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3737-1-09 **Limitations of fund coverage.**

(A) Nothing in this chapter shall be construed to authorize reimbursement for:

(1) Costs of corrective actions for releases prior to July 1, 1989;

(2) Costs of corrective action for a suspected release or release for which the director has issued a determination denying eligibility for reimbursement;

(3) Litigation costs of any kind incurred by a responsible person including, but not limited to: litigation costs involving acquisition of site access; local, state, or federal permit decisions; any ordinance, rule or regulation; or any order issued by the fire marshal;

(4) Costs associated with:

(a) Achieving compliance with the provisions of sections 3737.881 to 3737.98 of the Revised Code, with the exception of costs associated with corrective action and compensation to third parties for expenses associated with bodily injury or property damages caused by an accidental release of petroleum;

(b) Interest or carrying charges of any kind;

(c) Insurance premiums other than specific policies or bonds required for corrective action;

(d) Studies or surveys of an underground storage tank site or on property nearby other than from a site check or a tier 1 source investigation conducted in accordance with rule 1301:7-9-13 of the Administrative Code; and

(e) Corrective action costs which are determined to be non-reimbursable as a result of an audit performed in accordance with this chapter~~;~~.

(5) Costs incurred solely in conducting corrective action for non-petroleum products or corrective action for petroleum or petroleum products unrelated to a release from an assured underground storage tank system;

(6) Costs incurred solely in conducting corrective action for a release from an unassured underground storage tank system;

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(7) Costs not required for performing corrective action completed in accordance with rules of the fire marshal adopted under sections 3737.88 and 3737.882 of the Revised Code or, where applicable, completed in accordance with an order which establishes corrective action procedures and criteria for the site;

(8) Costs covered by insurance policies; ~~or recoverable from any other party;~~

(9) Costs associated with the closure or removal of underground storage tank systems in compliance with rule 1301:7-9-12 of the Administrative Code. Where closure or removal costs, associated with rule 1301:7-9-12 of the Administrative Code, are intermingled with corrective action costs and are not separately ascertainable, the director shall determine corrective action costs to be reimbursed based upon a reasonable standard;

(10) Costs for corrective action other than those costs which are usual, customary, and reasonable for similar corrective action activities and under similar circumstances, as determined from the fund's experience;

(11) Costs for corrective actions not submitted in accordance with rule 3737-1-12 of the Administrative Code;

(12) Additional corrective action costs for a release after a no further action letter has been issued by the fire marshal for the subject release, unless the additional corrective action activities are required by the fire marshal due to the discovery of chemicals of concern, as defined by rule 1301:7-9-13 of the Administrative Code, resulting from the original release but not reasonably discovered prior to the issuance of the no further action letter. Under no circumstances shall additional corrective action costs be reimbursed when the original no further action letter for the subject release is rescinded more than five years from the date it was issued;

(13) Costs necessary for performing corrective action authorized by the fire marshal under section 3737.882 of the Revised Code and rules adopted under that section greater than fifty percent of the usual, customary, and reasonable costs of the least expensive alternative for similar corrective action activities and under similar circumstances as determined from the fund's experience when pre-approval is required by paragraphs (A), (B), ~~and~~or (D) of rule 3737-1-12.1 of the Administrative Code but pre-approval was not sought or granted;~~.~~

(14) Undocumented corrective action costs, unless the responsible person submits documentation to support the corrective action costs within ninety days from

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the date that the director or the director's designee requests such documentation in writing pursuant to rule 3737-1-13 of the Administrative Code; ~~or~~

(15) Costs for corrective action and/or third-party claims ~~determined to be non-reimbursable pursuant to paragraph (E) of rule 3737-1-22 of the Administrative Code.~~where the responsible person has failed to comply with rule 3737-1-22 of the Administrative Code that are greater than the lesser of:

(a) Fifty percent of eligible corrective action and third-party claim costs, as determined by the director; or

(b) The total of eligible corrective action and third-party claim costs, as determined by the director, minus the amount of the deductible and minus the amount paid by the other party to the responsible person.

(16) Cost for performing corrective action not authorized by the fire marshal under section 3737.882 of the Revised Code and rules adopted under that section; or

(17) Markup for any of the following:

(a) Costs of disposal, disposal facilities, and treatment facilities;

(b) Internal expenses including labor, supplies, per diem travel expenses, and intra-company billings;

(c) Charges for supplies;

(d) Charges for materials; or

(e) Charges for equipment.

(B) The board, upon payment or reimbursement from the fund to a responsible person for corrective action costs or the cost of compensation to third parties for bodily injury or property damage, is entitled by subrogation to all rights of the responsible person to recover those costs from any other person.