

**STATE OF OKLAHOMA  
INDEPENDENT ACCOUNTANT'S REPORT  
ON APPLYING AGREED-UPON PROCEDURES**

**msi** **BARNES & ASSOCIATES**  
**PROFESSIONAL ASSOCIATION**

Certified Public Accountants

Joseph B. Barnes, CPA  
Richard A. Reposo, CPA  
Alexander E. Petrone, CPA  
Hymen Indowaky, CPA  
Alfredo R. Tamayo, CPA  
Adam F. Small, CPA

**INDEPENDENT ACCOUNTANT'S REPORT  
ON APPLYING AGREED-UPON PROCEDURES**

State of Oklahoma  
Office of State Finance and  
State Auditor and Inspector's Office  
Oklahoma City, OK

We have performed the procedures described in Schedule A, which were agreed to by the Office of State Finance and State Auditor and Inspector's Office, solely to assist you with respect to the management and performance of the program and funds administered by the Petroleum Storage Tank Division of the Corporation Commission of the State of Oklahoma in accordance with Oklahoma House Bill 2536. The Petroleum Storage Tank Division's management is responsible for the management and performance of the program and funds administered by the Petroleum Storage Tank Division of the Corporation Commission of the State of Oklahoma. This agreed-upon procedures engagement was conducted in accordance with attestation standards established by the American Institute of Certified Public Accountants. The sufficiency of the procedures is solely the responsibility of the Office of State Finance and State Auditor and Inspector's Office. Consequently, we make no representation regarding the sufficiency of the procedures described below either for the purpose for which this report has been requested or for any other purpose.

Our procedures and findings are described in Schedule A. The findings that are presented in Schedule A, which are a result of performing these procedures, where indicated, state the dollar amount of costs, which are questioned as a result of the sample selected. Where practicable, we have extrapolated our findings solely for the purpose of providing a perspective of the relative significance of the finding. These extrapolated amounts are not a scientifically accurate measure of the total amount of the questioned costs.

We were not engaged to, and did not, conduct an audit, the objective of which would be the expression of an opinion on the management and performance of the program and funds administered by the Petroleum Storage Tank Division of the Corporation Commission of the State of Oklahoma. Accordingly, we do not express such an opinion. Had we performed additional procedures, other matters might have come to our attention that would have been reported to you.

2929 East Commercial Boulevard, Suite 409, Fort Lauderdale, Florida 33308  
Tel 954-491-1950 Fax 954-776-5567 Email [firm@msibarnes.com](mailto:firm@msibarnes.com) Web [www.msibarnes.com](http://www.msibarnes.com)

MSI Barnes & Associates, P.A. is a member of MSI, an international network of independent professional firms

This report is intended solely for the information and use of the Office of State Finance and State Auditor and Inspector's Office, and is not intended to be and should not be used by anyone other than the specified parties.

*MSI Barnes & Associates PA*

**MSI BARNES & ASSOCIATES, P.A.**

Fort Lauderdale, Florida  
April 11, 2003

## PROCEDURES

- I. Edit the "Questions to consider as a basis for the investigative audit required by Section 3 of Enrolled House Bill No. 2536 (2002) : (updated 9-25-02)" which was drafted by State Senate Staff to assist in the formulation of procedures to be agreed upon by the Office of State Finance and the State Auditor and Inspector's Office. The editing is being undertaken at your direction to consolidate, clarify and focus the questions to assist you in determining which procedures are best employed in the conduct of our engagement.
- II. Procedures regarding Indemnity Fund expenditures
  - A. Petroleum Storage Tank Division (PSTD) direct expenditures (administrative, claims processing, and regulatory)
    1. Examine 100 cash disbursements of non-personnel PSTD direct expenditures paid during the fiscal year ended June 30, 2002 and verify the accuracy of the cost center classification (administrative, claims processing, and regulatory) and extrapolate the results to the entire population of PSTD direct expenditures for the fiscal year ended June 30, 2002.
    2. Compare the allocation of personnel costs among the various cost centers according to the PSTD salary allocation report for the fiscal year ended June 30, 2002 to results from an employee survey/questionnaire completed by each employee in the PSTD division. Calculate the percentage and dollar amount variances.
  - B. PSTD indirect expenditures (Oklahoma Corporation Commission overhead allocations)
    1. Verify the total indirect personnel costs for the fiscal year ended June 30, 2002 of the Oklahoma Corporation Commission (OCC) allocated to the divisions within the OCC.
    2. Compare the OCC allocation percentages of costs to the results of a survey/questionnaire completed by each of the directors of the OCC administrative divisions (legal, data processing, administration, and office of administrative proceedings). Calculate the percentage and dollar amount variances.
    3. Compare the payments/transfers from the PSTD to the OCC during the fiscal year ended June 30, 2002 to OCC's actual incurred costs attributable to the PSTD.

III. Procedures regarding the fairness and consistency of Indemnity Fund procedures and practices

A. Claims processing

1. Select all claims over \$100,000, all claims paid to other governmental agencies, and 50 additional claims, using the systematic approach (every nth claim), received during the fiscal year ended June 30, 2002 and all claims over \$500,000 for the quarter ended September 30, 2002 from the tracking log of the PSTD database and perform the following:
  - a. Verify that the claims that were submitted were logged into the PSTD database, reviewed and approved/denied in the statutory amount of time or within some consistent time frame as dictated by PSTD rules and guidance.
  - b. Select a random sample of 25 claims to verify that the costs included in the claim represent work that was pre-approved by the PSTD, and that the pre-approvals were reviewed and approved in the statutory amount of time or within some consistent time frame as dictated by PSTD rules and guidance. In addition, review the eligibility application submitted by the claimant to determine if it was reviewed in either the statutory amount of time or within some consistent time frame as dictated by PSTD rules and guidance.
2. Query the PSTD database for all Suspicion of Release (SOR) cases.
  - a. Document applicable statutes, regulations and guidelines pertaining to the payment of these costs. Schedule amounts expended for these cases and document payment of the deductible.
  - b. Select 15 SOR cases paid in FY 2002 and document case information including reason for reporting a suspected release and actions taken.
3. Query the PSTD database for cases in which there was a direct "assignment" to the contractor and an "initial" claim was made after June 16, 1999. Send a confirmation to the tank owner regarding proof of payment of the \$5,000 deductible.
4. Document costs expended for the "Municipality Projects" as identified as such by PSTD management. Document all cases opened as a result of the "Municipality Projects".

B. Indemnity Fund eligibility process

1. Review eligibility application history as provided by the PSTD Eligibility Officer. Query the PSTD database for additional eligibility issues as noted in the memo column of the PSTD database claims tracking log. Research and document cases in which there may have been an inconsistent application of Oklahoma Statutes and/or PSTD regulations.

2. Randomly select, using the systematic approach (every 5th submittal), eligibility applications filed with the PSTD in 2002 and perform the following:
  - a. Verify that the eligibility application was logged into the PSTD database and reviewed/approved in the statutory amount of time or within some consistent time frame as dictated by PSTD regulations or guidance. In addition, document all correspondence regarding application deficiencies.
  - b. Verify that the eligibility application was reviewed/approved in a manner consistent with PSTD regulation for eligibility to the Indemnity Fund.
3. Document the process by which the Fund utilizes the Federal LUST Trust grant monies to pay for site work and deductibles for tank owners/operators not eligible for the Indemnity Fund. Also, document the process by which the Division carries out its duties with respect to the LUST Trust Fund monies in trying to locate a responsible party and evaluate their "ability to pay" through review of randomly selected cases as they are identified.

C. Pre-approval requests

1. Select pre-approval requests submitted between January 1, 2002 through June 30, 2002 from the electronic spreadsheet log maintained outside of the PSTD Claims database ("PO tracking log") and perform the following procedures:
  - a. Compare this electronic spreadsheet log with the claims database (which contains only those pre-approvals which gained approval), and identify those that were approved and those that were not approved.
  - b. Document the time between the date the pre-approval request was received and the date it was approved. Verify if the request was reviewed in the statutory amount of time or within some consistent time frame as dictated by PSTD rules or guidance.
  - c. Schedule a statistical analysis of approvals and denials including consultants and claimants associated with those pre-approval requests approved and denied.
2. Perform any additional procedures necessary on work orders found in the claims database, not logged into the "PO tracking log."

D. PSTD contractor selection process

1. Document the process by which the PSTD selects contractors to perform site remediation work.
2. Document the process and procedures implemented by the PSTD in the selection of the five contractors who contracted the most dollars with the State during the fiscal year ended June 30, 2002.

E. Document the PSTD's current practice in conducting site assessments utilizing the equipment available through the EPA grant.

- F. Review two third-party property damage claims paid by the FUND. Verify that the PSTD processed those claims in accordance with Oklahoma Statute Title 17 Chapter 15. (Engage a specialist if necessary.)

IV. Procedures regarding the encumbrances, cash balances, and future liability of the Indemnity Fund.

A. Encumbrances

1. Schedule the encumbrance balances of the Indemnity Fund for each month for the fiscal year ended June 30, 2002.
2. Review all amounts encumbered for "pay for performance" contracts over \$300,000 and all pre-approval amounts over \$50,000 and 20 additional amounts encumbered, using the systematic approach (every nth claim), at June 30, 2002 and perform the following:
  - a. Compare to the applicable purchase order(s) and extrapolate the results to the entire population of claims encumbered as of June 30, 2002.
  - b. Compute the number of days between the date the contract was submitted/approved and the date the work was performed.
  - c. Verify that payments made between July 1, 2002 and December 31, 2002 were properly reflected in the encumbrance balance as of December 31, 2002.
  - d. Provide schedule of the aging of encumbered amounts at June 30, 2002.
3. Randomly select 12 "pay for performance" contracts entered into during the Fund's history and compare all contracts, milestone payments and other relevant data related to the cleanup process on the site.
  - a. Engage a specialist to review all technical documentation to verify, solely through documentation, contamination levels at the start of the cleanup, milestone payments, warranty period, and at closure.
  - b. Perform additional procedures, as necessary to document actions taken with respect to these contracts.
4. Compare each claim paid during first two months of the fiscal year ending June 30, 2003 to the amount encumbered at June 30, 2002.

B. Cash balances

1. Obtain copies of monthly bank reconciliations of the Indemnity Fund cash balance at the end of each quarter for the fiscal year ended June 30, 2002 and perform the following:
  - a. Confirm the bank balance.

- b. Test the clerical accuracy of the bank reconciliation and detail supporting schedules, if applicable.
      - c. Trace deposits in transit and outstanding checks per the bank reconciliation to the subsequent bank statement and determine the time period between book and bank recording.
    - 2. Confirm the balances of all Indemnity Fund certificates of deposit at the end of each quarter for the fiscal year ended June 30, 2002.
    - 3. Recalculate the "maintenance level" at the end of each quarter for the fiscal year ended June 30, 2002 and compare it to the total cash balance of the Indemnity Fund.
  - C. Future liability
    - 1. Inquire of the PSTD's fund administrator as to pending litigation and settlement agreements.
    - 2. Verify, that lawsuits/settlement agreements entered into were done so with the appropriate parties seeking recovery from the Fund.
- V. Procedures regarding the management and the administration of the Indemnity Fund
  - A. Review and document the EPA approval (including yearly reports from the EPA) of the Oklahoma UST Program.
  - B. Inquire from current employees if the current management system allows them to carry out their separate duties and responsibilities and document any comments that are applicable.
  - C. Research and document, where applicable, specific cases, policies and practices of the Indemnity Fund that were brought to our attention during the course of our engagement, by claimants, consultants, Fund staff, and legislators.
- VI. Inquire of the Office of State Auditor and Inspector and the Office of State Finance if there are any specific sites, responsible parties, or transactions that should be included in any of the above procedures.



## SCHEDULE A

### UNRESTRICTED ACCESS TO PRIOR AUDITORS WORKPAPERS DENIED

A customary procedure in an agreed-upon procedures engagement is for the successor auditor to communicate with the predecessor and review prior work papers. We were unable to complete this procedure on an unrestricted basis.

The predecessor to the engagement, Grant Thornton, LLP (GT), would not allow us *unrestricted* access to such work papers. The restrictions GT imposed were, they explained, standard restrictions in accordance with guidance included in Statement on Auditing Standards (SAS) No. 84. In fact, SAS No. 84 states that "a predecessor may request" agreement with such restrictions. Thus, it is clear that GT's position is supported by professional standards of practice as they chose to apply them. We determined that these restrictions could limit our ability to report pertinent information and declined to agree to the restrictions. Without review of these work papers we could not ascertain the relevance of the previous engagements to our engagement, nor could we evaluate whether GT had complied with 17 O.S. §326 in the conduct of their engagement for the fiscal periods of July 1, 1990 to June 30, 2001.

## AGREED-UPON PROCEDURE

- I. Edit the "Questions to consider as a basis for the investigative audit required by Section 3 of Enrolled House Bill No. 2536 (2002) : (updated 9-25-02)" which was drafted by State Senate Staff to assist in the formulation of procedures to be agreed upon by the Office of State Finance and the State Auditor and Inspector's Office. The editing is being undertaken at your direction to consolidate, clarify and focus the questions to assist you in determining which procedures are best employed in the conduct of our engagement.*

**FINDINGS RELATED TO I.**

**FINDING (I.): EDITED, "QUESTIONS TO CONSIDER AS A BASIS FOR THE INVESTIGATIVE AUDIT REQUIRED BY SECTION 3 OF ENROLLED HOUSE BILL NO. 2536 (2002) : (UPDATED 9-25-02)" PRESENTED BY SENATE STAFF OF THE OKLAHOMA LEGISLATURE**

QUESTION:	SEE FINDINGS:
<ul style="list-style-type: none"> <li>• How many Underground Storage Tank Sites have been remediated to "no further action" status under the Indemnity Fund program as of June 30, 2002? Has the regulatory program conducted an inventory of petroleum storage tanks sites in the state as of June 30, 2002? Can the Indemnity Fund provide an estimate of the number of potential cleanups remaining which are eligible for remediation under this program as of June 30, 2002?</li> </ul>	III. *
<ul style="list-style-type: none"> <li>• As of June 30, 2002 do the rules and regulations governing petroleum storage tank cleanups provide adequate measures to prevent or minimize future releases?</li> </ul>	III., IV.
<ul style="list-style-type: none"> <li>• Was the Indemnity Fund administered in compliance with provisions of the State of Oklahoma Statutes Title 17 chapters 14 and 15 during the fiscal year ended June 30, 2002?</li> </ul>	ALL
<ul style="list-style-type: none"> <li>• Did the Oklahoma Corporation Commission exceed statutory limits on the amount of Indemnity Fund expenditures allowed for use to subsidize the agency's data processing, legal, administration, and office of administrative proceedings divisions during the fiscal year ended June 30, 2002?</li> </ul>	II.
<ul style="list-style-type: none"> <li>• Did certain tank owners, consultants and contractors receive preferential treatment or were they discriminated against by the administrators of the Indemnity Fund or the employees of the Corporation Commission during the fiscal year ended June 30, 2002?</li> </ul>	III.
<ul style="list-style-type: none"> <li>• What future expenditures have the Indemnity Fund encumbered funds for as of June 30, 2002? Have the Administrators of the Indemnity Fund exceeded the statutory maintenance level for the cash balance of the Indemnity Fund?</li> </ul>	IV.
<ul style="list-style-type: none"> <li>• Did the PST Division use Indemnity Fund monies to perform actual site remediation and, if so, what is the scope of and costs associated with this work during the fiscal year ended June 30, 2002?</li> </ul>	III.
<ul style="list-style-type: none"> <li>• Did the Oklahoma Corporation Commission during the fiscal year ended June 30, 2002 adopt any guidelines, policies and procedures without properly following the requirements of the State of Oklahoma Constitution, the Administrative Procedures Act, and the Open Meetings Act?</li> </ul>	III., IV.
<ul style="list-style-type: none"> <li>• Has the Oklahoma Corporation Commission administered the program as it was approved by the Federal Environmental Protection Agency (EPA)? Has the Commission notified the EPA of all modifications to the program and received approval of same?</li> </ul>	V.
<ul style="list-style-type: none"> <li>• Has the Oklahoma Corporation Commission created and implemented an internal coordinated management system between the regulatory program and the Indemnity Fund as of June 30, 2002? Are the two programs able to carry out their separate duties and responsibilities as of June 30, 2002?</li> </ul>	V.

**FINDING (I.): (Continued)**

QUESTION:	SEE FINDINGS:
<ul style="list-style-type: none"> <li>• Were the regulatory decisions made based upon the requirements of Oklahoma Statutes Title 17 chapters 14 and 15 as it relates to the protection of the health, safety and welfare of the public and the environment during the fiscal year ended June 30, 2002?</li> </ul>	III., IV.
<ul style="list-style-type: none"> <li>• Did the Indemnity Fund reimburse the Oklahoma Corporation Commission for costs not actually incurred by the Commission in administering the Indemnity Fund during the fiscal year ended June 30, 2002?</li> </ul>	II.
<ul style="list-style-type: none"> <li>• Did the Indemnity Fund reimburse the Oklahoma Corporation Commission for costs not documented and reviewed as required by Oklahoma Statutes Title 17 chapter 14 Section 324(A)(2) during the fiscal year ended June 30, 2002?</li> </ul>	II.
<ul style="list-style-type: none"> <li>• Did the Indemnity Fund pay costs it was not authorized to pay by Oklahoma Statutes Title 17 chapters 14 and 15 (regulatory costs, excessive administrative costs, costs incurred prior to application of the deductible, and costs for non-eligible tanks) during the fiscal year ended June 30, 2002?</li> </ul>	II., III.
<ul style="list-style-type: none"> <li>• Has the Indemnity Fund been paying negotiated professional fees and market rates for contract services or has the fund been limiting reimbursement amounts and establishing their own rates for reimbursement during the fiscal year ended June 30, 2002?</li> </ul>	III., IV.
<ul style="list-style-type: none"> <li>• Did the Indemnity Fund appropriately handle, evaluate, and resolve property damage claims during the fiscal year ended June 30, 2002?</li> </ul>	III.
<ul style="list-style-type: none"> <li>• Did the administrators efficiently administer the Indemnity Fund and were the costs of administration reasonable during the fiscal year ended June 30, 2002?</li> </ul>	ALL

*\*Per the Petroleum Storage Tank Division (PSTD) Fiscal Year 2002 Annual Report, 1,458 eligible cases have been closed.*

*The PSTD maintains the UST database which keeps an inventory of all registered underground storage tanks (UST) and their status. While the UST database maintains information regarding sites with registered UST's and their status, the number of sites for which a potential cleanup may exist cannot be determined. Due to the fact that the PSTD has currently undertaken site assessment work on abandoned UST's, some of which were never registered with the PSTD, the number of potential cleanups cannot be determined (See Finding III) .*

## AGREED-UPON PROCEDURE

### II. Procedures regarding Indemnity Fund expenditures

- A. *Petroleum Storage Tank Division (PSTD) direct expenditures (administrative, claims processing, and regulatory)*
  - 1. *Examine 100 cash disbursements of non-personnel PSTD direct expenditures paid during the fiscal year ended June 30, 2002 and verify the accuracy of the cost center classification (administrative, claims processing, and regulatory) and extrapolate the results to the entire population of PSTD direct expenditures for the fiscal year ended June 30, 2002.*
  - 2. *Compare the allocation of personnel costs among the various cost centers according to the PSTD salary allocation report for the fiscal year ended June 30, 2002 to results from an employee survey/questionnaire completed by each employee in the PSTD division. Calculate the percentage and dollar amount variances.*
- B. *PSTD indirect expenditures (Oklahoma Corporation Commission overhead allocations)*
  - 1. *Verify the total indirect personnel costs for the fiscal year ended June 30, 2002 of the Oklahoma Corporation Commission (OCC) allocated to the divisions within the OCC.*
  - 2. *Compare the OCC allocation percentages of costs to the results of a survey/questionnaire completed by each of the directors of the OCC administrative divisions (legal, data processing, administration, and office of administrative proceedings). Calculate the percentage and dollar amount variances.*
  - 3. *Compare the payments/transfers from the PSTD to the OCC during the fiscal year ended June 30, 2002 to OCC's actual incurred costs attributable to the PSTD.*

**FINDINGS RELATED TO II.**

**FINDING (II. A. 1.): CONTRARY TO 17 O.S. §326 ATTORNEY FEES WERE EXPENDED FROM THE INDEMNITY FUND WITHOUT STATUTORY AUTHORITY**

17 O.S. §324 defines the types of expenditures that can be made from the Indemnity Fund (FUND). These costs are: costs associated with reimbursements to "eligible persons" for "eligible expenses", actual costs incurred for the evaluation of claims, and actual costs incurred for the administration of the FUND. We noted that approximately \$90,797 was expended in the fiscal year ended June 30, 2002 for attorney fees related to the defense of a patent infringement lawsuit. These disbursements were classified as claims processing expenditures. The attorney fees are not expenditures that are permitted to be paid by the FUND. Internal PSTD legal counsel informed us that the PSTD intervened in a lawsuit that was originally brought against a contractor (subsequently the plaintiff has brought a second lawsuit against another contractor). PSTD management advised us that the PSTD was not a named defendant in the original lawsuit. PSTD management explained that they asked to be named in the lawsuit as an intervenor and third party defendant. The PSTD felt that if the Plaintiff was successful in their lawsuit, the royalty fees that would be charged to the contractors for use of a specific type of remedial cleanup technology would ultimately have to be considered a reasonable cost integral to corrective action, thus allowable for reimbursement from the FUND on future cleanups. Further, PSTD management stated that if the patent was improvidently granted and it went unchallenged, the cost to the FUND could be in the millions of dollars.

While performing other procedures involving the "Pay for Performance" (PfP) contracts the PSTD has entered into with tank owners and their contractors, we noted language in most PfP contracts which addressed patent infringement lawsuits. Specifically, the language stated that the "consultant shall hold harmless and indemnify the applicant, the Oklahoma Petroleum Storage Tank Release Indemnity Program, the Petroleum Storage Tank Release Environmental Cleanup Indemnity Fund and the State of Oklahoma against any patent infringements and third party liability from damage caused by the consultant." We further inquired of PSTD management why they intervened in this lawsuit if they routinely included this language in their PfP contracts. They stated that the costs for PfP would go up by \$10,000 (royalty fee) for each site remediated using this technology. Contrary to what we were told by PSTD management and internal legal counsel, we were informed by outside legal counsel employed by the PSTD that the PSTD did not ask to be named in the lawsuit.

The reason given by PSTD management and legal counsel as to why they requested to intervene, if they did in fact request to intervene in the case, seems flawed as it would be unnecessary given the language in the PfP contracts described above.

<b>Total costs questioned with this finding:</b>	<b>\$ 90,797</b>
--	------------------

*(There may be costs incurred in prior years that we did not identify. Additionally, we were told there will be significant legal costs in the coming months as the case goes to court. We question all of these past and future costs as well). (The dollar extent involved is beyond the scope of our procedures to determine at this time.)*

**FINDING (II. A. 2.): CONTRARY TO 17 O.S. §353, MONIES FROM THE INDEMNITY FUND WERE USED TO PAY FOR THE SALARIES OF EMPLOYEES PERFORMING WORK INVOLVED IN THE REGULATION OF STORAGE TANKS.**

17 O.S. §353 prohibits the Indemnity Fund (FUND) from paying for the salaries of employees performing work involved in the regulation of storage tanks. It states:



**FINDING (II. A. 2.): (Continued)**

*"No monies from the Indemnity Fund shall be used to pay or reimburse the Corporation Commission for the salary of any employee while such employee is performing work involved in the regulation of storage tanks pursuant to the Oklahoma Storage Tank Regulation Act or the administration of programs pursuant to said act, including the development, review and approval of corrective action plans as required by the regulatory programs. The Commission shall cross-train the field staff of the Petroleum Storage Tank Division to perform inspections and related field activities for all programs within the Division and the Indemnity Fund Program may reimburse the Division the actual costs of inspection services performed on behalf of the Indemnity Fund Program."*

As part of the procedures performed, we utilized an Employee Survey/Questionnaire (Survey) (See Attachment I) to gather relevant information regarding each of the employee's job responsibilities. As some of the PSTD employees' jobs include some claims processing, administrative, and regulatory responsibilities, this Survey was used as a comparison to the allocation formulas established by PSTD management. In addition to this Survey, we spoke with the Comptroller of the PSTD regarding the methods by which the allocation percentages were developed and whether she felt they were representative of the responsibilities of each employee. The Comptroller indicated that while she would expect to be the individual responsible for this allocation, she was out sick the day that it was completed and was not involved in the development of the allocation.

The Survey was designed in a manner so as to allow the employee to give an overall percentage of time spent performing various job responsibilities, and follow-up questions were asked so as to confirm these responses. Question 5 of the Survey stated "What do you estimate is the allocation of your time between administrative, claims processing, and regulatory cost centers?" At the conclusion of this procedure, all responses were gathered, tabulated, and compared to the actual allocation of costs. The following table presents the overall variance for the fiscal year ended June 30, 2002 among these three categories of personnel classifications:

<b>Personnel Classifications</b>	<b>Overstated/(Understated)</b>
Administrative	(\$67,556)
Claims processing	\$726,904
Regulatory	(\$659,348)

In conducting the survey, we noted that the FUND did incur costs related to inspection services performed by PSTD staff. However, these costs, if incurred on behalf of performing services related to the FUND, are allowed according to 17 O.S. §353. Therefore, the overstated/(understated) amounts shown above are a result of other regulatory services being performed by employees.

<b>Total questioned costs in this finding:</b>	<b>\$ 659,348</b>
--	-------------------

**FINDING (II. A. 2.): 17 O.S. § 360 DOES NOT DEFINE WHAT COSTS SHOULD BE INCLUDED IN THE ADMINISTRATION OF THE INDEMNITY FUND**

17 O.S. § 360 provides, in part, as follows:

"A. Annual expenditures from the Petroleum Storage Tank Release Environmental Cleanup Indemnity Fund for costs incurred for the administration of the Indemnity Fund shall be limited to ten percent (10%) of the amount of claims paid during such year not to exceed One Million Dollars (\$1,000,000) per fiscal year."

The term "administration" noted in the above referenced statute is not defined within the definitions section of Title 17. Therefore, we are unclear as to whether or not the salaries and other expenses of employees performing "claims processing" were intended to be considered costs incurred in the "administration of the Indemnity Fund." If the definition of "administration" as referenced in the above statute is to include costs incurred to process claims and perform other administrative type services, the total "administrative" costs for fiscal year 2002 (including the understated "Administrative" costs and the overstated "Claims Processing" costs) are \$2,330,892. In such case, the amount expended by the FUND on such costs is \$1,330,892 in excess of its \$1,000,000 statutory authority. We note this issue due to uncertainty with respect to the term "administration" noted in Statute.

**FINDING (II. B. 1., 2., 3.):**

There were no findings related to these procedures; however, the following is provided for documentation purposes.

**DOCUMENTATION OF THE OKLAHOMA CORPORATION COMMISSION PROCESS FOR ALLOCATION OF COSTS TO THE PETROLEUM STORAGE TANK DIVISION**

The Oklahoma Corporation Commission (OCC) initiates transfers to its divisions based on budgeted amounts of OCC overhead costs. At the end of the fiscal year, these amounts are substantiated by the OCC with cost allocation calculations using various formulas. For example, some OCC data processing costs are allocated to its different divisions by the number of computers in each respective division. The amounts transferred from the Petroleum Storage Tank Division (PSTD) to the OCC were less than the actual amount calculated by the OCC for the fiscal year ended June 30, 2002. Some of the PSTD allocated costs are paid indirectly by the Indemnity Fund (FUND). We noted that no additional funds were collected from the PSTD (including the FUND) for this amount. The FUND transfers dollars to the 205 Fund, and some of those dollars are used to pay some of the OCC allocated costs. For the fiscal year ended June 30, 2002 the FUND paid \$628,667 of these OCC allocated costs.

## AGREED-UPON PROCEDURE

### III. *Procedures regarding the fairness and consistency of Indemnity Fund procedures and practices*

#### A. *Claims processing*

1. *Select all claims over \$100,000, all claims paid to other governmental agencies, and 50 additional claims, using the systematic approach (every nth claim), received during the fiscal year ended June 30, 2002 and all claims over \$500,000 for the quarter ended September 30, 2002 from the tracking log of the PSTD database and perform the following:*
  - a. *Verify that the claims that were submitted were logged into the PSTD database, reviewed and approved/denied in the statutory amount of time or within some consistent time frame as dictated by PSTD rules and guidance.*
  - b. *Select a random sample of 25 claims to verify that the costs included in the claim represent work that was pre-approved by the PSTD, and that the pre-approvals were reviewed and approved in the statutory amount of time or within some consistent time frame as dictated by PSTD rules and guidance. In addition, review the eligibility application submitted by the claimant to determine if it was reviewed in either the statutory amount of time or within some consistent time frame as dictated by PSTD rules and guidance.*
2. *Query the PSTD database for all Suspicion of Release (SOR) cases.*
  - a. *Document applicable statutes, regulations and guidelines pertaining to the payment of these costs. Schedule amounts expended for these cases and document payment of the deductible.*
  - b. *Select 15 SOR cases paid in FY 2002 and document case information including reason for reporting a suspected release and actions taken.*
3. *Query the PSTD database for cases in which there was a direct "assignment" to the contractor and an "initial" claim was made after June 16, 1999. Send a confirmation to the tank owner regarding proof of payment of the \$5,000 deductible.*
4. *Document costs expended for the "Municipality Projects" as identified as such by PSTD management. Document all cases opened as a result of the "Municipality Projects".*

III. *Procedures regarding the fairness and consistency of Indemnity Fund procedures and practices (Continued)*

B. *Indemnity Fund eligibility process*

1. *Review eligibility application history as provided by the PSTD Eligibility Officer. Query the PSTD database for additional eligibility issues as noted in the memo column of the PSTD database claims tracking log. Research and document cases in which there may have been an inconsistent application of Oklahoma Statutes and/or PSTD regulations.*
2. *Randomly select, using the systematic approach (every 5th submittal), eligibility applications filed with the PSTD in 2002 and perform the following:*
  - a. *Verify that the eligibility application was logged into the PSTD database and reviewed/approved in the statutory amount of time or within some consistent time frame as dictated by PSTD regulations or guidance. In addition, document all correspondence regarding application deficiencies.*
  - b. *Verify that the eligibility application was reviewed/approved in a manner consistent with PSTD regulation for eligibility to the Indemnity Fund.*
3. *Document the process by which the Fund utilizes the Federal LUST Trust grant monies to pay for site work and deductibles for tank owners/operators not eligible for the Indemnity Fund. Also, document the process by which the Division carries out its duties with respect to the LUST Trust Fund monies in trying to locate a responsible party and evaluate their "ability to pay" through review of randomly selected cases as they are identified.*

C. *Pre-approval requests*

1. *Select pre-approval requests submitted between January 1, 2002 through June 30, 2002 from the electronic spreadsheet log maintained outside of the PSTD Claims database ("PO tracking log") and perform the following procedures:*
  - a. *Compare this electronic spreadsheet log with the claims database (which contains only those pre-approvals which gained approval), and identify those that were approved and those that were not approved.*
  - b. *Document the time between the date the pre-approval request was received and the date it was approved. Verify if the request was reviewed in the statutory amount of time or within some consistent time frame as dictated by PSTD rules or guidance.*
  - c. *Schedule a statistical analysis of approvals and denials including consultants and claimants associated with those pre-approval requests approved and denied.*

III. *Procedures regarding the fairness and consistency of Indemnity Fund procedures and practices (Continued)*

2. *Perform any additional procedures necessary on work orders found in the claims database, not logged into the "PO tracking log."*

D. *PSTD contractor selection process*

1. *Document the process by which the PSTD selects contractors to perform site remediation work.*
2. *Document the process and procedures implemented by the PSTD in the selection of the five contractors who contracted the most dollars with the State during the fiscal year ended June 30, 2002.*

E. *Document the PSTD's current practice in conducting site assessments utilizing the equipment available through the EPA grant.*

F. *Review two third-party property damage claims paid by the FUND. Verify that the PSTD processed those claims in accordance with Oklahoma Statute Title 17 Chapter 15. (Engage a specialist if necessary.)*

**FINDINGS RELATED TO III.**

**FINDING (III. A. 1.): CONTRARY TO 17 O.S. §356, CLAIMS WERE PAID WITHOUT PREAPPROVAL OR PAYMENT OF REQUIRED DEDUCTIBLE. CLAIMS WERE PROCESSED IN A MANNER THAT WAS INCONSISTENT WITH PSTD CLAIM PROCESSING PROCEDURES.**

The PSTD processed two claims associated with the Hudson Refinery in Cushing, Oklahoma. The first claim was for \$995,000 and was paid by the PSTD to the Oklahoma Department of Environmental Quality (DEQ) on August 15, 2002 on Case 064-2595. A second claim payment was paid to the DEQ on August 15, 2002 for \$105,000 for "compensation for services for managing UST cleanup." This was paid as an ADMIN payment.

17 O.S. §356 B states in part;

*Any person who intends to file for reimbursement shall make application to the Indemnity Fund Program for such reimbursement. The only information required to be filed with the application shall be that information required by the Indemnity Fund Program to determine eligibility for reimbursement.*

1. *The following information may accompany the application and shall be required prior to any reimbursement:*
  - a. *Documentation of site conditions prior to initiation of corrective action,*
  - b. ***A record of the costs actually incurred by the eligible person for each corrective action taken,***
  - c. *Evidence that the corrective action was completed or will be completed in accordance with cleanup criteria established pursuant to the Oklahoma Storage Tank Regulation Act,*
  - d. *How any other financial responsibility requirements will be met,*
  - e. *Whether there is any other liability coverage for the release,*
  - f. *Any injury to property or physical injury incurred as a result of the release,*
  - g. *The corrective action plan approved by or submitted to the Storage Tank Regulation Program, and*
  - h. *Such other information and records as the Indemnity Fund Program may require.*

The required eligibility application was not located in the file. The only information located for this case was a letter dated January 30, 2002 from and signed by the PSTD management to the DEQ. The letter reasons that, as there is thought to be a release from a UST on the site, the PSTD offers monies from the Indemnity Fund to DEQ. The letter states "It is our understanding that your agency is working with EPA's Superfund in a joint project to clean the abandoned refinery site, and we believe that our funds might be helpful in this regard." The amount preapproved through the purchase order system did not have the required documentation establishing workscopes and costs. In addition, none of the required claim documentation was submitted to support payment of these costs.

We note this case as claims were paid in a manner inconsistent with PSTD regulations and claims processing procedures.

<b>Total costs questioned in this finding:</b>	<b>\$ 1,100,000</b>
--	---------------------

*Note: \$1,100,000 incurred during the fiscal year ending June 30, 2003*

**FINDING (III. A. 2.): CONTRARY TO PSTD REGULATIONS, OAC 165:27-7-7, REIMBURSEMENT WAS MADE FROM THE INDEMNITY FUND FOR COSTS INCURRED PRIOR TO A RELEASE**  
**(Note: Oklahoma Statutes and PSTD Regulations conflict with respect to costs incurred prior to confirmation of a release)**

Background Information

The Oklahoma Statutes and the Petroleum Storage Tank Division (PSTD) Regulations governing the Indemnity Fund (FUND) program, related to costs incurred prior to confirmation of a release, contain contradicting language. 17 O.S. §324 states in part;

*"Monies in the Indemnity Fund can be expended for "reimbursements to eligible persons for eligible expenses including the costs to identify and confirm the existence of a suspected release when so instructed by the regulatory program of the PSTD or when such expenses were necessary and appropriate to protect the health, safety and welfare of the public and the environment;" Within the regulations, OAC 165:29-1-11 defines a "suspected release" as "an event has occurred that establishes a reasonable basis to believe a release from a storage tank may have occurred."*

However, OAC 165:27-7-7 (Exclusions from Reimbursement), Item J states:

***"No reimbursement shall be made for costs incurred prior to confirmation of release."***

It appears the confusion surrounding these costs which are incurred prior to confirming a release, stem from a court case decided in 1997, *Cause No. FD-97000001, Applicant - Western Leasing Co.* We noted that Senate Bill 27, which was effective in July 1998, resulted in new language in 17 O.S. §324 A, which stated that these costs would now be paid for by the FUND. However, we note the obvious contradiction between the statutes and regulations pertaining to these costs.

The only applicable guidance document that was provided to us from PSTD management concerning the suspicion of release (SOR) cases was a 1993 document, "Guideline on Approach to Rules, What is a Suspicion of Release?" This guideline only describes what events may cause the OCC (PSTD) to require the tank owner perform a "system check" and a "site check". We were unable to locate any reference in the regulations or within this guideline regarding the specific costs that would be considered reimbursable by the FUND for this type of work.

<b>Total costs questioned in this finding:</b>	<b>\$ 950,499</b>
--	-------------------

*Note: \$562,919 was incurred during the fiscal year ended June 30, 2002*



**FINDING (III. A. 2.): CONTRARY TO 17 O.S. §356, THE REQUIRED ELIGIBILITY APPLICATIONS ARE NOT FILED AND THE DEDUCTIBLE PAYMENTS ARE NOT COLLECTED BY THE PSTD**

The eligibility application required to be filed with every case was not located for the SOR cases we examined that did not become confirmed release cases. Also, the required deductible was not collected by the PSTD for costs associated with those SOR cases. SOR cases are those where the PSTD has approved and paid for costs associated with investigating a suspected release. However, we found no evidence of payment of the required deductible by the "eligible person" for these cases. PSTD management told us that the deductible is not collected until there is a confirmed release. Therefore, there are SOR cases that are opened where a release is never confirmed, thus the required deductible payment is not made by the "eligible person".

We also noted other cases, similar in nature to the SOR cases, where the required deductible was not paid. These cases involve costs paid for backfill work (BF) cases, tank backfill work (TBF) cases, and line backfill work (LBF) cases.

We attempted to identify all SOR cases where no release was confirmed in order to report the amount of required deductibles not collected. Protocol within the PSTD has changed within the last two years making it difficult to tie together the two case numbers (the SOR and the case number associated with the confirmed release). However, the following summarizes the results of our procedures:

Of the 137 SOR cases, we were able to identify 92 cases which never became confirmed release cases. Thus, no deductible was ever collected on these 92 cases. The costs associated with this finding are \$90,261. This amount represents deductibles that should have been deducted from the initial payment(s) to the "eligible person" (this is calculated as the lesser of the \$5,000 required deductible amount or the total expended per case).

<b>Total costs questioned in this finding:</b>	<b>\$ 90,261</b>
--	------------------

*(This amount is also questioned in a previous finding)*

*Note: \$43,691 was incurred in fiscal year ended June 30, 2002*

**FINDING (III. A. 2.): CONTRARY TO 17 O.S. §356, CASE OPENED AS AN SOR CASE THAT IS LATER DOCUMENTED AS A CONFIRMED RELEASE; NO DEDUCTIBLE IS PAID**

SOR-1290 was opened by the PSTD on April 6, 1999 due to the reporting of a suspected release. The circumstances raising the suspected release were that gasoline had leaked from a nozzle during a rainstorm. As the definition of a "suspected release" is one that involves a release from a storage tank (and not the dispensers), this type of event does not appear to fit the definition of a suspected release.

This case was initially closed within a month of reporting the suspected release. However, it was reopened and a release was confirmed over a year later on August 6, 2000. A new case number was assigned 064-2419. However, we noted a memo in the file from PSTD management stating "While it should go through the application process as the Administrator I feel it doesn't make sense to incur another \$1,000 expense by making it go through the process when we know the party who incurred the cost and since the case is already closed. Therefore, apply the payment to SOR-1290." No deductible was collected for this SOR that became a confirmed release.

<b>Total costs questioned in this finding:</b>	<b>\$ 6,647</b>
--	-----------------

*(This amount is also questioned in a previous finding)*

**FINDING (III. A. 2.): TWO SOR CASES OPENED FOR ONE SITE WITHIN 5 MONTHS OF EACH OTHER; NO CASE CONFIRMED**

Two SOR cases (SOR-1319 and SOR-1366) were opened for the same site for the same reason within 5 months of each other. We note these two cases as \$7,889 was paid for "site check" activities with no case ever being confirmed.

<b>Total costs questioned in this finding:</b>	<b>\$ 7,889</b>
--	-----------------

*(This amount is also questioned in a previous finding)*

**FINDING (III. A. 2.): INITIAL RELEASE REPORT IS NOT LOCATED IN THE FILE**

SOR-1419 was opened by the PSTD sometime prior to February 20, 2001. We noted only a letter from the contractor stating that a monitoring well was being installed and sampling completed due to a tank failing a tank test. No confirmed release was reported, however \$9,781 was expended for work on this site.

<b>Total costs questioned in this finding:</b>	<b>\$ 9,781</b>
--	-----------------

*(This amount is also questioned in a previous finding)*

**FINDING (III. A. 3.): CONTRARY TO PSTD GUIDANCE, DEDUCTIBLE PAYMENTS WERE ABSORBED BY CONTRACTORS**

Oklahoma Statutes and the governing Petroleum Storage Tank Division Regulations require that the "eligible person" seeking coverage from the Indemnity Fund must incur the \$5,000 deductible payment. The "eligible person" can satisfy the requirement by having the first \$5,000 of allowable costs deducted from their initial claim to the Indemnity Fund (FUND). (17 O.S. §356 H (1)) states in part:

*"Eligible persons shall be reimbursed from the Indemnity Fund for allowable costs in excess of Five Thousand Dollars (\$5,000)..."*

In addition PSTD Regulation OAC 165:27-7-2 (b) states:

*"The Indemnity Fund Program shall reimburse from the Indemnity Fund an eligible person for allowable costs in excess of Five Thousand Dollars (\$5,000.00)..."*

The PSTD has required applicants and their contractors sign "non-collusion" affidavits to discourage tank owners from profiting from a release through collusion with their contractors (See Attachment 2 for an example of the "non-collusion" affidavit). In recent years, many tank owners have assigned their rights to collect reimbursement from the FUND directly to their chosen contractor. Therefore, the deductible payment for the initial claim submitted on a case is actually deducted from a payment to the contractor. Thus, the tank owner would be required to pay the \$5,000 deductible amount to the contractor. Proof of this payment from the "eligible person" to the contractor was not required by the PSTD nor was it available in PSTD records. However, if the consultant chooses to absorb the deductible, the tank owner has effectively profited from the cleanup process.

**FINDING (III. A. 3.): (Continued)**

The PSTD addressed the issue of consultants absorbing the deductibles in a June 16, 1999 letter to all UST consultants and petroleum storage tank owners. The letter addressed PSTD's policy regarding absorption of deductibles by the underground storage tank consultant. The letter states in part, "a tank owner cannot receive, either directly or indirectly, in advance or otherwise, any part of the money paid to a consultant for an investigation, delineation or remediation, and this includes the UST consultant paying or absorbing all or part of the cost of the deductible." The letter went on to state that should the PSTD learn of someone who violates this provision, the matter would be referred for investigation to the state's environmental crimes task force, the State Attorney General, the O.S.B.I. and the FBI.

During the course of performing our procedures, PSTD management provided us with documentation they had received from a former employee of a contractor (Genesis Environmental Solutions, Inc.). This documentation indicated that the contractor's former employer had frequently not collected the required deductible from tank owners on cases where the case was being accepted by the contractor on assignment. The procedure we performed to address this issue was to identify all cases where an initial claim was received by the PSTD after the date of the PSTD policy letter (June 16, 1999). From this group of cases, we identified cases where the contractor was the payee. A letter was sent to each of the tank owners requesting a copy of the front and back of the canceled check that would have been used to pay the contractor for the deductible. The following are the results of these inquiries:

	<b>Response Provided</b>	<b>No. of Responses</b>
*	The deductible was paid (provided a copy of the canceled check payable to the contractor).	61
	The contractor absorbed the deductible.	12
	A line of credit was established with the consultant and the amount has been paid (provided canceled check).	1
	A line of credit was established by the consultant and no payments have been made.	10
	A line of credit was established by the consultant and partial payments have been made.	5
	The tank owner was going to provide goods or services in lieu of paying the deductible.	4
	Unable to confirm for various reasons.	27
	No response.	40

*Note: We received one response where the responsible party paid the contractor on April 1, 2003. This is approximately 3 years after the first claim was filed by the contractor (Case 064-2231). We have included this deductible amount in the questioned costs below.*

**FINDING (III. A. 3.): (Continued)**

We asked PSTD management about their actions with respect to the specific allegation raised by the former employee. They indicated that they did speak with the owner of the contracting firm involved. They further indicated that they were satisfied with the explanation provided by the contractor and that further actions were not being taken. PSTD management told us that the contractor explained that they frequently issued lines of credit and if the tank owner eventually could not pay it, they wrote it off. We do not see where interest was charged on these lines of credit. **PSTD management's approach to this situation is inconsistent with the June 16, 1999 memo detailing actions that would be taken with respect to this type of allegation.**

Additionally, we noted cases in which tank owners, who were clients of this contractor for which the specific allegation was made, did confirm that they did not pay the deductible. The former employee also provided copies of accounts receivable ledger sheets that indicate that some of these lines of credit have been written-off. Most notable is that there are two large petroleum marketers listed where the deductibles have been on the books for several years.

<b>Total costs questioned in this finding:</b>	<b>\$ 500,000</b>
--	-------------------

**FINDING (III. A. 4.): CONTRARY TO PSTD REGULATION OAC 165:27-1-1 WHICH STATES THE PURPOSE OF THE INDEMNITY FUND PROGRAM, MONIES WERE EXPENDED ON THE COMMUNITY BROWNFIELDS/TANK CLOSURE INITIATIVE**

PSTD management established the Community Brownfields/Tank Closure Initiative, with the first purchase orders issued and paid in January 2002. We requested information regarding this Initiative from PSTD management, including regulations, policies, and procedures. We were provided with an April 2002 internal memorandum from PSTD management regarding payment of Project Management Fees to the cities. In addition, we located a reference to this Initiative in the 2002 Annual Fund Report.

Excerpted from the Annual Report of the Oklahoma Corporation Commission Petroleum Storage Tank Division for the Fiscal Year 2002:

"The national Brownfield's program is designed to clean up derelict, polluted industrial sites and return the site to productive use. The EPA has extended their program into the underground storage tank program and is pressing the states to clean up abandoned storage tank sites. Using its statutory authority to work with other state agencies and local government the Petroleum Storage Tank division has been working in cooperation with municipal governments to assess and if necessary clean abandoned tank sites. The city of Sayre was our pilot project; now done. Six other communities are underway and four more have asked for help. It has been extremely successful from the points of view of all involved and EPA believes it will become the national model for its Brownfield's initiative."

This initiative appears to be without proper statutory authority and contrary to the purpose of the Indemnity Fund as defined in Oklahoma Regulation 165:27-1-1:

**FINDING (III. A. 4.): (Continued)**

*"The Indemnity Fund Program will provide for rehabilitation of as many pollution sites as possible that have resulted from releases of petroleum from storage tank systems. The Indemnity Fund Program will also encourage voluntary corrective action in a manner and to a level of completion, which will protect the public health, safety and welfare and minimize damage to the environment. In order to accomplish these purposes, the Indemnity Fund Program will reimburse allowable costs incurred for corrective action to eligible parties."*

Contrary to OAC 165:27-1-1, the costs incurred are not integral to the rehabilitation of pollution sites from releases of petroleum from storage tank systems. Additionally, the FUND reimbursed costs not incurred for corrective action to eligible parties.

Due to the fact that the majority of the costs incurred are for project management fees to cities, and site assessment work where releases are not truly suspect according to the PSTD guidelines, the initiative does not appear to be entered into to protect the public health, safety and welfare and minimize damage to the environment.

17 O.S. §324 details the types of expenditures that may be paid from the FUND. It states, in part:

*"Monies in the Petroleum Storage Tank Release Environmental Cleanup Indemnity Fund shall only be expended for*

*Reimbursements to eligible persons for eligible expenses including the costs to identify and confirm the existence of a suspected release when so instructed by the regulatory program of the Petroleum Storage Tank Division or when such expenses were necessary and appropriate to protect the health, safety and welfare of the public and the environment. "*

The expenditures that have been paid for this Initiative are not consistent with these statutory requirements.

We noted that within the 2002 Annual Report, the PSTD states that the EPA is "pressing the states to clean up abandoned storage tank sites." The EPA initiative that it appears they are referring to is EPA's USTfields Initiative (Initiative). This Initiative was launched by EPA in November 2000 with the announcement that 10 states had been awarded USTfields Pilot Grants of up to \$100,000 each from the Federal LUST Trust Fund to assess, clean up, and ready for reuse high priority petroleum-impacted Brownfield's sites. EPA defines "USTfields" as abandoned or underused industrial and commercial properties where revitalization is complicated by real or perceived environmental contamination from underground storage tanks. From our review of the USTfields Initiative, EPA is encouraging states to address these "abandoned tank" sites. **However, this has only been in the form of the Pilot Grant programs for which Oklahoma has not applied.** Therefore, while EPA has taken action through this Initiative to encourage redevelopment of "abandoned tank" sites, it has been in the form of their Pilot Grant program. **In addition, we could not locate any EPA mandate or**

**FINDING (III. A. 4.): (Continued)**

**initiative that takes the position that state tank cleanup funds should be used to pay for these site assessments.**

As of February 28, 2003, 8 Municipal Projects were active (however, the PSTD indicated that 16 have actually been initiated), and approximately 69 sites had been assessed, at a total cost of \$1,105,368.

The breakdown of costs is as follows:

Project Management Fees (explained below).....	\$417,000
Site assessment work.....	\$597,863
Tank removal, excavation, building demolition, concrete removal and replacement .....	\$ 56,722
Payment to tank-owner to compensate for loss of usage of well and for the usage of City water.....	\$ 8,000
Work done in conjunction with a suspicion of release.....	\$ 25,783

**Project Management Fee** – PSTD management made payments to the cities involved with the Initiative of \$6,000 per site assessed for a total of \$417,000 through February 28, 2003. We were informed by the management of the PSTD that the payment was for the cities involvement in obtaining "limited power of attorney" from the property owners and to communicate with the people in the city. **These "management fees" are not reimbursable expenses and are clearly not related to correction action. Therefore, we question such amounts paid by the FUND.**

**Non-collection of Required Deductible** – The deductible payment requirement of 17 O.S. §356 H.1. was not met. Of the approximately 69 sites where assessment work had been done through February 28, 2003, \$0 had been collected from eligible persons as required by statute. In order to be eligible for reimbursements from the FUND the party submitting application to the fund must be an eligible person. Reimbursements from the FUND are allowable costs incurred **in excess of the \$5,000 deductible.**

PSTD management referred us to 17 O.S. §307 A.7, which states, in part;

*"The Corporation Commission shall promulgate rules governing storage tank systems. The Commission's rules shall, at a minimum, include the following provisions:*

*Procedures to allow an adjacent property owner whose property has been contaminated by a release to remediate his or her own property under the same requirements as the tank owner or operator responsible for remediating the release".*

This statute allows for adjacent property owners, whose property has been contaminated by a release, to remediate his or her own property. They explained that it is their interpretation that this provides the PSTD with a basis to allow for this Initiative. PSTD management informed us

**FINDING (III. A. 4.): (Continued)**

that their interpretation of this Statute is such that, due to the fact that the cities own the streets and sidewalks, they therefore qualify as an adjacent property owner, thus the potential to be considered an eligible person.

PSTD management also told us that it is their opinion this Initiative is a win-win situation. The PSTD can permanently close abandoned tank sites, and the city gets property back on their tax rolls. It would also seem that the Initiative serves to benefit property owners as well, as they now own a property with a clean bill of health, at no cost to them, as no deductible is being collected by the FUND. We noted that the PSTD issues the property owner a letter stating that the property does not require further action. Some letters, which we located from our file reviews, state that,

*"The PSTD suggests that this letter be recorded with the County Clerk to ensure that any future title search of the subject property will show the assessment results."*

*"It is the opinion of the PSTD that the subject site is suitable for redevelopment."*

Due to the lack of documentation regarding this Initiative, the following is our understanding of the Initiative compiled from discussions with PSTD management and others working in some manner with this program.

- A city approaches the PSTD with a request for assistance in addressing abandoned tank sites in their city, as they are interested in redeveloping those properties to get them back on the tax rolls.
- The PSTD then goes back to the city with a list of sites that the PSTD shows as temporarily or permanently out of service through review of their UST tank registration database.
- The city can add additional sites they know of, that might have UST's that were actually never registered.
- The city then receives \$6,000 per site as a "project management fee". This money is to compensate the city for working with the property owners of these sites in order to gain access to the properties.
- A contractor is selected by the PSTD, unless the city makes the request to utilize the services of a particular consultant.
- The contractor is then issued purchase orders to initially perform limited site assessment work on sites where abandoned UST's are suspected to be located.
- Additional purchase orders are then issued for work scopes beyond limited site assessments.
- None of the deductibles were charged to any property owner, including the cities themselves.

**Total costs questioned associated with this finding:**

**\$ 1,105,368**

**FINDING (III. A. 4.): (Continued)**

Of the 69 sites assessed within the 8 city projects initiated, only 5 sites had been recognized by the PSTD as requiring further investigatory work which resulted in the confirmation of a release and opening a case. As of February 28, 2003, \$0 had been paid for corrective action costs for any of the 5 cases identified under these new case numbers.

In conclusion, it appears that the FUND is paying for the general assessment of sites that are on the PSTD's temporarily out-of-use or historic sites lists, where there has not been a confirmation of a release, nor any reason to believe there is a release on a site, with the stated goal of attaining permanent tank closures. The Initiative does not appear to fit within the purpose of the FUND, and the PSTD appears to be without statutory authority in expending funds for this purpose.

**FINDING (III. A. 4.): CONTRARY TO 17 O.S. §356, COSTS ARE INCURRED BY THE INDEMNITY FUND WITHOUT IDENTIFYING AN "ELIGIBLE PERSON"**

We noted in the City of Altus, two sites (701 West Broadway and 920 Falcon Road) which had a significant amount of additional assessment work contracted (through the municipality project) and completed after the initial assessment work. These two sites came to our attention, as we were informed by a contractor familiar with the sites, **that they were actually two operating service stations**. Although the tank systems on the sites being investigated by the PSTD were "abandoned" many years ago when new tank systems were installed on another part of the property, the sites are both operating with a common owner. In this case, there was a potential qualifying "eligible person" if a release was discovered. However, the assessment work was all done under this Initiative with no cases opened, until much later, and no collection of the required deductibles. These two sites clearly should not have been a part of this Initiative as they were operating stations with a qualifying "eligible owner". After a release was confirmed at these two sites, the owner selected a contractor of their choosing and cases have been opened. The costs associated with work on these two sites, prior to confirming the release is \$36,619, which includes the \$12,000 in city management fees.

From the information provided by the PSTD manager in charge of the program, we found another site located in the City of Sayre (Highway 6 & Highway 283) where a case has been opened and the site was an operating service station. Although we were unable to specifically identify costs on purchase orders associated with work on this site, we question costs to perform assessment work on active operating service stations under this program.

<b>Total costs questioned in this finding:</b>	<b>\$ 36,619</b>
--	------------------

*Note: This amount was questioned in the previous finding*

**FINDING (III. A. 4.): MONIES EXPENDED BY THE INDEMNITY FUND WHEN THERE IS A KNOWN VIOLATION OF THE NON-COLLUSION AFFIDAVIT**

We noted that one city Mayor had received payments from the contractor for subcontracted services in the amount of \$1,442. We noted that the Mayor had signed the eligibility application and the "Tank Owner/Operator's Affidavit of Non-Collusion" (See Attachment #2). The Non-Collusion Affidavit states in part,



**FINDING (III. A. 4.): (Continued)**

*"I have not received any payment of any kind, either directly or indirectly from the Remediation consultant or Remediation consulting firm in this case; and 3. Neither the Remediation consultant or Remediation consultant firm nor anyone subject to their direction or control has agreed to pay me or share with me, directly or indirectly any of the monies to be paid by the Lust Trust Fund or the FUND for investigation, delineation or remediation in this case nor will I accept or retain directly or indirectly at any time in the future any part of the monies paid by the Lust Trust Fund or the FUND for the investigation and cleanup of contamination in this case."*

When we inquired about this from the PSTD manager in charge of this program, we were informed that he was aware of this situation and did not believe this to be an issue.

<b>Total costs questioned associated with this finding:</b>	<b>\$ 1,442</b>
---	-----------------

*(This amount was questioned in previous findings)*

**FINDING (III. B. 1.): STATUTES AND PSTD REGULATIONS CONFLICT REGARDING THE DEADLINE FOR WHICH AN "ELIGIBLE PERSON" CAN RECEIVE REIMBURSEMENT FROM THE INDEMNITY FUND (FUND); PSTD MANAGEMENT'S POLICY REGARDING THE STATUTORY AUTHORITY IMPLEMENTED THROUGH SENATE BILL 27, IS INCONSISTENTLY APPLIED**

As part of our procedures, we reviewed the eligibility application listing maintained by the PSTD Eligibility Officer. We noted the schedule was separated into several categories. One category noted was that of case eligibilities impacted by the adoption of Senate Bill 27 in 1998. This category was further broken down into those for which the PSTD was working the eligibility process and those that were on hold as legal issues were raised by the PSTD in March 2000. PSTD management informed us about litigation surrounding some of these on hold cases presented on this schedule. The following presents the Statutory language along with the language included in the PSTD regulations. It is important to note that it does not appear that the PSTD adopted new regulatory language to incorporate the direction of Senate Bill 27 as it relates to this subject.

Statutory authority is presented within 17 O.S. § 356 O. and states, in part:

*"O. Claims for reimbursement pursuant to the Oklahoma Petroleum Storage Tank Release Indemnity Program must be made within two (2) years of the effective date of this act or two (2) years after site closure, whichever is later. Eligible persons should be encouraged to submit claims for reimbursement as the costs are incurred and in the order they are incurred. However, the right to submit a claim or the time during which to submit a claim for reimbursement shall not be limited or restricted except as provided in this subsection."*

*\*\* For clarification, Senate Bill 27 was effective 7/1/98; therefore, the deadline set for cases where regulatory actions were closed prior to 7/1/96, would be 7/1/00.*

**FINDING (III. B. 1.): (Continued)**

Within the PSTD regulations, OAC 165:27-7-6 (f) states:

*"Any case that has had an application submitted to the Indemnity Fund Program prior to case closure by the appropriate regulatory agency must submit all reimbursement requests within 180 calendar days from the date of such regulatory closure."*

Through the course of conducting our procedures, we noted several cases where, in fact, the PSTD encouraged tank owners ("eligible persons") to reapply to the Fund as a direct result of the new statutory language included in 17 O.S. § 356 O. After review of the file for these cases, it appears that, for a period of about 21 months (July 1998-March 2000) following the passage of Senate Bill 27, the PSTD was proactively encouraging tank owners to resubmit denied claims due to the change in the statutes. In addition, these tank owners successfully gained access to the Fund and have had claims paid.

In March of 2000, PSTD management raised some legal questions regarding the Legislature's authority to change the statutes to allow these time extensions. Applications received after that point in time appear on the Eligibility Officers list as "on hold" due to the legal issues raised by the PSTD. At the conclusion of our fieldwork, this issue has not been resolved.

In addition, we noted that the PSTD has taken issue with the fact that some of the applications filed in June 2000 which are listed as "on hold", did not have "claims" filed with them. The PSTD stated that only eligibility applications were filed with the PSTD. It appears that this second area of conflict stems from an interpretation of terms in both the statutes and PSTD regulations. While the statutes refer to "claims", the PSTD regulations refer to "applications" and "reimbursement requests". As we were unable to locate any definition for the term "claims" within the statutes (17 O.S. § 354 Definitions), we are unable to determine whether or not PSTD management has interpreted and applied the statutes correctly.

However, the PSTD management has a) not adopted rules incorporating the Statutory language included in 17 O.S. § 356 O. and b) they have not consistently adopted and applied a policy, which would be in keeping with the statutory language adopted as a result of Senate Bill 27. There are approximately 30 cases involved in this eligibility dispute. Due to the fact that many of them have not had claims filed with them (only the eligibility application was filed), we are unable to present a dollar amount that is in dispute.

**FINDING (III. B. 1.): CONTRARY TO 17 O.S. § 353, PSTD MANAGEMENT IS MAKING ADMINISTRATIVE APPLICATIONS TO THE FUND, ACTING IN THE CAPACITY OF THE "ELIGIBLE PERSON."**

While querying the PSTD database, we noted approximately 5 cases for which claims, totaling approximately \$843,000, were made to the Indemnity Fund (FUND) whereby the claimant is listed as "Administrative Application." All of these claims were filed starting in April 2002. From further research, we noted that all of the cases appear to be ones in which the LUST Trust Fund (federal monies) had initiated cleanup actions at the sites and funds were expended from those federal monies. We noted that all funds expended from the LUST Trust Fund were reimbursed back to that fund, from the Indemnity Fund, with the exception of the \$5,000 deductible.

**FINDING (III. B. 1.): (Continued)**

17 O.S. § 353 (3) states, in part:

- "3. *Monies in the Indemnity Fund shall only be expended for:*
- a. *reimbursement to **eligible persons** unless duly assigned to another, and*
  - b. *costs incurred by the Indemnity Fund Program for the administration of the fund and costs incurred for the sole purpose of evaluating claims and determining whether specific claims qualify for payment or reimbursement from such Indemnity Fund."*

17 O.S. § 352 (3) defines an "eligible person" as:

- "3. *"Eligible person" means any:*
- a. *owner or operator of a storage tank system who has incurred liability as a result of an eligible release and who meets the requirements specified in Section 356 of this title, or*
  - b. *person who on or after November 8, 1984, purchases property on which a storage tank system is located if:*
    - (1) *the storage tank system was located on the property on November 8, 1984*
    - (2) *such person could not have known that such storage tank system existed. The burden shall be upon such purchaser to show that such purchaser did not know or should not have known of the existence of such storage tank system.*
    - (3) *The owner or operator of the storage tank system responsible for the system cannot be determined by the Corporation Commission or the Administrator, or the owner or operator of the storage tank system responsible for the system is incapable, in the judgment of the Corporation Commission, of properly carrying out any necessary corrective action, and*
    - (4) *Either, funds are unavailable from the Oklahoma Leaking Underground Storage Tank Trust Fund or the storage tank system is not eligible for corrective action taken pursuant to Section 365 of this title."*
  - c. *person who acquired ownership of a tank through inheritance as denoted in an Order Allowing Final Account and Determination of Heirship and Decree of Final Distribution or is responsible for a release by reason of owning the real property through inheritance within which a tank or a release is or was located if:*
    - (1) *the storage tank system of the release was located on the real property on November 8, 1984,*
    - (2) *the operator of the storage tank system responsible for the system cannot be determined by the Corporation Commission or the Administrator, or the operator of the storage tank system responsible for the system is incapable, in the judgment of the Corporation Commission, of properly carrying out any necessary corrective action,*

**FINDING (III. B. 1.): (Continued)**

- (3) *either, funds are unavailable from the Oklahoma Leaking Underground Storage Tank Trust Fund or the storage tank system is not eligible for corrective action taken pursuant to Section 365 of this title,*
- (4) *the person did not participate or was not responsible in any manner, directly or indirectly, in the management of the storage tank system or for the release and otherwise is not engaged in petroleum production, refining or marketing, and*
- (5) *the person meets the requirements specified in Section 356 of this title."*

From the definitions provided, the PSTD does not qualify as an "eligible person."

<b>Total costs questioned in this finding:</b>	<b>\$ 843,000</b>
--	-------------------

**FINDING (III. B. 2.): CONTRARY TO PSTD POLICY, CONTRACTOR PAID FINES LEVIED AGAINST THE TANK OWNER FOR NON-COMPLIANCE WITH PSTD REGULATIONS; "ELIGIBLE PERSON'S" SIGNATURE IS NOT PROVIDED ON ELIGIBILITY APPLICATION OR CLAIM FORMS.**

During our review of one of the eligibility applications selected for review (064-2546), we noted that the contractor actually paid a \$1,000 fine levied by the PSTD against the tank owner for non-compliance with PSTD regulations.

While absorption of compliance fines by a contractor remediating a site is not specifically prohibited by statute, regulation, or guideline, it does appear to violate the PSTD's policy which discourages contractors from giving monies associated with a cleanup to the tank owner responsible for the cleanup. In a letter to all UST consultants and petroleum storage tank owners dated June 16, 1999, PSTD management stated "a tank owner cannot receive, either directly or indirectly, in advance or otherwise, any part of the money paid to a consultant for an investigation, delineation or remediation, and this includes the UST consultant paying or absorbing all or part of the cost of the deductible." Absorption of a fine by the UST consultant appears to fall within the intent of this PSTD policy. Through discussions with PSTD management, this policy was adopted so as to ensure that there were no financial incentives for tank owners to cause releases.

<b>Total costs questioned in this finding:</b>	<b>\$ 1,000</b>
--	-----------------

**FINDING (III. B. 2.): TANK OWNER WHO FILED AN ELIGIBILITY APPLICATION WITH THE INDEMNITY FUND INCORRECTLY INDICATED ON THE APPLICATION THAT THERE WERE NO INSURANCE POLICIES FOR THE RELEASE**

Question Number 7 from the Indemnity Fund Application asks "Is there any insurance policy which would cover or contribute to the cost of cleaning up the property? If yes, please attach a copy of the policy." We reviewed Case 064-2624. The answer to the question on the form was marked "No". However, further in our review we noted that the applicant actually held an insurance policy with the Farm Bureau for which a claim was made. It does not appear that there was a duplication of payment by the Farm Bureau and the Indemnity Fund, therefore there are no questioned costs associated with this finding.

**FINDING (III. B. 2.): CONTRARY TO 17 O.S. § 356 H., THE "ELIGIBLE PERSON" IS GRANTED A "WAIVER" FROM PAYING THE REQUIRED \$5,000 DEDUCTIBLE**

We noted that case 064-2625 involves a site owner where a release is discovered on their property. We did not locate any documentation in the PSTD file that would indicate if PSTD management had taken the steps of determining whether or not the property owner qualified as an "eligible person" as defined in 17 O.S. § 352 (see statutory language in previous finding in this section.) We further noted in our review of the eligibility application, that PSTD management wrote a memo (June 4, 2002) creating a new policy regarding the definition of an "eligible person" versus an "impacted property owner." We noted no definition within the statutes or regulations as to who or what an "impacted property owner" is.

However, the memo uses analogies to demonstrate that an "impacted property owner" means a property owner whose property is impacted by a release from another property. Furthermore, PSTD management further states that "an impacted property owner does not have to pay a \$5,000 deductible". We located no statutory or regulatory authority that allows the PSTD to waive deductibles for an "eligible person", let alone this new category of "impacted property owner".

Within the memo written by PSTD management, another new policy is created hereby allowing a property owner, where a release is detected to have originated, to now be called an "impacted property owner" for the purpose of waiving the \$5,000 deductible.

17 O.S. § 352 defines an eligible person (see statutory language in previous finding in this section).

Furthermore, 17 O.S. § 356 H. states:

*"Eligible persons shall be reimbursed from the Indemnity Fund for allowable costs in excess of Five Thousand Dollars (\$5,000) but not more than..."*

Based upon this statutory language, we question not only the deductible waived on this site, but all other cases where this policy may have been employed. Additionally, in other findings in this Schedule, we have identified other types of cases in which the required deductibles have been waived (Suspicion of Release (SOR) cases & "Municipality" cases).

<b>Total costs questioned with this finding:</b>	<b>\$ 5,000</b>
--	-----------------

In addition to the case in the previous finding, we located, through a query of the PSTD database, 13 additional cases where an initial claim has been filed (that are not SOR or "Municipality" cases) where the required deductible has not been collected.

<b>Total costs questioned in this finding:</b>	<b>\$ 65,000</b>
--	------------------

### FINDING (III. B. 3.): FEDERAL LUST TRUST FUND DOCUMENTATION

The PSTD receives monies from the Federal LUST Trust Fund annually. After a review of the process employed by the PSTD for management of these funds, we determined that as a matter of present policy, most cases originally made part of the LUST Trust program are now made eligible for the Indemnity Fund (FUND) with only the \$5,000 deductibles being absorbed by LUST Trust dollars.

We reviewed EPA's requirements concerning use of Federal LUST Trust Fund dollars. The first guideline noted by EPA is that the State should "first seek to identify the owner or operator and direct him to perform the cleanup at his expense. A State should only rely on Trust Fund dollars to clean up a site when they cannot identify a responsible tank owner or operator who will undertake corrective action properly and promptly."

We noted that within the last 2 years, PSTD has made several policy decisions affecting Fund eligibility. These policy decisions effectively allow those that would otherwise not be considered an "eligible person" by definitions included in both Oklahoma Statutes and PSTD regulations, to now be deemed an "eligible person" and thus seek recovery of all cleanup costs from the Indemnity Fund, with the LUST Trust Fund only absorbing the required deductible. One such policy decision is noted as follows (from a PSTD management internal memorandum):

*February 1999: "For tanks out of service prior to November 8, 1984, the 'last operator' of the tanks is now deemed to meet the regulatory requirements of OAC 165:27-3-2. With this policy changes, current owners of property with releases where the tanks were not used after November 8, 1984, could secure a Limited Power of Attorney from the 'last operator' as opposed to the owner of the tanks when they were last in use."*

The second guideline noted by EPA is concerning cost recovery from tank owners or operators who are liable for the clean up. EPA's guidelines states, in part:

*"Solvent responsible parties (RPs) are expected to undertake and pay for corrective action, either voluntarily or in response to corrective action orders. The level of financial responsibility required to be maintained by owners and operators is not a limitation of their liability. When a release is discovered, States should first seek to identify the tank's owner or operator and direct him to perform the cleanup at his expense. Where time and circumstances permit, States should pursue RP cleanups through enforcement mechanisms. States may rely on the Trust Fund for cleanups when they cannot identify an RP who will undertake action properly and promptly."*

In our review of two of the LUST Trust cases (064-1252 and 064-2293) we were unable to locate any documentation regarding PSTD's determination as to their "ability to pay", which is one of the LUST Trust requirements for an applicant receiving Federal LUST Trust dollars. However, PSTD management told us that they do make it their policy to send field inspectors out in order to try to determine, through observance of the Responsible Party, their ability to pay. We present this finding for informational purposes only as we are unable to determine, without seeking a legal opinion regarding use of Federal LUST Trust monies, if the actions taken by the PSTD were appropriate.

### **FINDING (III. C.): LACK OF INTERNAL CONTROLS WITH RESPECT TO ISSUANCE OF PURCHASE ORDERS.**

In the course of conducting the procedures, we noted that the PSTD database used to track all purchase orders, claims and payments was not protected from data input into key fields such as the purchase order number fields. This would allow any user with access to this area in the database, to change these fields. We were informed that one of the accounting managers was responsible for data entry, including issuance of a purchase order number. PSTD management stated that, while they were unaware of this problem, they felt other controls (such as separation of duties with the hydrologist approving the work scopes and costs and the accounting manager entering the approvals) were sufficient.

We note this finding for informational purposes and suggest corrective action to strengthen internal controls.

### **FINDING (III. D.): PSTD CONTRACTOR SELECTION PROCESS**

Within the statutes and PSTD regulations, one commonality is that it is the "eligible person" who is seeking eligibility and payment from the Indemnity Fund (FUND) for corrective action costs and therefore, it is the "eligible person" who makes the selection of a contractor to perform site remediation. In discussions with PSTD management, we were told that the PSTD does not have the equivalent of a state lead cleanup program, in that contractors are selected by the "eligible person" and not by the PSTD. Additionally, we did not locate any reference to a state lead program in the statutes or the PSTD regulations.

During the course of performing our procedures, we noted that many times the PSTD has made contractor selections. This occurred, for example, when a claimant to the Fund was unwilling to make a selection, and it also occurred during the municipality projects. Through discussions with PSTD management, we learned that in the past, the PSTD simply selected a contractor on a basis that was not scientific. We inquired whether there was a requisition or bid process that took place for this work or if there was an approved contractor list used. We were told that, due to the fact that there were no provisions for a state lead type of contract, that the process for selection, had in the past, been somewhat subjective.

PSTD management informed us that the PSTD was working on developing and implementing a system for contractor selection that they felt would be less subjective. The process included development of a questionnaire, which when totaled and averaged, would produce a ranking system for the PSTD to follow. We were told that the hydrologists who actually reviewed and approved the work scopes and costs submitted by the contractors, were the PSTD employees who would be completing this questionnaire. During the course of our engagement we obtained several versions of this ranking system as they were testing it. We were told that there were no guidance or policy documents on the system as it was still being developed and tested.

We noted that the PSTD had selected the contractors on the majority of the "Municipality projects". Many of those chosen did fall into the top 5 on the contractor ranking list we reviewed. However, the first "Municipality project" was awarded to a firm ranked in the bottom 50% of this list. Therefore, we were uncertain as to the timeframe in which the list was employed or the manner in which it was employed.

We note this finding for informational purposes and suggest that the selection process be formalized and be made clearly objective.

**FINDING (III. E.) DOCUMENTATION REGARDING EPA GRANT FOR GEOPROBE EQUIPMENT**

The PSTD was able to secure an EPA grant for the purchase of Geoprobe equipment. This piece of equipment is currently utilized by the PSTD in order to perform confirmatory sampling on soil and groundwater. We noted that the equipment was utilized by the PSTD within the PFP program and within the Municipality projects. We specifically noted that the equipment was utilized on a PFP case in which there has arisen a dispute regarding the assessment of the plume prior to initiating the PFP contract. (See FINDING (IV. A. 3.)

**FINDING (III. F.): REAL ESTATE IS PURCHASED BY THE INDEMNITY FUND AS PART OF A THIRD PARTY LIABILITY SETTLEMENT; PROPERTY IS LATER DONATED TO THE COUNTY.**

We noted a facility which had two releases reported. The first release was confirmed in 1988 and made eligible for the Indemnity Fund (FUND) in 1997. A second release was confirmed at the site in 1996 and also made eligible for the FUND in 1997. In late 2001, it was determined by PSTD management that two pieces of adjacent real estate would need to be purchased in order to effect cleanup at the site, which included a large dig and haul process of removal of contaminated soils.

In January 2002, two pieces of real estate were purchased from "adjacent property owners". Each parcel of property was purchased for \$140,000. It was noted that the property was purchased in order to allow for excavation of the site where the release occurred.

We further inquired as to the disposition of the real property and were told by PSTD management, that the real property had been deeded over to the county in order to provide parking for a local school.

While we noted that the PSTD does have statutory authority to enter into settlement agreements in order to resolve these third party disputes, we were unable to locate statutory authority for the donation of the real property purchased as opposed to selling the subject property and recovering funds for the FUND.

<b>Total costs questioned in this finding:</b>	<b>\$ 280,839</b>
--	-------------------



## AGREED-UPON PROCEDURE

### IV. *Procedures regarding the encumbrances, cash balances, and future liability of the Indemnity Fund.*

#### A. *Encumbrances*

1. *Schedule the encumbrance balances of the Indemnity Fund for each month for the fiscal year ended June 30, 2002.*
2. *Review all amounts encumbered for "pay for performance" contracts over \$300,000 and all pre-approval amounts over \$50,000 and 20 additional amounts encumbered, using the systematic approach (every nth claim), at June 30, 2002 and perform the following:*
  - a. *Compare to the applicable purchase order(s) and extrapolate the results to the entire population of claims encumbered as of June 30, 2002.*
  - b. *Compute the number of days between the date the contract was submitted/approved and the date the work was performed.*
  - c. *Verify that payments made between July 1, 2002 and December 31, 2002 were properly reflected in the encumbrance balance as of December 31, 2002.*
  - d. *Provide schedule of the aging of encumbered amounts at June 30, 2002.*
3. *Randomly select 12 "pay for performance" contracts entered into during the Fund's history and compare all contracts, milestone payments and other relevant data related to the cleanup process on the site.*
  - a. *Engage a specialist to review all technical documentation to verify, solely through documentation, contamination levels at the start of the cleanup, milestone payments, warranty period, and at closure.*
  - b. *Perform additional procedures, as necessary to document actions taken with respect to these contracts.*
4. *Compare each claim paid during first two months of the fiscal year ending June 30, 2003 to the amount encumbered at June 30, 2002.*

*IV. Procedures regarding the encumbrances, cash balances, and future liability of the Indemnity Fund. (Continued)*

*B. Cash balances*

- 1. Obtain copies of monthly bank reconciliations of the Indemnity Fund cash balance at the end of each quarter for the fiscal year ended June 30, 2002 and perform the following:*
  - a. Confirm the bank balance.*
  - b. Test the clerical accuracy of the bank reconciliation and detail supporting schedules, if applicable.*
  - c. Trace deposits in transit and outstanding checks per the bank reconciliation to the subsequent bank statement and determine the time period between book and bank recording.*
- 2. Confirm the balances of all Indemnity Fund certificates of deposit at the end of each quarter for the fiscal year ended June 30, 2002.*
- 3. Recalculate the "maintenance level" at the end of each quarter for the fiscal year ended June 30, 2002 and compare it to the total cash balance of the Indemnity Fund.*

*C. Future liability*

- 1. Inquire of the PSTD's fund administrator as to pending litigation and settlement agreements.*
- 2. Verify, that lawsuits/settlement agreements entered into were done so with the appropriate parties seeking recovery from the Fund.*

**FINDINGS RELATED TO IV.**

**FINDING (IV. A. 1.): MONTHLY ENCUMBRANCE BALANCE SCHEDULE**

Month End	\$
Jul-01	15,550,849
Aug-01	15,169,755
Sep-01	14,950,742
Oct-01	14,016,346
Nov-01	13,778,852
Dec-01	15,896,530
Jan-02	17,594,546
Feb-02	18,463,062
Mar-02	18,785,961
Apr-02	18,630,931
May-02	16,794,529
Jun-02	16,270,539

This finding is for informational purposes only.

**FINDING (IV. A. 2. a., b., c.):**

There were no findings related to these procedures.

**FINDING (IV. A. 2. d.):**

As of June 30, 2002, \$16,270,539 was encumbered by the PSTD related to purchase orders and PFP contracts issued by the PSTD. We further noted that the PSTD issued purchase orders, and encumbered amounts, for cases which were reported, however, it was not yet eligible for the fund or there had not been an eligibility application filed with the fund to gain fund coverage.

The following is a breakdown of the encumbrance amounts:

Aging schedule	Total Encumbrance Amount	Less than 180 days	180-365 days	1 year - 2 years	2 years - 3 years	Greater than 3 years
Eligible cases	\$15,830,272	\$8,404,073	\$1,485,337	\$2,312,783	\$1,120,978	\$2,507,101
Ineligible cases	\$440,268	\$299,585	\$92,323	\$48,360		

This finding is for informational purposes only.

## **FINDING (IV. A. 3.):**

### **PfP Contracts**

Since 1997, the PSTD has entered into 76 "Pay for Performance" (PfP) contracts totaling approximately \$21.5 million, for which the Indemnity Fund (FUND), as of June 30, 2002, had paid out approximately \$14 million. We reviewed 12 PfP contracts within the scope of our engagement. The procedures included not only a financial review of the contract and payments made, but it also included a technical review of the remedial actions undertaken. In order to complete this technical review, we engaged the use of a Professional Engineering Firm, which was approved by the State Office of the Auditor and Inspector.

The nature of the findings below calls into question the PSTD's management of the PfP contract process. The manner in which the contracting process has worked has allowed for contractors to receive large portions of the contracted amounts in advance of reaching goals commensurate with these payments. In addition, we found instances of potential fraud and abuse. As these findings are significant, the following background information is provided.

### **Background Information**

With the passage of Senate Bill 27, known as the "Petroleum Storage Tank Regulation Act", in mid-1998, the Indemnity Fund became authorized to enter into contracts for site remediation or corrective actions on a performance basis. Rules were promulgated within OAC 165: 27-7-10. Additionally, OAC 165: 27-7-9, states that the two new programs adopted by Senate Bill 27, the pre-approval purchase order program and the Pay-for-Performance (PfP) program, are mandatory for all scopes of work performed after December 31, 1998, with certain exceptions (such as work scopes that are less than \$2,500 and initial response actions). Petroleum Storage Tank Division (PSTD) employees told us that currently their policy is to require PfP contracts be established for any site for which a remediation system is contemplated and warranted.

The concept of the PfP contract process is to effectively negotiate the amount that will be paid for cleanup of a site to a specific acceptable level of cleanup. The contractor that successfully negotiates a PfP contract is then paid this negotiated price in installments, known as milestone payments, based on their performance in cleaning up the site. As certain levels of cleanup are achieved, as measured by laboratory analysis performed on the groundwater and soil on the site (dissolved phase concentrations) and by a reduction in the thickness of free product, milestone payments are made to the contractor. Therefore, contracts are structured to establish baseline contamination levels on site before implementing the approved corrective action plan (i.e., activation of a remediation system). It is this baseline contamination level that all reductions of both free product and dissolved-phase concentrations of petroleum products are measured against in order for the contractor to receive milestone payments for achieving certain percentage reductions in the contamination levels as specified in the contract. The desired cleanup levels for each site are established through the Oklahoma Risk Based Contamination Assessment (ORBCA) process and are set forth in a document, which is approved by the PSTD. The acceptable levels of contamination for a site are established prior to proposing a corrective plan and are known as Site Specific Target Levels (SSTLs) for both absorbed-phase and dissolved-phase concentrations, which are soil and groundwater contamination, respectively. In addition, free product must also be reduced to levels established in the contract.

#### **FINDING (IV. A. 3.): (Continued)**

The critical components of a PfP contract that drive all of the remaining payments beyond the purchase and installation of equipment are:

- selection of key monitoring wells that will best represent contamination levels on the site (the key monitoring wells are selected by the PSTD),  
(The sampling results of the key monitoring wells are used for both the baseline and milestone payment calculations.)
- the accuracy of the baseline sampling data,  
(Inaccurate baseline data can make milestone payments easier to achieve.)
- the calculation of the average normalized baseline concentration levels for the site as a whole,  
(The manner in which this is calculated can allow contractors to receive milestone payments sooner than when the goal commensurate with that payment is actually reached.)
- the accuracy of all sampling data taken at different intervals when a contractor is requesting payment for attaining a certain level of cleanup,  
(Inaccurate laboratory data may result in achieving milestone payments before the level of cleanup is actually accomplished.)
- and the accuracy of sampling data from all wells at the end of the remediation process.  
(Allows for final payment to the contractor and the completion of the contract.)

The process by which these contracts are entered into begins when a contractor proposes to complete remediation at a facility through a PfP contract. In Oklahoma, the negotiation process for the price of the project begins with a cost analysis utilizing TankRACER software, a software tool the PSTD has adopted in estimating costs associated with cleanup of petroleum impacted sites. Then, an informal negotiation process begins between the PSTD staff and the contractor, regarding the overall cost of the project. This cost may, or may not, be broken into two components; the purchase and installation of equipment and the actual performance part of the contract, which encompasses operating and maintaining the remediation equipment. After the contract terms are negotiated, the key monitoring wells are selected by the PSTD and a PfP contract is entered into between the responsible party (RP), the contractor selected by the RP, and the PSTD. Following execution of the PfP contract, the approved corrective action plan is implemented and the remediation equipment is purchased and installed. Baseline sampling data is then collected within two weeks of system activation.

While the PSTD utilized a standard contract format, this contract evolved over time. Some variables noted in the contracts were:

- some contracts include the purchase and installation of the equipment with the performance contract, while others allow the equipment and installation costs to be approved and paid by the purchase order system,
- length of contract term,
- and whether the applicant (site owner) or contractor owns the equipment used on the site at the completion of the cleanup process.

### FINDING (IV. A. 3.): (Continued)

Upon review of the PfP contracts, we noted only one type of nonperformance penalty with which a contractor could be penalized. Within most contracts we reviewed, the following is stated:

*"Any contractor or any consulting firm in which he is a principal abandons site remediation activities as provided in this contract before requesting and receiving the final payment under the terms of this contract, or who in any other manner materially breaches the terms of this contract shall be prohibited from entering into another pay for performance contract or purchase order with the Indemnity Fund for a period of three (3) years."*

We further noted that the contractor has the ability to walk away from a site once the contract period is completed and can discontinue remedial actions even if remedial goals have not been met. We found that a contractor can secure additional PfP contracts, even though they do not complete their performance on previously negotiated contracts. Through the combination of findings below, it became evident that contractors were receiving the majority of their contract amounts (80%) without sufficient incentive to achieve their overall cleanup goals. In addition to the 12 PfP contracts we reviewed as part of this engagement, we did note that there are many PfP contracts where significant portions of the contracts have been paid out where the cleanups appear to be stalled due to the contractors' inability to achieve further cleanup.

For purposes of clarity in our findings, we have grouped the findings as follows:

- Equipment Issues
- Baseline Sampling Issues
- Milestone Payment Issues
- Key Well Issues
- Encumbrance Issues

### **PfP CONTRACT FINDINGS**

#### **EQUIPMENT ISSUES**

**FINDING: CONTRARY TO OAC 165:27-7-6, THE BID REQUIREMENT WAS NOT FULFILLED - OF THE 12 PFP CONTRACTS TESTED THERE WAS NO BID DOCUMENTATION ON FILE AT THE PSTD**

According to OAC 165:27-7-6:

*"Corrective action taken as a result of an eligible release other than in an emergency shall be made by competitive bid of **at least two (2) bidders**. Acquisition or contracts or subcontracts for corrective action or for labor or **equipment** which exceed \$2,500 from any one vendor or subcontractor for any one site shall be awarded to the lowest and best bidder. Professional engineering, geological, land surveying and other professional services or services provided by a Corporation Commission certified underground storage tank contractor required for investigation and the preparation of corrective action*

**FINDING (IV. A. 3.): (Continued)**

*plans or proposed corrective action plans and oversight of corrective action shall be selected based upon professional qualifications and technical experience of the contractor at a fair and reasonable negotiated fee." In addition, OAC 165:27-7-6 (b) states "The Indemnity Fund Program requires proof of such competitive bidding."*

Through interviews with both contractors and with PSTD staff, we were told that the PSTD did not request bid information as part of their PfP contract negotiation process.

This regulation requires the contractor to obtain bids for equipment in order to be reimbursed by the FUND and that the PSTD would require that these bids be provided to establish a reasonable cost for the remediation equipment. It was explained to us that it was common that the PSTD would not obtain the bids from the contractors. However, due to the nature of the PfP contract, the process allowed for negotiation of this equipment price. The PSTD instead utilizes a software package, TankRACER, to establish reasonable rates for equipment purchase rather than the competitive bid process.

We reviewed 3 PfP contracts covering 4 sites in one area. We found that 3 systems were purchased and installed on these sites. After a review of the site conditions and the levels of contamination on these sites prior to the PfP contract process and prior to system activation, we found that the remedial systems designed seemed inconsistent with the levels of contamination found on these sites and the magnitude of the plume. In fact, **two of the sites covered by two of the contracts, achieved their cleanup goals prior to system activation** and the other two sites achieve their goals within 6 months.

A total of \$897,806 was expended for equipment and installation on these sites.

The statutes and regulations do not address ownership of equipment utilized in the cleanup of sites. In an agreed-upon procedures engagement conducted by Grant Thornton, LLP (GT) in late 1994, the equipment issue was raised as part of an allegation and reportedly was addressed by GT procedures. Within the report, GT stated in their findings that "The Fund adopted a policy for control of equipment used on remediation sites in May, 1993....If remediation equipment must be purchased and the equipment is over \$2,500, then competitive bids must be obtained from three vendors and all bids must be certified as "True and Correct" by the vendor. Reimbursement for the equipment will only be made from an original invoice containing a description and serial number of the equipment." GT went on to state that they were able to review a list containing serial numbers and did not note instances where the same equipment had been purchased twice by the Fund. **We asked about the current equipment policy and were told that this list is no longer maintained by the PSTD, and the equipment purchases are not tracked.**

The issue of ownership of the equipment paid for by the PSTD for these PfP contracts vary contract-by-contract. In general, early contracts that were entered into (1996 – 1998) stated that the equipment would be the property of the applicant at the completion of the contract. Starting some time in 1999, the majority of the contracts appear to be silent on the subject of equipment ownership. **On February 14, 2000, PSTD management issued a letter that states that the equipment should not be the property of the applicant, but should be the property of the contractor** (we cannot confirm who received this letter as the copy provided to



**FINDING (IV. A. 3.): (Continued)**

us by the PSTD was addressed to one contractor and not all). Thus, **after February 14, 2000 it became possible for equipment to be used more than once, and effectively paid for by the FUND more than once.** Some of the equipment (purchase and installation) is purchased through a purchase order and not through the PfP contract itself. As the PSTD is paying for equipment that has some useful life beyond the original cleanup it is purchased for, the current policy allows for the PSTD to pay for equipment twice. **The combination of this policy with the policy of not requesting bids for equipment allows for an excessive amount of money to be charged to the FUND for equipment, with the potential that the equipment is actually used equipment that is paid for by the FUND more than one time** (See specific case in the following finding)

The potential costs associated with the above policy deficiencies when extrapolated over 53 PfP cases (at June 30, 2002) utilizing an average cost per system (the average of the 12 PfP contracts we reviewed) is \$13,462,000.

<b>Total costs questioned in this finding:</b>	<b>\$ 13,462,000</b>
--	----------------------

*(Some of this amount is also questioned in other findings)*

**FINDING: CONTRARY TO OAC 165:27-7-6, THE INDEMNITY FUND PAID AMOUNTS FOR NEW EQUIPMENT, HOWEVER, USED EQUIPMENT WAS INSTALLED BY CONTRACTOR - THE PSTD PAID FOR EQUIPMENT COMPONENTS (AT NEW EQUIPMENT PRICES) THAT WERE PREVIOUSLY PAID FOR AND UTILIZED AT OTHER INDEMNITY FUND SITES**

We found one instance in the 12 PfP contracts we reviewed, where the equipment negotiated and purchased through the purchase order system was thought to be new equipment, however **used equipment components were installed by the contractor (064-2198).** A former employee of a contractor informed us that they had first-hand knowledge of **equipment being moved from one site to another.** After reviewing the file and photographs of the equipment, it was apparent that used remediation equipment was utilized on this new PfP contract. **The equipment costs on this site (including installation) totaled \$288,325** purchased in fiscal year 2002. The PfP contract negotiated on this site had equipment costs (purchased through the preapproval program) that were approximately 60% of the total cost of the PfP cleanup, which was one of the highest noted through the course of our procedures. Therefore, at least some portion of the \$288,325 expended for equipment and installation on this site, was previously reimbursed to the same contractor on a prior PfP contract.

We discussed this issue with PSTD management who responded that even if used equipment is utilized and paid for twice, because these are PfP contracts, the PSTD will not pay for equipment maintenance or replacement if used equipment becomes inoperable and must be replaced. The PSTD, in negotiating the cost of the equipment/installation and the performance portion of the cleanup itself, does so under the assumption that the equipment that is actually installed will be what is specified in the equipment specifications. We also found that most of the PfP contracts do not include the purchase of equipment. Equipment and installation charges are paid for separately in a purchase order and are not a part of the PfP contract itself.

<b>Total costs questioned in this finding:</b>	<b>\$ 288,325</b>
--	-------------------

*Note: \$288,325 was paid during the fiscal year ended 6/30/02.*

**FINDING (IV. A. 3.): (Continued)**

**FINDING: REMEDIATION EQUIPMENT PURCHASED AND INSTALLED (THROUGH THE PURCHASE ORDER SYSTEM) IS SUBSEQUENTLY RENDERED USELESS BY THE CONTRACTOR DUE TO DIFFERENT TECHNOLOGY ATTEMPTED AFTER THE EQUIPMENT WAS INSTALLED.**

Remediation on case 064-1305 was entered into through a PFP contract in September 1999 for \$363,000. This amount was in addition to the **\$390,000 that was negotiated and paid for by the PSTD for the equipment and its installation.** No PFP milestone payments have been made on the site. We discussed this case with the PSTD hydrologist in charge of the project.

The equipment was purchased and installed in March 2000. In August 2000, the contractor discontinued operation of the existing remediation system in favor of utilizing a Fenton's Reagent injection (a relatively new technology). The PSTD hydrologist currently managing this case informed us that PSTD management was aware of the injection at the time, however, a formal request and approval was not noted in the file. Thus, only 6 months after activating the system, the system was turned off in order to perform the injection. The treatment was not effective, as average concentrations have actually increased by approximately 25% and are still elevated at the conclusion of our fieldwork. Due to the nature of this technology (Fenton's Reagent), the initial technology approved and installed at the site was rendered inoperable due to underground piping being ruptured during the injection process.

A report in the Spring of 2001, submitted by the contractor, stated that the piping was repaired and the system was reactivated. However, we did not find mention of certain items such as activation date and run-times that normally would be mentioned in the quarterly reports submitted to the PSTD by the contractor. The PSTD hydrologist in charge of the project said that he doubted the system was ever reactivated.

In February 2003, the PSTD utilized their own Geoprobe equipment to complete further plume delineation as they indicated that the assessment of the plume might not have been accurate. (We question the amount expended for this as well, which is the time and expenses associated with the Geoprobe and the \$1,440 associated with laboratory analysis, as the contractor, as part of their PFP contract, should have incurred these costs, NOT the FUND). The contractor that performed the plume delineation (site assessment) is the same company who negotiated the PFP contract. While quarterly sampling has continued to take place at this site since the failure of the Fenton's Reagent activities, it appears that the contractor may have discontinued operation of the remediation system or reduced efficiency due to the damage caused by the injection process, thereby effectively abandoning site remediation. There is no documentation in the file of any type to indicate that the PSTD has made an attempt to collect any of the costs associated with the \$390,000 equipment/installation from the contractor. There are no records of site visits conducted by PSTD staff confirming system operation. Therefore, we additionally question the ability of this contractor to still contract new PFP's (which they have been able to) in light of this site and the contractual exception of site abandonment.

<b>Total costs questioned in this finding:</b>	<b>\$ 391,440</b>
--	-------------------

*Note: \$390,000 was paid in 4/2000  
\$1,440 was paid in 2/2002*

**FINDING (IV. A. 3.): (Continued)**

**BASELINE SAMPLING ISSUES**

**FINDING: CONTRARY TO PfP CONTRACT TERMS, PAYMENTS HAVE BEEN MADE ON CONTRACTS WHERE THE BASELINE DATA WAS NOT ESTABLISHED ACCORDING TO THE TERMS OF THE PfP CONTRACT.**

We reviewed each of the 12 PfP contracts to determine the requirements for establishing the critical "baseline" sampling data for which payments would be measured against. While all of the contracts required the "baseline" sampling data to be taken from the "key monitoring wells" which are selected by the PSTD "within the two weeks prior to system activation", we noted 6 of the sites were tested outside of this time period (either more than two weeks prior or after system startup.)

The effects of not sampling and establishing baseline contamination levels within the specified contractual timeframe time can vary. If samples are taken far in advance of the system installation, and the contamination levels go down significantly, the contractor may be compensated for performance they did not achieve. If samples are taken after a system is activated, the contamination concentrations may be lower and the contractor may not receive credit for performance they achieved. We question all costs associated with these 6 cases as the critical baseline sampling was not performed as specified in the contract.

<b>Total costs questioned in this finding:</b>	<b>\$ 2,217,159</b>
--	---------------------

*Note: \$175,579 paid in FY 6/30/02  
 \$1,006,999 paid in prior fiscal years)  
 \$273,356 paid in FY 6/30/03  
 \$761,225 amounts still encumbered at conclusion of field work.  
 (Some of this amount is also questioned in other findings)*

**FINDING : BASELINE SAMPLES DRAWN APPEAR TO BE SUBSTANTIALLY ELEVATED AS COMPARED TO PRE-BASELINE SAMPLES AND POST-ACTIVATION SAMPLES.**

Baseline samples drawn by the contractor on one PfP site (064-1728), appear elevated based on historical analytical data for the same wells and post-system activation analytical data. The contractor was able to achieve 100% of their goal on the site within 5 months of system startup.

Key Wells (064-1728)	% Change in Baseline Concentrations vs. 3 Months Prior to Baseline	% Change of Baseline Concentrations After 1-Month of Operation
MW-1	-32%	514%
MW-2	238%	-97%
MW-3	-3%	-79%
MW-7	-55%	-94%
MW-15	18%	-92%
MW-16	69%	-100%
MW-17	163%	-100%

**FINDING (IV. A. 3.): (Continued)**

It can be noted from this illustration, 3 key monitoring wells (MW-2, MW-16, MW-17) had readings at baseline that are **significantly higher than they were three months prior to the baseline event**. In addition, **after only one month of system operation, the readings on all but one well, fall to almost 100% cleanup levels**.

We noted that the samples drawn to support the final payment (December 2001) were taken from 3 key wells that did not appear to have enough water in the wells to collect representative samples (based on liquid level measurements completed on 12/23/01 and also based upon the screen intervals). This would result in the potential for a misrepresentative sample to exist.

<b>Total costs questioned in this finding:</b>	<b>\$ 364,658</b>
--	-------------------

*Note: \$291,726 was incurred in fiscal years prior to 6/30/02  
\$ 72,932 was incurred in fiscal year 6/30/03*

**FINDING: TWO CASES GOVERNED BY TWO PFP CONTRACT'S HAD KEY MONITORING WELLS BELOW THE SSSL'S PRIOR TO CONTRACT SIGNING AND AGAIN AT BASELINE SAMPLING (I.E. THE CONTRACTOR REACHED 100% TARGET BEFORE ACTIVATING THE SYSTEM.)**

Two cases (064-0133 & 064-0523) were governed by two Pfp contracts signed on June 28, 1999. These two cases were part of a larger plume that involved one other Pfp contract that covered remedial actions on two other cases. From August 6, 1998 through December 8, 1998, several monitoring wells from an offsite property that was apparently affected by this plume of contamination, had samples collected and laboratory analysis performed. Four of the wells indicated benzene concentrations above the SSSL's.

From January through June of 1999, the contractor completed the process of having their plan for remedial actions approved by the PSTD, which included negotiating a Pfp contract. **On June 23, 1999, just 5 days prior to contract signing, analysis performed on the onsite wells (which was the source of the contamination) indicated that no well was above the applicable SSSL's.** We were unable to locate any documentation for analysis done for the offsite wells on June 23, 1999. We found it to be unusual that this contract was entered into, in light of the analysis of the onsite wells performed 5 days prior to contract signing. We noted that the size and magnitude of the system proposed and installed appeared to be inconsistent with the needs for this plume. We also found that a pilot test was not conducted for this site to determine the effective radius-of-influence (ROI), which determines the extraction well spacing and overall size of the system needed. Without conducting a pilot test and establishing an effective ROI prior to system design and implementation, the chances of over-designing and/or under-designing a system increases dramatically. Of the 12 Pfp contracts reviewed in our procedures, only one site appeared to have some type of pilot test conducted.

On December 2, 1999, the remedial system was activated. **The baseline samples were not taken two weeks prior to system startup (as required by contract), but were instead taken 5 weeks later, after start-up, on January 21, 2000. At this time, all but one well (offsite) was below the SSSL's. The one offsite well that was above the SSSL's was only very slightly above (2.21 ppm versus 1.98 ppm benzene concentration).**

**FINDING (IV. A. 3.): (Continued)**

When we inquired about this contact, PSTD management indicated that they "waited to take the baseline samples until all the remediation systems for this large commingled plume were installed." However, the two other systems installed for the one other PFP contract, were actually activated on November 4, 1999, which was 9 weeks prior to baseline sampling. Therefore, this does not explain the reason for not taking baseline samples in the contractual set time frame of two weeks prior to system activation.

In addition, the possibility exists that the source of the contamination from one of the upgradient sites may not have been removed; thus, it is possible that recontamination of the off-site property (the area where the system was installed) may occur.

Equipment costs for system: \$189,306  
PFP contract costs: \$205,694

<b>Total costs questioned in this finding:</b>	<b>\$ 395,000</b>
--	-------------------

*Note: \$41,139 of this total was paid during the fiscal year ended June 30, 2002*

**FINDING: BASELINE SAMPLING RESULTS IN ELEVATED READINGS - WELLS CONTAINING FREE PRODUCT ARE SAMPLED FOR BENZENE CONCENTRATIONS (ANALYSIS FOR BENZENE CONCENTRATIONS SHOULD ONLY OCCUR IN WELLS THAT NO LONGER CONTAIN FREE PRODUCT AS THE RESULTS WILL NOT BE REPRESENTATIVE OF THE DISSOLVED-PHASE CONCENTRATION IN THE GROUNDWATER.)**

We noted one case (064-1381) in which 3 wells sampled during the baseline event contained free product during sampling activities, which would cause an artificially high baseline result. Elevating the baseline data would make reaching milestone payments easier to obtain. As of 2/28/03, \$268,880 was paid on this site in milestone payments. We are unable to determine what the actual baseline concentrations were in these key monitoring wells, therefore, we question all PFP payments made to date.

<b>Total costs associated with this finding:</b>	<b>\$ 268,880</b>
--	-------------------

*Note: \$134,440 was paid during the fiscal year ended June 30, 2002.  
\$ 67,220 was paid August 17, 1999.  
\$ 67,220 was paid February 6, 2003.*

**FINDING: BASELINE SAMPLING RESULTS ALTERED - CHANGING THE RESULTS OF TWO WELLS RESULTS IN HIGHER BASELINE CONCENTRATIONS AND A MILESTONE PAYMENT IS INCORRECTLY MADE**

We found on case 064-1096 that due to the contractor's substitution of sampling data collected after the baseline data for two key monitoring wells, the contractor was able to receive a second milestone payment showing a greater than 50% reduction in benzene concentrations. However, had the original baseline sampling results been utilized for this 2<sup>nd</sup> milestone payment (as these were used in the 1<sup>st</sup> baseline calculation as well) the contractor would only show a 26% reduction.

<b>Total costs questioned in this finding:</b>	<b>\$ 68,712</b>
--	------------------

*Note: \$68,712 was paid in November 2002.*

FINDING (IV. A. 3.): (Continued)

**MILESTONE PAYMENT ISSUES**

**SOME PFP CONTRACTS DO NOT FOLLOW THE STATUTES GOVERNING THE PERCENTAGE PAYMENT TO BE MADE WITH REGARDS TO THE PERCENTAGE OF REMEDIATION LEVEL OBTAINED.**

OK ST T. 17 § 356 (P) sets forth the statutory authority for entering into Pfp contracts. The statute explicitly sets forth payment terms. The rules adopted in OAC 165: 27-7-10 do not reflect these payment terms as set forth in statute. In 3 of the 12 contracts we reviewed, the **payment terms were different than those called for by statute.**

Oklahoma Statutes direct a payment schedule of 20% for each of five payments. We noted 3 contracts that followed a different payment schedule due to the inclusion of equipment costs within the Pfp contract.

The costs associated with these sites are \$1,604,928 (of which \$144,851 had not been paid as of February 28, 2003).

**FINDING: DUE TO THE METHOD IN WHICH THE PSTD ALLOWS CALCULATION OF THE AVERAGE PERCENTAGE REDUCTION OF CONTAMINATION IN KEY MONITORING WELLS, THE CONTRACTOR IS ABLE TO RECOVER A SUBSTANTIAL PORTION OF THE CONTRACTED AMOUNT (THROUGH MILESTONE PAYMENTS) WHILE STILL LEAVING HIGH CONCENTRATIONS OF BENZENE ON SITE**

We analyzed the method in which the PSTD permits calculation of the average percentage reduction in contamination levels. We concluded that **the method utilized allows contractors to receive milestone payments while still leaving high levels of benzene concentrations on site.** While the contractor must prove that ALL key monitoring wells are below the SSTL's in order to receive the final payment on a Pfp contract, they can receive up to 80% of the total contract based on minimal hydrocarbon reduction. The significance of the deficiency that we observed with respect to milestone payment issues is the lack of an incentive for a contractor to complete remediation.

Two cases (064-0287 & 064-1285), governed by one Pfp contract (and related to the two sites as previously noted in a previous finding (064-0133 & 064-0523)) are illustrative of this problem. Please refer to the following table which includes all key monitoring wells and the associated sampling results for, what was deemed the baseline sampling event (even though it was 9 weeks after system startup), and the milestone payment which effectively gave the contractor credit for reaching 137% cleanup.

**FINDING (IV. A. 3.): (Continued)**

	OKLAHOMA CALCULATION			Excludes wells in baseline below the SSTL's. Wells that go below the SSTL's are given credit for 100% reduction and not something greater.		
Key Well	Benzene (mg/L)		% Reduction	Benzene (mg/L)		% Reduction
	Baseline	Milestone		Baseline	Milestone	
	1/21/2000	7/20/2000		1/21/2000	7/20/2000	
MW-7	1290	3310		1290	3310	
MW-18	3560	85.3		3560	85.3	
MW-23	726	64		726	64	
AMW-1	6870	4610		6870	4610	
AMW-3	1490	1230		1490	1230	
BMW-1	7680	7770		7680	7770	
PMW-1	3250	3260		3250	3260	
PMW-2	6210	5570		6210	5570	
PMW-8	7940	1120		7940	1120	
PMW-12	1380	7.1		1380	7.1	
PMW-13	2740	190		2740	190	
PMW-14	3580	1550		3580	1550	
PMW-15	3410	1220		3410	1220	
PMW-16	2500	28.3		2500	28.3	
PMW-19	1320	1360		1320	1360	
SSTL	2500	2500		2500	2500	
Total	53946	31374.7		47740	21210	
Normalized	16446	-6125.3	137.24%	22740	11210	50.70%

As can be seen in the chart above, the contractor was able to receive credit for wells that went below the SSTL's for the site (2500 mg/L), creating a negative number for the normalized amount (-6,125.3). In addition, 5 of the 15 key monitoring wells selected by the Division were already below the SSTL's at baseline. We noted that, in similar PfP contracts in other states, if key monitoring wells are already below the SSTL's during the baseline event, they would not be considered a key monitoring well as this would give the contractor credit before performance of the contract has begun.

By allowing mathematically for the wells that go below the SSTL's in calculating the normalized amount, the contractor is given credit for greater than a 100% reduction on a particular well. This allows for other wells to remain well above the SSTL's and still receive a substantial portion of their contract. Obviously, concentrations cannot be reduced greater than 100% of their value. Use of the PSTD's method of calculation of milestone payments clearly brings into question PSTD's management of these contracts.

**FINDING (IV. A. 3.): (Continued)**

In the illustration above, the true average percentage reduction in concentration levels for this site at 7/20/2000 is only 50.7%. The calculation allowed by the PSTD resulted in the contractor receiving 40% more payments than otherwise would have been permitted. The contractor for these particular cases has recently received the last 20% of their contract (11/02), which indicates that they may have achieved 100% cleanup in all wells and maintained it for a period of 6 months.

While the issue associated with this finding, involving these particular cases may be one solely of timing, the PSTD has many PfP contracts for which contractors have received a substantial portion of the contracted amount, only lacking the final 20%, and the contracts are either expired or are very close to expiration. **For this reason, this finding is very relevant to the current problem facing the PSTD as contractors are receiving a vast majority of contract dollars early in the contract, with no incentive to reach the cleanup objectives.**

A second case reviewed (064-0556) should also help illustrate this issue.

OKLAHOMA CALCULATION				Excludes wells in baseline below the SSTL's. Additionally, wells that go below the SSTL's are given credit for 100% reduction and not something greater.		
Key Well	Benzene (mg/L)		% Reduction	Benzene (mg/L)		% Reduction
	Baseline	Milestone		Baseline	Milestone	
	7/13/2000	11/14/2000		7/13/2000	11/14/2000	
MW-9	5.79	5.79		5.79	5.79	
MW-11	3.54	3.48		3.54	3.48	
MW-14	16	12.3		16	12.3	
MW-15	7.78	2.76		7.78	2.76	
MW-16	1.47	0.726		1.47	0.726	
MW-17	4.18	2.06		4.18	2.06	
SSTL	5.6	5.6		5.6	5.6	
Total	38.76	27.116		29.57	18.09	
Normalized	5.16	-6.484	225.66%	12.77	6.89	46.05%

As illustrated in the preceding table, the baseline sampling results for this site included 3 of the 6 wells that were already below the SSTL's. In addition, the contractor requested and received 80% of the contract amount within 2 months of system activation by demonstrating a 225.66% average percentage reduction.

If calculations were completed that did not allow credit for wells that were below the SSTL's, the contractor would only have received 20% of the contract amount with the 11/14/2000 sampling results (which correlates with an average reduction of 25%) as opposed to the 80% they received for achieving 225.66% reduction. As of the conclusion of fieldwork for this engagement, the contractor had not achieved cleanup of all wells for a period of 6 months even though the first milestone payment was made over 2 and a half years ago.

<b>Total costs questioned in this finding:</b>	<b>\$ 172,260</b>
--	-------------------

Note: \$172,260 was paid on December 14, 2000



FINDING (IV. A. 3.): (Continued)

**KEY WELL ISSUES**

**FINDING: CONTRARY TO THE PfP CONTRACT, THE CONTRACTOR PERFORMS ACTIVITIES ON KEY WELLS THAT ARE NOT PERMITTED. KEY WELLS ARE NOT TO BE ALTERED BECAUSE ALL MILESTONE PAYMENTS ARE MEASURED BASED UPON THE LEVELS OF CONTAMINATION FOUND IN THESE WELLS.**

During the course of our engagement, we were informed of two PfP cases in which the contractor performed activities on key wells that were not permitted. On one case (064-1953) we noted, from an internal email correspondence, that **key wells had been altered within 5 days of sampling** in order to earn a milestone payment. The results of the sampling event resulted in a payment of \$30,158 in April 2001.

We located documentation in the PSTD technical files that indicated the hydrologist in charge of the project had a telephone conversation with the contractor advising them that they "cannot use key free product wells as recovery wells." However, in the internal email provided to us dated approximately two months after notification from the PSTD that "key wells" could not be used for recovery of free product, the contractor in charge of the project stated within the email provided to us, that an employee "was removing free product from all wells that have product." Within the email the contractor states that **water was injected into key wells** to promote "free product" migration towards recovery wells. These two prohibited actions most likely resulted in a non-representative laboratory analysis of the contamination levels in those key wells.

We found that the 3<sup>rd</sup> Quarter 2002 Free Product Recovery Report, approved November 4, 2002, showed free product thickness had now actually increased from baseline levels by 6.5%. This provides further evidence as to the artificial means by which the payment of \$30,158 was made.

<b>The costs questioned with this finding:</b>	<b>\$ 30,158</b>
--	------------------

A second PfP case we reviewed (064-1381) indicated that similar types of activities were performed as in the previous case mentioned (altering key wells prior to milestone payment sampling). During our examination of the PSTD file contents, it was noted that **key wells were altered following baseline sampling and prior to system startup**. The activity of injecting a product known as microsolv surfactant into key wells only one month after the baseline sampling event may have also caused artificial results that resulted in a payment of \$67,220 within 3 months after the injection. In this case, key wells were altered possibly producing non-representative results.

<b>Total costs questioned with this finding:</b>	<b>\$ 67,220</b>
--	------------------

*(Some of this amount is also questioned in a previous finding)*

**FINDING (IV. A. 3.): (Continued)**

**FINDING: CONTRACTOR RECEIVES 60% OF PFP CONTRACT (ALMOST 100% OF CLEANUP GOAL) WITHIN 3 MONTHS OF SYSTEM ACTIVATION. BEGINNING IN THE MONTH FOLLOWING THIS 60% PAYMENT, THE AVERAGE CONTAMINATION LEVELS ON THIS SITE CONCENTRATIONS BEGIN TO REBOUND. THEY ARE BACK DOWN TO ONLY A 35% REDUCTION AT THE CONCLUSION OF OUR FIELDWORK (FOUR YEARS AFTER THIS INITIAL MILESTONE PAYMENT)**

Case 064-1787 had baseline sampling and system startup conducted on November 9, 1998. The contractor sampled the wells in February 1999 (3 months later) and showed average reductions in concentrations of almost 100% resulting in a payment of 60% of the contract amount. We noted that in sampling conducted in February 2002, the average reduction in concentrations had rebounded yielding only a 35% reduction. In November of 2003, the contract for this PFP will expire and the contractor will be contractually allowed to terminate this contract without penalty (other than not collecting the final 40% payment). Currently, there is no penalty (reimbursement of funds) for concentrations rebounding.

<b>Total costs questioned in this finding:</b>	<b>\$ 188,400</b>
--	-------------------

*Note: \$188,400 was paid on March 10, 1999*

**FINDING: CONTRACTOR IS PERMITTED BY PSTD TO EXCLUDE FINAL SAMPLING RESULTS FOR ONE "KEY WELL" IN ORDER TO RECEIVE FINAL PAYMENT.**

We found that one monitoring well, whose analytical results in the final round of sampling was still above the SSTL's, was permitted to be excluded by PSTD staff. The case, 064-1755, had a final payment made on September 25, 2001 based on this well being excluded from the calculation. Had this well been included, the final payment would not have been made. Therefore, we question the costs associated with this finding.

<b>Total costs questioned in this finding:</b>	<b>\$ 103,203</b>
--	-------------------

*Note: \$103,203 was paid on September 25, 2001*

**ENCUMBRANCE ISSUES**

**FINDING: AMOUNTS ENCUMBERED AT JUNE 30, 2002 THAT RELATE TO CONTRACTS THAT HAVE EXPIRED. IN ADDITION, THREE ADDITIONAL CONTRACTS HAVE EXPIRED IN THE SUBSEQUENT PERIOD OF JULY 1, 2002 THROUGH THE CONCLUSION OF FIELD WORK**

We noted three cases where the contracts had expired and the cleanup goals had not been achieved, yet the contract amounts were still encumbered at June 30, 2002. They are:

064-0517, contract expired 02/01, the amount still encumbered was \$ 35,081

064-0872, contract expired 02/02, the amount still encumbered was \$ 94,250

064-WQ, contract expired 08/01, the amount still encumbered was \$ 67,000

**FINDING (IV. A. 3.): (Continued)**

In addition, we noted three additional cases where the contracts have expired in the months following our fieldwork. They are:

064-1185, contract expired 10/24/02, the amount still encumbered was \$ 116,000  
064-1705, contract expired 8/19/02, the amount still encumbered was \$124,000  
064-0592, contract expired 11/05/02, the amount still encumbered was \$128,000

<b>Total costs questioned in this finding:</b>	<b>\$ 196,331</b>
--	-------------------

Due to the numerous issues raised in these findings related to the PfP contracts, we find we must question the funds expended and those amounts still encumbered through this contractual process, since its inception. (\$21.5 m in PfP contracts and approximately \$13.5 m in equipment and installation charges.)

<b>Total costs questioned in this finding:</b>	<b>\$ 35,000,000</b>
--	----------------------

*(Some of this amount is also questioned in a previous finding)*

**FINDING (IV. A. 4.):)**

There were no findings related to this procedure.

**FINDING (IV. B. 1., 2.):**

There were no findings related to these procedures.

**FINDING (IV. B. 3.): THE PSTD CALCULATED THE AVAILABLE INDEMNITY FUND BALANCE INCONSISTENTLY WITH THE LANGUAGE OF OKLAHOMA STATUTE 17-354. THIS ALLOWED THE INDEMNITY FUND TO RECEIVE THE PROCEEDS OF THE 1-CENT ASSESSMENT FOR EVERY MONTH DURING THE FISCAL YEAR ENDED JUNE 30, 2002.**

We noted during this procedure that at the end of three of the four quarters of the fiscal year ended June 30, 2002 the available Indemnity Fund balance\* exceeded the "maintenance level" (see table 1 below). We compared the available Indemnity Fund balance\* at the end of each month of the fiscal year ended June 30, 2002 to the "maintenance level". "Maintenance level" as defined by Oklahoma Statute 17-352:

"means the minimum balance of the Indemnity Fund to be maintained and below which the Indemnity Fund balance will fall when the balance of the Indemnity Fund is below the dollar amount of disbursements from the Indemnity Fund for the payment of claims during the preceding six (6) months plus Five Million Dollars (\$5,000,000.00)"

The available Indemnity Fund cash balance\* exceeded the "maintenance level" at the end of eight consecutive months during the year, from September 2001 through April 2002.

Throughout this period the Indemnity Fund continued to receive one hundred percent of the proceeds of the 1-cent assessment on motor fuel, diesel fuel, and blending materials.

**FINDING (IV. B. 3.): (Continued)**

**TABLE 1**

QUARTER ENDING	MAINTENANCE LEVEL PER PSTD CALCULATION	AVAILABLE INDEMNITY FUND CASH BALANCE*	AVAILABLE INDEMNITY FUND CASH BALANCE OVER/(UNDER) MAINTENANCE LEVEL
Sep-01	\$ 16,460,334	\$ 17,536,460	\$ 1,076,126
Dec-01	\$ 15,870,919	\$ 18,937,089	\$ 3,066,170
Mar-02	\$ 15,515,150	\$ 19,687,494	\$ 4,172,344
Jun-02	\$ 18,350,112	\$ 17,402,648	\$ (947,464)

**\*Available indemnity fund cash balance includes cash available at banks and certificates of deposits less outstanding checks**

The calculation performed by the PSTD resulted in a large deficiency in the reporting of the available indemnity fund cash balance less the "maintenance level" because they subtracted the "encumbered balance" from the available indemnity fund cash balance (see tables 2 and 3 below).

**TABLE 2**

QUARTER ENDING	AVAILABLE INDEMNITY FUND CASH BALANCE*	ENCUMBERED FUNDS	AVAILABLE INDEMNITY FUND CASH BALANCE PER PSTD CALCULATION**
Sep-01	\$ 17,536,460	\$ 14,950,743	\$ 2,585,717
Dec-01	\$ 18,937,089	\$ 15,896,531	\$ 3,040,558
Mar-02	\$ 19,687,494	\$ 18,785,961	\$ 901,533
Jun-02	\$ 17,402,648	\$ 16,270,539	\$ 1,132,109

**TABLE 3**

QUARTER ENDING	MAINTENANCE LEVEL PER PSTD CALCULATION	AVAILABLE INDEMNITY FUND CASH BALANCE PER PSTD CALCULATION**	AS REPORTED BY PSTD AVAILABLE INDEMNITY FUND CASH BALANCE OVER/(UNDER) MAINTENANCE LEVEL
Sep-01	\$ 16,460,334	\$ 2,585,718	\$ (13,874,616)
Dec-01	\$ 15,870,919	\$ 3,040,558	\$ (12,830,361)
Mar-02	\$ 15,515,150	\$ 901,533	\$ (14,613,617)
Jun-02	\$ 18,350,112	\$ 1,132,109	\$ (17,218,003)

**\*\*Available indemnity fund cash balance per PSTD calculation includes cash available at banks and certificates of deposits less outstanding checks less encumbered funds.**

**FINDING (IV. B. 3.): Continued**

According to Oklahoma Statute 17-354,

"If at any time the Petroleum Storage Tank Release Environmental Cleanup Indemnity Fund falls below the required maintenance level on or before December 31, 2009, the Administrator shall notify the Tax Commission that the Indemnity Fund has fallen below the required maintenance level and that the assessment is to be deposited into the Indemnity Fund for at least three (3) calendar months".

Although this Statute does not put a limit on the number of months the Indemnity Fund should receive the assessment, eight months appears to be materially excessive of three.

**FINDING (IV. C.) PENDING LITIGATION INVOLVING THE INDEMNITY FUND**

The following is a listing of the cases pending at February 27, 2003, in both federal and state court, as provided by Mr. Charles Wright, General Counsel with the Oklahoma Corporation Commission.

**PST CASES**

Case Name/Number

1.	Best Environmental (Several cases)	CJ 2002-3128 CJ-96-7007-65 (Dismissed and refiled as CJ 2002-3128) 96,202
2.	Shakir v. Legacy Services	CJ 98-5829-66
3.	Tate, Lowe, Bilingsley, Vernon v. OCC	CJ 2000-2421
4.	Board of County Comm'rs, Kay County v. Shepherd Oil v. PST	CJ 97-228
5.	OCC v. Phillips/Phillips v. OCC	CJ 2000-6631, 98,680 (appeal)
6.	Ana Enterprised v. Brent Bacon	CJ 01-168
7.	OCC & PST v. Geo & Rockwell	CJ 2001-8639
8.	EIT v. Giles	CIV-02-0155
9.	Ludwick v. State of OK, ex rel, & OCC	CJ 2002-9600
10.	Del Crest v. TIP Petroleum & Valereo Energy Corp.	CIV 02-953
11.	Agrawal (Several cases/appeals)	CJ-94-4096, 83,545, 85,587, 87,990, & US Ct App 95-6321

We also noted that the Indemnity Fund is currently incurring litigation expenses with outside counsel on two cases. The first case is addressed in a previous finding (FINDING II. A. 1.) in this Schedule regarding a patent infringement lawsuit. The second case is one in which outside counsel has been retained to defend several former employees of the Fund who were sued personally by a contractor.

**FINDING (IV. C.): SETTLEMENT PAYMENT IS MADE TO A CLAIMANT, WHICH IS DUPLICATIVE OF AMOUNTS PAID TO THE CONTRACTOR DURING A PREVIOUSLY NEGOTIATED SETTLEMENT**

During the course of the procedures, we located a payment made to a contractor for amounts previously disallowed by the PSTD. The amount paid by the PSTD to the contractor was a negotiated amount and covered several cases in which the contractor had performed work and submitted claims on direct assignment to the Fund. The informal settlement was negotiated and paid in July of 1999. The total amount disallowed by the PSTD over 26 cases totaled \$44,909 for which a lump sum payment of \$25,000 was negotiated and paid to the contractor. This effectively left \$19,909 disallowed on these claims which were informally settled with this contractor for costs incurred by them.

We noted one of the cases (064-0556) listed in that informal settlement agreement that was completed in July 1999, also appeared on a separate settlement agreement listing provided to us by PSTD management. This new settlement agreement listing was presented to us when we requested a listing of all previously settled claims and those pending settlement. It was in this new listing that we noted a payment made approximately two years later to the tank owner for the same case (064-0556). Through review of this more recent settlement, which was paid in 2001, we noted that \$8,550 was shown as the "relief requested" by the tank owner. However, a payment of \$13,004 was settled for and paid to the tank owner (which apparently included legal fees). We noted that the \$8,550, that was the amount requested by the tank owner, **included amounts actually not incurred by the tank owner**. Some portion of the costs that remained disallowed were, in fact, incurred during the period in time in which the contractor was working on direct assignment, thus the disallowances were ones that the contractor incurred, not the tank owner.

We discussed the issue of tank owner/claimants being allowed to recover disallowed costs on prior claims, for which they did not incur the costs, with PSTD management. If a tank owner is able to recover funds they never incurred, it would appear they profited from the cleanup of this site. We were told that, due to the fact that only the tank owner had standing in the court for claims to the Indemnity Fund, they could, in fact, sue and settle amounts not incurred by them. We inquired further about PSTD management's policy in effectively negotiating these types of settlements as we noted the one case where amounts previously negotiated as "settled" was reopened and amounts were paid to the tank owner who did not incur them. We were told that, due to the fact that the PSTD did not receive any type of information regarding who the plaintiffs were in these cases, the PSTD simply negotiated based upon a) the amounts previously historically disallowed on cases, and b) the amount deemed reasonable by applying their unit cost templates for pre-approval.

We are questioning the duplicative amounts settled upon in case 064-0556. This amount is \$775, which is the difference between the \$1,750 originally sought by the contractor who incurred the costs, and the amount paid to the contractor in July 1999 of \$975. This amount of \$775 was effectively "settled" at the point in time the payment of \$975 was made in July of 1999 and should not have been part of the settlement entered into with the tank owner in 2001 as the tank owner never incurred the costs.

<b>Total costs questioned in this finding:</b>	<b>\$ 775</b>
--	---------------

**FINDING (IV. C.): (Continued)**

Extrapolated Results

During the course of performing the procedures, we were provided with information regarding various lawsuits brought against the Indemnity Fund (Fund) by attorneys representing several plaintiffs. We were not able to determine if the "plaintiffs" were, in fact, the tank owner as the PSTD does not receive that information prior to settling cases. Therefore, there could be other cases, like case 064-0556, in which amounts that are being requested in these lawsuits are amounts that were never "incurred" or paid by the party bringing the lawsuit. We understand from PSTD management that this is due to the fact that only the tank owner can have standing in the court in order to settle cases.

The schedule provided to us by PSTD management included cases where the requested relief (not including legal fees) was approximately \$8.2 million. However, PSTD management provided information that reflected that their estimate on these cases is only about \$477,000 as many of the cases have issues that the PSTD is not able to or desirous of settling. Therefore, based on this information, we are unable to extrapolate these results against an unknown population; however, the preceding information provides perspective to the subject of pending litigation.

## AGREED-UPON PROCEDURE

- V. *Procedures regarding the management and the administration of the Indemnity Fund*
  - A. *Review and document the EPA approval (including yearly reports from the EPA) of the Oklahoma UST Program.*
  - B. *Inquire from current employees if the current management system allows them to carry out their separate duties and responsibilities and document any comments that are applicable.*
  - C. *Research and document, where applicable, specific cases, policies and practices of the Indemnity Fund that were brought to our attention during the course of our engagement, by claimants, consultants, Fund staff, and legislators.*



**FINDINGS RELATED TO V.**

## FINDING (V. A.): DOCUMENTATION OF THE EPA UST PROGRAM APPROVAL

### EPA UST Program Approval Background Information

The State of Oklahoma applied for Environmental Protection Agency (EPA) program approval for its "underground storage tank" program in June 1990. Program approval was received on August 12, 1992 and became effective on October 14, 1992. EPA program approval effectively granted the State of Oklahoma the ability to administer federal requirements as stated in subtitle I of the Resource Conservation and Recovery Act of 1976 (RCRA), as amended, 42 U.S.C. As part of EPA's approval of state programs, EPA codifies its approval of the State programs in 40 CFR part 282 and incorporates by reference therein the state statutes and regulations that will be subject to EPA's inspection and enforcement authorities. In essence, once the state program was "approved", state rules governed in place of dual federal/state rules.

As part of the procedures, we reviewed the requirements set by EPA with respect to approving a state program. We then reviewed the EPA's codification of Oklahoma's rules as contained in 40 CFR part 282. Oklahoma's program was codified in 40 CFR part 282 in 1996 with reference to the Oklahoma Corporation Commission (OCC) rules in place in 1995. We also reviewed the Memorandum of Agreement signed between EPA and the OCC in early 1992. We noted no other program modifications, nor documented EPA notifications of same, since the Memorandum of Agreement was signed in early 1992.

### **FINDING (V A.): CONTRARY TO 40 C.F.R. § 281.52, OCC RULES, AS CODIFIED BY EPA IN 1996, HAVE BEEN AMENDED AND, IN SOME CASES, REPEALED WITHOUT PROPER NOTIFICATION TO EPA; OKLAHOMA NO LONGER HAS RULES GOVERNING "FINANCIAL RESPONSIBILITY" REQUIREMENTS FOR UNDERGROUND STORAGE TANKS**

40 C.F.R. § 281.52 states in part;

**"(a) Either the EPA or the approved state may initiate program revision. Program revision may be necessary when the controlling federal or state statutory or regulatory authority is changed or when responsibility for the state agency is shifted to a new agency or agencies. The state must inform EPA of any proposed modifications to its basic statutory or regulatory authority or change in division of responsibility among state agencies. EPA will determine in each case whether a revision of the approved program is required."**

OAC Chapter 25 (Underground Storage Tanks) is specifically codified within 40 C.F.R. § 282.86. However, many of the Subchapters that were originally part of Chapter 25 have been amended or repealed in recent years. Subchapter 13, "Financial Responsibility Requirements" was repealed on 07/01/01. Subchapter 3 "Release Prevention and Detection Requirements" was also repealed 07/01/01, with portions of the rules contained in this Subchapter, now appearing in Chapter 29 (Remediation of Petroleum Storage Tank Sites), which became effective May 11, 2001.

**The significance of this finding is two-fold. First, the OCC has not notified EPA of this change in regulatory authority as required by 40 C.F.R. § 281.52. Secondly, the repeal of financial responsibility requirements is in direct violation of EPA's rules. Within EPA's State Program Approval Handbook, Appendix H, it describes the necessary components of a state program in order to gain approval by the EPA.**

**FINDING (V A.): (Continued)**

*"1. Basic Purpose of Financial Responsibility*

*The basic purpose of financial responsibility is simply to establish reasonable assurance that someone has the funds to pay for the costs of corrective action and third-party liability resulting from an UST release. This means that someone (or combination of persons) is ready to pay from the 'first dollar' of costs incurred up to the maximum amount required by the Federal regulations."*

To satisfy these federal financial responsibility requirements, many states, like Oklahoma, adopted insurance funds in order to provide full or partial coverage to all owners or operators of underground storage tanks. Oklahoma's fund is considered a partial coverage fund, in that the first \$5,000 is to be covered by the tank owner or operator. Thus, Oklahoma is responsible for establishing their own financial test of self-insurance for deductible amounts. The only financial test of self-insurance utilized by the OCC is contained within the annual tank registration form. A box is provided for the tank owner/operator to indicate that they do have the ability to pay the \$5,000 should a release occur.

**However, given the absence of rules governing "financial responsibility" requirements, Oklahoma appears to have put its state program approval at risk. Additionally, the State of Oklahoma may also be at risk due to the absence of any regulatory authority (rules) requiring tank owners or operators to maintain financial assurance.**

**FINDING (V A.): CONTRARY TO 40 C.F.R. § 281.52, NOTIFICATION TO EPA OF THE DIVISION OF JURISDICTION BETWEEN THE OCC AND THE OKLAHOMA DEPARTMENT OF ENVIRONMENTAL QUALITY (DEQ) WAS NOT LOCATED.**

40 C.F.R. § 281.52 requires the state to notify EPA when there is a "change in division of responsibility among state agencies." We did not locate any notification to EPA of the jurisdictional division of regulatory responsibilities between the OCC and the DEQ in 1999. The DEQ was given jurisdiction, in 1999, for underground and aboveground storage tanks containing hazardous substances and other substances or facilities not within the jurisdiction of the OCC. It appears that this change in jurisdiction required notification to EPA.

**FINDING (V. B.):**

There were no findings related to this procedure.

**FINDING (V. C.): NON-COLLUSION ISSUE**

We noted during the course of the procedures that a contractor (Summit Environmental Services, LLC) was purchased by NESCO, Inc. sometime prior to 2000. They contracted a significant portion of PfP contracts and purchase orders with PSTD. NESCO, Inc. went through a bankruptcy proceeding in 2001 which concluded in early 2002. This contractor had many significant Pfp contracts that appeared to be significantly delayed. PSTD management had brought this to our attention and informed us that they were dealing with this contractor to try to bring the cleanups closer to conclusion.

We further noted that in early 2002, a new firm (Summit Holdings, Inc.) bought the assets of the bankrupt firm (NESCO, Inc.) We discovered that the principal in the original firm (Summit Environmental Services, LLC) was still one of the owners of the new firm. **We noted through a review of the bankruptcy proceedings, that three tank owners were now owners of this new firm, Summit Holdings, Inc.** We further discovered that Summit Holdings, Inc. may have an ownership interest in Summit Group of Oklahoma, Inc. which is now the firm completing site remediation activities on sites owned by these three tank owners, including sites with Pfp contracts.

**FINDING (V. C.): (Continued)**

The "Tank Owner/Operator's Affidavit of Non-Collusion" states, in part;

"2. I have not received any payment of any kind, directly or indirectly from the UST consultant or UST consulting firm in this case; and

3. Neither the UST consultant or UST consulting firm nor anyone subject to their direction or control has agreed to pay me or share with me, directly or indirectly any of the monies to be paid by the Indemnity Fund for investigation, delineation or remediation in this case nor will I accept or retain directly or indirectly at any time in the future any part of the monies paid by the Indemnity Fund for the investigation and cleanup of contamination in this case."

We brought this issue to the attention of PSTD management who were aware of the ownership interest these tank owners now had in the firm performing remediation on their sites. We were advised that, the majority owner of the original firm (Summit Environmental Services, LLC) had told PSTD management that he was willing to walk away from all his contracts prior to forming the new company Summit Holdings, Inc. We were further told that a large portion of the "up front" monies (this would include the initial payments for equipment purchase and installation and the initial "milestone" payments) paid by the FUND to the firm Summit Environmental Services, LLC and NESCO, Inc. were lost in the bankruptcy. It was further explained by PSTD management that the reason the tank owners were willing to become owners in the new company was to be sure that cleanup was completed at their sites. (There was some concern by these tank owners that their sites would not be cleaned up by the time the \$1 million statutory cap was reached).

If there is a common ownership of Summit Holdings, Inc. and Summit Group of Oklahoma, Inc., there would be a clear violation of the "Tank Owner/Operator's Affidavit of Non-Collusion".

**AGREED-UPON PROCEDURE**

- VI. *Inquire of the Office of State Auditor and Inspector and the Office of State Finance if there are any specific sites, responsible parties, or transactions that should be included in any of the above procedures.*

**FINDINGS RELATED TO VI.**

**FINDING VI.**

The findings associated with the specific sites, responsible parties, or transactions referred to us by the Office of State Auditor and Inspector and the Office of State Finance are incorporated in the body of Attachment A.

**Attachment 1**



## PSTD Employee Survey/Questionnaire

NAME:

JOB TITLE:

DATE:

1. Explain in general terms your duties and/or responsibilities.
2. What percentage of your time do you devote to each duty/responsibility?
3. Do you supervise others? If yes, what are their names, job titles, and duties? What percentage of their time is devoted to each duty?
4. Are there any unique circumstances that would result in your duties/responsibilities being different than others within the division with the same job title?
5. What do you estimate the allocation of your time and the time of those you supervise is between the administrative, claims processing, and regulatory cost centers?
6. Does the current management system allow you to carry out your separate duties and responsibilities?

**Attachment 2**

**OKLAHOMA CORPORATION COMMISSION  
PETROLEUM STORAGE TANK DIVISION**

---

**APPLICANT'S  
AFFIDAVIT OF NON-COLLUSION**

STATE OF: \_\_\_\_\_

CASE NO. \_\_\_\_\_

COUNTY OF: \_\_\_\_\_

FACILITY NO. \_\_\_\_\_

I, \_\_\_\_\_, of lawful age, being first duly sworn, on oath say:

1. I am the Applicant for this facility and I am fully aware of the facts and circumstances of my agreement with the Remediation consultant or the Remediation consultant firm in this case; and

2. I have not received any payment of any kind, directly or indirectly from the Remediation consultant or Remediation consulting firm in this case; and

3. Neither the Remediation consultant or Remediation consultant firm nor anyone subject to their direction or control has agreed to pay me or share with me, directly or indirectly any of the monies to be paid by the Lust Trust Fund or the Indemnity Fund for investigation, delineation or remediation in this case nor will I accept or retain directly or indirectly at any time in the future any part of the monies paid by the Lust Trust Fund or the Indemnity Fund for the investigation and cleanup of contamination in this case.

4. Neither the Remediation consultant or the Remediation consulting firm has agreed to pay or absorb the cost of any deductible in this case and I would not and will not allow them to do so, now or in the future.

\_\_\_\_\_  
AFFIANT

Subscribed and sworn to before me this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_

\_\_\_\_\_  
NOTARY PUBLIC

My Commission Expires: \_\_\_\_\_ (SEAL)

**OKLAHOMA CORPORATION COMMISSION**  
**PETROLEUM STORAGE TANK DIVISION**

---

**REMEDATION CONSULTANT'S  
AFFIDAVIT OF NON-COLLUSION**

STATE OF: \_\_\_\_\_ ) CASE NO. \_\_\_\_\_  
  )§  
COUNTY OF: \_\_\_\_\_ ) FACILITY NO. \_\_\_\_\_

I, \_\_\_\_\_, of lawful age, being first duly sworn, on oath say:

1. I am a certified Remediation consultant in the State of Oklahoma. I am fully aware of the facts and circumstance surrounding the negotiation with the owner/operator and/or the Corporation Commission and have been personally and directly involved in securing an agreement with the owner/operator and/or the Corporation Commission to furnish Remediation consulting services in this case.
2. Neither I, nor anyone subject to my direction nor anyone subject to the direction of any firm by which I am employed has made any payment to the owner/operator or to any officer, employee or official of the Corporation Commission or agreed to pay or share, either directly or indirectly any part of the money paid or to be paid by the Lust Trust Fund or the Indemnity Fund for investigation, delineation or remediation services and neither I nor any firm by which I am employed has agreed to absorb or pay any deductible on the Indemnity Fund's coverage, in this case.
3. If I am employed as a Remediation consultant by a consulting firm or company on this project neither I nor any person under my direction or control will in the future pay, agree to pay, share or agree to share, either directly or indirectly any part of the money paid to the firm by the Lust Trust Fund or the Indemnity Fund for investigation, delineation or remediation to the owner/operator and if I learn of any other person associated with this firm making such a payment in the future I will report it to the Indemnity Fund Administrator and the Director of the Petroleum Storage Tank Division of the Corporation Commission.
4. No person who has been Involved in any manner in the development of the contract to which this statement is attached while employed by the State of Oklahoma will be employed to fulfill any of the services provided for under this contract. I understand that a violation of this sworn statement, in addition to any criminal penalties can result in the revocation of my right to practice as a Remediation consultant in Oklahoma.

\_\_\_\_\_  
Remediation Consultant

Subscribed and sworn to before me this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_

\_\_\_\_\_  
NOTARY PUBLIC

My Commission Expires: \_\_\_\_\_ (SEAL)

**OKLAHOMA CORPORATION COMMISSION  
PETROLEUM STORAGE TANK DIVISION**

---

**CONTRACTOR'S  
AFFIDAVIT OF NON-COLLUSION**

STATE OF: \_\_\_\_\_ ) CASE NO. \_\_\_\_\_  
COUNTY OF: \_\_\_\_\_ ) § FACILITY NO. \_\_\_\_\_

I, \_\_\_\_\_, of lawful age, being first duly sworn, on oath say:

1. I am the duly authorized agent of \_\_\_\_\_ the contractor under the agreement which is attached to this statement, for the purpose of certifying the facts pertaining to the giving of things of value to the Remediation consultant or the owner/operator or their agents, officers or employees, in return for special consideration in the letting of this contract;
2. I am fully aware of the facts and circumstances surrounding the making of the contract to which this statement is attached, and have been personally and directly involved in the proceedings leading to the procurement of this contract; and,
3. Neither the contractor nor anyone subject to the contractor's direction or control has paid, given nor donated, or agreed to pay, give or donate, to the Remediation consultant or to the owner/operator or any of their agents, officers or employees, any money or other thing of value, either directly or indirectly in procuring the contract to which this statement is attached.

\_\_\_\_\_  
AFFIANT

Subscribed and sworn to before me this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_

\_\_\_\_\_  
NOTARY PUBLIC

My Commission Expires: \_\_\_\_\_ (SEAL)

## Definitions

## DEFINITIONS

### §17-352. Definitions.

As used in the Oklahoma Petroleum Storage Tank Release Indemnity Program:

1. "Administrator" means the person hired by the Director of the Petroleum Storage Tank Division of the Corporation Commission to administer the Petroleum Storage Tank Release Environmental Cleanup Indemnity Fund and the Oklahoma Petroleum Storage Tank Release Indemnity Program;
2. "Distributor" means:
  - a. every person importing or causing to be imported into this state any motor fuel, diesel fuel or blending material for use, distribution, or sale and distribution, or sale and delivery after the same reaches this state. "Distributor" does not mean persons importing motor fuel only in the supply tank of a vehicle originally provided by the manufacturer of the motor vehicle as a container for motor fuel or diesel fuel to propel such motor vehicle, nor does "distributor" mean persons only importing motor fuel, diesel fuel or blending material into the state under circumstances requiring that they be licensed as "Motor Fuel/Diesel Fuel Importers for Use" as defined in subsection (g) of Section 601 of Title 68 of the Oklahoma Statutes and who are actually so licensed,
  - b. any person producing, refining, preparing, distilling, blending, manufacturing, or compounding motor fuel or blending material in this state for use, distribution or sale and delivery in this state,
  - c. any person within this state producing or collecting what is commonly known as drip, casinghead or natural gasoline,
  - d. any person who has in his or her possession or buys for sale or use motor fuel, diesel fuel or blending material from any person other than a licensed distributor, retailer or dealer,
  - e. any person other than a retailer or dealer who sells motor fuel, diesel fuel or blending material to anyone except a licensed distributor,
  - f. any person who makes bulk sales of motor fuel, diesel fuel or blending material, and
  - g. any other person, including a retailer or dealer, who has filed an application for and has procured a distributor's license in the manner provided by the Oklahoma Motor Fuel/Diesel Fuel Importers for Use Tax Code, Section 601 et seq. of Title 68 of the Oklahoma Statutes;
3. "Eligible person" means any:
  - a. owner or operator of a storage tank system who has incurred liability as a result of an eligible release, and who meets the requirements specified in Section 356 of this title, or
  - b. person who on or after November 8, 1984, purchases property on which a storage tank system is located if:
    - (1) the storage tank system was located on the property on November 8, 1984,

- (2) such person could not have known that such storage tank system existed. The burden shall be upon such purchaser to show that such purchaser did not know or should not have known of the existence of such storage tank system,
  - (3) the owner or operator of the storage tank system responsible for the system cannot be determined by the Corporation Commission or the Administrator, or the owner or operator of the storage tank system responsible for the system is incapable, in the judgment of the Corporation Commission, of properly carrying out any necessary corrective action, and
  - (4) either, funds are unavailable from the Oklahoma Leaking Underground Storage Tank Trust Fund or the storage tank system is not eligible for corrective action taken pursuant to Section 365 of this title,
- c. person who acquired ownership of a tank through inheritance as denoted in an Order Allowing Final Account and Determination of Heirship and Decree of Final Distribution or is responsible for a release by reason of owning the real property through inheritance within which a tank or a release is or was located if:
- (1) the storage tank system of the release was located on the real property on November 8, 1984,
  - (2) the operator of the storage tank system responsible for the system or responsible for a release cannot be determined or found by the Corporation Commission, or the operator of the storage tank system responsible for the system or responsible for the release is incapable, in the judgment of the Corporation Commission, of properly carrying out any necessary corrective action,
  - (3) either funds are unavailable from the Oklahoma Leaking Underground Storage Tank Trust Fund or the storage tank system or release is not eligible for corrective action taken pursuant to Section 365 of this title,
  - (4) the person did not participate or was not responsible in any manner, directly or indirectly, in the management of the storage tank system or for the release and otherwise is not engaged in petroleum production, refining or marketing, and
  - (5) the person meets the requirements specified in Section 356 of this title;

4. "Eligible release" means a release for which allowable costs, as determined by the Administrator, are reimbursable to or on behalf of an eligible person;

5. "Indemnity Fund" means the Petroleum Storage Tank Release Environmental Cleanup Indemnity Fund;

6. "Indemnity Fund Program" means the Oklahoma Petroleum Storage Tank Release Indemnity Program established to administer the Indemnity Fund;

7. "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 which competitive bids may be reasonably based.

8. "Maintenance level" means the minimum balance of the Indemnity Fund to be maintained and below which the Indemnity Fund balance will fall when the balance of



the Indemnity Fund is below the dollar amount of disbursements from the Indemnity Fund for the payment of claims during the preceding six (6) months plus Five Million Dollars (\$5,000,000.00);

9. "Owner" means:

- a. in the case of a storage tank system in use on November 8, 1984, or brought into 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, or
- b. in the case of a storage tank system in use before November 8, 1984, but no longer in service 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 use.

The term "owner" does not include a person who holds an interest in a tank system solely for financial security unless through foreclosure or other related actions the holder of a security interest has taken possession of the tank system;

10. "Motor fuel, diesel fuel and blending materials" have the same meaning as those terms are defined by Section 501 of Title 68 of the Oklahoma Statutes;

11. "Person" means any individual, trust, firm, joint stock company or corporation, corporation, limited liability company, partnership, association, any representative appointed by order of the court, municipality, county, school district, or other political subdivision of the state, or any interstate body. The term also includes a consortium, a joint venture, a commercial entity, or any other legal entity. The term also refers to any agency of the State of Oklahoma which purchases property containing storage tanks from an owner or operator qualified to access the Indemnity Fund and upon which an eligible release has occurred prior to the agency acquiring the property;

12. "Reimbursement" means either:

- a. repayment of an approved claim to an eligible person for allowable costs resulting from an eligible release, or
- b. payment of an approved claim submitted on behalf of an eligible person for allowable costs resulting from an eligible release;

13. "Release" means any spilling, overfilling, leaching, emitting, discharging, escaping, or unintentional disposing of the petroleum from a storage tank system into the environment of the state. The term release includes but is not limited to suspected releases of petroleum from a storage tank system, identified as a result of positive sampling, testing or monitoring results, or identified in any similarly reliable manner;

14. "Sale" means every gallon of motor fuel, diesel fuel, or blending materials sold, or stored and distributed, or withdrawn from storage, within the state, for sale or use. No gallon of motor fuel, diesel fuel, or blending materials shall be the basis more than once of the assessment imposed by Section 354 of this title;

15. "Storage tank" or "storage tank system" means a storage system as such term is defined by the Oklahoma Storage Tank Regulation Act; and

16. "Tax Commission" means the Oklahoma Tax Commission.

### **§17-303. Definitions.**

As used in the Oklahoma Storage Tank Regulation Act:

1. "Abandoned system" means a storage tank system which:

- a. has been taken permanently out of service as a storage vessel for any reason or is not intended to be returned to service,
- b. has been out of service for one (1) year or more prior to April 21, 1989, or

- c. has been rendered permanently unfit for use as determined by the Commission;
2. "Commission" means the Oklahoma Corporation Commission;
3. "Corrective action" means action taken to monitor, maintain, minimize, eliminate or clean up a release from a storage tank system;
4. "Corrective action plan" means the plan submitted to the regulatory program of the Corporation Commission detailing the method and manner of corrective action to be taken for a release;
5. "Department" means the Department of Environmental Quality;
6. "Director" means the Director of the Petroleum Storage Tank Division of the Corporation Commission;
7. "Division" means the Petroleum Storage Tank Division of the Corporation Commission;
8. "Environment" means any water, water vapor, any land including land surface or subsurface, fish, wildlife, biota and all other natural resources;
9. "Existing system" means a storage tank system for which installation of that system commenced prior to April 21, 1989;
10. "Facility" means any location or part thereof containing one or more storage tanks or systems;
11. "Hazardous substance" means any substance defined in Section 101(14) of the Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C., Section 9601, but not including:
  - a. any substance regulated as a hazardous waste under Subtitle C of the federal Solid Waste Disposal Act, 42 U.S.C., Section 6903, or
  - b. any substance regulated as a hazardous waste under the Oklahoma Hazardous Waste Management Act.

The term hazardous substance shall also include a mixture of hazardous substances and petroleum, providing the amount of petroleum is of a de minimus quantity;

12. "New system" means a storage tank system for which the installation of the system began on or after April 21, 1989;
13. "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 or a violation of the Oklahoma Storage Tank Regulation Act or of a rule promulgated thereunder;
14. "Owner" means:
  - a. in the case of a storage tank system in use on November 8, 1984, or brought into 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, or
  - b. in the case of a storage tank system in use before November 8, 1984, but no longer in service 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 use.

The term "owner" does not include a person who holds an interest in a tank system solely for financial security, unless through foreclosure or other related actions the holder of a security interest has taken possession of the tank system;

15. "Permit" means any registration, permit, license or other authorization issued by the Commission to operate a storage tank system;
16. "Person" means any individual, trust, firm, joint stock company or corporation, limited liability company, federal agency, corporation, including a government

corporation, partnership, association, the state or any state agency, municipality, county or other political subdivision of the state, or any interstate body. The term also includes a consortium, a joint venture, a commercial entity, and the United States Government or any other legal entity;

17. "Petroleum" means ethylene glycol-based antifreeze, crude oil, crude oil fractions, and refined petroleum fractions, including motor fuel, jet fuel, distillate fuel oils, residual fuel oils, lubricants, petroleum solvents and used oil which are liquid at standard conditions of temperature and pressure (60 degrees Fahrenheit and 14.7 pounds per square inch absolute). "Petroleum" also means a mixture of petroleum and hazardous substances provided, the amount of the hazardous substances is of a de minimus quantity;

18. "Pipeline facilities" means new and existing pipe rights-of-way and any equipment, facilities or buildings regulated under:

- a. the Natural Gas Pipeline Safety Act of 1968 (49 U.S.C. App., 1671, et seq.),
- b. the Hazardous Liquid Pipeline Safety Act of 1979 (49 U.S.C. 2001, et seq.),
- c. the state Hazardous Liquid Transportation System Safety Act, Section 47.1 et seq. of Title 52 of the Oklahoma Statutes, or
- d. intrastate pipeline facilities regulated under state law;

19. "Pollution" means contamination or other alteration of the physical, chemical or biological properties of any natural waters of the state, contamination or alteration of the physical, chemical or biological properties of the land surface or subsurface, when such contamination or alteration will or is likely to create a nuisance or render the waters or land harmful or detrimental or injurious to the public health, safety or welfare or the environment;

20. "Regulated substances" means hazardous substances or petroleum;

21. "Release" means any spilling, overfilling, leaking, emitting, discharging, escaping, leaching or disposing of regulated substances from a storage tank system into the environment of the state. The term "release" includes but is not limited to suspected releases identified as a result of positive sampling, testing or monitoring results, or identified in any similarly reliable manner;

22. "Storage tank system" means any one or combination of tanks, including underground piping connected thereto, that is used to contain an accumulation of regulated substances;

23. "Tank" means a stationary vessel designed to contain an accumulation of regulated substances which is constructed of primarily non-earthen materials that provide structural support;

24. "Transporter" means any person who transports, delivers or distributes any quantity of regulated substance from one point to another for the purpose of wholesale or retail gain; and

25. "Waters of the state" means all streams, lakes, ponds, marshes, watercourses, waterways, wells, springs, irrigation systems, drainage systems and all other bodies or accumulations of water, surface and underground, natural or artificial, public or private, which are contained within, flow through, or border upon the State of Oklahoma or any portion thereof.

## **165:27-1-2. Definitions**

In addition to the terms defined in 17 O.S. Sections 303, 352, and 402 and in OAC 165:25-1-11 and 165:26-1-2, the following words or terms, when used in this Chapter, shall have the following meaning unless the context clearly indicates otherwise:

"Associated costs" means those expenses that are not integral to the corrective action.

"Claim or Claims" means a properly submitted request for reimbursement from the Indemnity Fund Program.

"Closed file" means a file for which final payment or denial of payment has been made of all invoices submitted for corrective action taken under an individual application for reimbursement from the Indemnity Fund.

"Commission" means the Oklahoma Corporation Commission.

"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.

"Dispenser" means that equipment, gauge(s), hose(s), nozzle(s), immediately associated pipe or fittings and other such appurtenances located aboveground and intended for dispensing petroleum from a tank system. The dispenser is not part of a tank system for purposes of the Indemnity Fund Program.

"Extensive corrective action" means contamination that requires at least 3 months to remediate beginning after approval of the Corrective Action Plan by the Commission.

"Facility" means any location or part thereof containing one or more storage tanks or systems.

"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 which competitive bids may be reasonably based.

"New system (tank)" means an underground storage tank system for which installation began on or after April 21, 1989 or an aboveground tank for which installation began on or after July 1, 1990.

"Open file" means a file for which all documents required by the Indemnity Fund Program to complete an application have been received and the application accepted by the Indemnity Fund Program, and for which final payment or denial of payment of submitted invoices has not been made.

"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.

"Owner" means:

(A) In the case of an underground storage tank system in use on November 8, 1984, or brought into use after that date, any person who holds title to, controls or possesses an interest in an underground storage tank system used for the storage, use, or dispensing of regulated substances, or

(B) In the case of an underground storage tank system in use before November 8, 1984, but no longer in service on that date, any person who holds title to, controls or possesses an interest in an underground storage tank system immediately before the discontinuation of its use; or

(C) In the case of an aboveground storage tank system any person who holds title to, controls or possesses an interest in an aboveground tank at a service station in use on or after July 1, 1990.

"Person" means any and all persons, including any individual, trust, firm, joint stock company, federal agency, corporation (including a government corporation), partnership, association, state, municipality, commission, political subdivision of a state, or any

interstate body. It also includes a consortium, a joint venture, a commercial entity, and the United State Government.

"Reimbursement" means either:

(A) Repayment of an approved claim to an eligible person for allowable costs resulting from an eligible release; or

(B) Payment of an approved claim submitted on behalf of an eligible person for allowable costs resulting from an eligible release.

"Service station" means any facility including but not limited to businesses serving the public, marinas, and airports where flammable liquids are stored in aboveground storage tanks and dispensed for retail sales into the fuel tanks of airplanes, vessels or motor vehicles of the public.

"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 OAC 165:25 for such a report.

"Transporter" means any person who transports, delivers, or distributes any quantity of regulated substance from one point to another for the purpose of wholesale or retail gain.

"Work Plan" means a plan describing the actions taken or to be taken to monitor, maintain, minimize, eliminate or cleanup a release from a tank system and includes the work to be completed, schedules for action and costs or estimated costs.