

---

**TITLE 329 SOLID WASTE MANAGEMENT BOARD**

**SECOND NOTICE OF COMMENT PERIOD**

LSA Document #07-468

**DEVELOPMENT OF NEW RULES AND AMENDMENTS TO [329 IAC 9](#) CONCERNING DELIVERY PROHIBITION REQUIREMENTS MANDATED BY THE UNDERGROUND STORAGE TANK COMPLIANCE ACT, PART OF THE ENERGY POLICY ACT OF 2005**

**PURPOSE OF NOTICE**

The Indiana Department of Environmental Management (IDEM) is soliciting public comment on draft new rules and amendments to [329 IAC 9](#) concerning delivery prohibition requirements mandated by the Underground Storage Tank Compliance Act, part of the Energy Policy Act of 2005.

IDEM seeks comment on the affected citations listed and any other provisions of Title 329 that may be affected by this rulemaking.

**HISTORY**

First Notice of Comment Period: August 8, 2007, Indiana Register (DIN: [20070808-IR-329070468FNA](#)).

**CITATIONS AFFECTED:** [329 IAC 9](#).

**AUTHORITY:** [IC 13-14-8-1](#); [IC 13-14-8-2](#); [IC 13-14-9-8](#); [IC 13-23-1-1](#); [IC 13-23-1-2](#).

**SUBJECT MATTER AND BASIC PURPOSE OF RULEMAKING**

**Basic Purpose and Background**

The Federal Energy Policy Act of 2005 contains the Underground Storage Tank (UST) Compliance Act, amending Subtitle I of the Solid Waste Disposal Act, which contains the original federal UST program. The Act requires major changes to the state UST programs. The original legislation that created the UST program is Subtitle I of the Solid Waste Disposal Act. This proposed rulemaking addresses the fuel delivery prohibition requirement of the UST Compliance Act.

The department believes it currently has the authority to implement the fuel delivery prohibition program; however, going forward with a rule will provide clear, concise standards to help assure consistency.

On August 8, 2007, it was unlawful to deliver regulated substance to an "ineligible" tank. States, including Indiana, that receive federal funding under Subtitle I must implement the delivery prohibition requirement by August 8, 2007, to comply with their statutory requirements for funding. The delivery prohibition requirement prohibits the delivery, deposit, or acceptance of regulated substance to an underground storage tank that has been determined to be ineligible for such delivery, deposit, or acceptance. The state agency determines eligibility based on compliance with the state's environmental laws and regulations.

Section 9012 of the Act also requires U.S. EPA to develop and publish guidelines that describe the minimum processes and procedures for the delivery prohibition. U.S. EPA published those guidelines in August 2006.

A state implements the Energy Act's guidelines by:

Having the authority to prohibit delivery, deposit, or acceptance of regulated substance to an underground storage tank for both equipment and operational violations; and

Developing processes and procedures for a delivery prohibition program that, at a minimum, meets the requirements in these guidelines. States may choose to be more stringent than these minimum requirements.

This rule will include the following five categories of processes and procedures required by the Energy Policy Act of 2005:

Criteria for determining which underground storage tanks are ineligible for delivery, deposit, or acceptance of regulated substance;

Mechanism(s) for identifying ineligible underground storage tanks;

Process(es) for reclassifying ineligible underground storage tanks as eligible for delivery, deposit, or acceptance of regulated substance;

Process(es) for providing adequate notice to underground storage tank owners and operators and regulated substance deliverers that an underground storage tank has been determined to be ineligible for delivery, deposit, or acceptance of regulated substance; and

Delineation of a process for the application of delivery prohibition in rural and remote areas.

Definitions will be added to clarify the required processes. Definitions already in [329 IAC 9](#) may be moved to different sections so the definitions can continue to be in alphabetical order.

**[IC 13-14-9-4](#) Identification of Restrictions and Requirements Not Imposed under Federal Law**

No element of the draft rule imposes either a restriction or a requirement on persons to whom the draft rule applies that is not imposed under federal law.

### **Potential Fiscal Impact**

There will be no fiscal impact to the regulated community or to IDEM. This rulemaking implements the federal fuel delivery prohibition program.

### **Public Participation and Workgroup Information**

No workgroup is planned for the rulemaking. If you feel that a workgroup or other informal discussion on the rule is appropriate, please contact Lynn West, Rules Section, Office of Land Quality at (317) 232-3593 or (800) 451-6021 (in Indiana).

### **SUMMARY/RESPONSE TO COMMENTS FROM THE FIRST COMMENT PERIOD**

IDEM requested public comment from August 8, 2007, through September 7, 2007, on alternative ways to achieve the purpose of the rule and suggestions for the development of draft rule language. IDEM received comments from the following parties by the comment period deadline:

James R. Hartman, Department of Defense, Regional Environmental Coordinator, Region 5, Department of the Army (DoD)

Following is a summary of the comments received and IDEM's responses thereto:

*Comment:* Will the delivery prohibition apply to individual ineligible tanks or to an entire facility that has been found to have an ineligible tank. Department of Defense facilities often contain numerous underground storage tanks operated by multiple services or contractors, including many in isolated locations and many miles apart. Availability of UST resources impacts military mission readiness. Application of a facilities-wide prohibition on delivery of petroleum products into eligible tanks based on the ineligibility of a subset of tanks would critically affect the ability of a DoD facility to perform its national defense mission. (DoD)

*Response:* The fuel delivery prohibition (FDP) rule will apply to individual ineligible USTs.

*Comment:* Regarding the criteria to determine ineligibility, what conditions, if any, does IDEM intend to impose in addition to the objective criteria identified by USEPA in the grant guidelines? In our view, any additional criteria IDEM deems appropriate must be described in such a way as to put facilities on notice of the criteria to be applied and ensure objective determinations can be made by inspectors in the field. (DoD)

*Response:* Indiana's FDP rule will be substantially similar to EPA's guidance. All criteria for determining compliance will be either established in the rule or outlined in a Nonrule Policy Document developed by IDEM. In any case, all facilities will know how IDEM will administer the FDP rule and the criteria under which an ineligible UST will be identified.

*Comment:* If a UST is found to be ineligible by IDEM, what will be the process for providing notice of the finding to the owner/operator of the tank and how can the findings be contested? (DoD)

*Response:* The agency will notify the owner, operator, or employee on-site in writing of the agency's discovery of a chronic failure to comply. (See [329 IAC 9-4.5-1\(a\)](#).) All FDP actions will be appealable under Indiana statute [IC 4-21.5-3-4\(a\)\(6\)\(B\)](#) and [IC 4-21-5-3-7](#).

### **REQUEST FOR PUBLIC COMMENTS**

This notice requests the submission of comments on the draft rule language, including suggestions for specific revisions to language to be contained in the draft rule. Mailed comments should be addressed to:

#07-468(SWMB)[Fuel Prohibition Rule]

Janet Pittman

Office of Land Quality

Indiana Department of Environmental Management

IGCN 1101

100 North Senate Ave.

MC 66-30

Indianapolis, Indiana 46204-2251.

Hand delivered comments will be accepted by the receptionist on duty at the eleventh floor reception desk, Office of Land Quality, 100 North Senate Avenue, Indianapolis, Indiana.

Comments may be submitted by facsimile at the IDEM fax number: (317) 232-3403, Monday through Friday, between 8:15 a.m. and 4:45 p.m. Please confirm the timely receipt of faxed comments by calling the Rules Development Section at (317) 233-0426.

### **COMMENT PERIOD DEADLINE**

Comments must be postmarked, faxed, or hand delivered by January 11, 2008.

Additional information regarding this action may be obtained from Lynn West, Rules, Planning, and Outreach Section, Office of Land Quality, (317) 232-3593 or (800) 451-6027 (in Indiana).

### **DRAFT RULE**

SECTION 1. [329 IAC 9-1-10.7](#) IS ADDED TO READ AS FOLLOWS:

**[329 IAC 9-1-10.7](#) "Chronic failure to comply" defined**

Authority: [IC 13-14-8-1](#); [IC 13-14-8-2](#); [IC 13-23-1-1](#); [IC 13-23-1-2](#); 42 U.S.C. 6991

Affected: [IC 13-13-1-1](#); [IC 13-23](#)

Sec. 10.7. "Chronic failure to comply" means a person that has not complied with [329 IAC 9-2-1](#), [329 IAC 9-2.1](#) or either of the following occur:

(1) A liquid release of a regulated substance from an underground storage tank system, which may include the failure of any required overfill protection system, where the failure is causing a release to the environment, or the failure of a required spill containment structure, where the failure is causing a release to the environment due to a spill or an overfill.

(2) The inability of an underground storage tank system to detect a liquid leak or contain a liquid release of a regulated substance in the manner required by [329 IAC 9-7](#), which may include the tampering with leak detection equipment so that the equipment is no longer capable of detecting a leak at the earliest possible opportunity.

(Solid Waste Management Board; [329 IAC 9-1-10.7](#))

SECTION 2. [329 IAC 9-1-15.5](#) IS ADDED TO READ AS FOLLOWS:

**[329 IAC 9-1-15.5](#) "Deposit" defined**

Authority: [IC 13-14-8-1](#); [IC 13-14-8-2](#); [IC 13-23-1-1](#); [IC 13-23-1-2](#); 42 U.S.C. 6991

Affected: [IC 13-13-1-1](#); [IC 13-23](#)

Sec. 15.5. "Deposit" means the act of placing in or filling of an underground storage tank with a regulated substance.

(Solid Waste Management Board; [329 IAC 9-1-15.5](#))

SECTION 3. [329 IAC 9-1-19.5](#) IS ADDED TO READ AS FOLLOWS:

**[329 IAC 9-1-19.5](#) "Failure to comply" defined**

Authority: [IC 13-14-8-1](#); [IC 13-14-8-2](#); [IC 13-23-1-1](#); [IC 13-23-1-2](#); 42 U.S.C. 6991

Affected: [IC 13-13-1-1](#); [IC 13-23](#)

Sec. 19.5. "Failure to comply" means the failure of an owner or operator to manage or operate an underground storage tank system in accordance with [329 IAC 9-3.1](#) and [329 IAC 9-7](#).

(Solid Waste Management Board; [329 IAC 9-1-19.5](#))

SECTION 4. [329 IAC 9-1-38.5](#) IS ADDED TO READ AS FOLLOWS:

**[329 IAC 9-1-38.5](#) "Red tag" defined**

Authority: [IC 13-14-8-1](#); [IC 13-14-8-2](#); [IC 13-23-1-1](#); [IC 13-23-1-2](#); 42 U.S.C. 6991

Affected: [IC 13-13-1-1](#); [IC 13-23](#)

Sec. 38.5. "Red tag" means the device, such as a tamper-resistant strap, fill pipe bag, or any combination thereof, that identifies an underground storage tank system as ineligible to receive a regulated substance or the act of applying such device.

(Solid Waste Management Board; [329 IAC 9-1-38.5](#))

SECTION 5. [329 IAC 9-1-38.7](#) IS ADDED TO READ AS FOLLOWS:

**[329 IAC 9-1-38.7](#) "Regulated substance" defined**

Authority: [IC 13-14-8-1](#); [IC 13-14-8-2](#); [IC 13-23-1-1](#); [IC 13-23-1-2](#); 42 U.S.C. 6991

Affected: [IC 13-11-2-183](#); [IC 13-23](#)

**Sec. 38.7. "Regulated substance" has the meaning set forth in [IC 13-11-2-183](#).**

(Solid Waste Management Board; [329 IAC 9-1-38.7](#))

SECTION 6. [329 IAC 9-1-38.9](#) IS ADDED TO READ AS FOLLOWS:

**[329 IAC 9-1-38.9](#) "Release" defined**

Authority: [IC 13-14-8-1](#); [IC 13-14-8-2](#); [IC 13-23-1-1](#); [IC 13-23-1-2](#); 42 U.S.C. 6991

Affected: [IC 13-11-2-184](#); [IC 13-23](#)

**Sec. 38.9. "Release" has the meaning set forth in [IC 13-11-2-184\(a\)](#).**

(Solid Waste Management Board; [329 IAC 9-1-38.9](#))

SECTION 7. [329 IAC 9-4.5](#) IS ADDED TO READ AS FOLLOWS:

**Rule 4.5. Fuel Delivery Prohibition**

**[329 IAC 9-4.5-1](#) Affixing red tags**

Authority: [IC 13-14-8-1](#); [IC 13-14-8-2](#); [IC 13-23-1-1](#); [IC 13-23-1-2](#); 42 U.S.C. 6991

Affected: [IC 13-13-1-1](#); [IC 13-23-12-1](#)

**Sec. 1. (a) Upon the agency's discovery of a chronic failure to comply and prior to affixing a red tag, the agency must notify the owner, operator, or employee on site in writing of the agency's discovery of a chronic failure to comply.**

**(b) After the owner, operator, or employee on site receives the written notification required in subsection (a), the red tag will be attached to the fill pipe of the noncompliant underground storage tank system so that the tag is visible to any person attempting to deliver a regulated substance to the underground storage tank.**

**(c) Upon the discovery by the agency of an owner or operator that has a failure to comply, the agency may issue a violation letter to the owner and operator identifying the specific rule requirements that were not complied with in this article.**

**(d) If the owner or operator fails to correct the specific compliance failure within the time stipulated in the violation letter, the agency may affix a red tag to the fill pipe of the noncompliant underground storage tank system so that the tag is visible to any person attempting to deliver a regulated substance to the underground storage tank.**

**(e) The owner or operator may continue to dispense from the noncompliant underground storage tank until the underground storage tank is empty.**

**(f) The owner or operator of a facility shall:**

**(1) not deposit or allow the deposit of a regulated substance into an underground storage tank that has a red tag affixed to the tank's fill pipe; and**

(2) immediately notify their fuel delivery transporter of the red tag status.

(g) No person shall do the following:

(1) Deposit a regulated substance into an underground storage tank that has a red tag affixed to the tank's fill pipe.

(2) Remove, deface, alter, or otherwise tamper with a red tag so that the information obtained on the tag is not legible.

(h) A red tagged underground storage tank system may not be out of compliance for more than six (6) consecutive months. After this time, the underground storage tank system must be closed under [329 IAC 9-6](#).

(i) The underground storage tank annual registration fee, as required by [IC 13-23-12-1](#), must be paid on any tank that has a red tag.

(Solid Waste Management Board; [329 IAC 9-4.5-1](#))

#### [329 IAC 9-4.5-2](#) Removing red tags

Authority: [IC 13-14-8-1](#); [IC 13-14-8-2](#); [IC 13-23-1-1](#); [IC 13-23-1-2](#); 42 U.S.C. 6991

Affected: [IC 13-13-1-1](#); [IC 13-23](#)

Sec. 2. (a) Upon notification by the owner or operator documenting to the satisfaction of the agency that the compliance failure has been corrected, the agency may provide written authorization to the owner or operator to remove the red tag. The agency shall do the following:

(1) Inspect the underground storage tank system within five (5) business days of the notification to validate the documentation submitted by the owner or operator.

(2) Upon validation of the submitted documentation, the agency shall immediately remove the tag if the red tag was not already removed by the owner or operator under this subsection.

(b) A red tag that has been removed by the owner or operator shall be returned to the agency within five (5) business days.

(Solid Waste Management Board; [329 IAC 9-4.5-2](#))

#### [329 IAC 9-4.5-3](#) Notice of correction of a failure to comply

Authority: [IC 4-21-5-3-4](#); [IC 4-21.5-3-7](#); [IC 13-14-8-1](#); [IC 13-14-8-2](#); [IC 13-23-1-1](#); [IC 13-23-1-2](#); 42 U.S.C. 6991

Affected: [IC 13-13-1-1](#); [IC 13-23](#)

Sec. 3. Upon confirmation that a compliance failure has been corrected, the agency shall notify the owner or operator in writing by certified mail of the confirmation.

(Solid Waste Management Board; [329 IAC 9-4.5-3](#))

#### [329 IAC 9-4.5-4](#) Appeals

Authority: [IC 13-14-8-1](#); [IC 13-14-8-2](#); [IC 13-23-1-1](#); [IC 13-23-1-2](#); 42 U.S.C. 6991

Affected: [IC 4-21.5-3-4](#); [IC 4-21.5-3-7](#); [IC 13-13-1-1](#); [IC 13-23](#)

Sec. 4. A red tag affixed under this rule may be appealed within fifteen (15) days of receipt of written notification in accordance with [IC 4-21.5-3-4\(a\)\(6\)\(B\)](#) and [IC 4-21.5-3-7](#).

(Solid Waste Management Board; [329 IAC 9-4.5-4](#))

SECTION 8. THE FOLLOWING ARE REPEALED: [329 IAC 9-1-38.2](#); [329 IAC 9-1-38.3](#).

[Notice of Public Hearing](#)

*Posted: 12/12/2007 by Legislative Services Agency*  
An [html](#) version of this document.