

Managing C-Stores & Protecting the Environment
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IV. Contaminated Sites and the DEP Groundwater Fund
c. “When Good Fund Claims Go Bad”

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A. Purpose

What is the purpose of the Ground Water Oil Clean-Up Fund?

- “The Legislature intends by the enactment of this subchapter . . . to provide procedures whereby persons suffering damage from [leaks and unlicensed discharges of petroleum] may be promptly made whole; to establish a fund to provide for the investigation, mitigation, and removal of discharges or threats of discharge of oil from aboveground and underground storage facilities, including the restoration of contaminated water supplies; and to guarantee the prompt payment of reasonable damage claims resulting therefrom.” 38 M.R.S.A. § 561.¹
- The Fund is meant to function like an insurance policy for facility owners and operators and those damaged by a discharge.

A. Eligibility

Who can apply for fund coverage?

- An “applicant” for purposes of Fund coverage is defined as “the owner or operator of an underground oil storage facility or an aboveground oil storage facility that has suffered a discharge of oil and who is seeking coverage of eligible clean-up costs and 3rd-party damage claims from the fund.” 38 M.R.S.A. § 562-A(2).

Where do I apply?

- For underground oil storage facilities, application should be made to the Department of Environmental Protection (“DEP”). For aboveground facilities, application should be made to the State Fire Marshal. The state agencies provide application forms.

¹ This outline contains citations to the Maine Revised Statutes Annotated (“M.R.S.A.”). For questions and further guidance refer to the cited section of M.R.S.A. and your legal counsel.

- For practical purposes the DEP takes the lead in administering the Fund.

How soon must I apply?

- “The applicant must submit within 180 days of reporting the discharge a written request to the commissioner to be covered by the fund.” 38 M.R.S.A. § 568-A(1)(A).
- “The commissioner with respect to a claim involving an underground oil storage facility, or the State Fire Marshal with respect to a claim involving an aboveground oil storage facility, may waive the 180-day filing requirement for applicants for coverage of clean-up costs for discharges discovered after April 1, 1990 when the applicant has cooperated in a timely manner with the department in cleaning up the discharge.” 38 M.R.S.A. § 568-A(1).
- “When the commissioner determines that a site previously remediated to the commissioner's satisfaction requires further remediation, the owner or operator of the site may apply for coverage of eligible clean-up costs and 3rd-party damage claims from the fund, notwithstanding the person's failure to meet the 180-day deadline” 38 M.R.S.A. § 568-A(1)(G).

Are old spills eligible for coverage by the Fund?

- “An applicant is not eligible for coverage for any discharge discovered on or before April 1, 1990.” 38 M.R.S.A. § 568-A(1)(B-1).
- The term “discharge” is defined as “any spilling, leaking, pumping, pouring, emitting, escaping, emptying or dumping.” 38 M.R.S.A. § 562-A(6).

Are non-compliant UST facilities eligible for coverage by the Fund?

- “An applicant is not eligible for coverage for any discharge discovered or reported to the commissioner after October 1, 1998 if the discharge is from an underground oil storage facility or tank that is not constructed of fiberglass, cathodically protected steel or other noncorrosive material approved by the department or from an aboveground oil storage facility that has underground piping that is not constructed of fiberglass, cathodically protected steel or other noncorrosive material approved by the department.” 38 M.R.S.A. § 568-A(1)(B-2). Otherwise, a facility is eligible for coverage even if not fully compliant with all applicable regulations. A non-compliant facility does trigger conditional deductibles, described below.

What other restrictions on Fund eligibility apply?

- The federal government is not eligible. 38 M.R.S.A. § 568-A(1)(C).
- In one calendar year an applicant may not apply for coverage of costs and damages in excess of \$2 million aggregate per facility owner. 38 M.R.S.A. § 568-A(1)(D)
- Refiners, their franchisees, partners, subsidiaries, and parents are not eligible. However, an applicant remains eligible where its sole relationship with a refiner is to buy oil for sale or consumption. 38 M.R.S.A. § 568-A(1)(E)
- An applicant cannot get a double recovery where it has recovered costs by way of settlement with or judgment against the responsible party or its own insurer. “Applicants who recover costs by such a settlement or judgment shall reimburse the fund to the extent the amount recovered duplicates payments from the fund.” 38 M.R.S.A. § 568-A(1)(I).

B. Standard Deductibles

How does the deductible system work?

- The Fund contains a deductible system akin to that found in insurance policies. A standard deductible applies to all eligible applicants. An additional so-called “conditional deductible” may also apply where the facility is in non-compliance with applicable regulations.

How many standard deductibles are assessed per spill?

- The Fund statute provides that deductibles are assessed on a “per occurrence basis” 38 M.R.S.A. § 568-A(2). An “occurrence” is defined as “a contamination incident or prohibited discharge associated with one or more tanks or piping at an underground storage facility or aboveground oil storage facility within one year.” 38 M.R.S.A. § 562-A(14).

What is the amount of the standard deductible?

- The size of the deductible varies depending on whether the discharge is from an underground storage tank, aboveground storage tank, or whether the source of the discharge cannot be determined, as well as the number of underground storage facilities or amount of above ground oil storage capacity. 38 M.R.S.A. § 568-A(2)(A).
- Underground oil storage facility standard deductibles range from \$2,500 to \$62,500. Aboveground oil storage facility deductibles range from \$500 to \$62,500. 38 M.R.S.A. § 568-A(2)(A).

C. Conditional Deductible

- A conditional deductible applies for non-compliance with applicable regulations. Full compliance with all regulations is vital to avoiding conditional deductibles.
- The amount of the conditional deductible varies depending on the nature of non-compliance, but generally ranges from \$500 to \$10,000. 38 M.R.S.A. § 568-A(2)(B).

D. Appeals to the Fund Insurance Review Board (the “FIRB”).

What is the FIRB?

- The Fund Insurance Review Board (the “FIRB”) is a 10 member independent regulatory board established by statute to hear and decide appeals for Fund claims-related decisions. Most appeals address whether the DEP or Fire Marshall appropriately assessed a conditional deductible. The FIRB is also authorized to adopt certain rules and guidelines.
- The Appeals Panel of the FIRB is composed of the 5 public members of the FIRB. The industry appointed member of the FIRB do not serve. One of the public member positions on FIRB is currently vacant. The public members are: Dirk Brunner, Chair, Richard Knowlton, Sarah Walton, and Robert Bender.

The Clerk of the FIRB is Michelle McKenzie with the Finance Authority of Maine. Legal counsel to the FIRB is Assistant Attorney General Mary Sauer.

Do I have to appeal to the FIRB?

- Yes. “An applicant aggrieved by an insurance claims-related decision of the commissioner, including but not limited to decisions on eligibility for coverage, eligibility of costs and waiver and amount of deductible, may appeal that decision to the Fund Insurance Review Board.” 38 M.R.S.A. § 568-A(3-A).

How long do I have to file an appeal?

- The appeal must be filed within 30 days after the applicant receives the commissioner's decision on the matter. 38 M.R.S.A. § 568-A(3-A).

When will the FIRB hear my appeal?

- The appeals panel must hear an appeal at its next meeting following receipt of the appeal, unless the appeals panel and the aggrieved applicant agree to hear the appeal at a different time. 38 M.R.S.A. § 568-A(3-A). FIRB hearings are held at least quarterly.

Who has the burden of proof on appeal to the FIRB?

- On appeal, the burden of proof is on the commissioner as to which deductibles apply. 38 M.R.S.A. § 568-A(2).
- The review of the record on all issues presented in the notice of appeal is de novo, meaning that the DEP or Fire Marshall's conclusions are not binding on the FIRB. CMR 90-564-003.

What evidence can I submit to the FIRB?

- The record before the Appeals Panel shall consist of the notice of appeal and the entire record that was developed before the Commissioner at the time he or she made the decision which is being appealed. However, the Appeals Panel will review only those parts of the record which have been forwarded to the Panel by the parties. CMR 90-564-003.
- The Appeals Panel will not accept any new evidence unless it finds that it is relevant and that such evidence could not have been submitted to the Commissioner as part of the application process. CMR 90-564-003.

How does the appeal hearing work?

- After consideration of whether new evidence may be presented, the appellant shall be present and make a statement, either personally or through counsel, explaining his appeal. Witnesses or new evidence shall be presented at this time, if permitted by the Panel. DEP or Fire Marshal staff, the Appeals Panel, and the FIRB's counsel may ask questions of the appellant and any witness. At the conclusion of the presentation of the appellant's case, the DEP or Fire Marshal staff will present his position. The appellant or counsel for the appellant, the Appeals Panel, staff and the FIRB's counsel may ask questions of the DEP or Fire Marshal staff and any witness. CMR 90-564-003.
- The applicant can also file a position statement with the FIRB 10 days prior to the hearing.

Can I recover attorneys' fees if I win my appeal to the FIRB?

- If the appeals panel overturns the commissioner's decision, reasonable costs, including reasonable attorney fees, incurred by the aggrieved applicant in pursuing the appeal to the review board must be paid from the Fund. Reasonable attorney fees include only those fees incurred from the time of a claims-related decision forward. 38 M.R.S.A. § 568-A(3-A).

E. Appeals to Maine Superior Court and Maine Supreme Court.

- Decisions of the appeals panel are subject to judicial review pursuant to the Maine Administrative Procedure Act. 38 M.R.S.A. § 568-A(3-A); see also 38 M.R.S.A. § 346(1).

What is the standard of review?

- Any aspect of a FIRB finding can be appealed, both conclusions of law and findings of fact. However, FIRB decisions are not easily overturned. The Court's review is deferential. The Court will give considerable deference to the FIRB's interpretation of its own internal rules, regulations, and procedures and will not set it aside, unless the rule or regulation plainly compels a contrary result. The FIRB's interpretation is not binding on the court, however, and it will not be upheld if it is contradicted by the language and purpose of the statute.
- The Court will affirm *findings of fact* by the FIRB if they are supported by substantial evidence in the record. The Court will vacate agency factual findings only when they are clearly erroneous. The Court will uphold the agency's findings if it could have fairly and reasonably found the facts as it did. The Court, acting in an appellate capacity, is not free to make factual findings independent of those made by the agency.

What is the appeal process?

- An appeal of a FIRB decision is first taken to Superior Court. New evidence is generally not permitted. The case is decided based on written briefs and oral argument by counsel.
- A Superior Court decision may be appealed to the Maine Supreme Judicial Court sitting as the Law Court. Again, new evidence is generally not permitted. The case is decided on written briefs and oral argument by counsel.