



NONRULE POLICY DOCUMENT

Indiana Department of Environmental Management
Office of Land Quality
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Title: Brownfields Program Comfort and Site Status Letters Policy

Identification Number: W-0051

Date Originally Effective: April 18, 2003

Dates Revised: None

Other Policies Repealed or Amended: None

Brief Description of Subject Matter: IDEM Brownfields Program's policy regarding issuance of a Comfort or Site Status Letter to stakeholders redeveloping contaminated property.

Citations Affected: IC 13-23-13; IC 13-24-1; IC 13-25-4

This nonrule policy document is intended solely as guidance and does not have the effect of law or represent formal Indiana Department of Environmental Management (IDEM) decisions or final actions. This nonrule policy document shall be used in conjunction with applicable laws. It does not replace applicable laws, and if it conflicts with these laws, the laws shall control. This nonrule policy document may be put into effect by IDEM thirty days after presentation to the appropriate board and after it is made available to public inspection and comment, pursuant to IC 13-14-1-11.5. If the nonrule policy is presented to more than one board, it will be effective thirty days after presentation to the last. IDEM will submit the policy to the Indiana Register for publication. Revisions to the policy will follow the same procedure of presentation to the board and publication.

Policy Statement

Pursuant to IDEM's petroleum response authority (IC 13-24-1), its hazardous substance response authority (IC 13-25-4), its leaking underground storage tank response authority (IC 13-23-13), and its duty to evaluate remediation activities associated with the environmental remediation loan fund (IC 13-19-5-5), IDEM hereby informs the public that IDEM may issue a letter under this policy to a stakeholder ("Stakeholder") involved in redevelopment of a brownfield if, at a minimum, the Stakeholder demonstrates to IDEM's satisfaction that:

- (1) no State or federal enforcement action at the brownfield is pending;
- (2) no federal grant requires an enforcement action at the brownfield;
- (3) no condition on the brownfield constitutes an imminent and substantial threat to human health or the environment;
- (4) neither the Stakeholder nor an agent or employee of the Stakeholder caused, contributed to, or knowingly exacerbated the release or threat of release of any hazardous substance or petroleum at the brownfield; and,
- (5) either the Stakeholder is eligible for an applicable exemption to liability founded in Indiana law or IDEM policy, or current levels of contaminants at the brownfield meet current cleanup criteria as established by IDEM.

Comfort Letter. If the Stakeholder can demonstrate to IDEM's satisfaction that the Stakeholder qualifies for some applicable exemption to liability found in Indiana law or IDEM policy, IDEM may issue a Comfort Letter explaining the liability exemption. If applicable, IDEM may include language that the liability exemption prohibits IDEM from pursuing the Stakeholder or subsequent owners and operators even if cleanup requirements change or if IDEM determines that a response action is necessary.

Site Status Letter. If the Stakeholder can demonstrate to IDEM's satisfaction that the current levels of contaminants at the brownfield substantially meet current cleanup criteria as established by IDEM, IDEM may issue a Site Status Letter explaining that current site conditions do not present a threat to human health or the environment and that IDEM does not plan to take a response action at the brownfield.

Conditions

(A) The Stakeholder must not have caused, contributed to, or knowingly exacerbated the release or threat

of release of the hazardous substance or petroleum through an act or omission. Also, the Stakeholder must not have any ownership interest in any entity that caused, contributed to, or knowingly exacerbated the release or threat of release. For the purposes of this policy, the failure to take affirmative steps to mitigate or address contaminants will not, in the absence of exceptional circumstances, constitute an "omission" by the Stakeholder within the meaning of this condition. The Stakeholder must exercise due care with regard to the contaminants, including allowing another party to investigate and remediate the contaminants.

(B) There must be no alternative basis for the Stakeholder's liability for the contaminated property, such as liability as a disposer, generator, or transporter of the contaminants or liability as an owner or operator by reason of the existence of a new source of contaminants on the site.

(C) At the discretion of IDEM, a letter provided under this policy may be conditioned upon the Stakeholder's acceptance of recorded land use restrictions. IDEM may also require recording of the letter and/or a brief memorandum describing the environmental response activities done at the property, particularly if land use restrictions are recommended at the property.

(D) No letter issued by IDEM constitutes assurance that a property is safe or fit for a particular use. Letters issued under this policy are statements of enforcement priority based on known contaminant levels. No letter issued by IDEM can relieve a recipient of liability for contribution of costs incurred by a private party or liability for a cost recovery suit brought by the U.S. EPA. Additionally, a comfort letter does not relieve the recipient of any applicable duty under the Resource Conservation and Recovery Act (42 U.S.C. § 6901), criminal liability, or liability for natural resource damages.

(E) A letter issued under this policy may be revoked if IDEM learns that the information provided to IDEM was inaccurate. IDEM may then pursue any responsible party.

Discussion

A person or entity owning, operating, or considering the purchase or financing of contaminated property faces uncertainty about the liability for remediation of that property under State and federal environmental laws. This uncertainty leads to abandoned, dormant, or underutilized properties commonly known as “brownfields.” IDEM is concerned with the unintended adverse effects of environmental laws on property owners, operators, prospective purchasers, and other parties, as well as the ability of communities to redevelop brownfields.

This policy is intended to eliminate unnecessary barriers to the transfer and redevelopment of such property while maintaining the quality of the State’s environment. IDEM will seek to exempt from liability those parties who by law or public policy should not be held liable for response costs, and forgo enforcement at only those sites shown to be suitable for redevelopment. IDEM occasionally utilizes its enforcement discretion to forgo pursuit of a party potentially responsible for government response costs related to a release of petroleum or a hazardous substance. In recognition that the perception of an environmental defect on a property imposes a transaction cost upon the transfer of that property, this policy sets guidelines for IDEM personnel to consider when deciding to issue Comfort and Site Status Letters. This policy does not intend to set a legal standard and cannot lawfully do so.

These standards are based upon State and federal laws and policy statements, including:

- statutory liability provisions for hazardous substances and petroleum, and liability exemptions for innocent purchasers, political subdivisions, and fiduciaries;
- conditions of eligibility established for Indiana’s Voluntary Remediation Program, Indiana’s brownfields tax credit, and the brownfields revitalization zone;
- IDEM’s standards of cleanup under various programs; and,
- the contaminated aquifers policies established by IDEM and the United States Environmental Protection Agency (U.S. EPA).

“Current cleanup criteria”

The legislature has authorized IDEM to establish cleanup criteria under its various remediation programs. Additionally, these programs have begun using the Risk Integrated System of Closure standards. Before issuing a Site Status Letter, IDEM will determine which set of standards is appropriate for the site. This determination is within the sole discretion of IDEM. These remediation standards are not “action levels,” and property that contains contaminants below these levels should not automatically be considered free from liability.

“Applicable exemption to liability”

When deciding to issue a comfort letter under this policy, IDEM may decide that an “applicable exemption to liability” exists if the Stakeholder can demonstrate to IDEM’s satisfaction that the Stakeholder is a person exempted from liability by Indiana law or an adopted IDEM policy. Examples of applicable exemptions include:

- the Stakeholder is a government entity exempted from liability under IC 13-25-4-8(e) or IC 13-11-2-151(b);
- the Stakeholder satisfies the conditions of the IDEM “Property Containing Contaminated Aquifers” nonrule policy document (OER-0008-NPD, 20 IR 1674 (March 1, 1997)), or the IDEM “Property Containing Contaminated Aquifers/Underground Storage Tanks” nonrule policy document (WASTE-0038-NPD, 23 IR 2141 (May 1, 2000))
- the Stakeholder is not the statutory owner of an underground storage tank pursuant to IC 13-11-2-150(a)(2), because the tanks were not used after November 8, 1984 and the Stakeholder was not the person who owned the tank immediately before the discontinuation of the tank’s use;
- the Stakeholder is a creditor, lender, or fiduciary exempted from liability under IC 13-23-13-14, IC 13-24-1-10, IC 13-25-4-8(c), or IC 13-25-4-8.2; or
- no direct or indirect contractual relationship (as defined by the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9601 and interpreted by IDEM) exists between the Stakeholder and any party that caused the contaminants.

References

Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9601.

Brownfield Revitalization Zone Tax Abatement, IC 6-1.1-42.

Environmental Remediation Revolving Loan Fund IC 13-19-5.

Underground Storage Tank Corrective Actions, IC 13-23-13.

Petroleum Releases, IC 13-24-1.

Hazardous Substances Response Trust Fund, IC 13-25-4.

Indiana’s Voluntary Remediation Program, IC 13-25-5.

“Property Containing Contaminated Aquifers” nonrule policy document, W0047 (formerly OER-0008-NPD), 20 IR 1674 (March 1, 1997).

“Property Containing Contaminated Aquifers/Underground Storage Tanks” nonrule policy document, WASTE-0038-NPD, 23 IR 2141 (May 1, 2000).