



April 1, 2024

Ms. Peggy Dorsey – Assistant Commissioner
Office of Land Quality
Indiana Department of Environmental Management
100 North Senate Ave
Indianapolis, IN 46204
via email PDorsey@idem.IN.gov

Re: Comments to the DRAFT Excess Liability Trust Fund Cost Guidance (Waste-0078-NPD-R1)

Dear Ms. Dorsey:

Wilcox Environmental Engineering, Inc. (Wilcox) has reviewed the draft Excess Liability Trust Fund (ELTF) Cost Guidance and offers the following comments/requests for clarification.

At the beginning of IDEM’s draft non rule policy document (NPD) it states that “It is intended solely to provide guidance and shall be used in conjunction with applicable rules or laws. It does not replace applicable rules and laws, and if it conflicts with these rules or laws, the rules or laws shall control.”

Additionally, according to IDEM’s website, “A non-rule policy document (NPD) is intended to clarify for the public IDEM’s interpretation of an environmental statute or rule. It is not intended by the agency to have the effect of law...”

The proposed NPD goes beyond clarifying IDEM’s interpretation of 328 IAC. It seems as though many of these proposed changes not only conflict with 328 IAC, but it appears that the ELTF does intend for these rules to have the effect of law. For example, one of the proposed changes is how consultants would bill oversight of subcontracted drilling activities, which would create an undue burden on the consulting industry. Currently, all labor is billed by the hour – which is completely appropriate. The proposed NPD sets rates for oversight of drilling based on the number of feet drilled and the technique being used. This is certainly not industry standard, and it would be very difficult to keep track of and invoice properly for a company that bills time and materials.

The optics of the ELTF’s recent implementations of various guidelines are that they are essentially using the authority granted to them by the Financial Assurance Board to create NPD’s in order to sidestep the administrative process of modifying 328 IAC. The ELTF’s was created to work hand in hand with consultants, property owners, and other stakeholders to provide a mechanism of funding for remediating contaminated properties. As their own definition implies, their purpose is to interpret the statutory rules, not rewrite them. If the ELTF believes it is necessary and justifiable to implement changes that affect the statutory rules in 328 IAC, they should use the administrative process set forth in the Indiana Code.

Comment #1: Does the phrase “The task-based reimbursement cost as of June 1, 2023 for this task would be \$XXX.” indicate that the ELTF will be applying this NPD to work done prior to the effective date of this NPD. Consultants have routinely been denied reimbursement of necessary work that occurred before the most recent NPD based on the ELTF retroactively

applying that NPD. This is simply not fair. If consultants have no knowledge of a retroactively applied rule, how can they comply?

Suggestion –Task-based reimbursements should be applied to work performed AFTER the effective date of the NPD. Costs completed prior to the effective date should be reviewed and reimbursed according to the rules and rates effective at the time the work was performed.

Comment #2: Since ELTF labor rates are adjusted on an annual basis, how will these adjustments be reflected in the task-based reimbursement amounts provided in this NPD?

Suggestion - Remove language below each Task in the NPD, or modify it to something similar to “The task-based reimbursement cost for this task is based on the effective personnel rates at the time the work is performed”.

Comment #3 Why is the NPD not following the set of standards for each staff level set out in 328 IAC 1-3-5 when determining cost associated for each person in the NPD? The proposed NPD modifies predetermined labor categories. For instance, Staff project person is not qualified to prepare bids.

Additionally, as outlined in 328 IAC 1-3-5 it is standard practice for two people to be on site performing activities such as monitoring well sampling. Generally, a Staff person is overseeing the Field Technician. However, the proposed NPD only allows for one person on site. IDEM should continue allowing and reimbursing two staff members onsite, not only to ensure proper procedure and protocol are adhered to, but more importantly, for safety reasons. In the past, we’ve had field employees express concerns about their personal safety when entering off site dwellings for VI sampling or other sites they are sampling and not being able to be aware of their surrounding or any potential dangers that may arise.

Suggestion Conform to the ELTF rule with regard to what activities each personnel classification shall perform and change the task based reimbursement rates proposed in this NPD to comply with the standards set forth in 328 IAC 1-3-5

Comment #4 The ELTF is determining the number of hours it takes to write Site Characterizations. How did the ELTF determine the number of hours? How can they reasonably assume that the exact effort and resources is the same across all sites when characteristics of each site are inherently different from one another?

The proposed NPD does not account for the fact that site conditions, site access issues, regulatory communications, are very site specific. These things vary from site to site and therefore it is conceivable that more time will need to be spent completing these tasks on a site that has offsite issues versus one that does not. However, these things are not known to the consultant until we have had ample opportunity to investigate and begin delineation of the site, and so a Scope of Work form cannot be submitted for ELTF’s approval. How does the ELTF expect it will handle such cases where complex issues arise out of an initial investigation?

Comment #5 The proposed NPD states that edits to reports are included in the number of hours, the kind of edits they are referring to should be outlined.

Suggestion - If they are referring to simple typographical edits, the proposed inclusion seems appropriate, but if additional delineation or analysis is required, these tasks should not be included

in the amount proposed by this NPD. The number of hours proposed under the NPD are minimal to begin with, and so if those things are needed a subsequent FSI should be completed and submitted under its own report with the task based reimbursement applying to each report separately.

Comment #6 It the NPD sets task based reimbursement costs, when is it appropriate to complete a Scope of Work?

Suggestion: As stated above, it is not reasonable to apply the same number of hours to every site identically. Limitations and restrictions such as this ultimately lead to incomplete analysis and ineffective treatment remedies. The Scope of Work Requests/Approval process, as currently utilized seem to be a sufficient way to control costs while allowing consultants to devote the proper resources to delineating a site, developing a CAP, etc. Also, the ELTF should give more deference to the consultant when determining the appropriate Scope of Work. Often times the IDEM/ELTF project manager has not performed a site visit, and does not have the benefit of consultation with other team members who have been working on the project.

Additionally, a consultant's Scope of Work Request should not automatically and arbitrarily be given a reduction in the number of hours. While sometimes it's necessary for compromise, it seems as though ELTF employees do not consider the consultant's opinion when determining whether their proposed number of hours is appropriate for the amount of resources being devoted to a particular phase.

Comment #7: How is the ELTF going to allow for pilot studies when developing a CAP? The actual task of analyzing data resulting from a pilot study and determining the appropriate remedial approach is mentioned as a necessary task for completing the CAP, but the is no mention regarding the guideline reimbursement rates for pilot study activities.

Scope of Work Requests/Approvals appear to be the most appropriate way to address this, as consultants will generally know what type of pilot study will be performed (i.e. injection, engineered system, etc.)

Comment # 8: Similarly to Comment #3, Wilcox disagrees with allotting a specific number of hours for CAP development as there is no way to determine an appropriate number of hours it will take to complete a task with so many variables – whether they are related to site conditions, potential off site property concerns, regulatory involvement (some IDEM PM's are very hands off, while some are very involved), and these things should be taken into account.

As there are many different redial approaches that could be implemented at a site, there is no basis for the assumption of the number of hours it will take to select the one that will be most effective economically, as well as for treating the source area. Additionally, the differential in task based costs between an engineered and non-engineered treatment remedy (especially in the case of chemical injection) does not seem appropriate. There is no less time taken to develop a remedial work plan for a chemical injection considering the complexity and conciseness of this particular approach. The assumption that an engineered remedial remedy is more complex or requires more effort is not justified.

Comment # 9: Vapor Intrusion sampling does not allow for the appropriate number of hours. VI sampling is normally an 8-hour or 24-hour testing event. At a minimum the 8-hour event will take 9 or more hours for setup and take down of the sampling air cans. A 24-hour event requires the same amount of work built into 2 consecutive days.

Comment # 10 The NPD proposes billing oversight of drilling activities on a per foot basis depending on the method of drilling utilized. This method will require consultants to develop a new billing procedure solely for the purpose of claiming costs to the ELTF for reimbursement and seems unnecessary. The number of hours for oversight is not dependent on factors such as drilling method or number of feet drilled.

A consultant's time for oversight includes their drive time to the site and the number of hours the drilling event takes to complete. The ELTF has suggested that a consultant does not need to oversee a subcontractor the entire time they are onsite, which is unheard of, not only in our industry, but in most every personal or professional case of subcontractor work. It would be negligent to have any work that involves subsurface activities performed without a representative of the consultant onsite as well to ensure they are properly following the work scope (i.e. drilling in the necessary locations and to the correct depth, avoiding utility corridors, installing temporary or permanent wells, etc.). To suggest that a consultant could perform work on another project while drilling activities are taking place distracts them from actual oversight, and in our opinion, it is unethical.

Suggestion: Make no changes to the current oversight billing rates or allowable time.

Thanks again for the opportunity to provide these comments. If you have any questions or require additional information, please contact our office at (317) 472-0999.

Sincerely,
Wilcox Environmental Engineering, Inc.



Elizabeth McKinney
ELTF Project Specialist



Melissa Wilcox
Owner, General Manager