

The Indiana Brownfields Program



Environmental Stewardship. Economic Development.

Mitchell Smith, Communications Lead & Project Manager

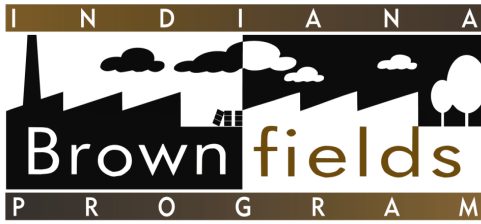
mismith@ifa.in.gov

317-234-8833

Brownfields Program 101



A State that Works



What is a Brownfield?

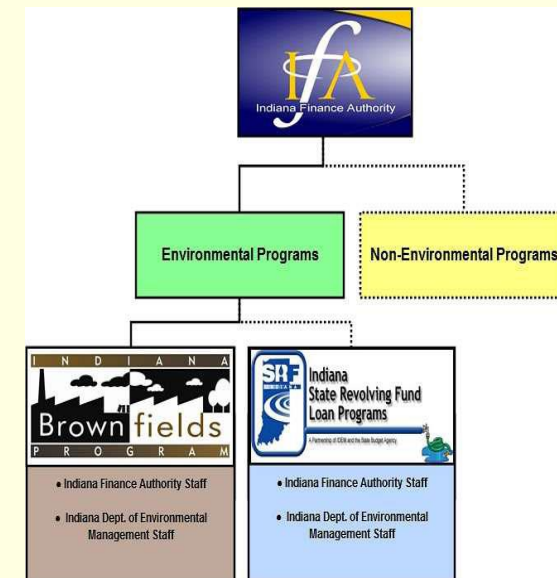
- A parcel of real estate that is abandoned or inactive; or may not be operated at its appropriate use;
- And on which expansion, redevelopment, or reuse is complicated;
- Because of the presence or potential presence of a hazardous substance, a contaminant, petroleum, or a petroleum product that poses a risk to human health and the environment.





Technical and Financial Assistance

- Provides **free governmental assistance** to address environmental issues that impede brownfield redevelopment
- Typically works with communities or prospective purchasers
- Allows for **voluntary participation** – not enforcement
- Works in partnership with U.S. EPA & IDEM
- Has different processes for different incentives
- Has a qualified pool of consultants
- Uses consultants differently per incentive
- Utilizes IDEM's Risk-based Closure Guide (R2)
- Offers **closure & liability clarification documents**





What we do

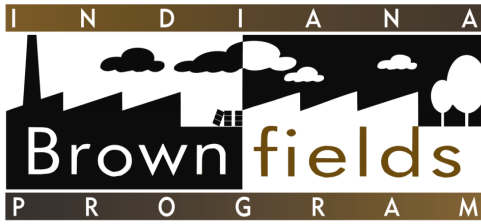
- Voluntary - not regulatory
- No fees
- Non-responsible parties
- Property transfers and/or financial assistance for assessment/remediation
- Use existing laws, regulations, and/or policies

■ Assistance

- Financial
 - “Grants”
 - Loans
- Legal
 - Comfort Letters
- Technical
 - Closure Letters
 - Comment Letters
- Educational

■ Coordination

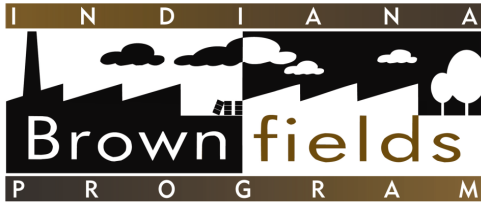
- U.S. EPA
- Other IDEM Programs
 - Voluntary Remediation Program
 - State Cleanup
 - LUST
 - RCRA



What Are Some Obstacles to Brownfield Redevelopment?

- Real or suspected environmental contamination
- Assessment/Cleanup costs
- Liability concerns for the lender, prospective purchaser, investor, tenant, and third parties
- Socio-economic issues or economic development climate
- Viability of re-use plans for the site
- Lack of resources – knowledge, money, partners
- Unknowns – risks, ownership, access





Financial Incentives

- **State and federal \$:** fund loans, subgrants (awards of professional services), coordination/leveraging
 - Phase I Environmental Site Assessment (Phase I ESA) Initiative
 - Petroleum Orphan Sites Initiative (POSI)
 - Revolving Loan Fund (RLF) Incentive (federal \$)
 - \$2M Assessment Grant (federal \$)
 - 128(a) Annual Grant (federal \$); ~\$250k assessment/cleanup
 - IFA State Revolving Fund (SRF) Loan Program coordination
 - IDEM Supplemental Environmental Project (SEP) coordination
 - OCRA-IFA partnership coordination (e.g., demo/clearance)
 - Misc. brownfield determinations/support letters (e.g., PEDs)

Financial assistance varies throughout the years....

Some assistance via rolling applications... some not....

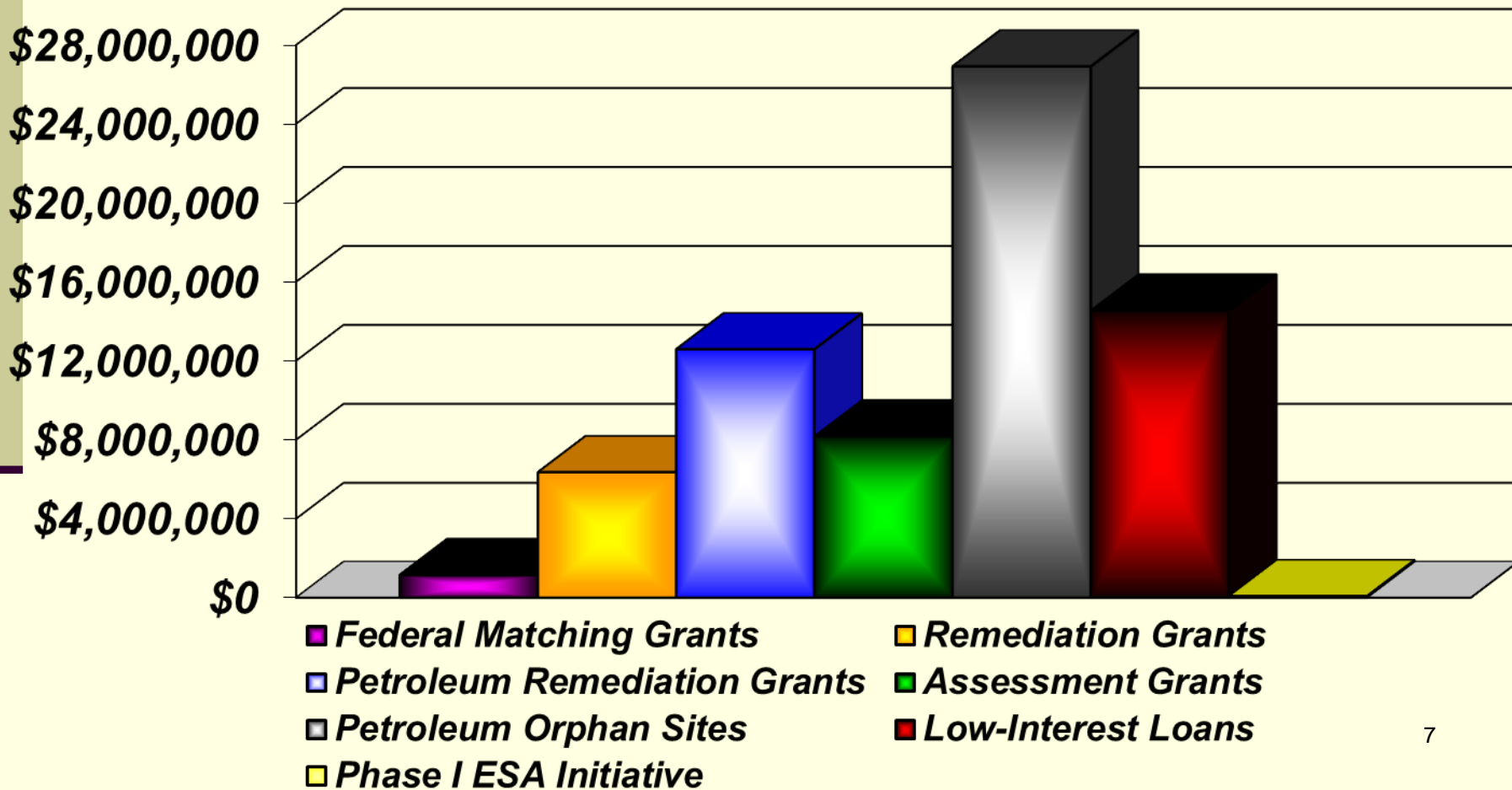
Assistance is not mutually exclusive and is not linear....





Total State Funding Awards FY 1997-2022

\$69,800,745





Comfort and/or Closure Letters

All letters drafted by the Program go through peer, legal, and technical review before being signed by IDEM (Peggy Dorsey or Tim Veatch) with the exception to POSI NFAs, which are signed by Andrea Robertson.

The Program utilizes IDEM Science Services (Chemistry, Risk, Geology, etc) to review available data as needed and in conjunction with determining any needed land use restrictions.

Comfort Letters are not issued to Responsible Parties.

There are other bases for a Comfort Letter – political subdivision acquisition or lender liability defense most common





Comfort Letter Timeline

- Letters are typically issued within a **minimum of 90-120 days** from the time the Program receives all pertinent documentation and information.
- Length of the time varies based on:
 - the number of other requests already in the queue
 - the volume of data/reports associated with the subject site that require review
 - Review process includes peer review, general counsel review, technical review, and signature review
 - Complexity of the Site/project and redevelopment plans
- BFPP liability defense is self-implementing; a stakeholder need not have an IDEM Comfort Letter in hand at the time of site transfer/closing to be eligible for the liability defense.



Bona Fide Prospective Purchaser (BFPP)

A BFPP is a prospective purchaser or owner of a site that satisfies “all appropriate inquiry” by completing a Phase I ESA prior to purchasing (or leasing) a site at which all disposal of hazardous/petroleum substances occurred prior to purchase (or lease). AAI is a rule under CERCLA that prescribes the due diligence necessary for a buyer to undertake so it knows what it is getting into when buying a property with contamination.

The BFPP liability defense is self-implementing; if the applicant meets the pre-purchase statutory criteria and follows the post-acquisition continuing obligations, the applicant should be protected, regardless of whether it has obtained a letter from IDEM. Of course, such liability protection won't be validated until and unless the BFPP is sued. A Comfort Letter also provides IDEM's technical opinion on recommended reasonable steps regarding known environmental conditions on the Site in order to satisfy continuing obligations and maintain BFPP protection.





BFPP Comfort Letter

■ Bona Fide Prospective Purchaser (BFPP) Defense

- Meet AAI requirements – Phase I ESA (ASTM1527-21)
- Self Implementing by statute – letter not needed but helpful
- Can be issued after purchase
- No RECs or Historical RECs and/or no contamination
 - Program can't issue Comfort Letter because no enforcement risk
 - Comment Letter
- Reasonable Steps (due care)
 - Technical opinion (mitigation to exposures)
- Phase II Investigation
 - Identified RECs should be investigated but are not required to be
 - IBP comments on recommended reasonable steps/continuing obligations



Comfort Letter - BFPP Phase I ESA

■ RECs vs CRECs vs HRECs

■ Recognized Environmental Condition (REC)

“...the presence or likely presence of any hazardous substances or petroleum products in, on, or at a property: (1) due to any release to the environment; (2) under conditions indicative of a release to the environment; or (3) under conditions that pose a material threat of a future release to the environment.”

■ Controlled REC

“...a recognized environmental condition resulting from a past release of hazardous substances or petroleum products that has been addressed to the satisfaction of the applicable regulatory authority (for example, as evidenced by the issuance of a no further action letter or equivalent, or meeting risk-based criteria established by regulatory authority), with hazardous substances or petroleum products allowed to remain in place subject to the implementation of required controls (for example, property use restrictions, activity and use limitations, institutional controls, or engineering controls).”



Comfort Letter - BFPP Phase I ESA

■ RECs vs CRECs vs HRECs

■ Historical REC

“...a past release of any hazardous substances or petroleum products that has occurred in connection with the property and has been addressed to the satisfaction of the applicable regulatory authority or meeting unrestricted use criteria established by a regulatory authority, without subjecting the property to any required controls (for example, property use restrictions, activity and use limitations, institutional controls, or engineering controls).”

■ Definitions listed in ASTM 1527-21

- Consultants have misused/confused the terms
- Program staff will correct the term(s) in the Comfort Letter
- Program staff may identify and list site conditions it perceives as RECs not identified by the Phase I ESA



Comfort Letter - BFPP Phase I ESA

■ Other ASTM Terms

■ De Minimis Condition

“...a condition that generally does not present a threat to human health or the environment and that generally would not be the subject of an enforcement action if brought to the attention of appropriate governmental agencies. Conditions determined to be de minimis conditions are not recognized environmental conditions nor controlled recognized environmental conditions.”

■ Common Non-Scope Issues

- Asbestos Containing Materials (ACM)
- Lead-Based Paint (LBP)
- Business Environmental Risks (BERs) – often misused or not used



Comfort Letter - BFPP Phase II ESA

- **Phase II Environmental Site Assessment (ESA)**
 - Investigate RECs identified in the Phase I ESA
 - Soil borings
 - Groundwater monitoring wells
 - Soil Gas
 - Indoor Air
 - Exposure Risks
 - Soil - direct contact residential, commercial/industrial, excavation worker scenarios
 - Groundwater
 - Soil gas – vapor outside building or beneath slab
 - Indoor air – vapor in the building
 - More information (data and reuse plans), better letter



Comfort Letter Submittals

All Comfort Letter requests should include a **completed**:

1. *Comfort/Site Status Letter Request Form,*
2. *Comfort/Site Status Letter Supplemental Information Request Form, AND*
3. *Comfort/Site Status Letter Submittal Checklist, AND*
4. *Cover Letter*

All supporting documentation to ensure your request is complete; an incomplete submittal will delay staff review of your request. **Please submit an electronic transmission of each form/document/report (or a list of VFC #s) as part of your request.** Current forms can be found here:

<https://www.in.gov/ifa/brownfields/2364.htm>



Technical Closure Letters

■ Site Status Letter

- Non-responsible party
- Demonstrate current contaminant levels substantially meet IDEM published levels in the Risk-Based Closure Guide (R2)
- Concludes that current site conditions do not present a threat to human health or the environment and that IDEM does not plan to take or require a response action at the brownfield site
- Does not address the potential liability



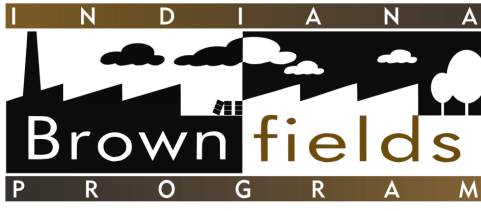
Technical Closure Letters

- **No Further Action (NFA)**
 - Non-responsible and responsible parties
 - Only for incidents such as spills/releases (LUST and SCP incidents)
 - Petroleum sites and an occasional hazardous site
 - Similar to the Site Status Letter
- **Project Status Letter (PSL)**
 - Non-responsible and responsible parties
 - For summary and site update purposes; no incident
 - Petroleum sites and occasional hazardous site
 - Used to note use of funding source (POSI, RLF, etc.)



Environmental Restrictive Covenant (ERC)

- Form of institutional control used in risk-based closure
- **Land Use Restrictions**
 - Drafted by the Program; issued with letter
 - Recorded/Attached to property deed through an ERC
 - Detail property conditions
 - Contaminants – levels and locations
 - Affected media – soil, groundwater, surface water, soil gas, and/or indoor air
 - Proscribe actions or prohibitions deemed necessary for safe intended property use - residential, commercial, industrial
 - Modifications can be made (or ERC terminated) as property conditions change or more information is gathered



Petroleum Brownfields

■ Financial Options for Communities

■ Petroleum Orphan Site Initiative (POSI)

- Addressing petroleum contamination on brownfield sites resulting from leaking underground storage tanks that cannot be addressed by the responsible party due to an inability-to-pay, bankruptcy, or other factors (orphan sites)
- Hazardous substances or petroleum contamination from other on-site sources (e.g., hydraulic lifts, etc.) also addressed if funding is available

The following sites are eligible for POSI funding:

- Sites with no viable responsible party due to dissolution, being defunct or bankrupt, or having demonstrated an inability-to-pay verified by IDEM
- Sites that are effectively abandoned due to tax delinquency or for which there is no known responsible party
- Sites with a responsible party solely based on current ownership (e.g., inheritance), but the owner did not cause or contribute to the historic contamination or own and/or operate at the site at the time of the disposal or release



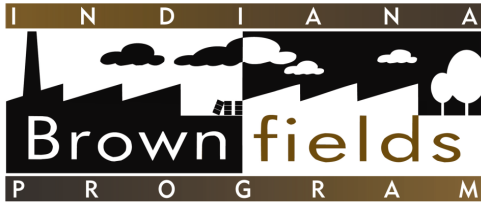


Petroleum Orphan Site Initiative (POSI)

■ POSI Process

- Site Access obtained & RFP is issued for each Site to a pre-qualified pool of consultants
- RFP is tailored for each site based on known and suspected site conditions
 - Activities at sites with no available info include:
 - Phase I, geophysical, UST removal, Phase II, and final monitoring
 - Average project duration is 2 years
 - Site remains in process until NFA is issued
- Brownfields Program project managers provide oversight
 - Site visits for UST/soil removal
 - Approve change orders (if needed)
 - Approve invoices
 - Draft Environmental Restrictive Covenants (ERCs)
 - Work cooperatively with consultants/technical staff to close out sites





Sites within other Programs

Some sites exist in one or multiple other Programs before being labeled a brownfield. Once that site is admitted into the Program (following an application submission), the Program PM will reach out to the appropriate IDEM PM for background info, analytical data, etc. that may not be on VFC and to obtain current project status. IDEM PMs are cc'd on outgoing letters from the Program.

The Program does not work with RPs (except maybe on ERC recordation); we work with the CL applicant whose responsibility is only to mitigate exposure not undertake clean up.





Sites within other IDEM Programs

Although the Site is an active State Cleanup/LUST/VRP site, the Program has discussed the proposed transaction and redevelopment with State Cleanup staff who do not object to the agency's use of enforcement discretion as it pertains to the [Owner or Prospective Purchaser].

Liability Clarification

IDEM's "*Brownfields Program Comfort and Site Status Letters*" Non-rule Policy Document, W-0051 (April 18, 2003) (Comfort and Site Status Letter Policy), provides that IDEM may issue a letter to a stakeholder involved in redevelopment of a brownfield if the stakeholder satisfies certain eligibility criteria outlined below. IDEM concludes, based in part on information provided by the Owner, that:

- (1) no state or federal enforcement action at the Site is pending;
- (2) no federal grant requires an enforcement action at the Site,
- (3) no condition on the Site constitutes an imminent and substantial threat to human health or the environment;
- (4) neither the Owner nor an agent or employee of the Owner caused, contributed to, or knowingly exacerbated the release or threat of release of any hazardous substance or petroleum at the Site; and,
- (5) the Owner is eligible for an applicable exemption to liability, specifically the bona fide prospective purchaser (BFPP) exemption to liability for hazardous substance contamination found in IC §13-25-4-8(b) and for petroleum contamination under IC §§ 13-23-13 and 13-24-1, provided the applicable statutory criteria are met.

As discussed below, the Owner has demonstrated to IDEM's satisfaction that it is eligible for the State BFPP exemption from liability for hazardous substance and petroleum contamination provided it takes the "reasonable steps" required by statute, recommendations for which are also discussed below.





Sites within other IDEM Programs

The Program can wait to issue an ERC if closure in other program is imminent or issue an ERC so the BFPP can comply with reasonable steps obligations

(a) Shall prohibit any activity at the Real Estate that interferes with any ongoing response activities, long-term groundwater monitoring, or measures necessary to assure the effectiveness and integrity of any response action or engineering control, or component thereof, implemented at the Real Estate.

- Record the environmental restrictive covenant (ERC) expected to be required in conjunction with issuance of a Certificate of Completion (COC) and Covenant Not to Sue (CNTS) by IDEM's VRP for site #6020903 and comply with any land use restrictions therein. Land use restrictions applicable to use of the Site may include, but not be limited to:
 - Do not use the Site for residential purposes.
 - Do not occupy any renovations/additions to the existing buildings or any newly-constructed human-occupied building(s) without first determining, with IDEM concurrence, that VI exposure is not occurring; or, install an IDEM-approved VI mitigation system and operate and maintain it to ensure VI exposure risk is mitigated until such a time IDEM determines that the VI exposure risk no longer exists.
 - Neither engage in nor allow drilling or excavation of soil on the Site during any construction without first submitting a work plan for approval by IDEM at least sixty (60) days prior to beginning work. Any removal, excavation or disturbance of soil from the Site during any construction must be conducted in accordance with an IDEM-approved work plan/SMP, including all applicable requirements of Indiana OSHA/OSHA.
 - Do not use groundwater for anything except for environmental monitoring and/or remediation.





Comfort Letter Sample

IDEM
INDIANA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT
We Protect Hoosiers and Our Environment.
100 N. Senate Avenue • Indianapolis, IN 46204
(800) 451-6027 • (317) 232-8603 • www.idem.IN.gov
Eric J. Holcomb
Governor
Brian C. Rockensuess
Commissioner

August 11, 2022

Jeffrey Congdon
Guggman Haus Investments, LLC dba Boyle Racing Project, LLC
152 East 22nd Street, Suite B
Indianapolis, IN 46202

Re: **Comfort Letter**
Bona Fide Prospective Purchaser
Rex Metals
(a.k.a. Boyle Racing Headquarters)
1701 Gent Avenue
Indianapolis, Marion County
(State Cleanup #0000744)
Brownfield #4170407
IDEM AI #117788

Rex Metals, Indianapolis – BFPP Comfort Letter
BFD #4170407
August 11, 2022
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requirements under the Resource Conservation and Recovery Act, 42 U.S.C. § 6901 or CERCLA. In addition, if any acts or omission by the Owner exacerbates the contamination at the Site, or if the Owner does not implement and maintain the reasonable steps and other statutory requirements outlined in this letter, then the Owner would not be considered a BFPP and may be potentially liable under IC §§ 13-25-4-8(a), 13-23-13 and/or 13-24-1. Furthermore, activities conducted at the Site subsequent to purchase that result in a new release can give rise to full liability. This letter does not constitute an assurance that the Site is safe for any particular use.

IDEM is pleased to assist Guggman Haus Investments, LLC dba Boyle Racing Project, LLC with this commercial redevelopment project. Should you have any questions or comments, please contact Tracy Concannon at 317/233-2801. She can also be reached via email at: tconcann@ifa.in.gov.

Sincerely,

Peggy Dorsey
Assistant Commissioner
Office of Land Quality

Attachment (Tables)

cc: Britney Nadler, U.S. EPA Region 5
Meredith Gramelspacher, Indiana Brownfields Program
Tracy Concannon, Indiana Brownfields Program
(Crystal Hauler, State Cleanup Program)
Steven Jessee, Polaris Environmental, LLC
Jennifer Baker, Barnes & Thornburg
Marion County Health Department





POSI NFA Letter Sample



INDIANA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT

We Protect Hoosiers and Our Environment.

100 N. Senate Avenue • Indianapolis, IN 46204

(800) 451-6027 • (317) 232-8603 • www.idem.IN.gov

Eric J. Holcomb
Governor

Brian C. Rockensuess
Commissioner

December 12, 2022

Ronald Royer
P.O. Box 258
Goodland, Indiana 47362

Re: **No Further Action Determination
Pursuant to Risk-based Closure Guide
LUST POSI**
Goodland Food Shop
102 East Jasper Street
Goodland, Newton County
UST FID #11592
LUST #202111520
Brownfield #4210604

IDEM is pleased to assist Mr. Royer with this request. Should you have any questions or comments, please contact Mitchell Smith of the Indiana Brownfields Program at 317-234-8833 or by email at mismith@ifa.in.gov.

Sincerely,

Andrea Robertson Habeck
Technical Staff Coordinator
Indiana Brownfields Program

cc: Brittney Nadler, U.S. EPA Region 5
Meredith Gramelspacher, Indiana Brownfields Program
Mitchell Smith, Indiana Brownfields Program
Shay Hartley, Petroleum Remediation Section
Brad Gentry, IWM



A State that Works



Contact Information

- **Meredith Gramelspacher, Program Director /General Counsel** 317- 233-1430
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- **John Morris, Stakeholder Engagement Coordinator** 317- 234-0235
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- **Andrea Robertson Habeck, Technical Staff Coordinator** 317-234-0968
aroberts@ifa.in.gov
- **Mitchell Smith, Communications Lead & Project Manager** 317-234-8833
mismith@ifa.in.gov
- **Tracy Concannon, Planning Measures & Compliance Coordinator** 317-233-2801
tconcann@ifa.in.gov
- **Sara Westrick Corbin, Financial Resources Coordinator** 317- 234-1688
scorbin1@ifa.in.gov

Check out the Indiana Brownfields Program web site at: www.brownfields.in.gov

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Environmental Stewardship. Economic Development