

Chapter ATCP 35

AGRICULTURAL CHEMICAL CLEANUP PROGRAM

ATCP 35.01	Definitions.	ATCP 35.18	Reimbursement conditions.
ATCP 35.02	Corrective action order.	ATCP 35.20	Multiple responsible persons.
ATCP 35.03	Landspreading.	ATCP 35.22	Reimbursement amounts.
ATCP 35.04	Costs eligible for reimbursement.	ATCP 35.25	Interest on approved reimbursement amounts.
ATCP 35.06	Application for reimbursement.	ATCP 35.26	Partial corrective action; reimbursement.
ATCP 35.08	Department action on reimbursement application.	ATCP 35.28	Reimbursement payments.
ATCP 35.10	Responsible person; eligibility for reimbursement.	ATCP 35.30	Contested insurance claim; duplicate reimbursement; repayment.
ATCP 35.12	Corrective actions not eligible for reimbursement.	ATCP 35.32	Hearing on denial of reimbursement application.
ATCP 35.14	Costs not eligible for reimbursement.	ATCP 35.34	Agricultural chemical cleanup council.
ATCP 35.16	Contract services.		

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 an application 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 reducing the amount of agricultural chemical contamination or minimizing the spread of contamination. “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. 292.01 (5), Stats.

(4) “Agricultural chemical cleanup council” means the council appointed under s. ATCP 35.34.

(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 (1) (a).

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

(7m) “Contiguous land” means land included in the same parcel or an adjacent parcel. “Contiguous land” includes parcels that are separated only by a road, railway, or utility right–of–way, or by a government–owned land corridor or waterway not wider than 66 feet.

(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 employee of a responsible person.

(9) “Contract services” means services provided by a contractor as part of a corrective action. “Contract services” includes all of the following services:

- (a) Excavating.
- (b) Trucking.
- (c) Landspreading.
- (d) Waste disposal services.

(e) Drilling, including at–depth soil sampling and well installation.

(f) Laboratory services.

(g) Professional consulting services.

(h) General contractor services.

(i) 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. 292.11 (7), Stats., in response to a discharge, but does not include an action ordered by the department of natural resources under s. 291.37 (2) or 291.95, Stats. “Corrective action” does not include any action taken or required to be taken 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. 292.01 (3), Stats., of an agricultural chemical.

Note: Under s. 292.01 (3), 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. “Discharge site” includes all contiguous land that is owned, leased or controlled by the responsible person 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.

(17m) “Fixture” means any of the following:

- (a) Railroad tracks, ties and ballast.
- (b) Culverts.
- (c) Fences.
- (d) Gas mains, pipelines and related structures.

- (e) Electric poles, power lines and related structures.
- (f) Water and sewer mains and pipelines.
- (g) Facilities for the transmission of telecommunications or television services, including wires, optics, cables, poles and towers.

(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) "Household pesticide" means a pesticide that is any of the following:

- (a) A sanitizer.
- (b) A disinfectant.
- (c) A germicide.
- (d) An insect repellent that is applied to the human body or to clothing.
- (e) A pesticide that is used exclusively for the treatment of household pets.
- (f) A pesticide product that is labeled exclusively for household, lawn or garden use if the product either is sold in ready-to-use form or is sold exclusively in container sizes of less than one gallon.
- (g) A solid or liquid pesticide product that is used exclusively for the treatment of swimming pools, spas or hot tubs.

(20) "Indirect cost" means any general cost of doing 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, staff training, 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.

(20m) "Industrial pesticide" means any of the following pesticides that is not a household pesticide:

- (a) A pesticide that is solely labeled for use on wood and contains pentachlorophenol, coal tar creosote or inorganic arsenical wood preservatives.
- (b) A pesticide that is labeled for use in controlling algae, fungi, bacteria, other microscopic organisms or mollusks in or on one or more of the following, and is labeled for no other use except a use described in sub. (19) (f) or (g):
 1. Textiles, paper, leather, plastic, vinyl or other synthetic materials, metal or rubber.
 2. Paints, varnishes, other coating products, lubricants or fuels.
 3. Commercial, construction, manufacturing or industrial fluids, including adhesives, additives and pigments.
 4. Commercial, construction, manufacturing or industrial processes, equipment, devices or containers, other than those used in the production or storage of human food or animal feed.
 5. Air washing, cooling or heat transfer systems.
 6. Medical equipment.
 7. Drinking water or wastewater systems.

(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.

(22m) "Landspread" means to spread or deposit on land, other than in a landfill approved by the department of natural resources under s. 289.31, Stats., soil or water removed from a discharge site.

(22r) "Nonhousehold pesticide" means a pesticide that is not a household pesticide or industrial pesticide.

(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; am. (1), (3), (6), (10), (14), (15) and (20), cr. (7m), (20m), (22m) and (22r), r. and recr. (9) and (19), Register, September, 1998, No. 513, eff. 10-1-98; am. (4), cr. (17m), Register, October, 2000, No. 538, eff. 11-1-00.

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:

- (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 and this chapter.
 2. Applicable rules of the department of natural resources under chs. NR 700, 706, 708 and 712 to 726.

Note: For corrective actions under this chapter, the department is authorized to review compliance with chs. NR 700, 706, 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 recipient of the order consents to a later date for the informal hearing. If a contested matter is not resolved at the informal hearing, the recipient of the order 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 recipient of the order for reasonable corrective action costs necessarily incurred by the 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; am. (1) (e) 1., 2., (2) (b) and (c), Register, September, 1998, No. 513, eff. 10-1-98.

ATCP 35.03 Landspreading. (1) SOIL.

(a) No person may landspread soil that is removed from a discharge site, and contains an agricultural chemical, unless the department issues to that person a permit authorizing that landspreading. Landspreading shall comply with conditions that the department specifies in the permit.

(b) An individual who landspreads soil containing a pesticide is deemed, for purposes of licensing and certification under ss. ATCP 29.25 to 29.27, to be applying that pesticide.

Note: Landspreading is a potential method for destroying or recycling agricultural chemicals removed from a discharge site as part of a corrective action. The department may approve landspreading which applies agricultural chemicals at rates that are comparable to normal agronomic practice.

(2) WATER. No person may landspread water that is removed from a discharge site, and is contaminated with an agricultural chemical, unless all of the following apply:

(a) The department issues to that person a permit authorizing that landspreading.

(b) The department of natural resources issues to that person a pollution discharge elimination system permit, if required under ch. 283, Stats., which authorizes that landspreading.

(c) The landspreading complies with conditions specified by the department and the department of natural resources under pars. (a) and (b).

(3) PERMIT APPLICATION. A person applying for a landspreading permit under sub. (1) or (2) (a) shall apply on a form prescribed by the department. The person shall submit the application at least 5 department business days before any landspreading occurs. The application shall include all of the following:

(a) The name of the applicant and any other persons involved in the landspreading.

(b) The source and quantity of soil or water that will be spread on land.

(c) The kinds and amounts of agricultural chemical contaminants present in the soil or water under par. (b).

(d) The proposed application rate for each agricultural chemical under par. (c).

(e) The locations at which the soil or water will be spread on land.

(f) Any proposed tillage for which the applicant may request reimbursement.

(g) A landspreading agreement form, provided by the department and completed by the applicant. The completed form shall document all the following:

1. That the owner of the proposed landspreading site has consented to the proposed landspreading.

2. That the applicant has disclosed in writing, to the owner of the proposed landspreading site, the kinds and anticipated amounts of agricultural chemicals that will be landspread on the site. The disclosure shall state that persons applying agricultural chemicals to the site must, by law, take account of the pesticides applied by landspreading.

3. That the owner of the proposed landspreading site has agreed to provide a copy of the disclosure under subd. 2 to any other person who may grow crops on that site within 18 months after the landspreading is completed.

Note: To obtain a copy of the landspreading agreement form, contact the Department of Agriculture, Trade and Consumer Protection, Agricultural Resource Management Division, P.O. Box 8911, Madison, Wisconsin 53708.

(h) Other relevant information which the department may require.

(4) ACTION ON PERMIT APPLICATION. The department may approve landspreading which applies agricultural chemicals at rates that are comparable to those used in normal agronomic practice. The department shall grant or deny a permit application under sub. (3) within 30 days after the department receives a complete application.

(5) PERMIT CONDITIONS. The department may specify conditions which apply to a permit issued under sub. (1) or (2) (a), including any applicable requirements under chs. 94, 281 to 285 and 289 to 299, Stats. The department shall specify the conditions in writing, as part of the permit.

(6) REPORT. Within 30 days after a permit holder landspreads soil or water pursuant to a department permit under sub. (1) or (2) (a), the permit holder shall provide the department with documentation showing all of the following:

(a) The dates and fields on which the landspreading occurred.

(b) The rate at which the landspread materials were applied to each field.

(c) Written confirmation that the responsible person notified the owner of the landspreading site of the actual kinds and amounts of agricultural chemicals that were applied to the site as a result of the landspreading.

(d) A description of any problems incurred in connection with the landspreading.

(e) A description of the tillage performed in connection with the landspreading.

History: Cr. Register, September, 1998, No. 513, eff. 10-1-98; am. (3) (intro.), renum. (3) (f) to be (3) (h), cr. (3) (f), (g) and (6) (c) to (e), r. and recr. (6) (a) and (b), Register, October, 2000, No. 538, eff. 11-1-00; CR 03-119: renum. (1) to be (1) (a), cr. (1) (b) Register October 2004 No. 586, eff. 11-1-04.

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.

(4) Costs to collect, handle, transport, treat or dispose of contaminated soils, groundwater or other contaminated materials. If the responsible person disposes of contaminated soils by means of landspreading under s. ATCP 35.03, the department may reimburse the following additional costs related to that landspreading:

(a) Reasonable costs for tillage that is in excess of normal tillage and that is needed to reduce soil compaction caused by the landspreading. The department may not reimburse costs for more than 2 tillage passes.

(b) Costs for pre-plant nitrogen testing of the landspreading site to determine appropriate nitrogen credits for landspread soil that includes a significant nitrogen component. The department may reimburse pre-plant nitrogen testing only if that testing uses sampling and analytical methods that are scientifically recognized and standard within the agronomic community.

(c) Locally reasonable rent, not to exceed rent for one growing season, for cropland taken out of production for any of the following reasons:

1. The necessary stockpiling of soil, pending landspreading.

2. Crop harvesting restrictions in the landspreading permit.

(d) Costs to compensate a landowner for crop loss or yield reduction that occurs within one year after the landspreading if the landowner demonstrates, to a reasonable degree of certainty, that the crop loss or yield reduction was caused by one of the following:

1. Agricultural chemicals that were present in the landspread soil, but not known to be present when the landspreading occurred.

2. Planting delays caused by the landspreading.

3. Soil compaction caused by landspreading, notwithstanding reasonable tillage of the landspreading site.

(e) Costs to compensate a landspreading site owner for access, scheduling and like costs related to landspreading, if that compensation is necessary to obtain access to a landspreading site. The department may reimburse costs that are locally reasonable, and do not exceed \$0.50 per cubic yard of landspread soil. This

paragraph does not apply to landspreading on a site owned by the responsible person.

(f) Costs to remove rocks and other debris from landspread soils. The department may reimburse costs to remove rocks and other debris before or after the landspreading occurs, but not both. The department may not reimburse costs to remove rocks or debris more than 90 days after landspreading is completed. If a responsible person obtains competitive bids to screen the soil before it is landspread, the responsible person may not substitute the costs for post-landspreading debris removal without obtaining competitive bids under s. ATCP 35.16.

(5) Costs for any of the following corrective measures that the department specifically requires, or that the department specifically pre-approves in writing after finding that the measures are less expensive than the available alternatives:

(a) Removal and disposal of concrete or asphalt. The department may not reimburse costs for the removal or disposal of concrete or asphalt installed after January 1, 1998 unless the responsible person proves to the department, by credible laboratory tests, that the construction site was free of agricultural chemical contamination when the concrete or asphalt was installed. The cost to remove concrete or asphalt may include its depreciated value calculated as the original construction cost less all depreciation claimed to date by any person for tax purposes.

(b) Installation of an engineered barrier to limit infiltration of existing contamination, provided that the responsible person agrees in writing to maintain the barrier at his or her expense until the contamination is removed or fully degraded.

(c) Temporary removal and reinstallation of a structure, fixture or equipment item that is removed intact, and returned intact to its original use and approximate original location.

(d) The following corrective measures related to fixtures that are in good condition and operating adequately when the corrective measure occurs:

1. Temporary or permanent relocation.
2. Removal and replacement with a new fixture of the same size and quality, including any upgrade required by law.
3. Protection during a corrective action, through shoring or other methods.

(7) 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; am. (5), renum. (6) to be (7) and cr. (6), Register, September, 1998, No. 513, eff. 10-1-98; am. (3), r. and recr. (4) to (6), Register, October, 2000, No. 538, eff. 11-1-00; CR 03-119: r. and recr. (5), r. (6) Register October 2004 No. 586, eff. 11-1-04.

ATCP 35.06 Application for reimbursement.

(1) APPLICATION REQUIRED. A responsible person who seeks reimbursement of corrective action costs shall complete and submit to the department all of the following:

(a) An "application cover sheet" containing all of the following:

1. The responsible person's name and address.
2. The name and address of the person directing the corrective action on behalf of the responsible person, if other than the responsible person.
3. A statement indicating whether the responsible person has applied or will apply to another government agency for reimbursement of corrective action costs incurred for the same discharge site.
4. Other relevant information requested by the department.
5. The last date for which an eligible corrective action cost paid by the responsible person is being submitted for reimbursement. If the last date is not specified on the application form, the last date will be the day the department receives the application.

(b) A "multiple responsible persons form" containing all of the following:

1. A certification that the responsible person has made a reasonable effort to notify other responsible persons as required under s. ATCP 35.20 (2).

2. Other relevant information requested by the department.

(c) A "total reimbursement costs form" containing all of the following:

1. The total eligible corrective action costs for which the responsible person seeks reimbursement from the department.

2. Other relevant information requested by the department.

(d) An "insurance information form" containing all of the following:

1. A statement indicating whether any portion of the corrective action costs for which the responsible person seeks reimbursement may be covered by insurance, or a statement from the responsible person's insurance company stating that the insurance company has denied the responsible person's claim for reimbursement of the corrective action costs.

2. Other relevant information requested by the department.

(e) A map showing the township, range, section and quarter-quarter section location of the discharge site. If the agricultural chemical was discharged while being transported from a site owned or controlled by a person who owned or controlled the agricultural chemical at the time of the discharge, the application shall include a second map showing the township, range, section and quarter-quarter section location of the site from which the agricultural chemical was being transported.

(f) An accurate legal description of the land parcel on which the discharge site is located. If the agricultural chemical was discharged while being transported from a site owned or controlled by a person who owned or controlled the agricultural chemical at the time of the discharge, the application shall also include an accurate legal description of the land parcel on which that site is located. A parcel description under this paragraph shall correspond to the parcel description that was on record, at the time the discharge occurred or was discovered, with the register of deeds in the county where the land parcel is located.

(g) A summary statement identifying each eligible corrective action cost for which the applicant seeks reimbursement from the department. The statement shall include each eligible corrective action cost, paid by the applicant prior to the date of the reimbursement application, for which the applicant seeks reimbursement. The summary statement shall allocate each cost to one of the following categories:

1. Soil investigation.
2. Soil remediation.
3. Laboratory and other analysis.
4. Groundwater investigation.
5. Groundwater remediation.
6. Miscellaneous.

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 application if the responsible person knew or should have known that the cost was not eligible. 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).

(h) Invoices or other information documenting each of the costs under par. (g). Documentation shall identify the nature of the materials or services provided, the amount charged for the materials or services, the identity of the provider, and the dates on which the materials or services were provided.

(i) Canceled checks or other information documenting that the applicant has paid all of the costs under par. (g).

(j) All of the following, for each cost item under par. (g):

1. Every bid required under s. ATCP 35.16 (2) (a), including every accepted and rejected bid. Each bid shall indicate the name of the contractor and the amount of the bid.

2. Every cost estimate required under s. ATCP 35.16 (2) (c) 3., including the name of the contractor and the amount of the cost estimate.

3. Every authorization required under s. ATCP 35.16 (2) (c) 5., including the name of the contractor and the amount of the authorization.

(k) A spreadsheet that identifies and matches each invoiced cost in par. (h) with the documentation under pars. (i) and (j) supporting that invoiced cost.

(L) A substitute W-9 tax form.

(m) Other relevant information required by the department.

Note: To obtain application materials, contact the Department of Agriculture, Trade & Consumer Protection, Agricultural Resource Management Division, P.O. Box 8911, Madison, WI 53708. The department will provide application materials, including illustrative examples and all of the forms required under pars. (a) to (d) and (L). Reimbursement paid to a responsible person under this chapter may be reportable, for tax purposes, as income received by that person.

(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 applications 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) FAILURE TO SEEK REIMBURSEMENT IN PRIOR APPLICATION. A responsible person may not apply for reimbursement of an eligible corrective action cost which the responsible person paid during or before the period for which a prior reimbursement application has been submitted for that discharge site, unless the corrective action cost was not eligible for reimbursement under this chapter at the time of any prior reimbursement application for that discharge site.

History: Cr. Register, August, 1994, No. 464, eff. 9-1-94; r. and recr. (1) and (4), Register, September, 1998, No. 513, eff. 10-1-98; cr. (1) (a) 5. and (5), am. (1) (f), (j) (intro.) and 1., r. and recr. (4), Register, October, 2000, No. 538, eff. 11-1-00; CR 03-119; r. (5) Register October 2004 No. 586, eff. 11-1-04; **CR 10-122: am. (4) Register July 2011 No. 667, eff. 8-1-11.**

ATCP 35.08 Department action on reimbursement application. **(1) PRELIMINARY OPINION.** 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.

(b) The applicable rate of reimbursement under s. ATCP 35.22, 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 COSTS REJECTED. (a) The department shall disapprove any portion of a reimbursement application that the department finds to be ineligible for reimbursement under this chapter, and shall deduct any costs that the department finds to be ineligible for reimbursement.

(b) If the department finds that any portion of an applicant's reimbursement application 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 cost from the applicant's total application. Deductions under this paragraph may not exceed the total amount of the applicant's application. Before making a deduction under this paragraph, the department may consult with the agricultural chemical cleanup council appointed under s. ATCP 35.34.

Note: The department will invoke sub. (5) (b) in cases where a cost is clearly ineligible, either because it is clearly prohibited under s. ATCP 35.14 or because there is no plausible basis for applying for reimbursement under this chapter. In order to protect themselves against a double deduction under sub. (5) (b), applicants may discuss questionable items with the department before submitting an application.

(c) If, after consulting with the agricultural cleanup council, the department determines that the cost submitted 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.

(6) RECONTAMINATION; REDUCED REIMBURSEMENT RATE. (a) The department, after consulting with the agricultural chemical cleanup council, may reduce the reimbursement rate for a corrective action related to a discharge discovered after November 1, 2004 if the department has received or paid a reimbursement application related to a prior discharge at the same discharge site.

(b) The presumptive reimbursement rate under par. (a) is 50%, unless the department finds that a different rate is appropriate. In determining the appropriate reimbursement rate, the department may consider all of the following in consultation with the agricultural chemical cleanup council:

1. The type of agricultural chemical discharged.
2. The nature, size and location of discharge.
3. The similarity between the discharge and prior discharges.
4. The number of prior discharges, and the number of prior discharges for which the department has reimbursed corrective action costs.
5. The responsible person's apparent negligence, if any.
6. Whether the discharge was caused by a law violation.

Note: See s. ATCP 35.12 (8), which prohibits the department from reimbursing any costs for corrective actions made necessary by intentional or grossly negligent violations of law.

(7) FAILURE TO SUBMIT INFORMATION. If an applicant for reimbursement fails to provide an adequate report of the corrective

measures taken or corrective action costs incurred, or fails to provide any other relevant information required by the department, the department may disapprove all or part of the application for reimbursement.

History: Cr. Register, August, 1994, No. 464, eff. 9-1-94; am. (1) and (5) (b), Register, September, 1998, No. 513, eff. 10-1-98; correction in (4) (b) made under s. 13.93 (2m) (b) 7., Stats., Register, September, 1998, No. 513; am. (5) (b), cr. (6), Register, October, 2000, No. 538, eff. 11-1-00; correction in (5) (b) made under s. 13.93 (2m) (b) 7., Stats., Register, October, 2000, No. 538; CR 03-119: renum. (6) to be (7), cr. (6) Register October 2004 No. 586, eff. 11-1-04; **CR 10-122: am. (5) (title), (a), (b), (c), (6) (a) Register July 2011 No. 667, eff. 8-1-11.**

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, by October 14, 2000 or within 3 years after incurring the corrective action costs, whichever is later, 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. 292.11 (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. 292.11 (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 29.20.

(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. 281 to 285 and 289 to 299, Stats., this chapter, chs. ATCP 29 to 33, and chs. NR 700, 706, 708 and 712 to 726.

Note: For corrective actions under this chapter, the department is authorized to review compliance with chs. NR 700, 706, 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 an application or waiver, under s. ATCP 35.20 (3), from each of the responsible persons identified under s. ATCP 35.20 (2).

History: Cr. Register, August, 1994, No. 464, eff. 9-1-94; am. (1) to (4) and (6), Register, September, 1998, No. 513, eff. 10-1-98; **CR 10-122: am. (8) Register July 2011 No. 667, eff. 8-1-11.**

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. 292.11 (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. 292.31 (1), (3) or (7), Stats.

(3) Taken by the department of natural resources under s. 292.11 (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. 289.31, Stats.

(b) A facility that would be required to be licensed under s. 289.31, Stats., except that the department of natural resources has issued a specific exemption under s. 289.43, Stats., or rules promulgated under s. 289.05 (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. 289.31, Stats., or a specific license exemption under s. 289.05 (1) or (2), Stats.

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

(8) Taken in response to a discharge caused by an intentional or grossly negligent violation of law committed by the responsible person or the responsible person's agent, including an intentional or grossly negligent violation of ss. 94.645, 94.67 to 94.71, 94.73 or 292.11, Stats., or of 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 environmental benefit.

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

History: Cr. Register, August, 1994, No. 464, eff. 9-1-94; am. (1) to (3), (6) (a) to (c), (8) and (10), Register, September, 1998, No. 513, eff. 10-1-98.

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.

Note: An example of a reasonable cost allocation formula may be obtained from the Department of Agriculture, Trade & Consumer Protection, Agricultural Resource Management Division, P.O. Box 8911, Madison WI 53708

(3) A responsible person's indirect costs. 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 employee wages, salaries, expenses or fringe benefit allocations for time which the responsible person's employees actually spend on a corrective action.

(c) Costs for equipment owned by the responsible person and used during a corrective action for excavating, trucking or landspreading, provided that all of the following apply:

1. The equipment is reasonably sized and designed to perform the corrective action.

2. The hours or units of equipment use are reasonable and necessary for the task performed.

3. The equipment costs are determined according to a reasonable cost allocation formula.

4. The equipment costs do not exceed reasonable rental costs for equivalent equipment, including any operator costs.

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

(5) Costs to construct, repair, replace, improve, relocate or demolish any structure, equipment 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 up to \$50,000 for any of the following corrective actions if the department or the department of natural resources orders that action in response to a discharge:

(a) Replacement or restoration of private wells.

(b) Connection to alternative water sources, whether public or private.

(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. 292.11 (7) (a), Stats., and charged to the responsible person, provided that the responsible person reimbursed the department of natural resources and 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, except as provided under s. ATCP 35.16 (2) (c).

(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 application 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, to contest an application decision under s. ATCP 35.32 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 services, including expedited laboratory analysis, mail service or parcel delivery service, unless the department approves those charges in advance.

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

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

(30) The following costs related to landspreading under s. ATCP 35.03:

(a) Compensation for crop damage, except as provided in s. ATCP 35.04 (4) (d).

(b) Residue sampling for nutrients or pesticides, except as provided in s. ATCP 35.04 (4) (b).

(c) Land rental or access charges, except as provided in s. ATCP 35.04 (4) (c) and (e).

(31) Costs for subcontractor service charges or markups.

(32) Costs to plant or till land on which the responsible person landspreads soil or water under s. ATCP 35.03, unless the department requires that land to be planted or tilled.

History: Cr. Register, August, 1994, No. 464, eff. 9-1-94; am. (3) (intro.), (4), (15), (16), (24), (27), (28) and (30), cr. (3) (c), (31) and (32), Register, September, 1998, No. 513, eff. 10-1-98; am. (5) and (6), r. and recr. (30), Register, October, 2000, No. 538, eff. 11-1-00; CR 03-119; am. (5), r. and recr. (13) Register October 2004 No. 586, eff. 11-1-04; CR 10-122; am. (19) Register July 2011 No. 667, eff. 8-1-11.

ATCP 35.16 Contract services. (1) GENERAL REQUIREMENT. Except as provided in sub. (8), the department may not reimburse a responsible person for the cost of a contract service unless the responsible person contracts that service according to subs. (2) to (7).

(2) BIDS AND ESTIMATES REQUIRED. (a) The department may not reimburse a responsible person for contract services performed at a discharge site unless the responsible person selects the contractor to provide services at that site on the basis of at least 3 competitive bids. The responsible person shall provide the department with a copy of the accepted bid before authorizing the contractor to proceed.

(b) Except as provided in par. (c), the department may not reimburse a responsible person for contract service costs that exceed the contractor's bid for those services under par. (a).

(c) The department may reimburse a responsible person for contract services not included in the contractor's initial bid under par. (a), or for additional hours or units of service beyond those included in the bid under par. (a), if all of the following apply:

1. The contractor providing the additional services was selected by the competitive bidding procedure under par. (a).

2. The contractor bills for the additional services at the same per-unit price at which the contractor agreed to provide equivalent services, if any, in the contractor's initial bid under par. (a).

3. The contractor provides the responsible person and the department with a cost estimate for the additional services, and obtains the approval of the responsible person and the department, before performing those services.

5. The responsible person gives the contractor written authorization to proceed with the additional services, after receiving the contractor's estimate under subd. 3.

6. The cost for the additional services does not exceed the contractor's estimate under subd. 3.

7. The additional services do not involve the selection, design or installation of active groundwater remediation.

(d) A responsible person requesting reimbursement from the department shall keep copies of all bids and estimates required under this subsection, and shall make those copies available to the department for inspection and copying upon request. The responsible person shall keep copies of the bids and cost estimates for at least 2 years after the department has paid or denied all reimbursements to which those bids or cost estimates pertain.

(2m) BID AND ESTIMATE CONTENTS. Every bid under sub. (2) (a) and every cost estimate under sub. (2) (c) 3. shall include all of the following:

(a) A clear description and itemization of the contract services included in the bid or estimate. 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 or estimate.

(b) A total bid price or cost estimate for all of the contract services included in the bid or estimate, and a subtotal price for each of the component services itemized in the bid or estimate.

(c) The following information related to every service priced on an hourly or per unit basis:

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.
3. The total estimated price for the service, based on the estimate under subd. 2.
4. The estimated date by which the contractor will perform the service.

(d) Every certification and disclosure required of the contractor under subs. (6) and (7).

(e) The basis for attributing project costs to corrective measures under this chapter, if the project is also designed to investigate or repair environmental contamination involving substances that are not agricultural chemicals. The attribution shall take into account the reasons for which the overall project was initiated, and the end goals of the project.

(3) SERVICES PRICED ON AN HOURLY OR PER UNIT BASIS. (a) Bids and cost estimates for the following services shall be priced on an hourly or per unit basis:

1. Excavating.
2. Trucking.
3. Landspreading and other waste treatment or disposal services.
4. Drilling, including at-depth soil sampling and well installation.
5. Laboratory services.
6. Services normally billed on an hourly or per unit basis.

(b) Bids and cost estimates for professional or personal services, including engineering, hydrogeologic, field technician and general contracting services, shall be priced on an hourly basis.

(4) RESPONSIBLE PERSON; CHOICE OF CONTRACTORS. (a) The department may require a responsible person to explain that person's choice of contractors.

(b) A responsible person may select any contract service provider, but may not apply for reimbursement of any corrective action costs that exceed the low bid for any of the following contract services:

1. Excavating.
2. Trucking.
3. Landspreading and waste disposal services.

4. Drilling, including at-depth soil sampling and well installation.

Note: A responsible person may obtain full reimbursement for services provided by a consultant or laboratory that is not the lowest bidder, provided that other requirements under this section are met. A responsible person should consider bid amounts, but may consider other factors including professional qualifications and special project needs.

(5) SEPARATE CONTRACTORS. (a) No contractor who provides any of the following contract services for a corrective action may provide contract services other than the following contract services for that corrective action:

1. Excavating.
2. Trucking.
3. Landspreading and other waste treatment or disposal services.
4. Drilling, including at-depth soil sampling and well installation.

(b) No contractor who provides laboratory services for a corrective action, other than immunoassay services or field testing services using hand-held devices, may provide other contract services related to that corrective action.

(c) Paragraphs (a) and (b) do not apply to a general contractor who subcontracts with independent subcontractors to provide services under par. (a) or (b) for a corrective action, provided the subcontractors comply with pars. (a) and (b).

(6) CERTIFICATION BY CONTRACTOR. (a) In every bid or cost estimate under sub. (2), the 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, 706, 708 and 712 to 726.

Note: For corrective actions under this chapter, the department is authorized to review compliance with chs. NR 700, 706, 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 submits a bid or cost estimate under sub. (2) to provide 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.

Note: If a general contractor solicits other contractors on behalf of a responsible person and the responsible person contracts directly with or directly compensates the other contractors, the general contractor is subject to the insurance provisions contained in this paragraph. A contractor who subcontracts for corrective action services and directly compensates the subcontractor is not acting as a general contractor with regard to that subcontracted service.

(c) If a contractor submits a bid or cost estimate 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.

(d) If a contractor submits a bid or cost estimate under sub. (2) to provide drilling services or soil probing, the contractor's bid shall certify that the contractor has and will maintain insurance coverage for 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.

(7) CONTRACTOR DISCLOSURE. (a) If a contractor's bid or cost estimate under sub. (2) includes any contract service or cost a contractor knows or should know is not eligible for reimbursement under this chapter, the bid or cost estimate shall clearly identify

that service or cost and shall clearly disclose that it is not eligible for reimbursement by the department.

(b) A contractor shall disclose, in every bid under sub. (2) that includes landspreading services, the name of the subcontractor who will provide the landspreading services.

(8) EXEMPTIONS. The department may reimburse necessary and reasonable contract service costs incurred by a responsible person who fails to comply with subs. (2) to (7) if any of the following applies:

(a) The responsible person demonstrates that compliance with subs. (2) to (7) is not reasonably possible.

(b) The contract service costs charged by the contractor do not exceed \$3,000.

(c) The department pays reimbursement at a rate that is no more than 75% of the rate normally allowed under s. ATCP 35.22.

(9) DISAPPROVED BIDS OR ESTIMATES. If the department finds that a bid or cost estimate under sub. (2) is unreasonable, that bids or cost estimates appear to be noncompetitive, or that all or part of the contract service is unnecessary, the department may do any of the following:

(a) Disapprove the bid or estimate.

(b) Require the responsible person to obtain up to 3 additional bids or estimates. Additional bids or estimates, if any, shall comply with this section.

(c) Determine that the corrective action cost eligible for reimbursement is less than the amount bid or estimated.

History: Cr. Register, August, 1994, No. 464, eff. 9-1-94; am. (1), (6) (a) (intro.), 1., and (8) (b), r. and recr. (2), (3), (4) and (5), cr. (2m), r. (7), Register, September, 1998, No. 513, eff. 10-1-98; am. (1), (2) (a) and (c) 3., (2m) (d), (6) (b) and (c), r. (2) (c) 4., cr. (2m) (e), (6) (d), (7) and (9), r. and recr. (8), Register, October, 2000, No. 538, eff. 11-1-00; CR 03-119; renun. (7) to be (7) (a), cr. (7) (b), am. (9) (intro.) Register October 2004 No. 586, eff. 11-1-04; CR 10-122; am. (4) (b) Register July 2011 No. 667, eff. 8-1-11.

ATCP 35.18 Reimbursement conditions. (1) WORKPLAN REQUIRED. (a) Except as provided in par. (b) or (c), the department may not reimburse a responsible person for eligible corrective action costs exceeding \$7,500 unless the department approves a written workplan for the corrective action before the responsible person takes the corrective action.

(b) Paragraph (a) does not apply to a reasonable and necessary corrective action taken on an emergency basis.

(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 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; r. and recr. (1), am. (2), Register, September, 1998, No. 513, eff. 10-1-98; r. and recr. (1) (a), Register, October, 2000, No. 538, eff. 11-1-00.

ATCP 35.20 Multiple responsible persons. (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 for a discharge under s. ATCP 35.22 (4) (a) or a discharge site under s. ATCP 35.22 (1) or (2).

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 an application 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; am. (1), Register, September, 1998, No. 513, eff. 10-1-98; CR 10-122; am. (3) Register July 2011 No. 667, eff. 8-1-11.

ATCP 35.22 Reimbursement amounts. (1) GENERAL REIMBURSEMENT FORMULA. (a) Except as provided in subs. (2) through (6), the department shall reimburse a responsible person for each discharge site an amount equal to 75% of the eligible corrective action costs that are greater than \$3,000 and less than \$400,000. To this amount, the department shall add interest costs under s. ATCP 35.25.

(b) If no more than \$3,000 of the eligible corrective action costs under par. (a) were incurred prior to January 1, 2004, the total amount paid under par. (a) may not exceed \$297,750.

(c) If more than \$3,000 of the eligible corrective action costs under par. (a) were incurred prior to January 1, 2004, the total amount paid under par. (a) may not exceed \$317,600 or the sum of the following, whichever amount is less:

1. Eighty percent of the eligible corrective action costs incurred prior to January 1, 2004 that exceed \$3,000.

2. Seventy-five percent of the difference between \$400,000 and the eligible corrective action costs incurred prior to January 1, 2004.

(2) DIFFERENT REIMBURSEMENT FORMULA FOR SOME PERSONS. (a) Except as provided in subs. (3) through (6), the department shall reimburse a responsible person for each discharge site an amount equal to 75% of the eligible corrective action costs that are greater than \$7,500 and less than \$400,000 if any of the following apply at the time the discharge occurs or is discovered:

1. The responsible person is required to be licensed under ss. 94.67 to 94.71, Stats.

2. The responsible person employs more than 25 persons.

3. The responsible person has gross annual sales of more than \$2,500,000.

(b) To the amount under par. (a) the department shall add interest costs under s. ATCP 35.25.

(c) If no more than \$7,500 of the eligible corrective action costs under par. (a) were incurred prior to January 1, 2004, the total amount paid under pars. (a) and (b) may not exceed \$294,375.

(d) If more than \$7,500 of the eligible corrective action costs under par. (a) were incurred prior to January 1, 2004, the total amount paid under pars. (a) and (b) may not exceed \$314,000 or the sum of the following, whichever amount is less:

1. Eighty percent of the eligible corrective action costs incurred prior to January 1, 2004 that exceed \$7,500.

2. Seventy-five percent of the difference between \$400,000 and the eligible corrective action costs incurred prior to January 1, 2004.

(3) **TRANSPORTATION DISCHARGES.** For purposes of subs. (1) and (2), whenever an agricultural chemical is discharged while being transported from a site owned or controlled by a person who owns or controls the discharged agricultural chemical, the discharge is deemed to occur at that site.

(4) **PREAPPROVAL REQUIRED FOR SOME CORRECTIVE ACTION COSTS.** (a) The department may not reimburse corrective action costs that exceed \$100,000 for any discharge unless the department, after determining that the costs are reasonable and necessary based on the nature, size and complexity of the corrective action, approves the additional costs before the responsible person incurs them. The department may specify conditions and limitations on its approval. An approval under s. ATCP 35.16 (2) (c) 3. constitutes an approval under this paragraph.

(b) A discharge under par. (a) includes all discharges that occur at a discharge site before the responsible person initiates corrective action in response to any of those discharges. A subsequent discharge is considered a separate discharge under par. (a), subject to a separate \$100,000 limit.

(c) A reimbursement under this subsection may not exceed the limits provided under subs. (1) and (2).

(5) **CORRECTIVE ACTION COSTS INCURRED PRIOR TO JANUARY 1, 2004.** For eligible corrective action costs incurred prior to January 1, 2004, the applicable reimbursement rate under subs. (1) and (2) is 80%, rather than 75%.

(6) **REDUCED REIMBURSEMENT RATE FOR REPEAT DISCHARGES.** The department may reduce the applicable reimbursement rate under this section, if a reduction is appropriate under s. ATCP 35.08 (6).

History: Cr. Register, August, 1994, No. 464, eff. 9-1-94; r. and recr., Register, September, 1998, No. 513, eff. 10-1-98; am. (1), (2) (a) (intro.) and (4) (a), r. (4) (b), Register, October, 2000, No. 538, eff. 11-1-00; CR 03-119: r. and recr. (1) and (2), renum. (4) (c) and (d) to be (4) (b) and (c), cr. (5) and (6) Register October 2004 No. 586, eff. 11-1-04.

ATCP 35.25 Interest on approved reimbursement amounts. The department shall add interest to a reimbursement amount calculated under s. ATCP 35.22 at a rate equal to the prime interest rate on the date when the department receives a complete reimbursement application. The department shall calculate interest from that date for the unpaid balance approved under s. ATCP 35.22.

History: Cr. Register, August, 1994, No. 464, eff. 9-1-94; am. Register, September, 1998, No. 513, eff. 10-1-98.

ATCP 35.26 Partial corrective action; reimbursement. (1) Upon completing any of the following portions of a corrective action, a responsible person may apply for and receive reimbursement of eligible corrective action costs which the responsible person pays prior to the reimbursement application date:

(a) An emergency response, if any.

(b) A soil investigation approved by the department. If the soil investigation concludes that active soil remediation is necessary, the department shall approve an active soil remediation plan before reimbursing the responsible person for the soil investigation.

(2) The department may not reimburse any portion of a corrective action under sub. (1) unless the responsible person demonstrates, to the department's satisfaction, that the responsible person is proceeding in a timely manner with the remainder of the corrective action. The department may withhold reimbursement pending department approval of a workplan for the remainder of the corrective action.

(3) If, after receiving any reimbursement under sub. (1), a responsible person fails to complete a corrective action as required under this subsection, the department may direct the

responsible person to return that reimbursement by a specified date. If the department properly directs a responsible person to return a reimbursement, the responsible person shall return the reimbursement according to the department's directive.

(4) Reimbursement under sub. (1) for a portion of a corrective action does not affect the reimbursement rate that applies to a discharge under s. ATCP 35.22 (4) (a) or to a discharge site under s. ATCP 35.22 (1) or (2).

History: Cr. Register, August, 1994, No. 464, eff. 9-1-94; r. and recr. Register, September, 1998, No. 513, eff. 10-1-98.

ATCP 35.28 Reimbursement payments. The department shall reimburse responsible persons for approved corrective action costs, in the total amount approved for each corrective action under s. ATCP 35.08 (4) (c), in the order in which the department receives complete reimbursement applications from those responsible persons. The department shall make payments under this section from the appropriations under s. 20.115 (7) (wm), Stats. Notwithstanding any other provision of this chapter, payment is subject to the availability of funds in those appropriations.

History: Cr. Register, August, 1994, No. 464, eff. 9-1-94; r. and recr. (1) and (2), am. (3) (a), renum. (3) (d) to be (3) (c), r. (4) and (5), Register, September, 1998, No. 513, eff. 10-1-98; CR 03-119: r. and recr. Register October 2004 No. 586, eff. 11-1-04; correction made under s. 13.92 (4) (b) 7., Stats., Register July 2011 No. 667.

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.

(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, 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; am. (2) and (3), Register, September, 1998, No. 513, eff. 10-1-98.

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 (5) 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 employee 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).

History: Cr. Register, August, 1994, No. 464, eff. 9-1-94; am. (1) and (3), Register, September, 1998, No. 513, eff. 10-1-98.

ATCP 35.34 Agricultural chemical cleanup council.

(1) CREATION. The department shall appoint an advisory council to advise the department on matters related to the administration of this chapter. The advisory council shall be called the agricultural chemical cleanup council.

(2) MEMBERS. The agricultural chemical cleanup council

shall consist of the following members, appointed for 2-year terms:

- (a) Two farmers.
- (b) Two pesticide dealers or commercial applicators.
- (c) One environmental consultant.
- (d) One agricultural chemical manufacturer or wholesaler.

(3) MEETINGS. The agricultural chemical cleanup council shall meet, at the call of the department, to advise the department on any of the following matters on which the department seeks advice:

- (a) Rules proposed under s. 94.73, Stats.
- (b) Fees and surcharges to fund reimbursement of corrective action costs.
- (c) Proposed department actions under s. ATCP 35.08 (5) (b) and (c).
- (d) Other matters related to the administration of this rule.

History: Cr. Register, October, 2000, No. 538, eff. 11-1-00.