



STATE OF IDAHO  
DEPARTMENT OF  
ENVIRONMENTAL QUALITY

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C. L. "Butch" Otter, Governor  
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## DEQ POLICY STATEMENT PS18-04

### LEAKING UNDERGROUND STORAGE TANK (LUST) PROGRAM COST RECOVERY

#### PURPOSE

The purpose of the Idaho Department of Environmental Quality's (DEQ's) cost recovery policy is to comply with the federal financial management and cost recovery responsibilities as specified in the Leaking Underground Storage Tank (LUST) Trust Fund Program. These responsibilities are detailed in the Solid Waste Disposal Act (SWDA) of 1976 (i.e., Resource Conservation and Recovery Act [RCRA]) as amended in RCRA §9003(h)(6) [42 USC §6991b(h)6] and US Environmental Protection Agency's (EPA's) *Cost Recovery Policy For Leaking Underground Storage Tank Trust Fund Corrective Action Cooperative Agreements* (EPA 510-B-16-002, November 2016).

#### STATEMENT OF POLICY

RCRA Subtitle I, Section 9003(h) allows states with EPA-state cooperative agreements the capability to conduct corrective actions, enforcement activities, and to exercise various program authorities, including the authority for states to administratively settle cost recovery claims in cases of petroleum contamination. RCRA §9003(h)(6,7) provides DEQ with the authority to recover, from responsible parties, costs that have been incurred by the state for performing corrective actions or enforcement actions with respect to petroleum releases from underground storage tank (UST) systems.

#### RESPONSIBILITY

DEQ's underground and leaking underground storage tank program manager is responsible for maintaining this policy.

#### IMPLEMENTATION

This policy is effective immediately and will remain in effect for 5 years unless amended, replaced, or rescinded prior to expiration.

Dated this 6<sup>th</sup> day of March, 2018

  
John H. Tippetts  
Director

# **Leaking Underground Storage Tank (LUST) Program Cost Recovery Policy**

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**State of Idaho  
Department of Environmental Quality**

**January 2018**

## Table of Contents

1 Introduction.....	1
1.1 Purpose.....	1
1.2 Legal Authorities.....	1
1.3 DEQ Policy .....	1
2 When to Recover Costs .....	2
2.1 Priorities .....	2
2.2 Activity Descriptions .....	2
2.3 Ability To Pay .....	3
2.4 Bankruptcy .....	3
3 Recoverable Costs .....	4
3.1 Contracts .....	4
3.2 Supplies/Operating.....	4
3.3 Capital Equipment.....	4
3.4 Laboratory Costs .....	4
3.5 Personnel.....	5
3.6 Travel .....	5
3.7 Indirect Costs .....	5
3.8 Interest.....	5
3.9 Documentation .....	5
4 Informing the Responsible Party .....	6
4.1 Initial Notification.....	6
4.2 Billing.....	6
4.3 RP Payments and Interest .....	7
4.4 Nonpayment .....	7
4.5 Account Closeout .....	7
5 Use of Cost Recovered Funds.....	8

# 1 Introduction

## 1.1 Purpose

The purpose of the Idaho Department of Environmental Quality's (DEQ's) cost recovery policy is to comply with the federal financial management and cost recovery responsibilities as specified in the Leaking Underground Storage Tank (LUST) Trust Fund Program. These responsibilities are detailed in the Solid Waste Disposal Act (SWDA) of 1976 (i.e., Resource Conservation and Recovery Act [RCRA]) as amended in RCRA §9003(h)(6) [42 USC §6991b(h)6] and US Environmental Protection Agency's (EPA's) *Cost Recovery Policy For Leaking Underground Storage Tank Trust Fund Corrective Action Cooperative Agreements* (EPA 510-B-16-002, November 2016).

## 1.2 Legal Authorities

RCRA Subtitle I, Section 9003(h) allows states with EPA-state cooperative agreements the capability to conduct corrective actions, enforcement activities, and to exercise various program authorities, including the authority for states to administratively settle cost recovery claims in cases of petroleum contamination. RCRA §9003(h)(6,7) provides DEQ with the authority to recover, from responsible parties, costs that have been incurred by the state for performing corrective actions or enforcement actions with respect to petroleum releases from underground storage tank (UST) systems. The owner or operator of the tank system that resulted in a release is liable to the state for such costs.

The Idaho Environmental Protection and Health Act (EPHA) authorizes DEQ to recover costs expended in Idaho's LUST program. Idaho Code §39-108(6) specifically authorizes "...any person who has been determined to have violated the provisions of this act or the rules, regulations, permits, or orders promulgated therein, shall be liable for any expense incurred by the state in enforcing the act, or in enforcing or terminating any nuisance, source, or environmental degradation, cause of sickness, or health hazard."

According to the Code of Federal Regulations (2 CFR 307(e)(2)), when states make successful cost recoveries, the state may retain the money, including interest, as program income, and it may be used for additional LUST cleanups and activities as specified in the EPA-state cooperative agreement.

## 1.3 DEQ Policy

DEQ's policy is as follows:

- Encourage responsible parties (RPs) to comply with state and federal regulations by completing the corrective actions necessary to remediate their petroleum release sites.
- Ensure state expenses at cost recovery sites are reasonable and equitable for work performed.
- Maintain a record-keeping system that accurately documents state costs at each site requiring cost recovery, including contracts, supplies/operating, capital equipment, laboratory costs, personnel, travel, indirect costs, and interest.

- Process cost recovery cases in a timely manner to increase the chance of successful recovery.
- Promptly deposit recovered funds to a state petroleum program account for use in petroleum program projects.

## **2 When to Recover Costs**

Cost recovery of state and federal resources can be initiated at all sites where surface and/or ground water have been contaminated and/or where surface water and/or ground water are threatened by petroleum-contaminated soil. A determination using best professional judgement can initiate cost recovery.

### **2.1 Priorities**

Although recovery of costs for all state and federal resources expended in remediating contaminated sites is the goal, DEQ will determine where cost recovery is practical to perform. An administrative cost is associated with conducting cost recovery. It may be unreasonable to proceed in cost recovery efforts when the chances of recovering DEQ expenditures are minimal or the dollar amounts that could be recovered are small. Listed below are the cost recovery priorities for site cleanup to be used by the LUST program, ordered from highest to lowest priority:

- Solvent RPs who are not complying with state rules and are recalcitrant
- Site costs are above \$20,000 (estimating administrative costs to recover DEQ expenditures)
- RPs that are financially distressed (RPs that are unable to fully reimburse the state must follow the ability-to-pay evaluation procedures in section 2.3)
- Sites where the statute of limitations has been exceeded, see Idaho Code §39-108(4)
- RPs that are insolvent or bankrupt (section 2.4)
- RPs that cannot be identified (abandoned sites)
- Other circumstances as specific facts warrant

### **2.2 Activity Descriptions**

Listed below are activities that DEQ could initiate to remediate and/or protect surface and/or ground water. This list is not inclusive of all costs that could be cost recoverable.

- Contracting costs
- Exposure assessments to determine health effects of a release and establish corrective action priorities
- Complaint response costs
- Cleanup of releases
- Long-term operation and maintenance of corrective action measures
- Purchase and/or lease of equipment
- Protecting drinking water
- Temporarily or permanently relocating residents

- Laboratory charges for analyzing soil and water samples
- Emergency response and initial site hazard mitigation
- Corrective action plans
- Developing, issuing, and overseeing enforcement actions directed to responsible owners/operators
- Preparing for legal actions
- Managing review of site activities
- Reviewing and commenting on technical reports
- Clerical support
- Correspondence and documentation
- Travel costs
- Staff meetings concerning site activities
- Billing and collection procedures
- Other reasonable and necessary administrative and planning expenses directly related to a site activity

## **2.3 Ability To Pay**

If a RP indicates they are unable to reimburse the state for petroleum contamination-related costs, the RP is required to submit documentation to demonstrate an inability to pay. This documentation will be evaluated by DEQ personnel trained in EPA's penalty and financial models. The models DEQ uses include the following:

3. INDIPAY, for individuals—evaluates an individual's ability to afford compliance costs, cleanup costs, or civil penalties. INDIPAY requires submitting the INDIPAY Financial Data Request Forms and 1 to 5 years of an individual's recent and consecutive federal tax returns. DEQ's policy is to obtain 3 years of an individual's federal tax returns.
4. ABEL, for businesses—evaluates a corporation's or partnership's ability to afford compliance costs, cleanup costs, or civil penalties. ABEL requires submitting 3 to 5 years of an entity's federal tax returns. DEQ's policy is to obtain 3 years of an entity's federal tax returns.

Once the output of the model is evaluated by DEQ personnel, the decision will be documented as a summary document and placed in the site file. The supplied taxes and INDIPAY Financial Data Request Forms will either be destroyed or returned to the RP. The RP will be notified of DEQ's decision to require (1) full reimbursement, (2) partial reimbursement, or (3) no reimbursement. Reimbursement may be a check, money order, or a consensual lien on the property. DEQ is willing to negotiate a payment plan.

Failure to return the necessary financial information will result in the expectation of full payment for the contamination-related costs.

## **2.4 Bankruptcy**

If a RP indicates that they are unable to reimburse the state for petroleum contamination-related costs due to bankruptcy, the RP is required to submit documentation verifying the bankruptcy,

the reason for the bankruptcy filing, and what debtor is seeking to be discharged. Depending on the nature of the bankruptcy proceeding, DEQ's UST/LUST program manager and DEQ's attorney general's office will decide if DEQ should submit a claim for cost reimbursement of remedial actions. Claims could potentially be for work that will be invoiced or for previously incurred remediation expenses on a property with a lien. In general, DEQ will follow the Association of State and Territorial Solid Waste Management Officials, *ASTWMO's Guidance for Understanding Petroleum Storage Tank Bankruptcy* (January 2017).

### **3 Recoverable Costs**

Responsible parties may be liable for any expense incurred by the state, including the following DEQ costs: contracts, supplies/operating, capital equipment, laboratory costs, personnel, travel, indirect costs, and interest.

#### **3.1 Contracts**

Contracts include the costs of using contract services to perform work on a specific site. These costs may include, but are not limited to, DEQ's retained contractors, leased or rented equipment, expert testimony, environmental/engineering consultants, vacuum trucks, drillers, and excavators.

#### **3.2 Supplies/Operating**

Supplies/operating includes costs for miscellaneous supplies required to perform work on a specific site. These costs may include, but are not limited to, office or field supplies or equipment, sampling equipment, freight, packaging, postage, express mail services, photocopying, data processing supplies, court fees and costs, technical documents, and computer software.

#### **3.3 Capital Equipment**

Capital equipment includes costs for purchasing equipment, tools, machinery, instruments, or computer hardware to be used at a specific site. Items are normally over \$2,500 in value and are generally available for multisite use. If items are used at other sites, the individual site may be charged for the item at a *usage rate*. The usage rate shall be pro-rated, based upon cost and estimated life of the item.

#### **3.4 Laboratory Costs**

Laboratory costs include testing and analyzing soil, water, and air samples.

### 3.5 Personnel

Personnel costs include staff time charged to specific sites, vacation, holiday, sick leave, and other paid absences calculated from the percent of time spent on a specific site. Personnel costs include fringe benefits such as the following:

- FICA
- Disability insurance
- Health insurance
- Unemployment insurance
- Worker's compensation
- Personnel commission
- Retirement
- Group life insurance
- Employee assistance plan
- Retirement health insurance

### 3.6 Travel

Travel includes all transportation (rental cars, mileage on personal vehicles, fuel expenses, and airfare), meals, lodging, parking, and other related travel expenses incurred while traveling on site-specific business. If more than one site is visited in one trip, travel costs will be divided between the sites.

### 3.7 Indirect Costs

DEQ's indirect cost rate changes annually. The indirect rate is negotiated with DEQ's related federal agencies based upon actual expenditures and may be modified to reflect current accounting information. Indirect costs support the administrative functions of the agency.

### 3.8 Interest

Interest may be assessed on recoverable funds beginning the day after full payment is due. Interest rate charges will be the minimum interest rate suggested by the US Department of Treasury's Bureau of the Fiscal Service ([www.treasurydirect.gov/GA-FI/FedInvest/selectOvernightRateDate.htm](http://www.treasurydirect.gov/GA-FI/FedInvest/selectOvernightRateDate.htm)). The rate of interest will remain fixed for the duration of the indebtedness, except where the owner or operator has defaulted on a repayment plan and seeks to enter into a new agreement.

### 3.9 Documentation

DEQ costs directly attributable to remedial action activities will be clearly documented to allow potential recovery of expended state and federal funds. Upon determining that a site is expected to require remediation and require significant state resources, a site-specific cost accounting code will be obtained from DEQ's Fiscal Office. The cost accounting code will be specific to the site and the appropriate grant and task within DEQ's accounting system, GOFR.

The appropriate cost accounting code will be placed on the invoices that DEQ receives from contractors so that contractual charges can be included in the accounting system for each cost recovery site. DEQ's Fiscal Office will be responsible for ensuring contractual charges are properly tracked and displayed in GOFR.

Cost accounting codes will be placed on the chain-of-custody forms when laboratory samples are submitted to the laboratory. The laboratory will invoice the program for laboratory services rendered. The appropriate cost accounting code will be included on each invoice so that laboratory charges can be included in the accounting system for each cost recovery site. DEQ's Fiscal Office will be responsible for ensuring laboratory charges are properly tracked and displayed in GOFR.

Personnel who perform tasks related to the remedial actions at the site will code their time related to the cost recovery activities associated with the site. Personnel will choose the specific cost accounting code on their biweekly timesheet. Supervisors will be responsible for ensuring the appropriate cost accounting code is used and the time coded is accurate.

Other charges, such as supplies/operating and capital will be recorded for all activities related to specific cost recovery sites. The appropriate cost accounting code will be recorded. The original of each document will be filed and maintained by DEQ's Fiscal Office.

## **4 Informing the Responsible Party**

### **4.1 Initial Notification**

DEQ will inform RPs about the state's cost recovery program throughout the enforcement process. When DEQ becomes aware of petroleum contamination at a facility, a letter is sent to the RP confirming a petroleum release at their facility or on their property where they may be legally and financially responsible. If a site requires considerable effort from DEQ, the RP will be notified that DEQ intends on recovering costs associated with work on the site.

### **4.2 Billing**

DEQ's Fiscal Office will track expenditures on all cost recovery sites. The UST/LUST program manager and the applicable DEQ regional office will work with DEQ's Fiscal Office to generate an invoice specifying the allowable potential charges and payment procedures. The RP will be billed following project completion. The invoice sent to the RP will explain the potential charges. If a reimbursement agreement is reached with the RP, the RP may be billed quarterly or according to an alternative payment schedule.

The cost recovery charges will be broken out into the following categories:

- Contracts
- Supplies/operating
- Capital equipment
- Laboratory costs
- Personnel (including fringe and indirect)
- Travel
- Interest

### **4.3 RP Payments and Interest**

Payments are due within 30 days of receipt of the invoice. Interest and/or penalties may be charged on delinquent payments.

Payments will be sent to the following:

DEQ Fiscal Office  
ATTN: Accounts Receivable  
(Site Name)  
1410 N. Hilton Street  
Boise, Idaho 83706

Full payment is due 30 days after the postmarked date of the billing. Interest may be assessed on recoverable funds after this 30-day period.

### **4.4 Nonpayment**

Failure to pay the costs incurred by DEQ may result in a civil enforcement action in district court pursuant to the EPHA, Idaho Code §§39-108(3)(b) and (6) to recover any expense incurred by the state and civil penalties for violation of EPHA.

### **4.5 Account Closeout**

A cost recovery site account is closed for the following:

- All conditions of the enforcement have been satisfactorily met.
  - All cost recoverable monies have been collected, and the site account has a balance of \$0.00.
  - DEQ determines that cost recovery actions for the site are no longer practical or economical to pursue.

Before finalizing closeout of an account, the file will be reviewed by the UST/LUST program manager and the applicable regional office UST/LUST staff.

Once a formal determination has been made regarding closeout of an account:

- A final invoice is sent to the RP indicating a \$0.00 balance due and the account has been closed.
- The regional office UST/LUST staff will prepare a memorandum for the file documenting the rationale for closing the cost recovery account.
- DEQ's Fiscal Office is notified so that the assigned cost accounting and grant task codes will be taken out of the accounting system.

DEQ's Fiscal Office will maintain closed cost recovery site files for 6 years, which includes timesheets, invoices, and other related documentation of charges. After 6 years, the files will be destroyed.

## **5 Use of Cost Recovered Funds**

Any funds DEQ cost recovers will be placed in the LUST Trust Fund Cost Recovery Account. The UST/LUST program manager will be responsible for ensuring the funds were correctly deposited and any use of the funds are properly withdrawn.

On a semiannual basis, the UST/LUST program manager will report to EPA the status of the cost recovery account in the LUST Trust Fund Cooperative Agreement grant report. The balance of the account and any uses of the account will be reported. DEQ will ask EPA's permission to use any funds in the cost recovery account before using the funds.