

HIRING A CONSULTANT

One of your primary concerns when cleaning up your site will be selecting a good consultant. The consultant you choose to direct your cleanup should have your best interests in mind. Your goal is to clean up your site in a cost effective manner and have marketable property when the cleanup is complete.

The consultant you hire should be qualified and experienced in agricultural chemical cleanups and familiar with state laws and regulations. If you intend to apply for reimbursement from the Agricultural Chemical Cleanup Program (ACCP), select a consultant who is familiar with the program so your eligibility for reimbursement is considered throughout the cleanup process.

ATCP 35, Wis. Adm. Code, is the rule that details the ACCP reimbursement process. This rule requires a minimum of three bids prior to hiring a consultant. When putting together your request for bids, thoroughly describe the scope of work at your site. Find out which activities the consultant will subcontract and how you will be billed for subcontractor services. An estimated time schedule to complete each phase of work should also be included.

After you receive bids from each consultant, compare them. You must first determine if the bids are based on the same scope of work. To make a reliable decision, each bid you consider must be composed of the same parts and you must understand each part of every bid. If you have any questions, call the consultant and get answers. You may want to make an appointment with them so you can sit down and ask questions.

If you are not satisfied with the bids you receive, don't feel obligated to select a bid at this point. You may want to request the consultants to modify their bids to meet the scope of work, or request bids from additional consultants.

Ask for referrals and evaluate each consultant's credentials and experience. The consultant that offers you the lowest price may not always be the best choice for your project. To find a consultant who is qualified and experienced with agricultural chemical cleanups, follow up on the referrals that you receive. Additional information on consultant qualifications and selecting a consultant can be found at the Department of Natural Resources website (<https://dnr.wi.gov/topic/brownfields/select.html>). You want to select an experienced contractor who also provides quality work.

Insurance

To protect your interests, ATCP 35.16, Wis. Adm. Code, requires that consultants obtain errors and omissions insurance. A certification of coverage should be included with each bid. Work performed by a consultant without this insurance may not be eligible for reimbursement from the ACCP fund.

NEGOTIATING THE CONTRACT

Before you sign a contract with a consultant, ask yourself some questions. Do I have a clear understanding of the scope of work, how long the cleanup could take and how much the cleanup may cost? Some consultants may provide a contract that tends to protect their interest. You should feel free to revise the contract or choose not to use it at all. As with any contract, make sure all of your questions are answered before you sign.

Require that the cost estimate cannot be exceeded without prior written authorization from you. If you feel the consultant is deviating from the terms of your contract, ask for explanations. Remember, you are in control of the money you spend.

The consultant's contract may include a termination clause allowing them to assess a penalty fee if you terminate their services. You may wish to add language to the contract allowing you to terminate the contract for a valid reason without penalty provided you give the consultant prior written notice stating your intent. To protect your interest in the project, include a provision requiring a 10 day written notice if the consultant chooses to terminate their services. Be aware that some consultants may use a document known as "terms and conditions" which will become a part of the contract. Be sure you understand and agree with the contents of this document.

Ask the consultant to identify the project manager working at your site and request the names of other clients whose cleanup sites the project manager has directed. Call those references and ask about the consulting firm and the project manager's qualifications and experience related to agricultural chemical cleanups. You may also contact the Department.

An experienced and qualified consultant will be familiar with the requirements of **ATCP 35, Wis. Adm. Code**. Your contract with the consultant should specify that it is the consultant's responsibility to be informed and assist you in complying with all applicable laws, rules and guidelines as the cleanup progresses. The contract should also specify that prior authorization is required for services that are ineligible for reimbursement from the ACCP fund.

MANAGING THE PROCESS

Since you are ultimately responsible for the cleanup at your site, take the initiative to keep the consultant within the guidelines of your contract and on schedule with the cleanup.

Maintaining open communication between yourself, the consultant and Department staff may be the easiest way for you to control the cost of the cleanup. Your project can get bogged down simply because the consultant does not keep the cleanup progressing. You may wish to ask your consultant to give you a brief monthly status report with their invoices. Under **ATCP 35, Wis. Adm. Code**, you are required to have all of the invoices for your project linked to the bid or estimate amounts when you submit a reimbursement application. You should ask your consultant to link their invoiced costs to the bid amounts so that you can readily identify whether or not a bid or estimate has been exceeded.

Require the consultant to submit all work plans and reports to you in draft form for your review and comment prior to submittal to the Department. If you have questions about these documents, discuss your concerns with the consultant. If you still have questions regarding the proposed activities, call Department staff and request further clarification.

Be sure you understand what the consultant proposes to do at your site and why. For example, you should feel comfortable asking questions about sampling: why are samples being taken at certain locations, what are the results, how many contaminants have been identified, and what are the concentration levels. Becoming familiar with the "language" associated with this program will enable you to clearly communicate with the consultant and Department staff. To make this easier, we developed the Environmental Acronyms and Definitions list for your use.

It is essential that a Department approved remedial plan is implemented to reduce the contaminants identified at your site. If you will be applying for reimbursement from the ACCP fund this will ensure that cleanup activities at your site are eligible for reimbursement.

INTERPRETING THE BILL

Understanding the charges listed on the consultant's bill is essential to control the costs of your cleanup. Ask the consultant to attach a cover letter with a brief narrative to each bill explaining what work was accomplished and included on that bill. If the billing includes charges for a report that you have not seen, ask for a copy of that report.

If the hours charged on an invoice seem unreasonable, ask to see the consultant's daily log of hours that were charged to your project. Check the dates when work was done or samples were taken. If you think some of the work could have been combined and completed in one day, ask for an explanation.

Eligible and ineligible costs for the Agricultural Chemical Cleanup Program (ACCP) are listed in **ATCP 35, Wis. Adm. Code**. The Department will not reimburse for surcharges, mark-ups, or miscellaneous costs on contractor's invoices. Each cost must be itemized so a determination can be made if that cost is eligible for reimbursement.

The Department considers contractor costs for re-usable field and office equipment as overhead costs which are not eligible for reimbursement from the ACCP fund. These costs should be included in the wages of the person operating the equipment.

If your site has multiple contaminants (i.e. petroleum and agricultural chemicals) the consultant should separate the costs associated with each type of contaminant. Ask the consultant to provide you with separate billings for agricultural chemicals and for other contaminants. You may only submit costs associated with the cleanup of agricultural chemicals for reimbursement from the ACCP fund.

Check for billing errors. Each invoice should have a breakdown of costs including quantities and billing rates for labor, mileage, lodging, and supplies. Request this information if it does not appear on the invoice. Costs resulting from transactions with an outside vendor, such as lodging, meals or subcontractors, should be supported by receipts.

Ask the consultant to give you an estimate of the cost for completing each phase of your project. Compare the estimates and the billing, if the actual costs are greater than the estimated costs, ask the consultant for an explanation. Costs greater than the estimated costs are ineligible for reimbursement unless change orders are approved by you and the Department prior to incurring the costs.

WHAT IS THE ACCP FUND

The Wisconsin Legislature created the Agricultural Chemical Cleanup Program (ACCP) under s. 94.73, Wis. Stats., to ease the financial burden associated with the cleanup of agricultural chemicals. An agricultural chemical is a fertilizer or non-household pesticide.

Responsible persons who incurred costs within the last three years may apply to the Department of Agriculture, Trade and Consumer Protection (DATCP) for reimbursement of eligible costs from the ACCP fund in accordance with the requirements of **ATCP 35, Wis. Adm. Code**. A responsible person may be the person who owned or controlled the discharged agricultural chemical, the owner of the property where the discharge occurred, or the person who caused the discharge. Cleanup costs for transportation spills are often applicable back to the site where the product originated.

A cost is considered **incurred** on the date the payment is made. To remain eligible, all costs must be submitted within three years of the date of the check. Costs incurred more than three years prior to the reimbursement application being submitted are not eligible for reimbursement.

Only certain costs that are considered reasonable and necessary are eligible for reimbursement. Examples of costs eligible for reimbursement include consultant fees, sampling and analyzing soil and groundwater, installing monitoring wells, and removing or treating contaminated soil or groundwater. Examples of costs ineligible for reimbursement include attorney's fees, loss of income, replacement of the spilled agricultural chemical, and decreased property values. Consultants and contractors need to be hired based on competitive bids in order for the work to be eligible for reimbursement.

Reimbursement is based upon each discharge site. The combined amount paid to all responsible persons at a discharge site may not exceed the \$650,000 reimbursement limit for a site¹. If you know of other potentially responsible persons who may have incurred cleanup costs at this site, or may incur costs in the future, you must notify them that you are filing an application for reimbursement. ATCP 35.20, Wis. Adm. Code, states you may be held liable for the eligible costs to which they were entitled if you fail to notify them.

There is a deductible within the ACCP. The first \$7,500 in cleanup costs must be paid by responsible persons who: are licensed by the DATCP to sell or apply pesticides or manufacture fertilizers, employ more than 25 persons or have gross annual sales of more than \$2,500,000. Farmers, private applicators, and others must pay the first \$3,000.

After the deductible has been paid, the ACCP reimburses 75% of all eligible costs up to \$650,000 per discharge site. A responsible person must receive our approval prior to incurring any additional costs beyond that of the competitive bid. Therefore, when the project expands and costs are expected to exceed the original bid, the responsible person must submit a new cost estimate for the next phase of work. After we review the cost estimate, our approval will indicate how much they are approved to spend.

¹ - The discharge site maximum increased from \$400,000 in eligible costs to \$650,000 in eligible costs effective July 1, 2017 per 94.73, Wis. Stats.

WHAT ELSE SHOULD I KNOW

Chapter 292.11, Wis. Stats., requires prompt reporting at the time a discharge occurs, or if that is not known, at the time the discharge is discovered. Chapter ATCP 35.10(3), Wis. Adm. Code, also requires prompt reporting to be eligible for reimbursement of cleanup costs through the Agricultural Chemical Cleanup Program (ACCP) fund.

A minimum of one soil or groundwater sample, with results greater than Department approved levels, is necessary to identify contamination at your site. Once contamination has been identified, eligible costs may be reimbursed. Costs associated with a site assessment for property transfer and costs associated with the discovery of contamination are not eligible for reimbursement.

Eligible and ineligible costs for the ACCP are listed in **ATCP 35, Wis. Adm. Code**. A workplan and cost estimate must be submitted and approved by the Department before starting cleanup activities.

ATCP 35.14, Wis. Adm. Code, lists a number of costs that are ineligible for reimbursement through the ACCP fund. If you are uncertain if a cost is eligible, contact the Department and request clarification prior to submitting your application. The Department has the authority to deduct twice the amount of an ineligible cost from your application if it is determined that you should have known the cost was ineligible.

ATCP 35.16, Wis. Adm. Code, explains when you are required to obtain three bids when hiring contractors for your cleanup. You should take the time to read and understand this section of the rule.

After Department staff review your application, a summary will be presented to you and the ACCP Council. The six member ACCP Council meets quarterly and is composed of representatives of the following groups: one agricultural chemical manufacturer and wholesaler, two farmers, two pesticide dealers and/or commercial applicators, and one environmental consultant. Department staff and Council members will discuss all costs that the Department proposes are ineligible for reimbursement on your application. You will be invited but are not required to attend this meeting.

The costs for cleanup at your site may be deductible as ordinary and necessary business expenses in the year in which the costs were incurred. You may wish to contact your personal tax specialist regarding this information.

NOW I'M READY TO APPLY

When you are ready to apply for reimbursement from the Agricultural Chemical Cleanup Program (ACCP), download a package from the Department of Agriculture, Trade and Consumer Protection (DATCP) website, or contact the Department at (608) 224-4522 to request an application packet to be sent by mail. We recommend that you read **ATCP 35, Wis. Adm. Code**, prior to completing the application. ATCP 35 provides the information necessary to file a complete application and sets forth the guidelines for reimbursement.

All costs must be submitted within 3 years to retain eligibility for reimbursement. The reimbursement application must include all invoices and proof of payments for costs you have **paid** (based upon the date of the check) prior to the cut-off date specified on each application. Only costs paid after that date will be eligible for reimbursement on subsequent applications.

You must include a copy of the cost allocation formula when submitting costs for use of your own equipment.

If you will be applying for reimbursement for labor performed by your employees, you will be required to submit proof for the labor charges. Since employee wages may not generate invoices, you must submit timesheets for the weeks in which the work was performed, a log of hours worked with the corresponding services provided, hourly wage and fringe benefit information, and attach copies of cancelled paychecks.

Corrective action costs that are covered by insurance are not eligible for reimbursement through this fund. If insurance was held at any time during the period of the discharge and coverage was denied, you must submit documentation indicating denial of coverage from each insurance provider. If your cleanup costs were partially covered by insurance, you must submit documentation indicating the specific invoices or costs that were covered by insurance and the specific invoices and costs that were not covered by insurance.

A summary of the accepted and rejected bids for each contract service that exceeds \$3,000 must be included with your application. The summary should include the name of each bidder and the price that was bid. Alternatively, you may submit a copy of all of the bids and not be required to prepare a summary of the bids.

Although you may hire an attorney or consultant to review your consultant's contract or work plan, or to assist you with the preparation of your reimbursement application, legal fees are not reimbursable through the ACCP fund.

Your social security number or your taxpayer identification number must be on file with the DATCP before a reimbursement payment can be made. Please complete the Substitute W-9 form included with the application.

A responsible person may not submit more than one application within any 12 month period for the same discharge site.