

567—137.3(455H) Enrollment in land recycling program.

137.3(1) Property eligible for enrollment. Unless excluded by statute or this rule and subject to eligibility conditions specified in this chapter, property which has been or is suspected to be the site of or affected by a release of a hazardous substance as defined in Iowa Code Supplement section 455H.103 is eligible for enrollment beginning October 27, 1998. The following sites shall not be enrolled in the land recycling program:

a. Property with petroleum releases associated with underground storage tanks subject to regulation under Iowa Code chapter 455B, division IV, part 8; and department rules under 567—Chapter 135. (However, property affected by releases of “regulated substances” from underground storage tanks other than petroleum as defined in rule 567—135.2(455B) subject to regulation under 567—Chapter 135 may be enrolled under this chapter.) Property enrolled and affected by a release from underground storage tanks of regulated substances other than petroleum will be subject to the response action standards in this chapter rather than those in 567—135.8(455B) through 135.12(455B). See also 567—paragraph 135.1(3) “e.”

b. Property which has been placed or is proposed to be included on the national priorities list established pursuant to the federal Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. Section 9601 et seq. A property will be considered proposed at the time that a public notice of intent to list the property on the national priorities list is published in the Federal Register in accordance with 40 CFR 300.425.

c. An animal feeding operation structure as defined in Iowa Code section 455B.161.

d. Properties subject to administrative or judicial enforcement action by the department or the Environmental Protection Agency or subject to an administrative or judicial consent order addressing environmental conditions. These properties may be eligible for enrollment only with the written approval of and under such terms as determined by the enforcing agency.

e. Eligible properties which are or may be affected by or commingled with ineligible releases or conditions will be evaluated on a case-by-case basis to determine their appropriateness for enrollment. Only the eligible property and participant(s) will be afforded the benefits and immunities available under Iowa Code Supplement chapter 455H. Any protections provided by issuance of a no further action certificate will be limited by and may be subject to reopening due to future conditions associated with the ineligible release. Considerations for enrollment or exclusion include but are not limited to the following:

(1) The extent to which eligible releases and site conditions can be assessed and response action(s) designed and implemented independent of the ineligible releases and property.

(2) The extent to which the liability and other protections offered by Iowa Code Supplement chapter 455H and the conditions of a no further action certificate can reasonably be defined to apply to the eligible site without consideration of or dependence on future conditions associated with the ineligible release and property.

(3) The extent to which a participant is willing to conduct all response action(s) necessary to address the health, safety and environmental conditions implicated by both eligible and ineligible releases and conditions. The extent to which a nonparticipant responsible for the ineligible release and property can establish an intention and ability to cooperatively address and share costs associated with the commingled conditions and satisfy both the standards in this chapter and any other regulatory standards applicable to the ineligible release or condition.

137.3(2) Enrollment policy and procedures. Prior to enrollment, the applicant/participant(s) should have conducted sufficient preliminary site investigation and project planning to be prepared to show that a site is eligible for enrollment and the participant(s) is ready and capable of initiating and completing a response action in accordance with these rules. The applicant/participant(s) must submit a completed program application and participation agreement form as supplied by the department. The program application shall contain at least the following information.

a. An acknowledgment of access/control of the site signed by the participant if that person is a fee titleholder in the affected property; if the applicant/participant(s) is not a fee titleholder, then an acknowledgment by the fee titleholder of the affected property. If acknowledgment of access cannot be obtained, the participant must describe efforts to obtain access and reasons why it has been refused.

b. The name, address and other relevant information of each current and anticipated participant(s). The description should include a brief statement of the reasons for each person's participation including but not limited to that person's interest in and legal relationship to the property enrolled and the expected role and scope of any participation. Other persons who are not participants but who may have an interest in the project should be identified, such as state and local development agencies, community groups, and financing sources.

c. The applicant/participant(s) must demonstrate the presence of hazardous substances at concentrations that warrant response action(s) under the standards in this chapter. At a minimum the environmental condition to be addressed must be documented by the submission of a report which includes the following:

(1) Soil and groundwater samples of hazardous substances which have been analyzed by a laboratory certified under 567—Chapter 83 for the analytes being tested. The laboratory analysis should establish the presence of hazardous substances under conditions which exceed or are likely to exceed a statewide standard, if a statewide standard is available. Copies of the laboratory analytical report, boring logs and a site diagram showing the location of the sampling points in relation to the site should be included.

(2) A description of the current and historical uses of the property based on a reasonable and diligent inquiry. This must include a description of the following: known sources and probable locations of hazardous substances and probable location of the sources at the property which the participant proposes to address as part of the project; a general description of the historical uses of the property and probable hazardous substances which could reasonably be associated with past land use; and a general description of the surface characteristics of the property and surrounding areas such as current zoning, residential, commercial and industrial uses, and current uses of adjoining properties.

d. Any assessments or other reports relating to contamination at the property in excess of a statewide standard or reportable under 567—Chapter 131 which are known to and within the control of the applicant/participant shall be submitted. If the applicant/participant intends to claim that information constitutes a privileged environmental audit as provided in 1998 Iowa Acts, House File 681, the applicant must notify the department of the claim and resolve the issue of privilege prior to submittal. The applicant shall not submit to the department a report or any part of a report which it claims to be privileged and any information submitted under this paragraph shall be deemed a nonprivileged submittal as provided in section 6, paragraph (1) "a," of the Act. This provision does not relieve the applicant/participant of any obligation to notify the department of a hazardous condition as provided in Iowa Code section 455B.386 and rules under 567—Chapter 131.

e. A statement of the project objectives which includes the current use of the property, proposed development activities, and an expected time frame for meeting these objectives. The statement should include a general description of the scope of the proposed environmental condition to be addressed and a proposed schedule for initiation and submittal of site assessment activities pursuant to rule 137.8(455H). The statement should describe any foreseeable barriers toward achieving project objectives such as access to property, financing uncertainties, legal actions, allocation of responsibility amongst parties.

f. A list of all known permits and regulatory actions and directives associated with an environmental condition at the site. If any parcel of the proposed enrolled site is subject to any federal regulatory corrective action directives, administrative orders or judicial actions, these must be explained. The applicant must submit written proof that the appropriate federal regulatory agency has been notified of the applicant's desire to participate in the Iowa land recycling program. Objections, concerns or issues which could lead to disputes regarding dual or conflicting jurisdiction should be resolved prior to application, if possible, and before admission.

g. The department will respond in writing within 60 days of receipt of the enrollment application. The department will notify the applicant/participant(s) whether the site has been accepted and an expected time line for assignment of the project to a manager. If the site is not accepted, the department will notify the applicant of the reason(s). Upon notification of admission, the property shall be considered enrolled. Once the department has assigned the enrolled site to a project manager, the department will enter into a participation agreement with the participant(s).

137.3(3) Enrollment fees and oversight costs. A nonrefundable enrollment fee of \$750 must be submitted with the program application. This fee is intended to cover the department's cost of reviewing the program application and a minimum amount of subsequent oversight costs. Subsequent fees in excess of the minimum \$750 may be assessed for actual oversight costs incurred by the department as provided in this chapter. Department oversight activities may include, but are not limited to: review of documents, meetings with the participant(s), site visits, sampling, and laboratory costs related to verification of submitted materials. The total fees for oversight costs shall not exceed \$7,500 per enrolled site. Fees shall be assessed and collected as follows:

a. Hourly billing rate. Project oversight fees shall be based on an hourly rate to cover wages and overhead costs of personnel employed by the department in the land recycling program. The department shall calculate and publish on an annual basis an hourly billing rate at which oversight fees shall be calculated.

b. Quarterly payments. The department shall bill the participant(s) on a quarterly basis for additional oversight costs beyond the review of the application incurred by the department. The participant(s) shall pay the department within 30 days after receiving the department's quarterly fee statement. If there is more than one participant, each shall be jointly and severally responsible for payment. The department will provide split billings if provided with an enforceable written contract allocating the fees amongst the participants.

c. Failure to pay required fees. If the participant(s) fails to pay department oversight fees that are required under this subrule, the department shall cease to provide oversight to the participant(s) and terminate enrollment of the site as described in subrule 137.3(7).

137.3(4) Participation agreement. All participants shall enter into a participation agreement. This agreement shall be executed at the time the project is assigned to a project manager. At a minimum, the agreement shall establish the following:

a. A requirement that the participant(s) agree and provide necessary documentation to ensure reasonable access to the affected property by department staff and other authorized representatives of the department.

b. A requirement that the participant(s) reimburse the department for the actual costs assessed as provided in 567—subrule 137.3(3).

c. A requirement that the participant(s) certify that the participant(s) has the financial means to complete the project based on an initial estimate of completion costs. The department may require modification and amendment of the financial certification at any stage in the project and may require the participant(s) to provide financial documentation as necessary to support the certification.

d. A requirement that the participation agreement include a general description of the scope of the project and the goals to be achieved, a general time frame for submission and review of documents in accordance with this chapter, allocation of responsibility amongst multiple participants and other appropriate milestones. Either the participant(s) or the department may request a meeting to develop a statement describing the scope, goals, and time frames for the project.

137.3(5) Prioritization. Eligible sites will be enrolled in the order in which they are received. The department reserves the right to elevate the priority of a given site if it determines the threat to the public health or environment or environmental conditions in combination with the development objectives consistent with Iowa Code Supplement section 455H.104 is significantly greater than those of sites with an earlier enrollment date.

137.3(6) Withdrawal procedures. Enrollment and continued participation in the program are voluntary. The participant(s) may withdraw the enrolled site and individual participants may withdraw from further participation in the land recycling program at any time upon written notice to the department. Any participant who withdraws an enrolled site from further participation in the program shall not be entitled to any refund or credit for the \$750 enrollment fee and shall be liable for any oversight costs actually incurred by the department up to the cap of \$7,500 per enrolled site. A participant who withdraws a site prior to completion of all response action(s) required by this chapter and issuance of a no further action certificate in accordance with rule 137.11(455H) forfeits all benefits and immunities provided by this chapter and Iowa Code chapter 455H. Prior to withdrawal,

the participant(s) shall submit a plan, which must be approved by the department, for stabilization of conditions at the site or a justification for why further action to stabilize the site is not necessary. Participants shall be required to take such actions as the department determines necessary to stabilize conditions at the site, including, but not limited to, securing or properly abandoning monitoring wells, removing or otherwise properly disposing of all contaminated soil excavations, removing or properly disposing of exposed or exhumed contaminants, filling or properly fencing open excavations, and posting safety notices.

137.3(7) Termination of enrollment. Enrollment of the participant(s) may be terminated based on a finding of material noncompliance with department rules and statutory requirements including but not limited to the following:

a. Significant failure, after written notice, to comply with schedules for completion and submission of reports and implementation of response action(s) required by these rules or otherwise agreed upon in writing by the department and participants. Written requests for reasonable schedule extensions may be granted upon a showing of extenuating circumstances beyond the control of the participant(s) and the participant(s) agent/contractor.

b. Failure to proceed in a timely manner after written notice in performing the additional response action required due to a failure of technological and institutional controls pursuant to rule 137.7(455H).

c. Material misstatement or omission of fact in reports submitted to the department by the participant or agents of the participant.

d. Evidence that the site falls under one of the exclusion categories in subrule 137.3(1).

e. Failure to pay required fees to the department as required in subrule 137.3(3).

137.3(8) Appeal rights. The department will notify participant(s) of a denial of enrollment or of an intent to terminate enrollment and provide a statement of reasons. The participant(s) shall have a right to appeal the decision to deny enrollment or to terminate enrollment. Upon timely appeal, contested case procedures shall be initiated pursuant to 561—Chapter 7.