is a commercial application business, the responsible person is in compliance, at the time of the discharge, with s. ATCP 29.11 (1).

(5) If an approved workplan is required under s. ATCP 35.18 (1), the corrective action complies with the approved workplan for that corrective action.

(6) The corrective action complies with applicable requirements under chs. 144 and 147, Stats., this chapter, chs. ATCP 29 to 33, and chs. NR 700, 708 and 712 to 726.

Note: For corrective actions under this chapter, the department is authorized to review compliance with chs. NR 700, 708, and 712 to 726, and to grant required approvals and variances under those chapters on behalf of the department of natural resources.

(7) The corrective action is performed by or under the direct supervision of a person who meets applicable qualification requirements under ch. NR 712, and who has adequate training and experience to perform the corrective action.

(8) The responsible person's application for reimbursement includes a claim or waiver, under s. ATCP 35.20 (3), from each of the responsible persons identified under ATCP 35.20 (2).

History: Cr. Register, August, 1994, No. 464, eff. 9-1-94.

ATCP 35.12 Corrective actions not eligible for reimbursement. The department may not reimburse a responsible person for a corrective action that is any of the following:

(1) Taken in response to a discharge that is an intentional use of an agricultural chemical for an agricultural purpose, unless the corrective action is ordered by the department under s. ATCP 35.02 or by the department of natural resources under s. 144.76 (7) (c), Stats. An intentional use of an agricultural chemical includes an application of that chemical, but does not include handling, mixing, loading or disposal that is incidental to an application.

(2) Taken by the department of natural resources under s. 144.442 (4), (6) or (8), Stats.

(3) Taken by the department of natural resources under s. 144.76 (7) (a), Stats., because the applicant failed or refused to respond adequately to a discharge.

(4) Taken by a pesticide manufacturer or labeler who is required to be licensed under s. 94.68 (1), Stats., or who is exempt from licensing under s. 94.68 (1) (b), Stats., in response to a discharge by that pesticide manufacturer or labeler.

(5) Taken in response to a discharge that occurs while the agricultural chemical is being held or transported by a common carrier.

(6) Taken in response to a discharge from a landfill or other facility that is any of the following:

(a) A facility required to be licensed under s. 144.44 (4), Stats.

(b) A facility that would be required to be licensed under s. 144.44 (4), Stats., except that the department of natural resources has issued a specific exemption under s. 144.44 (7), Stats., or rules promulgated under s. 144.435 (1) or (2), Stats.

(c) A closed or abandoned solid or hazardous waste disposal facility that, if operating today, would require a license under s. 144.44 (4), Stats., or a specific license exemption under s. 144.435 (1) or (2), Stats.

(7) Taken in violation of federal, state or local law.

(8) Taken in response to a discharge caused by that responsible person's intentional or grossly negligent violation of law, including ss. 94.645, 94.67 to 94.71 or 144.76, Stats., or any rule or order adopted under those sections.

(9) Taken without a reasonable technical or scientific basis.

(10) Taken without a reasonable prospect of success, or without any reasonable prospect of environmental benefit.

(11) Taken at a discharge site located outside this state.

History: Cr. Register, August, 1994, No. 464, eff. 9-1-94.

ATCP 35.14 Costs not eligible for reimbursement. The department may not reimburse a responsible person for any of the following:

(1) Costs that are not eligible for reimbursement under s. ATCP 35.04.

(2) Indirect costs charged by a contractor unless those costs are allocated to the contract according to a reasonable cost allocation formula that the contractor uses for other, similar contracts.

(3) A responsible person's indirect costs, including indirect costs for equipment, supplies or services. This does not prohibit the department from reimbursing any of the following:

(a) Actual costs for equipment, supplies or services that are used exclusively for the corrective action. If a responsible person purchases equipment that is used exclusively for the corrective action, the department may pay reimbursement on the difference between the purchase cost and the reasonable salvage value of that equipment, provided that the difference does not exceed the reasonable rental cost for equivalent equipment.

(b) Normal employe wages, salaries, expenses or fringe benefit allocations for time which the responsible person's employes actually spend on a corrective action.

(4) The cost of time which the responsible person, or any officer of the responsible person, spends on a corrective action. This does not prohibit the department from reimbursing normal employe wages, salaries, expenses or fringe benefit allocations for time which employes, other than officers, actually spend on a corrective action.

(5) Costs to construct, repair, replace, improve, relocate or demolish any building or fixture, except as provided under s. ATCP 35.04 (5).

(6) Loss or impairment of property values or other assets, except as provided under s. ATCP 35.04 (5).

(7) Loss or impairment of revenue or income.

(8) Attorney fees or other legal costs.

(9) Costs of relocating residents or business operations.

(10) Costs of aesthetic or other improvements that are not essential to a corrective action, except for restorative grading and filling costs authorized under s. ATCP 35.04 (3).

(11) A cost that is reimbursed from another source. If, after being reimbursed by the department for any cost, a responsible person is reimbursed for the same cost from another source, the responsible person shall promptly notify the department and repay any duplicate reimbursement.

Note: See s. ATCP 35.30 related to duplicate reimbursement recovered as a result of a contested insurance claim.

(12) The cost of replacing discharged agricultural chemicals.

(13) The cost of providing alternative sources of drinking water or point-of-use water purification devices, except that the department may reimburse a responsible person a total of not more than \$20,000 for the replacement of private wells if the department or the department of natural resources orders that well replacement in response to a discharge.

(14) Liability claims or judgments.

(15) Costs incurred by any federal, state or local government entity. The department may reimburse a responsible person for corrective action costs incurred by the department of natural resources under s. 144.76 (7) (a), Stats., and charged to the responsible person, provided that the responsible person did not fail or refuse to take corrective action in response to an order or directive from the department or the department of natural resources.

(16) Costs for a contractor's services that exceed the contractor's bid price for those services under s. ATCP 35.16 (2). This subsection does not prohibit reimbursement of contract service costs incurred, at the specified contract rate, for additional hours or units of service authorized under s. ATCP 35.16 (2) (b) 2.

(17) Costs that the responsible person has not yet paid, or on which the responsible person may later receive a discount or rebate.

(18) Costs not supported by a canceled check or other conclusive proof of payment by the responsible person who is applying for reimbursement of those costs.

(19) Costs to investigate or repair environmental contamination involving substances that are not agricultural chemicals. If a corrective action under this chapter is combined with the investigation or repair of environmental contamination involving substances that are not agricultural chemicals, the department may reimburse a portion of the combined project costs based on a reasonable cost allocation formula approved by the department. If, for any combination project, a responsible person also submits a reimbursement claim to another governmental agency, the cost allocation formula shall be approved by the department and that other agency.

(20) Costs to analyze environmental samples for substances that are not agricultural chemicals, except that the department may reimburse costs for the analysis of environmental parameters if that analysis is needed for the design or implementation of a corrective action.

(21) Costs to analyze environmental samples for agricultural chemicals that are not reasonably suspected of having been discharged at the discharge site.

(22) Costs for environmental audits, evaluations or appraisals, other than those needed for the effective planning and implementation of a corrective action.

(23) Costs incurred by a responsible person because of a contractor's breach of contract.

(24) Costs to prepare an application under s. ATCP 35.06, or to consult with the department on the application.

(25) Air travel expenses.

(26) Expense charges for meals, lodging, travel or other personal expenses that exceed actual, necessary or reasonable expenses.

(27) Supplementary charges for expedited laboratory analysis, expedited mail or parcel delivery, or other services performed on an expedited basis, unless the expedited service charges are approved in advance by the department.

(28) Contractor charges that are not based on services provided by the contractor and documented under s. ATCP 35.06 (1) (k) and (l).

(29) Interest expenses or other financing costs, except as calculated by the department under s. ATCP 35.25.

(30) Costs for the rental or use of land used for the application of soil or water under s. 94.73 (2) (d), Stats., unless the department's permit under s. 94.73 (2) (d), Stats., prohibits the harvesting of crops from that land.

History: Cr. Register, August, 1994, No. 464, eff. 9-1-94.

ATCP 35.16 Contract services. (1) **GENERAL REQUIREMENT.** If a responsible person hires a contractor to provide a contract service, the department may not reimburse the responsible person for the cost of that contract service unless that service is contracted according to this section and the responsible person provides the department with the documentation required under sub. (7).

(2) **COMPETITIVE BIDS REQUIRED.** Contract services, including those provided by a subcontractor, shall be contracted on the basis of competitive bids submitted by at least 3 competing contractors or subcontractors. Every bid shall include all of the following:

(a) A clear description and itemization of the contract services included in the bid. The description shall be based on an approved workplan or, if there is no workplan, on a good faith estimate of the scope of the project as stated in the bid.

(b) A total bid price for all of the contract services included in the bid, and a subtotal price for each of the component services itemized in the bid. If any service is priced on an hourly or per unit basis, the bid shall specify all of the following:

1. The price per hour or per unit of service.
2. A reasonable, good faith estimate of the number of hours or units of service to be provided. A contractor may

not exceed this estimate without additional authorization from the responsible person.

3. The total estimated price for the service, based on the estimate under subd. 2.

(c) The estimated date by which the contractor will perform each contract service.

(d) Every certification required of the contractor under sub. (6).

(3) SERVICES PRICED ON HOURLY OR PER UNIT BASIS. (a) Bids for the following services shall be priced on an hourly or customary per unit basis, and bid according to sub. (2) (b):

1. Generic services.

2. Laboratory services.

3. Services that are customarily billed on an hourly or per unit basis.

(b) Bids for professional or personal services, including engineering, hydrogeologic, field technician and general contracting services, shall be priced on an hourly basis and bid according to sub. (2) (b). Bids for professional services shall include a statement of the bidder's professional qualifications.

(4) RESPONSIBLE PERSON; CHOICE OF CONTRACTORS. The department may require a responsible person to explain the responsible person's choice of contractors. If a responsible person contracts, either directly or through a general contractor, with any provider of generic services, the responsible person may not claim reimbursement of any costs for those services that exceed the low bid cost.

Note: Under s. ATCP 35.01 (19), "generic services" include excavation, trucking, landspreading, disposal, drilling, backfilling and grading services. Responsible persons selecting contractors for professional services should consider costs, but may base their decisions on other factors including professional qualifications and special project needs.

(5) SEPARATE CONTRACTORS. (a) Except as provided under par. (b):

1. A contractor who provides generic services related to a corrective action may not provide any other contract services related to that corrective action.

2. A contractor who provides laboratory services related to a corrective action, other than immuno-assay services or field testing services using hand-held devices, may not provide any other contract services related to the same corrective action.

(b) Paragraph (a) does not prohibit a general contractor from providing a combination of subcontracted generic services, subcontracted laboratory services and other subcontracted services as a general contractor, provided those services are obtained from independent subcontractors who comply with par. (a).

Note: Under s. ATCP 35.01 (19), "generic services" include excavation, trucking, landspreading, disposal, drilling, backfilling and grading services.

(6) CERTIFICATION BY CONTRACTOR. (a) In every bid under sub. (2), the bidding contractor shall certify both of the following:

1. That the contract services will comply with applicable requirements under this chapter, chs. ATCP 29 to 33, and chs. NR 700, 708 and 712 to 726.

Note: For corrective actions under this chapter, the department is authorized to review compliance with chs. NR 700, 708, and 712 to 726, and to grant required approvals and variances under those chapters on behalf of the department of natural resources.

2. That the contractor will make available to the department upon request, for inspection and copying, all of the contractor's documents and records related to the contract services.

(b) If a contractor bids under sub. (2) to provide drilling, engineering, hydrogeologic, field technician or general contractor services, the contractor's bid shall certify that the contractor has and will maintain insurance coverage for errors and omissions, including pollution impairment liability coverage of not less than \$1,000,000 per claim, for not less than \$1,000,000 in annual aggregate claims, with a deductible of not more than \$100,000 per claim.

(c) If a contractor bids under sub. (2) to provide laboratory services, the contractor's bid shall certify that the contractor has and will maintain insurance coverage for errors and omissions (professional liability) of not less than \$1,000,000 per claim, for not less than \$1,000,000 in annual aggregate claims, with a deductible of not more than \$100,000 per claim.

(7) DOCUMENTATION REQUIRED. A responsible person applying for reimbursement of contract service costs shall submit both of the following with that person's application under s. ATCP 35.06:

(a) Invoices or other documents itemizing the services provided, specifying the dates when the services were provided, and indicating the amount charged by the contractor for each of the itemized services.

(b) A summary of the accepted and rejected bids for each contract service, including the name of each bidder and the price bid for that contract service by that bidder.

(8) EXEMPTIONS. (a) The department may reimburse reasonable costs incurred for necessary contract services, regardless of compliance with subs. (2) to (6), if either of the following apply:

1. The contract service costs were incurred by the responsible party pursuant to contracts made prior to September 1, 1994.

2. The responsible person demonstrates, to the department's satisfaction, that compliance with subs. (2) to (6) is not reasonably possible.

(b) The department may reimburse contract service costs totalling not more than \$500 for each contractor, regardless of compliance with subs. (2) to (6).

Note: This section does not prevent a general contractor from obtaining, in a single subcontract with any subcontractor, contract services related to 2 or more general contracts, provided that the subcontract is bid according to this subsection.

History: Cr. Register, August, 1994, No. 464, eff. 9-1-94.

ATCP 35.18 Workplan for corrective action. (1) WORKPLAN REQUIRED. (a) Except as provided under par. (b) or (c), the department may not pay reimbursement to a responsible person on eligible corrective action costs exceed-

ATCP 35.18

ing \$20,000 unless the responsible person submits to the department in writing, and the department approves, a workplan for the corrective action before the corrective action is taken.

Note: Except as otherwise agreed in a memorandum of understanding between the department and the department of natural resources (DNR), the department must promptly furnish DNR with a copy of each workplan submitted to the department under sub. (1). If the DNR comments on the workplan within 14 days, or within a different time period specified in a memorandum of understanding between the agencies, the department must either incorporate those comments into the workplan or give DNR a written explanation why the comments were not incorporated. (See s. 94.73 (4) (b), Stats.)

(b) Paragraph (a) does not apply to either of the following:

1. A reasonable and necessary corrective action taken on an emergency basis.
2. A corrective action taken before August 12, 1993.

(c) A responsible person is not required to obtain department approval for a workplan under par. (a) if the responsible person submits the workplan to the department at least 30 days before taking the corrective action, and the department neither approves nor rejects the workplan within 30 days after the department receives the workplan.

(2) **ADDITIONAL SITE INVESTIGATION OR CORRECTIVE ACTION.** The department may, in a workplan under sub. (1) or by order under s. ATCP 35.02, require a responsible person to perform additional investigation, or take additional corrective action, as a precondition to the reimbursement of any corrective action cost under this chapter.

History: Cr. Register, August, 1994, No. 464, eff. 9-1-94.

ATCP 35.20 Multiple claimants. (1) **REIMBURSEMENT LIMIT.** If more than one responsible person is eligible for reimbursement under this chapter for corrective action taken in response to one or more discharges at the same discharge site, the combined amount paid to those responsible persons may not exceed the maximum amount specified under this chapter for a single responsible person.

Note: See s. 94.73 (6) (am), Stats.

(2) **NOTICE TO OTHER RESPONSIBLE PERSONS.** (a) Before any responsible person files a reimbursement application under s. ATCP 35.06, that responsible person shall make a reasonable effort to notify every other person, known to the applicant, who may be a responsible person and who has incurred or may foreseeably incur corrective action costs related to the same discharge site. The reimbursement application shall identify every potentially responsible person whom the applicant has notified or attempted to notify under this paragraph.

(b) The department may require an applicant to notify other responsible persons, known to the department, who have incurred or may foreseeably incur corrective action costs related to the same discharge site.

Note: A responsible person who fails to give notice under sub. (2) may be liable to those not notified if, because of that failure, those persons are disqualified from all or part of the reimbursement to which they would otherwise be entitled.

(3) **JOINT APPLICATION.** The department shall deny a reimbursement application unless every responsible person

successfully notified under sub. (2) includes his or her full claim for reimbursement as part of the same joint application, or waives any claim for reimbursement related to discharges to date at that discharge site. If a notified person fails to submit a claim within 30 days after receiving notice, or fails to provide documentation under s. ATCP 35.06 (1) within 60 days after receiving notice, that failure constitutes a waiver of that person's claim with respect to that application.

History: Cr. Register, August, 1994, No. 464, eff. 9-1-94.

ATCP 35.22 Initial corrective action; reimbursement rate. (1) Except as provided under sub. (2) or s. ATCP 35.24, the department may reimburse a responsible person for a corrective action as follows:

(a) The department may reimburse 75% of eligible corrective action costs that exceed \$7,500 for a person required to be licensed under ss. 94.64 to 94.71, Stats., or that exceed \$3,000 for any other person, but that do not exceed \$100,000. To this amount the department shall add interest costs under s. ATCP 35.25, but in no case shall the total reimbursement amount under this paragraph exceed \$69,375 for a person required to be licensed under ss. 94.64 to 94.71, Stats., or \$72,500 for any other person.

(b) If the corrective action includes active groundwater remediation ordered or directed by the department, or by the department of natural resources under s. 144.76 (7) (c), Stats., the department may reimburse 80% of eligible corrective action costs that exceed \$100,000, but that do not exceed \$300,000. To this amount the department shall add interest costs under s. ATCP 35.25, but in no case shall the total reimbursement amount under this paragraph exceed \$160,000.

(2) Except as provided under s. ATCP 35.24 (3), if a corrective action is related to a discharge that occurred during the transportation of an agricultural chemical, including transportation in the course of application, the department may reimburse a responsible person for 75% of that person's eligible costs for that corrective action that exceed \$7,500 for a person required to be licensed under ss. 94.64 to 94.71, Stats., or that exceed \$3,000 for any other person, but that do not exceed \$50,000. To this amount the department shall add interest costs under s. ATCP 35.25, but in no case shall the total reimbursement amount under this subsection exceed \$31,875 for a person required to be licensed under ss. 94.64 to 94.71, Stats., or \$35,250 for any other person.

History: Cr. Register, August, 1994, No. 464, eff. 9-1-94.

ATCP 35.24 Subsequent corrective action; reimbursement rate. If the department has previously reimbursed a responsible person for a separate corrective action at the same discharge site, the department may reimburse a responsible person for a corrective action as follows:

(1) Except as provided under sub. (2) or (3), the department may reimburse 50% of eligible corrective action costs that exceed \$15,000 but that do not exceed \$100,000. To this amount the department shall add interest costs under s. ATCP 35.25, but in no case shall the total reimbursement amount under this subsection exceed \$42,500.

(2) Except as provided under sub. (3), if the corrective action includes active groundwater remediation ordered

or directed by the department, or by the department of natural resources under s. 144.76 (7) (c), Stats., the department may reimburse 50% of eligible corrective action costs that exceed \$15,000 but that do not exceed \$300,000. To this amount the department shall add interest costs under s. ATCP 35.25, but in no case shall the total reimbursement amount under this subsection exceed \$142,500.

(3) If the corrective action is related to a discharge that occurred during the transportation of an agricultural chemical, including transportation in the course of application, the department may reimburse 50% of eligible corrective action costs that exceed \$15,000 but that do not exceed \$50,000. To this amount the department shall add interest costs under s. ATCP 35.25, but in no case shall the total reimbursement amount under this subsection exceed \$17,500.

History: Cr. Register, August, 1994, No. 464, eff. 9-1-94.

ATCP 35.25 Interest on approved reimbursement amounts. The department shall add interest to a reimbursement amount calculated under s. ATCP 35.22 or 35.24, at a rate equal to the prime interest rate on the January 31, May 31 or September 30 date that first follows the department's receipt of a complete reimbursement application. Interest shall be calculated on a compounded rate from the same January 31, May 31 or September 30 date, for the unpaid balance approved under s. ATCP 35.22 or ATCP 35.24. Amounts, including interest, not paid by June 30 of any year shall be calculated and a new interest rate equal to the prime rate on June 30 of that year shall be applied to the unpaid balance.

History: Cr. Register, August, 1994, No. 464, eff. 9-1-94.

ATCP 35.26 Reimbursement for partially completed corrective action. (1) At any of the following stages of a corrective action, a responsible person may apply for and receive reimbursement of eligible corrective action costs thus far incurred, provided that the remainder of the corrective action is described in an approved workplan:

- (a) Upon completing an emergency response, if any.
- (b) Upon completing a soils investigation deemed adequate by the department and, if active soil remediation is necessary, upon obtaining department approval of a plan for active soil remediation.
- (c) Upon completing active soil remediation.
- (d) Upon completing a groundwater investigation deemed adequate by the department and, if active groundwater remediation is necessary, upon obtaining department approval of a plan for active groundwater remediation.
- (e) Upon completing the design, installation and start-up of an active groundwater remediation system.
- (f) Upon completing the first or any subsequent 12 months of passive bio-remediation, long-term monitoring of soil or groundwater, or operation of an active soil or groundwater remediation system.
- (g) Upon completing the entire corrective action described in the approved workplan, or upon reaching the applicable limit of reimbursement.

(2) Reimbursement under sub. (1) for any part of a corrective action does not affect the reimbursement rate that applies under s. ATCP 35.22 or 35.24 to any other part of that same corrective action.

(3) As a condition to paying reimbursement at any stage of a corrective action under sub. (1), the department may require the responsible person to complete the remainder of the corrective action as described in the approved workplan. If, after receiving any partial reimbursement under sub. (1), a responsible person fails to complete a corrective action as required under this subsection, the department may demand return of the partial reimbursement by a specified date. If the department demands return of a partial reimbursement, the responsible person shall return that partial reimbursement in compliance with the department's demand.

(4) If a responsible person applies for reimbursement under sub. (1) at 2 or more stages of the same corrective action, that person's eligibility for an initial installment under s. ATCP 35.28 (2) applies only to costs included in that person's first application.

History: Cr. Register, August, 1994, No. 464, eff. 9-1-94.

ATCP 35.28 Reimbursement payments. (1) **GENERAL.** (a) The department shall reimburse approved corrective action costs in installments under this section, up to the total amount approved for each corrective action under s. ATCP 35.08 (4) (c). Payment in 2 or more installments under this section does not affect the reimbursement rate that applies to a corrective action under s. ATCP 35.22 or 35.24.

(b) The department shall pay installments under this section from the appropriations under s. 20.115 (7) (e) and (w), Stats. Notwithstanding any other provision of this chapter, payment is subject to the availability of funds in those appropriations.

(2) **INITIAL INSTALLMENT.** The department shall pay a responsible person an initial installment of \$50,000 for each corrective action, or the total reimbursement amount approved for that corrective action under s. ATCP 35.08 (4) (c), whichever is less. If, on any payment date specified under sub. (5), available funds are insufficient to pay a full initial installment to every person then eligible for an initial installment, the department shall pay full initial installments in the following order:

(a) The department shall first pay a full initial installment for each discharge site at which a pesticide, associated with a discharge at that site, has been detected in a drinking water well at or above the enforcement standard specified for that pesticide under ch. NR 140.

(b) After the department has paid full initial installments for discharge sites identified under par. (a), the department shall next pay a full initial installment for every other discharge site at which a pesticide, associated with a discharge at that site, has been detected in groundwater at or above the enforcement standard specified for that pesticide under ch. NR 140.

(c) After the department has paid full initial installments for discharge sites identified under par. (b), the department shall next pay a full initial installment for every other discharge site at which a pesticide, associated

with a discharge at that site, has been detected in groundwater.

(d) After the department has paid full initial installments for discharge sites identified under par. (c), the department shall next pay a full initial installment for other discharge sites that are eligible for initial installments, except that the department shall pay initial installments under this paragraph only at the times specified under sub. (5) (b) or (c).

(e) If, on any payment date specified under sub. (5), available funds are insufficient to pay a full initial installment to every person then eligible for an initial installment under pars. (a) through (d), the department shall pay full initial installments under each paragraph by establishing a list of priority payments within each paragraph based on the order in which the reimbursement applications were received by the department.

(3) SUBSEQUENT INSTALLMENTS FOR SAME CORRECTIVE ACTION. (a) If an initial installment under sub. (2) is less than the full reimbursement amount approved for a corrective action under s. ATCP 35.08 (4) (c), the department shall pay one or more subsequent installments to that responsible person or that person's designee until the department has paid the full approved amount. No installment under this paragraph may exceed \$100,000 in any fiscal year.

(b) Installments under par. (a), if any, shall be paid on June 30 of each fiscal year. The department may not pay any installment under par. (a) in any fiscal year until the department has paid all initial installments under sub. (2) that are payable in that fiscal year. If, on June 30 of any fiscal year, available funds are insufficient to pay the maximum authorized installment under par. (a) to every person then eligible for an installment, the department shall pay prorated installments under par. (a) to all persons then eligible, except that the department may pay the maximum authorized installment under par. (a) to any person whose maximum authorized installment is \$500 or less. If the prorated amount for any person is less than \$100, the department may defer payment to that person until a later year.

(d) The department may not, in any fiscal year, pay more than one installment under par. (a) to the same responsible person. This paragraph does not prohibit the department from paying an installment under par. (a) to a responsible person in the same fiscal year that the department pays an initial installment to that responsible person under sub. (2).

(4) NEW CORRECTIVE ACTION AT SAME DISCHARGE SITE. (a) Notwithstanding subs. (2) and (3), if the department has previously reimbursed a responsible person for a separate corrective action at the same discharge site, the department shall not do either of the following:

1. Pay installments under sub. (2) or (3) that total more than \$50,000 in any fiscal year for that discharge site.

2. Pay any installment under sub. (2) or (3) for that discharge site until the department has paid all other installments under subs. (2) and (3) that are payable in that fiscal year for other discharge sites.

(b) Installments related to discharge sites under par. (a), if any, shall be paid on June 30 of each fiscal year. If, on June 30 of any year, available funds are insufficient to pay the maximum authorized installment for every discharge site under par. (a) which is then eligible for an installment, the department shall pay prorated installments for those discharge sites except that the department may pay the maximum authorized installment under par. (a) to any person whose maximum authorized installment is \$500 or less. If the prorated amount for any person is less than \$100, the department may defer payment to that person until a later year.

(5) INSTALLMENT PERIODS; AVAILABLE FUNDS. (a) By October 15 of each calendar year, the department shall specify the recipients and the amounts of the initial installments under sub. (2) that the department will pay on approved reimbursement applications received under s. ATCP 35.06 by May 31 of that calendar year. The department shall pay those initial installments between October 15 and October 21 of that calendar year. The total amount paid for all initial installments under this paragraph in any fiscal year shall not exceed the total amount of unspent funds from prior fiscal years under s. 20.115 (7) (e) and (w), Stats., plus one half of the appropriation for the current fiscal year under s. 20.115 (7) (e), Stats., plus \$0.40 per ton on fertilizer tonnage distributed during the prior fiscal year as estimated by the department based on fertilizer tonnage reports received under s. 94.64 (4) (b), Stats.

(b) By February 15 of each fiscal year, the department shall specify the recipients and amounts of the initial installments under sub. (2) that the department will pay on approved reimbursement applications received under s. ATCP 35.06 by September 30 of that fiscal year. The department shall pay those initial installments between February 15 and February 21 of that fiscal year. The total amount paid for all initial installments under this paragraph in any fiscal year shall not exceed the total of any unspent funds under par. (a), plus one half of the appropriation for the current fiscal year under s. 20.115 (7) (e), Stats., plus 75% of the department's estimate of the amount collected during that fiscal year from the 1.3% surcharge on gross pesticide sales under s. 94.68 (3) (br) 3, Stats.

(c) By June 30 of each fiscal year, the department shall specify the recipients and amounts of the initial installments under sub. (2) that the department will pay on approved reimbursement applications received under s. ATCP 35.06 by January 31 of that fiscal year, and shall also specify the recipients and amounts of any installments that the department will pay under subs. (3) and (4). The department shall pay the installments that it specifies under this paragraph on June 30 of that fiscal year. The total amount paid for all installments under this paragraph in any fiscal year shall not exceed the total amount of unspent funds in the appropriations under ss. 20.115 (7) (e) and (w), Stats.

History: Cr. Register, August, 1994, No. 464, eff. 9-1-94.

ATCP 35.30 Contested insurance claim; duplicate reimbursement; repayment. If, after being reimbursed by the department for any corrective action cost, a responsible person recovers on a contested insurance claim related to

the same corrective action, the responsible person shall apply the proceeds of that recovery as follows:

(1) The responsible person may first apply the proceeds to pay reasonable legal fees, reasonable expert witness fees and other reasonable legal costs necessarily incurred by the responsible person to obtain the recovery.

(2) The responsible person may next apply the proceeds against that portion of the responsible person's eligible corrective action costs which exceeds the maximum amount on which the department may pay reimbursement under s. ATCP 35.22 or 35.24.

(3) The responsible person shall pay to the department a percentage of any remaining proceeds which equals the applicable reimbursement rate specified under s. ATCP 35.22 or 35.24, except that the total amount repaid under this subsection need not exceed the total amount of reimbursement which the department paid to the responsible person for the same corrective action.

History: Cr. Register, August, 1994, No. 464, eff. 9-1-94.

ATCP 35.32 Hearing on denial of reimbursement application. (1) **REQUEST FOR HEARING.** A person adversely affected by the department's disapproval of a reimbursement application under s. ATCP 35.08 may, within 30 days after receiving notice of that disapproval, request a hearing before the department to contest that disapproval. A request for hearing shall be made in writing and shall specify the grounds for the request.

(2) **INFORMAL HEARING.** (a) Within 10 business days after the department receives a request for hearing under sub. (1), the department shall hold an informal hearing in response to the request unless the requester agrees to a

later date for the informal hearing. The informal hearing shall be held before a department employe or official who is authorized to reverse or modify the department's decision as necessary. The informal hearing shall be held by telephone or at a location determined by the department.

(b) Within 10 business days after the conclusion of the informal hearing under par. (a), the presiding officer shall issue a brief written memorandum which summarizes the informal hearing, and any decision or action resulting from the informal hearing. A copy of the memorandum shall be provided to the person who requested the hearing. The memorandum shall include a notice of the person's right to request a formal contested case hearing under sub. (3).

(3) **FORMAL HEARING.** If a contest related to the disapproval of a reimbursement application is not resolved after an informal hearing under sub. (2), a person adversely affected by the department's disapproval of the application may request a full contested case hearing on the disapproval. A request for a full contested case hearing shall be filed with the department, in writing, within 30 days after the date of the informal hearing under sub. (2). The contested case proceeding shall be conducted as a class 3 proceeding under ch. 227, Stats., and ch. ATCP 1.

History: Cr. Register, August, 1994, No. 464, eff. 9-1-94.

ATCP 35.34 Rule review. Within 2 years after September 1, 1994, the department shall review the effectiveness of this chapter and shall submit a report to the board of agriculture, trade and consumer protection.

History: Cr. Register, August, 1994, No. 464, eff. 9-1-94.