



Cost Recovery Policy For Leaking Underground Storage Tank Trust Fund Corrective Action Cooperative Agreements

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Introduction

Cost recovery is a legal process that states or the United States Environmental Protection Agency undertakes to recover from underground storage tank owners or operators the costs related to petroleum releases at leaking underground storage tank sites. Recoverable costs include those paid through the LUST Trust Fund for corrective action¹, enforcement (including oversight), program administration, and interest on those costs². For this guidance, the mechanism (e.g., lien on property sale proceeds, fees) a state³ uses to recover costs paid for by the LUST Trust Fund under a SWDA 9003(h)(7) cooperative agreement for cost recovery is not determinative of whether the recovered funds are considered program income.

Recovering LUST Trust Fund (LTF) money may provide an incentive for:

- UST owners or operators to clean up releases from their own tanks.
- UST owners or operators to comply with technical and financial responsibility requirements.
- States to pursue recoveries efficiently because they may retain recovered LTF money to use for additional LTF eligible cleanups and activities.

This document:

- Identifies requirements, objectives, and responsibilities for LTF cost recovery under state LTF corrective action cooperative agreements.
- Is a companion document to EPA's *Leaking Underground Storage Tank Trust Fund Corrective Action Cooperative Agreement Guidelines (LTF Guidelines)*.
- Replaces the 2016 and the 1994 *Cost Recovery Policy For The Leaking Underground Storage Tank Trust Fund* and the 1989 *LUST Trust Fund State Financial Management Handbook*.

¹ This document uses the terms cleanup and corrective action interchangeably to refer to all activities related to the investigation, characterization, and cleanup, remediation, monitoring, and closure of an UST release.

² See EPA's *Leaking Underground Storage Tank Trust Fund Corrective Action Cooperative Agreement Guidelines* for more information about these cost categories.

³ This document uses the term states to refer to both states and territories.

State LUST Trust Fund Cost Recovery Programs

EPA expects owners or operators to conduct the majority of UST cleanups. However, when states spend LTF money, EPA expects states to make reasonable efforts to recover LTF costs from owners or operators.

Autonomy And Discretion

States implement the cost recovery program, have discretion operating it, and benefit directly from their successful recoveries.

States have the autonomy and discretion to:

- Litigate and settle cost recovery cases:
 - Use the authority provided in SWDA § 9003(h)(6) [U.S. Code 42 6991b(h)(6)] to litigate and settle claims without EPA's or the U.S. Department of Justice's routine involvement or concurrence.⁴
 - Settle cost recovery litigation as part of the exercise of enforcement discretion conveyed by SWDA § 9003(h).
 - Settle cost recovery claims administratively.⁵
 - Compromise or terminate LTF cost recovery claims.
- Determine:
 - Under what circumstances they will pursue costs.
 - Which costs to pursue.
 - How much effort to devote in pursuit of costs.

States are encouraged to tailor procedures to:

- Suit their individual programs.
- Save program resources.
- Use cost recovery resources appropriately and efficiently.

⁴ Under [28 U.S.C §516](#), the Department of Justice must conduct any litigation in which the United States has an interest unless there is an exception authorized by law. EPA interprets SWDA § 9003(h) to be such an exception, allowing states with cooperative agreements that have the capabilities to carry out effective corrective actions and enforcement activities to exercise various program authorities, including the cost recovery authority provided in SWDA § 9003(h)(6).

⁵ EPA interpreted SWDA § 9003(h) authority to include the ability to administratively settle claims and to compromise or terminate LUST Trust Fund claims based on considerations of equity as described in SWDA § 9003(h)(6)(B). In this document, the term compromise means accepting less than the full value of the claim and termination means forgoing any cost recovery whatsoever.

Recoverable LUST Trust Fund Expenditures

Pursuing cost recovery for all categories of state LTF expenditures gives states an advantage in trying to reach agreements with owners or operators. However, states are not required to pursue cost recovery of all LTF expenditures (such as, recovery of negligible expenditures, program administration costs, or indirect costs). EPA also expects that states will exercise discretion in determining an appropriate level of effort to devote to pursuing enforcement costs. Generally, the costs of enforcement, including oversight, are comparatively low and the number of cases is very large. Where owners or operators perform cleanups, states may choose not to pursue recovery of enforcement costs. This may encourage owners or operators to take corrective action at their sites.

Owners and operators are liable for all LTF expenditures made by states and interest. For information about site corrective action, enforcement, oversight, and program administration costs, see the *LTF Guidelines*, Categories of Cost, page 5. For interest costs, see below:

Interest

Owners or operators are liable for interest charges on LTF expenditures at their sites. Assessing interest can:

- Deter owners or operators from postponing payment
- Provide incentives for owners or operators to settle cost recovery claims

States should assess and are encouraged to pursue interest⁶ on recoverable LTF corrective action and enforcement expenditures. United States Department of Treasury's, Bureau of the Fiscal Service publishes the minimum recommended rate of interest that states should assess (see: www.treasurydirect.gov/GA-FI/FedInvest/selectOvernightRateDate.htm). States may assess a higher rate of interest if state law authorizes it. The rate of interest should remain fixed for the duration of the indebtedness, except where the owner or operator has defaulted on a repayment agreement and seeks to enter into a new agreement. New agreements should reflect the current value of funds to the U.S. Treasury unless state law requires otherwise. States are allowed to compound interest.

Before assessing interest, states should notify the owner or operator through a demand letter explaining the requirements concerning the debt and the interest. Interest accrues from the date the demand letter is sent or hand-delivered to the owner or operator. Interest should not be charged if the amount due is paid within 30 days after the notice was postmarked or delivered to the owner or operator. States may decide, on a case-by-case basis, to extend the thirty-day period.

⁶ SWDA § 9003(h) describes the states' role in recovering LTF expenditures but does not specifically address the collection of interest on those expenditures. EPA is entitled under the [Debt Collection Act of 1982](#), as amended by the Debt Collection Improvement Act of 1996 ([31 U.S.C. 3701](#), et seq), and common law authorities to collect interest on recoveries of Trust Fund expenditures. Since states also have responsibility for recovering LTF expenditures under SWDA § 9003(h), they should also assess and may pursue interest on recoverable costs.

As part of their responsibility for settling claims, states may elect not to pursue all or part of the collection of interest, to the extent permitted by state law. For example, state law may allow state UST programs to forgo collection of interest if the owner or operator is in financial distress, or if the cost of collecting the interest will be more than the amount potentially collected.

Requirements And Responsibilities

States are responsible for all legal, programmatic, and administrative activities necessary to recover LTF expenditures. EPA expects states to adequately fund and staff cost recovery caseloads and to discuss cost recovery actions with EPA's regional UST program as part of program reviews.

Cost Recovery Authority

States must have either state authority to recover LTF expenditures, or a state law that permits it to exercise the cost recovery authorities under the [Solid Waste Disposal Act of 1976 \(commonly known as the Resource Conservation and Recovery Act\) as amended § 9003\(h\)\(6\) \[42 US § 6991b\(h\)6\]](#). States with their own recovery authorities should also cite SWDA Subtitle I in their recovery actions to establish the liability of owners or operators to the federal government for LTF expenditures. For more information on state authority, see *LTF Guidelines: LTF Cooperative Agreement Requirements: Authority And Capability*, page 18.

Cost Recovery Policy Or Procedures

States must have a cost recovery policy or procedures consistent with those outlined in this document. These policies or procedures should provide a framework for consistent state cost recovery program decisions. States must submit their written cost recovery policies or procedures to EPA upon request.

Although states have the discretion to decide which costs to pursue on a case-by-case basis, states should articulate their overall approach to cost recovery including a rationale for not pursuing certain costs. For example, states may elect not to pursue oversight costs associated with cooperative owner or operator-lead cleanups.

Priority Systems For Cost Recovery Cases

States should have a system to set priorities for cost recovery cases but have considerable discretion in prioritizing and determining an appropriate level of effort for each case. Under the Energy Policy Act of 2005, Congress required EPA and states to consider UST owners or operators ability to pay when determining the level of cost recovery effort and the amount to be recovered. When setting priorities, states should also consider:

- Cost of cleanup.
- Likelihood of recovery.
- Deterrent value of the case.
- Opportunity costs (resources the state could use pursuing other cases).
- Whether the owner or operator is in compliance with financial responsibility requirements.
- Whether the owner or operator is cooperative.
- Whether the owner or operator was negligent in allowing the release to occur.
- Whether the owner or operator is deceased and has an estate.
- Resources needed to undertake cost recovery.
- Statute of limitations.

States should aggressively pursue cost recovery cases when owners or operators:

- Are solvent and recalcitrant.
- Fail to comply with applicable financial responsibility requirement.

States should weigh the resources necessary to recover the claim against the amount they may recover. States should generally commit fewer resources to cost recovery when owners or operators are insolvent or financially distressed. However, states should make reasonable efforts to locate a liable owner or operator before assigning a low priority to these cases.

Notifying Owners And Operators And Demanding Payment

When states use the LTF for corrective action, states should:

- Search for owners or operators.⁷
- Make reasonable efforts to contact owners or operators who are liable for releases.
- If identified, notify owners or operators of their liability for corrective action and enforcement cost, and demand payment.

States must follow state law to notify the owner or operator through a written notice or demand letter with the amount of funds they intend to recover. When demanding payment, EPA expects states to pursue corrective action costs, enforcement costs, and interest. States should ensure that any letter or other official notice to the owner or operator includes the amount due, payment schedule, and interest rate.

States would not issue a demand letter when:

- The owner or operator is unknown.
- States determine that the owner or operator is insolvent.
- States decide not to pursue oversight costs, for example, when
 - The owner or operator pays for cleanup.
 - An alternative mechanism exists, such as a state financial assurance fund, to pay for corrective action.

Timely Processing: Statute Of Limitations

States are responsible for timely processing of cost recovery cases in order to increase the chances of successful recovery.

States should pursue cost recovery so as not to exceed any statute of limitations or other legal limitation. They should revise their priorities for individual cost recovery cases as statute of limitation deadlines approach. For states relying solely on SWDA 9003(h)(6) cost recovery authority, the statute of limitations is six years. However, EPA recommends pursuing cost recovery within three years if

⁷For more information on searching for responsible UST owners or operators, see: [EPA's Responsible Party Search Guide For The Underground Storage Tank Program](#)

possible.⁸ If states have authority under state law to support LTF cost recovery action, then the states statute of limitations would apply even if it is longer than the federal statute of limitations. States should not allow the statute of limitations to run out and justify case closure solely on that basis.

Where the program is dependent on the state Attorney General's Office to pursue cost recovery, states should consider formal funding arrangements with the AGO (for example, a memorandum of agreement to ensure legal staffing for cost recovery referrals).

States may refer cost recovery cases to EPA when additional support may be needed, for example when cases:

- Are complicated.
- Are resource intensive.
- Involve large sums of money.
- Cross state jurisdictions; or
- When EPA and the state pursue corrective action jointly.

Documenting Costs

To pursue cost recovery actions effectively, states must be able to provide documents that prove the:

- Owner or operator is liable under federal or state law.
- Work performed was reasonable and necessary.
- Expenditures were documented accurately.

States must document all site-specific LTF expenditures (see: *LTF Guidelines, Accounting and Documentation*, page 24), delineating both direct and indirect costs. Documentation should also include details about how the state derived subtotals for direct and indirect costs.

No one approach to cost documentation is applicable to all states. Therefore, upon request, states should inform EPA about their cost accounting, documentation, and recordkeeping systems. Some states have policies where they do not use LTF money for any site with a responsible owner or operator therefore negating the need to recover payments from a liable owner or operator or document these costs.

⁸SWDA does not contain a specific statute of limitations provision. However, EPA believes that the relevant federal statute of limitations provision for a LUST cost recovery claim under SWDA 9003(h)(6) is the six year statute of limitations period found in 28 U.S.C. § 2415(a), which provides in relevant part:

...every action for money damages brought by the United States or an officer or agency thereof which is founded upon any contract express or implied in law or fact, shall be barred unless the complaint is filed within six years after the right of action accrues....

EPA believes that a SWDA 9003(h)(6) LUST cost recovery claim is a claim for money damages based on a "contract," (which has a six-year statute of limitations), and not based on a tort (which has a three year statute of limitations).

Preparing The Cost Recovery Package

Cost recovery package preparation begins when the state program office decides to initiate a cost recovery action and requests staff responsible for recordkeeping and accounting to prepare a cost summary for the site. The summary, placed in the front of the cost recovery package, should identify costs by category (salaries, travel, supplies and equipment, etc.). Each category should contain supporting documentation obtained from both site files and the state accounting system. A critical aspect of cost documentation preparation is reconciliation of cost information pulled from both sources. States should not forward a cost summary to the legal office until the figures obtained from site files and the accounting systems agree.

At a minimum, each document in the cost document package should demonstrate that:

- Cost are properly charged.
- Site-specific identifier and account number agree with the site name.
- Timesheets indicate appropriate information to identify employees, hours, and account numbers.
- Account numbers and costs are recorded in states accounting systems.
- Travelers charged appropriate travel time to the site, particularly when they have visited one or more sites.
- Contractor invoices reference the specific site.

States should ensure that documents submitted as evidence are authentic, reliable, complete, and accurate. States should:

- Produce receipts showing expenses incurred.
- Be prepared to provide an expert witness to testify to the document's authenticity and reliability.
- Be able to discuss full cost accounting such as the indirect cost and accounting methodologies used to track costs.
- Have timesheets that reflect the timeframe in which the state performed the work.

States should comply with appropriate privacy act requirements for redacting; a process by which sensitive information contained in the documents is removed.

States should consider appointing a cost recovery coordinator to assist during the cost recovery phase. The function of the coordinator is to track anticipated actions and progress as well as to review cost documentation packages for completeness before forwarding to the state's legal staff.

Site File Establishment

States are required to maintain documentation and appropriate records to support cost recovery. Maintaining files with all pertinent documents for each site is an effective, simple way to access expense records quickly. States may develop their own recordkeeping systems. However, states should establish unique site-specific identifiers or codes along with corresponding site-specific files. States should also develop a filing protocol to ensure that they file documents in a consistent order.

In developing a site-specific recordkeeping system, states should consider:

- Staff availability for collecting and filing records.
- Ability to access original documents.⁹
- Ability to access records quickly.
- Ability to match documents with corresponding cost data.
- Document protection.
- Procedures for safe long-term documentation storage.

The chart on page 12 lists the documents that states should retain for cost recovery purposes.

⁹ Electronic, open, machine-readable information is preferable to paper, as long as there are appropriate and reasonable internal controls in place to safeguard against any inappropriate alteration of records.

Recommended Documents For Retention		
Cost Category	Keep In Site Files	Keep But Not Necessarily In Site Files
Payroll	<ul style="list-style-type: none"> • Time attendance records. • Time attendance amendments. • Worksheet showing fringe benefit calculations (if not calculated by accounting system). 	<ul style="list-style-type: none"> • Position titles of staff. • Salary of staff (annual or hourly rate). • Methodology for determining fringe benefit rate.
Staff Travel	<ul style="list-style-type: none"> • Authorizations (including purpose of trip). • Vouchers showing: <ul style="list-style-type: none"> ○ Starting point and destination. ○ Transportation method. ○ Number and names of persons on trip. • Receipts (airlines, hotel, rental car, etc.). • Proof of payment. • Trip reports. 	
Contractor Services	<ul style="list-style-type: none"> • Contractor invoices. • Project officer approval of invoices. • Proof of payment. 	<ul style="list-style-type: none"> • Proposal. • Contractor cost data (EPA Form 5700-41). • Cost price analysis of proposal. • Proposal evaluations. • Contract. • Reports on contractor work. • Audits of contractor.
Equipment and Supplies	<ul style="list-style-type: none"> • Invoices. • Proof of payment. • Hourly records of equipment use. 	<ul style="list-style-type: none"> • Types of materials and supplies furnished. • Types of equipment. • Contracts. • Leases. • Purchase orders. • Receiving reports. • Explanation of usage rate calculation.
Program Administration Costs	<ul style="list-style-type: none"> • Worksheets showing calculations, if appropriate. 	<ul style="list-style-type: none"> • Allocation method. • Rate calculation.
Indirect Costs	<ul style="list-style-type: none"> • Worksheets showing calculations if not calculated by accounting systems. 	<ul style="list-style-type: none"> • Rate agreement. • Rate documentation package.
Other	<ul style="list-style-type: none"> • Audit reports. • Financial transactions. 	<ul style="list-style-type: none"> • Cooperative agreement and amendments.

Notifying And Reporting To EPA

If the cost recovery effort proceeds to judicial action, states should notify EPA's regional UST Program Manager to determine whether the action may affect the scope of the SWDA Subtitle I authorities.

If a settlement is reached, as required by 2 CFR § 200.327 and the cooperative agreement's terms and conditions, states must report to EPA:

- Settlement amount.
- Amount received.
- Date of receipt of payment.

States must also document and file any cost recovered money received from the owner or operator, agreed to, or adjudged owed by the owner or operator, as a settlement for site corrective action.

Retaining Cost Recovered LTF Money

In accordance with 2 CFR § 200.307(e)(2), when states make successful cost recoveries, they may retain the recovered LTF share, including interest, as program income and use the money for additional LTF eligible and allowable costs. Program income is, in effect, reimbursement for LTF corrective action, enforcement, oversight, and program administration costs.

When states retain recovered LTFs, they must:

- Use recovered money for allowable and eligible activities.
- Track accounts received.
- Maintain appropriate accounting of recovered funds.
- Document appropriate use in accordance with 2 CFR § 200.305(b)(5) and 2 CFR § 1500.7 and 2 CFR § 200.307 and applicable requirements of the cooperative agreements.

Alternatively, states may return recovered money to the U.S. Department of Treasury through coordination with EPA. However, EPA does not have access to this money from the Treasury unless Congress appropriates LTF money to EPA. Therefore, EPA recommends states retain cost-recovered money for use under the cooperative agreement. When negotiating their cooperative agreements, states and EPA should develop contingency plans that allow states to obligate their recoveries efficiently.

States should calculate the LTF portion (this may include state matching funds under the cooperative agreement) of their total recoveries on a site-by-site, pro rata basis. For example, if a state spends \$50,000 of LTF cooperative agreement money at a site and the state ultimately recovers 50 percent of all LTF money used at the site, it must redirect \$25,000 as program income to use for LTF eligible activities and allowable costs.

EPA policy as stated in the LUST Trust Fund Guidelines provides that states may not meet cost share requirements with recovered LTFs. However, states may consider the costs of legal staffing as in-kind contributions toward satisfying their ten percent cost share (match) requirements under 2 CFR § 200.306 if LTF money was not used to pay for these legal services.

If states cost recover funds while their assistance agreement is in effect, the funds become program income and are to be added to the cooperative agreement. The funds must be spent following the same terms and conditions as the cooperative agreement (per 2 CFR 1500.8(b)). States may apply for, and EPA may award an annual state cooperative agreement even if the state has program income that they have not yet spent.¹⁰ Per 2 CFR 200.344(d), regions may authorize states to retain unexpended accrued program income when their cooperative agreement ends. If states cost recover after a LTF cleanup cooperative agreement is closed, the state must use these recovered funds for activities authorized in their new, active LTF cleanup cooperative agreement.

States should provide EPA an estimate of anticipated cost-recovered funds when applying for the LTF corrective action cooperative agreement. Funds recovered by the state are considered program income even if that amount exceeds the estimate. States may deduct incidental costs from gross income to determine program income, as long as the costs have not been charged to any Federal award.

Documenting Cost Recovery Decisions And Case Closure

EPA encourages states to make decisions that are in the best interest of their programs, reflect efficient use of LTF money, and stimulate compliance by owners or operators. However, states must document the reasons for their decisions and maintain adequate documentation for audit and cost recovery purposes. States must document cost recovery decisions by site.

In cases where equitable factors or the efficient use of resources supports compromise or termination of a cost recovery action, states must document the basis for any LTF compromise or termination. This documentation should be adequately supported in state records and reflect the efficient use of LTF resources. For example, when:

- An owner or operator demonstrates the lack of financial resources to pay the claim.
- The likelihood of success litigating the claim is small because of the absences of proof of liability or unavailability of required witnesses; or
- Costs of judicial collection are disproportionately high.

Regardless of the action taken by states in exercising their discretion in cost recovery cases, states must document fully their decisions and formally close out all cases. The documentation need not be extensive, but the rationale for states decision needs to be clearly presented and consistent with their cost recovery policies. Reasons for case closure include situations where costs of pursuing a case further will approach or exceed the potential recovery or cause bankruptcy of the owner or operator.

States must also document reasons for not pursuing cost recovery, for example, if the owner or operator cannot be found or is deceased and the estate has insufficient assets.

¹⁰ Pursuant to 2 CFR 200.305(a), the state's disbursement of program income is governed by the state's Cash Management Improvement Act Agreement or a default provision of 31 CFR Part 205. Regions can presume and need not verify that the states are in compliance with these requirements.

States must maintain original cost documentation records¹¹ for at least six years (consistent with the LTF cost recovery statute of limitations, see page 8) from the final expenditure report (Federal Financial Report Standard Form 425) or for the length of time required by the state, whichever is longer:

- If any litigation, audit, or other action was initiated prior to the expiration of the three-year period, states must retain records until completion of the action and resolution of all issues that arise from it.
- Before disposing of any cost documentation, states should consider their relevance to future cost recovery efforts and the applicable statute of limitations.
- Must comply with the federal retention and access requirements for records 2 CFR § 200.333 through 200.337 and 2 CFR § 1500.6).

¹¹ Electronic, open, machine-readable information is preferable to paper, if there are appropriate and reasonable internal controls in place to safeguard against any inappropriate alteration of records.

Considerations For Different Scenarios

Solvent Owner Or Operator

States should assess owners or operators' ability to pay when determining whether they can use LTFs and whether cost recovery is feasible. Congress intended that solvent owners or operators take responsibility for releases from their underground storage tanks. When states use the LTF for corrective action, they should pursue cost recovery from solvent owners or operators. When owners or operators claim inability to pay, states should conduct a preliminary ability to pay analysis and a more detailed analysis in the cost recovery process¹².

Ability To Pay

EPA has three financial models ([ABEL](#), [INDIPAY](#), and [MUNIPAY](#)) that may help states analyze whether the owner or operator has an ATP for corrective action.

- ABEL - Evaluates a corporation or partnership's ability to afford compliance costs, corrective action costs, or civil penalties.
- INDIPAY - Evaluates an individual's ability to afford compliance costs, corrective action costs, or civil penalties.
- MUNIPAY - Evaluates a municipality's or regional utility's ability to afford compliance costs, corrective action costs or civil penalties.

States should view solvency in terms of how much an owner or operator can afford to pay without becoming insolvent. EPA defines owners' or operators' solvency as the ability to pay financial obligations as they become due, including the cost of corrective action and cost recovery. States must consider the owners or operators ATP while still maintaining its basic business operations, including consideration for their overall financial condition and demonstrable constraints on the ability of the owner or operator to raise revenues. States may view the owners or operators ATP in terms of a lump sum or installment payments, depending on states preference. If states determine that an owner or operator cannot pay for all or a portion of the costs in a lump sum payment, states should consider alternative payment methods as appropriate (SWDA 9003(h) (6)(E)(iv)).

If owners or operators claim an inability or limited ATP for corrective action costs, they must promptly provide states with all relevant information needed for states to make a determination. If an owner or operator provides false information or otherwise misrepresents its financial situation, states "shall seek full cost recovery" without considering their financial ATP (9003(h)(6)(E)(v)).

States should not impair owners or operators from continuing in business if the owner or operator complied with financial responsibility requirements, and there was no negligence or misconduct by the owner or operator (SWDA 9003(h)(6)(E)(ii)). This provision does not provide a legal defense for owners or operators against further cost recovery, but provides an indication of Congressional intent, particularly for small businesses.

¹² In considering cost recovery, older insurance policies may be a source of funding since older policies often did not contain pollution exclusions.

Owner Or Operator Fails To Maintain Financial Responsibility

If an owner or operator does not comply with financial responsibility requirements, states:

- Must seek full cost recovery.
- May not use an owners or operators ATP as a basis for compromising or terminating the claim (SWDA § 9003(h)(11)). There may be other valid reasons for not pursuing a claim.

Recalcitrant (Unwilling) Owner Or Operator

In cases where an owner or operator is unwilling to take corrective action, EPA encourages states to use LTF money for cleanup and pursue cost recovery. States should always issue a demand letter for payment to recalcitrant owners or operators. EPA encourages states to take a strong position in negotiating settlements with these owners or operators.

Insolvent (Unable To Pay) Owner Or Operator

Many states use LTF money for cleanup primarily where owners and operators are financially unable to carry out corrective actions. When states make a formal determination of insolvency (prior to, or after the use of LTF money), a demand letter, and the pursuit of cost recovery is not necessary. However, when a state uses LTF money based on an informal or anecdotal determination of financial ability with no further determination of solvency, a demand letter for payment should be part of the cost recovery process.

Municipalities That Have Involuntarily Acquired Properties

States may determine whether it is equitable to pursue cost recovery of LTF money from municipalities that have involuntarily acquired properties with underground storage tanks (for example, through bankruptcy, property transfers, tax delinquency). Although municipalities that have involuntarily acquired properties with USTs could be considered liable owners or operators under SWDA § 9003(h)(6)(A)¹³, states may consider whether it would be equitable to pursue cost recovery against these municipalities in specific cases.

Releases Caused By Natural Disasters

SWDA Subtitle I does not include an explicit waiver of the cost recovery provisions when states spend LTF money to address releases caused by natural disasters such as floods, hurricanes, or earthquakes. However, EPA thinks it is inappropriate to pursue cost recovery in these circumstances.

Under the cost recovery provision of SWDA § 9003(h)(6), UST owners or operators are liable for cost recovery under the same standard of liability that applies under the Clean Water Act Section 311. CWA Section 311 provides a defense to liability where the discharge or release was caused by an act of God. EPA believes that releases caused by natural disasters are within the defense as an act of God.

¹³ SWDA § 9003(h)(6)(A) says that the UST owner or operator is liable to EPA or the state for costs, when EPA or a state has undertaken corrective action or enforcement, with respect to the release from a petroleum UST.

Therefore, CWA Section 311 would relieve an owner or operator from liability for cost recovery and, thus would relieve the state from pursuing recovery of those particular monies. States, under cooperative agreements, have the discretion to determine whether a release was caused solely by an act of God, and whether to pursue cost recovery in any particular case. As with other cost recovery situations, states are required to document decisions and close out all cases.

EPA's Role In State Cost Recovery Of LUST Trust Funds

EPA:

- Generally, limits pursuing cost recovery for federal lead corrective actions.
- Provides policy and technical assistance to states to support cost recovery.
- Makes funding available for cost recovery programs through cooperative agreements.
- Assesses overall performance of state cost recovery programs and provides support where improvements are needed.
- Generally, abides by settlements and judgments reached by states.
- Reserves the right to pursue cost recovery independently in unusual cases (for example, if the state is unable to pursue the cost recovery case).

EPA is more interested in states overall cost recovery record rather than examining decisions to pursue particular costs retrospectively. EPA has no quotas or numerical expectations for the performance of state recovery programs. EPA will focus on assuring that states have systems, policies, and procedures in place that will enable states to recover LTF expenditures efficiently and effectively. In rare circumstances, at the request of the state, or in extreme cases, EPA may consider filing a cost recovery action against the owner or operator even though the state has the authority to initiate an action or has already done so.

If EPA finds that states are not effectively implementing their cost recovery programs, EPA will offer the necessary assistance to correct any problems. If problems in these or other areas persist, EPA may take appropriate action under regulations governing cooperative agreements ([2 CFR §§ 200.338 and 200.339](#)).

(6) Recovery of costs

(A) In general

Whenever costs have been incurred by the Administrator, or by a State pursuant to paragraph (7), for undertaking corrective action or enforcement action with respect to the release of petroleum from an underground storage tank, the owner or operator of such tank shall be liable to the Administrator or the State for such costs. The liability under this paragraph shall be construed to be the standard of liability, which obtains under section 1321 of title 33.

(B) Recovery

In determining the equities for seeking the recovery of costs under subparagraph (A), the Administrator (or a State pursuant to paragraph (7) of this subsection) may consider the amount of financial responsibility required to be maintained under subsections (c) and (d)(5) of this section and the factors considered in establishing such amount under subsection (d)(5) of this section.

(C) Effect on liability

(i) No transfers of liability

No indemnification, hold harmless, or similar agreement or conveyance shall be effective to transfer from the owner or operator of any underground storage tank or from any person who may be liable for a release or threat of release under this subsection, to any other person the liability imposed under this subsection. Nothing in this subsection shall bar any agreement to insure, hold harmless, or indemnify a party to such agreement for any liability under this section.

(ii) No bar to cause of action

Nothing in this subsection, including the provisions of clause (i) of this subparagraph, shall bar a cause of action that an owner or operator or any other person subject to liability under this section, or a guarantor, has or would have, by reason of subrogation or otherwise against any person.

(D) Facility

For purposes of this paragraph, the term “facility” means, with respect to any owner or operator, all underground storage tanks used for the storage of petroleum which are owned or operated by such owner or operator and located on a single parcel of property (or on any contiguous or adjacent property).

(E) Inability or limited ability to pay

(i) In general

In determining the level of recovery effort, or amount that should be recovered, the Administrator (or the State pursuant to paragraph (7)) shall consider the owner or operator’s ability to pay. An inability or limited ability to pay corrective action costs must be demonstrated to the Administrator (or the State pursuant to paragraph (7)) by the owner or operator.

(ii) Considerations

In determining whether or not a demonstration is made under clause (i), the Administrator (or the State pursuant to paragraph (7)) shall take into consideration the ability of the owner or operator to pay corrective action costs and still maintain its basic business operations, including consideration of the overall financial condition of the owner or operator and demonstrable constraints on the ability of the owner or operator to raise revenues.

(iii) Information

An owner or operator requesting consideration under this subparagraph shall promptly provide the Administrator (or the State pursuant to paragraph (7)) with all relevant information needed to determine the ability of the owner or operator to pay corrective action costs.

(iv) Alternative payment methods The Administrator (or the State pursuant to paragraph (7)) shall consider alternative payment methods as may be necessary or appropriate if the Administrator (or the State pursuant to paragraph (7)) determines that an owner or operator cannot pay all or a portion of the costs in a lump sum payment.

(v) Misrepresentation

If an owner or operator provides false information or otherwise misrepresents their financial situation under clause (ii), the Administrator (or the State pursuant to paragraph (7)) shall seek full recovery of the costs of all such actions pursuant to the provisions of subparagraph (A) without consideration of the factors in subparagraph (B).

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