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**TITLE 329 SOLID WASTE MANAGEMENT DIVISION****SECOND NOTICE OF COMMENT PERIOD**

LSA Document #13-272

**UNDERGROUND STORAGE TANK DELIVERY PROHIBITION****PURPOSE OF NOTICE**

The Indiana Department of Environmental Management (IDEM) has developed draft rule language for amendments to [329 IAC 9-1](#) and [329 IAC 9-4.5](#) concerning the Underground Storage Tank (UST) Delivery Prohibition Program. By this notice, IDEM is soliciting public comment on the draft rule language. 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: June 26, 2013, Indiana Register (DIN: [20130626-IR-329130272FNA](#)).

**CITATIONS AFFECTED:** [329 IAC 9-1](#); [329 IAC 9-4.5](#).

**AUTHORITY:** [IC 13-14-8](#); [IC 13-19-3-1](#); [IC 13-23-1-2](#); [IC 13-23-1-4](#).

**SUBJECT MATTER AND BASIC PURPOSE OF RULEMAKING****Basic Purpose and Background**

In 2005, Congress made amendments to include a delivery prohibition provision in the Underground Storage Tank Compliance Act (USTCA). A state that plans to receive funding under Subtitle I of the Solid Waste Disposal Act (SWDA) for UST programs must comply with 42 U.S.C. 6991k, by establishing at a minimum criteria for determining ineligibility, processes for providing notice of ineligibility, the mechanism for identifying an ineligible tank, the process for reclassification, and delineation for rural and remote areas. To further clarify requirements, the United States Environmental Protection Agency (U.S. EPA) published Underground Storage Tank Program Delivery Prohibition Grant Guidelines to States (Grant Guidelines) in August 2006 (EPA-510-R-06-003).

[IC 13-23-1-2](#) and [329 IAC 9](#) require UST owners and operators to install and maintain equipment to prevent corrosion, detect leaks, prevent overfill, prevent spills, and meet other performance and upgrade standards. Owners and operators must also maintain financial responsibility for corrective action and liability to third parties. The current delivery prohibition rules, found at [329 IAC 9-4.5](#), allow IDEM to place a UST that is noncompliant under UST delivery prohibition. A UST under delivery prohibition is prevented from accepting further delivery or deposit of regulated substances into the tank until the tank is brought back into compliance. Delivery prohibition has an economic impact. The degree of the impact will depend upon factors such as the following:

- Whether the UST is the only source of the regulated substance or one of several sources as part of a large facility.
- The number of USTs under delivery prohibition at the site.
- The function and purpose of the UST.
- The amount of time the UST is in noncompliance.
- What is needed to come into compliance, such as registrations of the UST, payment of tank fees, new or upgraded equipment, or testing of equipment.

If one UST is at a large facility, not used daily, and is noncompliant for a short period of time, the impact of delivery prohibition will be very small. If the UST is the only source of the regulated substance at the facility, is used daily, and is left in noncompliance for a long period of time, the impact of delivery prohibition would likely be larger.

In 2012, the Indiana General Assembly passed legislation found at [IC 13-23-1-2\(c\)\(9\)](#) and [IC 13-23-1-4](#) directing IDEM to adopt rules for a delivery prohibition program to fully implement the requirements of 42 U.S.C. 6991k. [IC 13-23-1-4](#) specifically describes the instances that cause a UST to be ineligible for delivery of a regulated substance. [IC 13-23-1-4\(d\)](#) allows the Commissioner of IDEM to implement the Delivery Prohibition Program, as described in [IC 13-23-1-4](#), prior to the Environmental Rules Board's adoption of rules, until January 1, 2015.

IDEM has developed draft rule language amending the existing [329 IAC 9-4.5](#) UST delivery prohibition rules and associated definitions at [329 IAC 9-1](#). These changes will ensure the rules remain consistent with federal law and guidelines and comport with current Indiana statutes. Further, these changes will protect human health and the environment and provide clear guidelines for those who own or operate a UST. IDEM seeks comment on the affected citations listed and any other provisions of Title 329 that may be affected by this rulemaking.

**[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. All elements of the draft rule are required under federal law to maintain state UST program funding through Subtitle I of the SWDA. [IC 13-23-1-4\(b\)\(2\)\(C\)](#) allows the commissioner to prohibit delivery to a UST, after a 30 day opportunity for the owner or operator to take corrective action, if an owner fails to register a UST or pay annual registration fees. Failure to register a UST is not specifically prescribed by 42 U.S.C. 6991k but registration of a UST with the state is the cornerstone of a federally approved state program under the USTCA that receives federal funding (Notification; 42 U.S.C. 6991a.; [329 IAC 9-2-2](#)). In Indiana, failure to pay annual tank fees required under [IC 13-23-12](#) is a failure to maintain financial responsibility as prescribed by 42 U.S.C. 6991 and the Grant Guidelines. A UST owner who relies on the Excess Liability Trust Fund, described in [329 IAC 9-8-11](#), to meet financial responsibility obligations is not eligible to receive reimbursement for corrective action or third party liability costs under [IC 13-23-8-4\(a\)\(2\)](#) if the owner fails to pay tank fees.

#### **Potential Fiscal Impact**

Complying with these amendments will not impose any additional fiscal impact than what is currently required under existing federal law and state UST laws and rules. Current state law and rules require UST owners to maintain registration, pay annual registration fees, and implement various techniques to detect, prevent, and correct releases and spills. UST delivery prohibition is a significant deterrent to violations of state law and rules that may result in releases to the environment, but does not impose any further requirements on the regulated community. IDEM does not anticipate any fiscal impact stemming from delivery prohibition to exceed \$500,000.

#### **Public Participation and Work Group Information**

No work group is planned for the rulemaking. If you feel that a work group or other informal discussion on the rule is appropriate, please contact Lauren Aguilar, Rules Development Branch, Office of Legal Counsel at (317) 234-8559 or (800) 451-6027 (in Indiana).

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

IDEM requested public comment from June 26, 2013, through July 26, 2013, on alternative ways to achieve the purpose of the rule and suggestions for the development of draft rule language. IDEM received no comments in response to the first notice of public comment period.

#### **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. Comments may be submitted in one of the following ways:

(1) By mail or common carrier to the following address:

LSA Document #13-272 UST Delivery Prohibition  
Lauren Aguilar  
Rule Development Branch  
Office of Legal Counsel  
Indiana Department of Environmental Management  
Indiana Government Center North  
100 North Senate Avenue  
Indianapolis, IN 46204-2251

(2) By facsimile to (317) 233-5970. Please confirm the timely receipt of your faxed comments by calling the Rules Development Branch at (317) 233-8903.

(3) By electronic mail to [laguilar@idem.in.gov](mailto:laguilar@idem.in.gov). To confirm timely delivery of submitted comments, please request a document receipt when sending the electronic mail. **PLEASE NOTE: Electronic mail comments will NOT be considered part of the official written comment period unless they are sent to the address indicated in this notice.**

(4) Hand delivered to the receptionist on duty at the thirteenth floor reception desk, Office of Legal Counsel, Indiana Government Center North, 100 North Senate Avenue, Indianapolis, Indiana.

Regardless of the delivery method used, to properly identify each comment with the rulemaking action it is intended to address, each comment document must clearly specify the LSA document number of the rulemaking.

#### **COMMENT PERIOD DEADLINE**

All comments must be postmarked, faxed, or time stamped no later than May 23, 2014. Hand-delivered comments must be delivered to the appropriate office by 4:45 p.m. on the above-listed deadline date.

Additional information regarding this action may be obtained from Lauren Aguilar, Rules Development Branch, Office of Legal Counsel, (317) 234-8559 or (800) 451-6027 (in Indiana).

#### **DRAFT RULE**

SECTION 1. [329 IAC 9-1-15.1](#) IS ADDED TO READ AS FOLLOWS:

**[329 IAC 9-1-15.1](#) "Delivery prohibition" defined**

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

Affected: [IC 13-13-1-1](#); [IC 13-23-1-4](#); [IC 13-23-12-1](#)

Sec. 15.1. "Delivery prohibition" means the commissioner:

- (1) determined a UST to be ineligible under [IC 13-23-1-4](#); and
- (2) issued a temporary order prohibiting the owner or operator of the ineligible UST from allowing a regulated substance to be:
  - (A) delivered;
  - (B) deposited; or
  - (C) accepted.

(Solid Waste Management Division; [329 IAC 9-1-15.1](#))

SECTION 2. [329 IAC 9-1-15.2](#) IS ADDED TO READ AS FOLLOWS:

**[329 IAC 9-1-15.2](#) "Department" defined**

Authority: [IC 13-14-8-1](#); [IC 13-14-8-2](#); [IC 13-23-1-1](#); [IC 13-23-1-2](#)

Affected: [IC 13-23](#)

Sec. 15.2. "Department" means the Indiana department of environmental management.

(Solid Waste Management Division; [329 IAC 9-1-15.2](#))

SECTION 3. [329 IAC 9-1-38.5](#) IS AMENDED 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 a tag, device, or mechanism**, such as a tamper-resistant strap, fill pipe bag, **numbered zip tie**, or any combination thereof, that **clearly** identifies an underground storage tank ~~system~~ as ~~ineligible to receive a regulated substance~~ **being under delivery prohibition** or the act of ~~applying such~~ **attaching the tag, device, or mechanism. The red tag shall:**

- (1) **indicate the UST is prohibited from receiving a regulated substance;**
- (2) **be tamper resistant; and**
- (3) **state "Delivery Prohibition" in bold face type.**

(Solid Waste Management Division; [329 IAC 9-1-38.5](#); filed May 7, 2010, 10:02 a.m.: [20100602-IR-329070468FRA](#))

SECTION 4. [329 IAC 9-4.5-4](#) IS ADDED TO READ AS FOLLOWS:

**Rule 4.5. Delivery Prohibition Program**

**[329 IAC 9-4.5-4](#) Applicability**

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

Affected: [IC 13-13-1-1](#); [IC 13-23-1-4](#); [IC 13-23-12-1](#)

Sec. 4. This rule applies to owners and operators of a UST determined to be ineligible by the commissioner under [IC 13-23-1-4](#) and this rule.

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

SECTION 5. [329 IAC 9-4.5-5](#) IS ADDED TO READ AS FOLLOWS:

**[329 IAC 9-4.5-5](#) Ineligibility**

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

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

Sec. 5. The commissioner may determine a UST to be ineligible if one (1) of the following conditions are met:

(1) An inspection shows the following required equipment is not installed:

- (A) Corrosion protection.
- (B) Leak detection.
- (C) Overfill protection.
- (D) Spill prevention.

(2) The owner or operator fails to:

- (A) properly operate or maintain equipment for:
  - (i) corrosion protection;
  - (ii) leak detection;
  - (iii) overfill protection; or
  - (iv) spill prevention;
- (B) register a UST that holds petroleum under [329 IAC 9-2-2](#); or
- (C) pay annual registration fees due under [IC 13-23-12](#).

(Solid Waste Management Division; [329 IAC 9-4.5-5](#))

SECTION 6. [329 IAC 9-4.5-6](#) IS ADDED TO READ AS FOLLOWS:

**[329 IAC 9-4.5-6](#) Notification**

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

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

Sec. 6. (a) Notification to the UST owner or operator of ineligibility shall be provided before delivery prohibition.

(b) Notification shall:

(1) be delivered:

- (A) in person; or
- (B) by certified mail with return receipt;

(2) be delivered to the:

- (A) address of the owner or operator provided to the department on the form required by [329 IAC 9-2-2](#);
- (B) registered agent if the owner or operator is a business; or
- (C) facility where the UST is located; and

(3) provide:

- (A) a list of the violations that caused ineligibility;
- (B) actions the owner or operator must take for the UST to be reclassified from ineligible to eligible; and
- (C) the date delivery prohibition shall be imposed.

(c) If a UST is determined to be ineligible under section 5(1) of this rule, the commissioner may determine an immediate order of delivery prohibition, described in section 8 of this rule, be issued and a red tag attached to the UST. The delivery prohibition order may serve as notification of ineligibility.

(d) If a UST is determined to be ineligible under section 5(2) of this rule, the commissioner may determine, after providing a thirty (30) day warning period described in section 7 of this rule, to issue a delivery prohibition order.

(Solid Waste Management Division; [329 IAC 9-4.5-6](#))

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

**[329 IAC 9-4.5-7](#) Thirty (30) day warning period**

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

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

Sec. 7. (a) The commissioner shall provide for a thirty (30) day warning period for any UST determined to be ineligible under section 5(2) of this rule prior to issuing a delivery prohibition order described under section 8 of this rule.

(b) A UST that is not reclassified as eligible to receive a regulated substance, under section 9 of this rule, within thirty (30) days of receiving a warning under this section may receive a delivery prohibition order under section 8 of this rule.

(Solid Waste Management Division; [329 IAC 9-4.5-7](#))

SECTION 8. [329 IAC 9-4.5-8](#) IS ADDED TO READ AS FOLLOWS:

**[329 IAC 9-4.5-8](#) Delivery prohibition order**

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

Affected: [IC 13-13-1-1](#); [IC 13-23-1-4](#); [IC 13-23-14-4](#)

Sec. 8. (a) After notification of ineligibility under [IC 13-23-1-4](#) and this rule, the commissioner may prohibit delivery. A delivery prohibition order shall be issued in the form of a temporary emergency order, described in [IC 4-21-5-4](#).

(b) When a UST is under a delivery prohibition order, the owner or operator of the UST must notify any person who has delivered or is scheduled to deliver a regulated substance to the UST of the delivery prohibition.

(c) When the commissioner issues a delivery prohibition order, a red tag shall be attached to the UST.

(d) Unless authorized by the commissioner, a red tag shall not be:

- (1) removed;
- (2) defaced;
- (3) altered; or
- (4) otherwise tampered with.

(e) Violators of subsection (d) shall be assessed penalties under [IC 13-23-14-4](#).

(Solid Waste Management Division; [329 IAC 9-4.5-8](#))

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

**[329 IAC 9-4.5-9](#) Reclassification**

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

Affected: [IC 13-13-1-1](#); [IC 13-23-3](#); [IC 13-23-12-1](#)

Sec. 9. (a) A UST shall be reclassified from ineligible to receive a regulated substance to eligible if the:

- (1) owner or operator notifies the department that all corrective actions listed in the notification have been taken; and
- (2) department determines that the violations were corrected by:
  - (A) reviewing and approving the provided documentation; or
  - (B) reinspecting the UST.

(b) The UST owner or operator must provide applicable documentation to the department as follows to show the violations were corrected:

- (1) UST test results performed by a UST tester, who is certified under [IC 13-23-3](#).
- (2) Proof of installation of equipment by a UST installer, who is certified under [IC 13-23-3](#).
- (3) Proof of payment of UST fees due under [IC 13-23-12](#).
- (4) Proof of submission of a complete registration or notification form described in [329 IAC 9-2-2](#).
- (5) Any other documentation the department determines is necessary to show the owner or operator corrected the violations described in the notice of ineligibility.

(c) The commissioner shall issue a written determination of eligibility upon:

- (1) review and approval of all required documentation; and
- (2) an inspection of the UST, if applicable.

(d) The written determination shall include the following:

- (1) Identification of the UST that is reclassified.
- (2) A statement that all the violations described in the notification have been corrected and approved.
- (3) A statement that the UST is eligible to receive a regulated substance.
- (4) Authorization for the owner or operator to remove the identified red tag, if applicable.
- (5) Instructions for removing and returning the red tag, if applicable.

(e) The written determination shall be delivered by one (1) of the following:

- (1) Facsimile.
- (2) Electronic mail.
- (3) Certified mail.
- (4) Other appropriate means.

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

SECTION 10. [329 IAC 9-4.5-10](#) IS ADDED TO READ AS FOLLOWS:

**[329 IAC 9-4.5-10](#) Special circumstances**

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

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

Sec. 10. (a) The commissioner may defer a delivery prohibition order to an ineligible UST that holds motor fuel if the prohibition would jeopardize the availability of, or access to, motor fuel in any rural and remote area unless an urgent threat to public health, as determined by the commissioner, exists.

(b) The commissioner may only defer a delivery prohibition order for up to one hundred eighty (180) days after determining the UST is ineligible.

(c) A UST is in a rural and remote area if there are no other USTs that contain similar motor fuel for sale within thirty (30) miles by road from the ineligible UST. A motor fuel is similar to another motor fuel if it can run the same motor.

(d) The commissioner may allow delivery of a regulated substance to a UST under delivery prohibition if:

- (1) a certain volume in the UST is necessary to test or calibrate the system and the delivery is only of the amount necessary to conduct the test or calibration; or
- (2) the UST is used to fuel an emergency generator that:
  - (A) provides a power supply in the event of a commercial power failure;
  - (B) stores petroleum; and
  - (C) is used solely in connection with:
    - (i) an emergency system;
    - (ii) a legally required standby system; or
    - (iii) an optional standby system.

(e) If the commissioner determines a UST is subject to the special circumstances described in this section, a written decision shall be provided to the owner or operator following receipt of a request for the finding and evidence sufficient to allow the commissioner to make this determination.

(Solid Waste Management Division; [329 IAC 9-4.5-10](#))

SECTION 11. [329 IAC 9-4.5-11](#) IS ADDED TO READ AS FOLLOWS:

**[329 IAC 9-4.5-11](#) Transfer of ownership**

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

Affected: [IC 13-13-1-1](#); [IC 13-23-1-4](#); [IC 13-23-12-1](#)

Sec. 11. (a) If an owner who has received notice of ineligibility under section 6 of this rule transfers the ineligible UST, the owner shall notify the following:

(1) IDEM within thirty (30) days of the transfer that a transfer of ownership has occurred. The following information shall be included:

- (A) The name of the new owner.
  - (B) The address of the new owner.
  - (C) The date of the transfer.
- (2) The new owner the UST is ineligible.

(b) In accordance with [IC 13-23-1-4\(c\)](#), the new owner must complete the corrective actions required to comply with an order issued by the commissioner to the previous owner.

(Solid Waste Management Division; [329 IAC 9-4.5-11](#))

SECTION 12. THE FOLLOWING ARE REPEALED: [329 IAC 9-1-10.7](#); [329 IAC 9-1-19.5](#); [329 IAC 9-4.5-1](#); [329 IAC 9-4.5-2](#); [329 IAC 9-4.5-3](#).

[Notice of Public Hearing](#)

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