

TITLE 165. CORPORATION COMMISSION
CHAPTER 27. INDEMNITY FUND

PROPOSED RULES
October 1, 2018

**Changes made after
September 24, 2018
STAC meeting
highlighted**

This is not the official version of the Oklahoma Administrative Code, however, the text of these rules is the same as the text on file in the Office of Administrative Rules. Official rules are available from the Office of Administrative Rules of the Oklahoma Secretary of State. This copy is provided as convenience for our customers.

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[**Authority:** 17 O.S., §§ ~~52 and 350~~ 301 et seq.; 27A O.S., § 1-3-101]

[**Source:** Codified 6-25-92]

Corrects the section number in Title 17

CHAPTER 27. INDEMNITY FUND

SUBCHAPTER 1. GENERAL PROVISIONS

165:27-1-2. Definitions

In addition to the terms defined in 17 O.S. Sections 303, ~~352~~, and in OAC 165:25-1-11, 165:26-1-2, and 165:29-1-11 the following words or terms, when used in this Chapter, are the Commission's interpretation of enabling statutes and shall have the following meaning unless the context clearly indicates otherwise:

"Actual physical damage" means those damages to real and personal property directly related to corrective action performed on a release of petroleum from a Commission regulated storage tank system. Personal property damage is limited to the replacement value of the personal property less depreciation. Real property damage is limited to the lesser of the property value or diminution in property value directly associated with a release of regulated substances from a Commission regulated storage tank system. In no event will the Indemnity Fund reimburse speculative damages, inferred damages, unrealized damages or any other damages where damage costs are not actually incurred, paid, or otherwise established to the Commission's satisfaction. The burden of proof shall be upon the person seeking compensation from actual physical damages.

"Administrative Application" means an Application for eligibility and reimbursement made to the Commission by the Director of the Petroleum Storage Tank Division on behalf of an unavailable or unwilling Applicant to facilitate meeting the Program's obligation to protecting public health, safety and welfare.

"Agent" means a person authorized by another to act on their behalf, either out of employment or contract.

"Allowable Costs" means costs that are reasonable, integral and necessary to corrective action.

"Assignment of Benefits" means a written directive from the Applicant of Record instructing the PSTD Indemnity Fund to pay reimbursement directly to the named Assignee.

"Assignment of Rights" (aka "Limited Power of Attorney") means a transfer of authority granting the Assignee the legal right to act on the Assignee's behalf for specified matters.

"Associated costs" means expenses that are not integral to the corrective action and not subject to reimbursement.

"Chemicals of Concern" or **"COC"** means chemicals that may pose a threat to human health and the environment.

"Claim" or **"Claims"** means a properly submitted request for reimbursement from the Fund for an ~~SOR~~ or eligible suspicion of release ("SOR") or confirmed release case when the co-pay is paid.

"Closed file" means a file for which final resolution has been made of all invoices submitted for corrective action taken under an application for reimbursement from the Indemnity Fund and the PSTD Technical Department deems no further corrective action is necessary.

"Commission" or **"OCC"** means the Oklahoma Corporation Commission.

"Confirmed Release" means a release of a regulated substance from a regulated storage tank system resulting in free product, contaminated soils or groundwater that exceed state action levels, organic vapor readings significantly above background levels, petroleum staining or odors

or any other indication that a release has occurred that could be harmful to human health, safety or the environment and to which a PSTD case number is assigned and further corrective action is required.

"Contamination" means pollution in the native environment caused by a release of a regulated substance above action levels for that substance as set by the Commission.

"Disbursement" includes all monies, actually paid, expended, encumbered, reserved or attributable to a reimbursable event(s).

"Dispenser" means equipment, gauge(s), hose(s), nozzle(s), immediately associated pipe or fittings and other such appurtenances located aboveground and intended for dispensing PSTD-regulated substances from a tank system.

"Electronic signature" means any information in digital form that is included in or logically associated with an electronic document for the purpose of expressing the same meaning and intention as would a handwritten signature if affixed to an equivalent paper document with the same reference to the same content.

"Eligible Person" means the party who has made application to the Indemnity Fund and met applicable criteria to become eligible to receive reimbursement on an OCC suspicion of release or confirmed release, and who has been issued an Eligibility Letter from the Indemnity Fund. An eligible person may be an impacted party or adjacent owner.

"Eligible Release" means a suspicion of release or confirmed release that qualifies for Indemnity Fund reimbursement once Fund eligibility has been determined.

"Fund" means the Petroleum Storage Tank Indemnity Fund.

"Impacted Party" means an owner whose property has been impacted by a release from an on-site or off-site petroleum storage tank system that was never owned or operated by the impacted party and who has no OCC regulatory responsibility. An Impacted Party can apply for Fund eligibility and reimbursement, and the Fund deductible is not applicable.

"Investigation" means activities taken to identify, confirm, monitor or delineate the physical extent of a release and which result in the selection of an appropriate means to remediate a release and specific design criteria for such remediation upon currently used costing programs and/or reasonable competitive bids.

"Licensed Environmental Consultant" means an individual who has a current license issued by the PSTD to perform corrective action.

"Medical injury(ies)" means actual physical injury to a person in which medical costs have been incurred in association with the diagnosis and treatment of a physical injury directly caused by corrective action performed on a release of petroleum from a Commission regulated storage tank system.

"Modified eligibility" means the eligibility process for a suspicion of release case in which substantial compliance review is not required and the Indemnity Fund co-payment is paid upon closure of the suspicion of release case. In the event the suspicion of release case becomes a confirmed release case, a substantial compliance review is required and the statutory co-payment must be remitted within 30 days of the invoice date.

"Occurrence" means the release of a PSTD regulated substance into the soil or groundwater. Each PSTD regulated substance will be treated as one (1) occurrence regardless of the composition of the substance released. Separate occurrences of the same PSTD regulated substance may be allowed if evidence establishes the PSTD regulated substance occurred in two (2) different tank system locations, are separated by time, or both.

"Operator" means any person in control of or having responsibility for the daily operation of the storage tank system, whether by lease, contract, or other form of agreement. The term "operator" also includes a past operator at the time of a release, tank closure, violation of the Oklahoma Petroleum Storage Tank Regulation Act, or a rule promulgated thereunder, or a requirement of the Commission. In the case of a storage tank system in service/use before November 8, 1984, but no longer in service/use on that date, the last person to operate the storage tank system immediately before the discontinuation of its service/use.

"Owner" means:

(A) In the case of a storage tank system in service/use on November 8, 1984, or brought into service/use after that date, any person who holds title to, controls, or possesses an interest in a storage tank system used for the storage, use, or dispensing of regulated substances, including the real property owner where the storage tank system is still present, the storage tank system presence is a trade fixture or improvement or both. It is not necessary that the real property owner sold, used, or stored regulated substances in, of, or from the storage tank system.

(B) In the case of a storage tank system in service/use before November 8, 1984, but no longer in service/use on that date, any person who holds title to, controls, or possesses an interest in a storage tank system immediately before the discontinuation of its service/use. A real property owner who has a storage tank system located on their property that was taken out of service/use prior to November 8, 1984, is not considered to be a storage tank owner for any PSTD regulated purpose.

"Pay for Performance" or **"PFP"** means a process where an environmental consulting company (Consultant) guarantees by contract that a release of a regulated substance will be remediated to Chemicals of Concern (COC) levels agreed to by the PSTD, the Consultant and tank owner/operator that are protective of human health, safety and the environment. This performance-based process encompasses several steps, but is not limited to the contract signed by an officer/owner of the environmental consulting company, the applicant and the Administrator of the Indemnity Fund and an agreed to reasonable price. Scheduled payments are distributed only as performance-based goals are attained.

"Petroleum storage tank system" means a closed-plumbed system including storage tank(s), line(s) and dispenser(s) for a given product, e.g. a facility site can have a gasoline and a diesel system, or systems for different grades of gasoline, or even separate systems for the same grade of gasoline. It also includes a transport truck when attached to a tank system, and a used oil tank.

"PSTD" means Petroleum Storage Tank Division, or Division.

"Purchase Order" means a document submitted to PSTD online to obtain pre-approval by PSTD of a scope of work and the costs associated with the scope of work.

"Recalcitrant owner" means an owner/operator who is responsible for a tank system and after notice will not adhere to a PSTD enabling statute, Commission rule, requirement or order.

"Reimbursement" means repayment of a claim to a qualified Claimant or Assignee, or for an Administrative Application, or for such a claim submitted on behalf of a qualified Claimant, for incurred allowable costs resulting from an eligible release.

"Remedial Action Plan" means a plan implementing the required and approved remediation.

"Remediation" means the process or technique used to reduce concentration levels of regulated substances in the soil and groundwater, and/ or to reduce the presence of free product in the environment to levels that are protective of human health, safety and the environment.

"**Site assessment**" means a multi-step process designed to determine if a site has possibly been impacted by an amount of regulated substance(s).

"**Site characterization**" means a report submitted to the Commission that defines the extent of the contamination. The report should include, as a minimum, all things required by Chapter 29 of Commission rules for such a report.

"**Suspicion of Release**" or "**SOR**" means preliminary investigative work to determine if a release of a regulated substance has occurred.

"**Work Plan**" means a proposed scope of work submitted online to implement corrective action.

Updates statute consolidated in Title 17; clarifies definition of claim, closed file, and modified eligibility.

165:27-1-4. Authority

17 O.S. ~~1994~~ **2018**, §§ ~~350~~ **301** et seq. establishes the Oklahoma Petroleum Storage Tank Release Indemnity Program **Fund**. ~~Section 353 (A) provides that the Commission shall administer the Petroleum Storage Tank Indemnity Fund.~~

Updates the statute and name from Title 17 consolidation.

SUBCHAPTER 3. ELIGIBILITY REQUIREMENTS

165:27-3-1. General requirements

In order to qualify for reimbursement from the Fund, a person must meet the following requirements:

- (1) The person must be an eligible storage tank owner or operator, property owner, adjacent property owner, or impacted party who has met applicable criteria for Fund reimbursement, to include Fund eligibility for an OCC confirmed release case, or a PSTD authorized Purchase Order for a Suspicion of Release, that does require modified eligibility. The Director of PSTD may make a formal administrative application without meeting eligibility criteria.
- (2) The claimant must have incurred eligible expenses for an eligible release **from an eligible tank** for which reimbursement is requested.
- (3) The claimant must submit properly completed forms, purchase orders, reports, and claims for reimbursement to the Fund in accordance with governing statutes, the Rules of this Chapter, and ~~Chapter~~ **Chapters 25, 26 and** 29 of Commission rules in a format established by PSTD. Failure to submit required paperwork within the required timeframe may result in an enforcement action.
- (4) The release of substances must be from an eligible tank system, either present, abandoned, or formerly present at the facility where the release occurred. It is the sole duty and responsibility of the Indemnity Fund applicant to establish to the satisfaction of the PSTD that a tank system is/was formerly present, and that the tank system contains/contained regulated substances.

(5) If tanks were in service after November 8, 1984, the person who **currently** owns either the tank system or the property or both, where a tank system is located, is the eligible person regardless of the person never having sold, stored or otherwise owned or operated the storage tank system while the storage tank system contained regulated substances.

Clarifies eligibility requirements.

165:27-3-2. Eligible person

An eligible person can be any of the following who has costs incurred as the result of a confirmed eligible release from a petroleum storage tank system, who has satisfied requirements for PSTD eligibility, and has been issued an Indemnity Fund Eligibility Letter by the PSTD Director.

- (1) An owner or operator of a storage tank system who fulfills the requirements of 17 O.S. ~~See 356~~ **§ 327.3** and OAC 165:25 or OAC 165:26 **of Commission rules.**
- (2) An owner whose property has been impacted by a release from an on-site or off-site petroleum storage tank system that was never owned or operated by the property owner and has no responsibility for the release.
- (3) A town or city which has obtained assignments from the property owners to act in their stead as "eligible party" and/or be deemed an "eligible party" itself for purposes of investigation and remediation of abandoned tank sites where a release of regulated substances has occurred on the property where the tanks are or were located and/or on nearby property within the limits of a single town or city. In any case where an abandoned petroleum storage tank system has released regulated substances ~~on to~~ **onto** the property where tanks are located or ~~on to~~ **onto** nearby property, within the limits of a single town or city, the city or town may obtain assignments from the property owners to act in their stead as "eligible party" and/or be deemed an "eligible party" itself for the ~~purposed~~ **purpose** of investigation and remediation of the site(s).
- (4) Adjacent property owner or impacted party.

Updates statute consolidated in Title 17 and the rule citations; grammatical corrections.

SUBCHAPTER 5. QUALIFICATIONS FOR REIMBURSEMENT

165:27-5-2. Application for reimbursement

An application for PSTD Eligibility on a confirmed release or a suspicion of release shall be made to the Administrator of the Indemnity Fund in a format established by PSTD and at a minimum include:

- (1) A properly completed "Indemnity Fund Application" with all requested information provided.
- (2) A Leak Detection Data Sheet (if applicable) with supporting documents and other information verifying regulatory compliance at the time of the reporting of the release.
- (3) Contract **between Indemnity Fund applicant and Licensed Environmental Consultant.**

(4) Damage Statement or court filed petitions alleging damages from a release of regulated substances (if applicable).

(5) Other Financial Mechanisms allowable besides the Indemnity Fund.

(6) Information deemed sufficient by PSTD staff to substantiate a claim as an impacted party or adjacent property owner and a sworn statement that no other financial mechanisms were in place at the time of discovery of the release. The eligible person must submit any and all property insurance policies to the Indemnity Fund in place at time of the release.

(7) Any other information requested by PSTD or Fund. When deemed warranted to support PSTD's charge to protect the public health, safety, and welfare, the Director of PSTD may execute an Administrative Application to the Fund on behalf of an unavailable or unwilling owner.

Clarifies the documents required for an application to the Fund.

SUBCHAPTER 7. REIMBURSEMENT

165:27-7-1. Reimbursable expenses

The Fund may reimburse eligible persons for:

(1) Reasonable, integral and necessary costs directly related to the corrective action. These costs may include but are not limited to such items as waste disposal, soil and groundwater remediation techniques, laboratory analyses, professional services, drilling, sampling, coring, transportation, and for use of third party property, on a case by case basis, for corrective actions.

(2) Backfill on active confirmed cases.

(3) Suspicion of release, and other costs deemed investigatory in nature.

(4) Costs that are reasonable, integral and necessary.

(5) Third Party property damage costs and medical injury costs that have been paid by the eligible person as set forth in 17 O.S. ~~356~~ § 327.3(I).

(6) Reasonable, integral and necessary costs for any county, municipality or state agency imposed permit fees, disposal fees or other such fees that may be needed to further corrective actions.

Clarifies the type of reimbursable medical cost; corrects statute number from Title 17 consolidation.

165:27-7-2. Reimbursement

(a) Among other requirements an eligible person for reimbursement is required to show:

(1) Allowable costs were incurred on or after December 23, 1988.

(2) The PSTD has determined that the release or suspicion of release may pose a threat to human health or the environment.

(3) The eligible person has fully cooperated with PSTD in responding to the release.

(b) The Petroleum Storage Tank Division will reimburse from the Indemnity Fund an eligible person, with an eligible release from an eligible tank system allowable costs in excess of one percent (1%) co-pay not to exceed Five Thousand Dollars (\$5,000.00) but not more than:

~~(1) One million five hundred thousand dollars (\$1,500,000.00) per occurrence providing the storage tank is used in petroleum marketing or if the system has a throughput in excess of ten thousand (10,000) gallons per month based on annual throughput for the previous calendar year, (throughput to be established by clear and convincing documentary records that are deemed sufficient by PSTD staff) and~~

~~(A) Two million dollars (\$2,000,000.00) annual aggregate for owners of one (1) to one hundred (100) storage tank systems, or~~

~~(B) Three million dollars (\$3,000,000.00) annual aggregate for owners with more than one hundred (100) storage tank systems or,~~

~~(2) Five hundred thousand dollars (\$500,000.00) per occurrence providing the system is not used in petroleum marketing, or if the storage tank system has a throughput of ten thousand (10,000) gallons or less per month based on annual throughput for the previous calendar year, and~~

~~(A) Two million dollars (\$2,000,000.00) annual aggregate for owners of one (1) to one hundred (100) storage tank systems or,~~

~~(B) Three million dollars (\$3,000,000.00) for owners with more than one hundred (100) storage tank systems.~~

(c) Indemnity Fund co-payments must be paid by the eligible person within thirty (30) days of invoice date. If the eligible person does not timely pay any Indemnity Fund co-payment within thirty (30) days of invoice date, then corrective actions will continue and the PSTD will seek cost recovery against the eligible person after the petroleum release case closes.

~~(e)~~ (d) Reimbursement shall not be made from the Indemnity Fund pursuant to this Section until the Indemnity Fund Program has determined that the costs for which reimbursement is requested were incurred on behalf of an eligible person, of an eligible release from an eligible tank system and were reasonable, integral and necessary.

~~(d)~~ (e) Releases that occurred prior to June 4, 2004, shall not receive reimbursement until the Five Thousand Dollars (\$5,000.00) co-pay has been prepaid or a payment arrangement concerning the co-pay has been agreed to by PSTD and significant compliance with the payment agreement is achieved.

~~(e)~~ (f) All corrective action or assessment costs incurred shall be subject to reimbursement in accordance with unit cost pricing recommended by the Unit Cost Committee as approved by the PSTD Director and any adaptations, amendments or changes thereto.

~~(f)~~ (g) All corrective action costs incurred shall be subject to reimbursement that is deemed allowable, fair and reasonable by the PSTD.

~~(g)~~ (h) All purchase orders, reports, and other required paperwork must be submitted within the required timeframe in a format established by PSTD.

~~(h)~~ (i) When the technology is available, payment of Indemnity Fund claims may be in the form of Electronic Funds Transfer ("EFT").

Strikes language regarding the reimbursement cap amount in § 323.3 that was increased in Title 17 consolidation; requires Indemnity Fund co-pays must be paid within 30 days of invoice date or PSTD will proceed with corrective action and cost recovery.

165:27-7-9. The Pre-Approval Program

(a) The purpose of the Pre-Approval Program is to reduce, if not eliminate, disallowances of reimbursement for costs incurred and associated with corrective action, as well as to foster a spirit of cooperation between the Licensed Environmental Consultant, PSTD and the eligible person.

(b) Parties are required to use either or both of the two (2) pre-approval processes developed by PSTD. These two (2) procedures are: Purchase Orders and Pay-For-Performance (PFP). These procedures document the agreement that all parties have reached and must comply with.

(c) An eligible person may opt out of the pre-approval program if they elect, in writing after consultation with the Administrator of the Indemnity Fund, not to participate in the pre-approval program and acknowledges in writing that the eligible person understands that all requests for reimbursement submitted without pre-approval will be subject to non-reimbursement of costs incurred which do not meet the statutory standards for reimbursement set forth in 17 O.S. § ~~350~~ 327.3 et seq.

Updates the statute from Title 17 consolidation.

165:27-7-11. Purchase order procedures

(a) Purchase order proposals are designed for pre-approval of work that is to be performed. Purchase orders shall not be issued on work that has been completed without pre-approval.

(1) All purchase orders must use the appropriate standardized method for a particular scope of work.

(2) All purchase order requests must be submitted online within the required timeframe by the Licensed Environmental Consultant.

(3) All purchase order requests submitted will be reviewed and responded to within thirty (30) days.

(4) If the purchase order request is approved as submitted, the PSTD staff will notify the Licensed Environmental Consultant and eligible person with the assigned purchase order number and a list of the required documents that will support the completed scope of work as described in the purchase order proposal at the agreed upon price.

(5) If the purchase order request is not approved as submitted, the PSTD staff will contact the Licensed Environmental Consultant or eligible person concerning the necessary changes required or will schedule a meeting, if needed.

(A) The Licensed Environmental Consultant will then make the agreed revisions and resubmit online the final purchase order to PSTD within the required timeframe.

(B) When PSTD staff recommends revisions to the purchase order request, the Licensed Environmental Consultant or eligible person will have thirty (30) days from notification of revisions to respond and submit a final purchase order proposal. If the consultant or eligible person does not respond within thirty (30) days, the purchase proposal as originally submitted is void.

(C) Unless agreed upon by PSTD, the eligible person and the Licensed Environmental Consultant, in writing, any purchase orders that have not been completed and submitted for payment within 120 days after the scope of work completion date are null and void.

(6) In the event the Licensed Environmental Consultant, eligible person, and PSTD cannot agree upon reasonable terms, the purchase order request shall be void and the following shall apply:

(A) Work will then proceed on a Work Plan basis with documentation, as provided for in 17 O.S. § ~~356(D)~~327.3(C), required for reimbursement; and

(B) Multiple submissions of purchase orders for the same or similar scopes of work will only be considered at the discretion of PSTD.

(b) Change orders must be submitted prior to performing work not included in the scope of work set forth in the approved purchase order, which will require pre-notification to and pre-approval by the Technical staff, unless the total additional costs are less than five percent (5%) of the approved purchase order. Documentation will be required to explain additional work completed and to justify additional costs. All requests for reimbursement of costs not incurred in the approved purchase order will be reviewed at the discretion of the Fund.

(c) Reimbursement format and requirements for purchase orders include the following:

(1) All scope(s) of work described in the approved purchase order must be completed in full, required reports submitted within the required timeframe and approved by PSTD, before reimbursement is requested, unless other payment terms are pre-approved by the PSTD and set forth with specificity in the purchase order.

(2) All purchase orders being submitted for reimbursement will contain:

(A) A copy of the approved purchase order (and change order, if applicable).

(B) Required documentation.

(d) Reimbursement claims on purchase orders will be paid within thirty (30) days of receipt.

(e) The Licensed Environmental Consultant, eligible person or both may make application for an Administrative Application for hearing to determine terms and conditions of purchase order approval.

Updates the statute from Title 17 consolidation.

SUBCHAPTER 9. ADMINISTRATIVE PROVISIONS

165:27-9-2. Changes to rules

The adoption of this Chapter shall not preclude the PSTD from subsequently altering, amending, or changing the rules in whole or in part ~~after proper notice and hearing pursuant to Chapter 5 of Commission rules~~ in accordance with 75 O.S. § 250 et seq., of the Administrative Procedures Act.

75 O.S. § 250 establishes the requirements for rule changes.

165:27-9-3. Notices

Any notices and documents required to be submitted to the Fund or PSTD shall be delivered or mailed to:

- (1) ~~Mailing~~ Indemnity Fund mailing address: Administrator, Petroleum Storage Tank Indemnity Fund, P.O. Box 52000, Oklahoma City, Oklahoma 73152-2000.
- (2) ~~Mailing~~ PSTD mailing address: Director, Petroleum Storage Tank Division, P.O. Box 52000, Oklahoma City, Oklahoma 73152-2000.
- (3) Delivery address for Indemnity Fund and PSTD: ~~Petroleum Storage Tank Indemnity Fund~~, Jim Thorpe Building, 2101 N. Lincoln Blvd., Room 480, Oklahoma City, Oklahoma 73105 (405) 521-4683.
- (4) ~~Delivery address: Petroleum Storage Tank Division, Jim Thorpe Building, 2101 N. Lincoln Blvd., Room 480, Oklahoma City, Oklahoma 73105 (405) 521-4683.~~

Clarification.

[**Authority:** 17 O.S., §§ ~~52 and 350~~ 301 et seq.; 27A O.S., § 1-3-101]

[**Source:** Codified 6-25-92]

Updates the statute from Title 17 consolidation.