

FIRST NOTICE OF COMMENT PERIOD

LSA Document #19-390

EXCESS LIABILITY TRUST FUND**PURPOSE OF NOTICE**

The Indiana Department of Environmental Management (IDEM) is soliciting public comment on amendments to rules at [328 IAC 1](#) concerning the requirements for the Excess Liability Trust Fund (ELTF). IDEM seeks comment on the affected citations listed and any other provisions of Title 328 that may be affected by this rulemaking.

CITATIONS AFFECTED: [328 IAC 1](#).

AUTHORITY: [IC 13-14-8](#); [IC 13-23](#).

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

In this rulemaking, IDEM is proposing amendments to [328 IAC 1](#) concerning requirements for the Excess Liability Trust Fund for underground storage tanks (USTs). ELTF is a dedicated state trust fund that provides financial responsibility for reimbursement of eligible costs related to emergency measures, investigation, corrective action, and ELTF indemnity claims resulting from releases of petroleum from regulated USTs. [328 IAC 1](#) includes requirements for fund scope and management, fund eligibility and access, prioritization of claims, reimbursable costs for claims, ELTF indemnity claims, claim and payment procedures, and other aspects of ELTF.

This rulemaking is a follow-up to a recent rulemaking, LSA Document #15-231 (DIN: [20180822-IR-328150231FRA](#)), which amended [328 IAC 1](#) and became effective in August 2018. LSA Document #15-231 amended the rule requirements to be consistent with recent ELTF statutory changes and included other amendments to improve the clarity, accuracy, and organization of the ELTF requirements. After the completion of that rulemaking, IDEM planned to initiate a subsequent rulemaking to make more comprehensive changes to improve the overall management of ELTF.

In this rulemaking, IDEM is proposing additional amendments to [328 IAC 1](#) that will affect many aspects of the ELTF rule requirements and the management of ELTF. The proposed changes are vital to improving the reasonableness and cost effectiveness of ELTF claims and ensuring the long-term financial solvency of ELTF. The main purposes of this rulemaking include the following:

- Update existing cost guidelines to include reimbursement caps for tasks performed and other specific line items, adjust reimbursement rates to reflect current market conditions, and make other related amendments to [328 IAC 1-3](#).
- Amend [328 IAC 1-3-1.6](#) to require preapproval of projected costs and work to be performed and [328 IAC 1-3-1.3](#) to improve the ability of IDEM and regulated entities to comply with the updated preapproval process. In addition, establish a process for change orders to the preapproval and include provisions for preapproved work plans that are within existing cost guidelines.
- Clarify the requirements for eligibility and fund access priority by resolving conflicts between statutory and rule requirements. Related amendments will consolidate, reiterate, and clarify rights and obligations of all parties regarding fund access and reimbursement, including reiteration of the requirement to submit a certificate of financial assurance within 30 days to receive reimbursement from ELTF, with a proposed future implementation date.
- Establish a regulatory framework for performing audits of ELTF claims that includes a basic methodology for IDEM's audit procedures and recordkeeping requirements for regulated entities.
- Simplify the ELTF claim application and submittal requirements.
- An overall reorganization and restructuring of the rules to improve clarity and ease of use, including the following:
 - Amend applicability requirements to clarify the terms and rules that apply to certain types of incidents and claims.
 - Distinguish eligible parties and eligible releases from parties with access and fund qualifying occurrences.
 - Clarify the use of "eligible release" in [328 IAC 1-3-3](#) and elsewhere, as necessary.
 - Amend the definitions to be consistent among the applicable statutes and rules.
 - Other amendments to achieve the overall purpose of the rulemaking.

IDEM seeks comment on the affected citations listed, including suggestions for specific language, any other

provisions of Title 328 that may be affected by this rulemaking, and alternative ways to achieve the purpose of the rulemaking.

Alternatives to Be Considered Within the Rulemaking

Alternative 1. Amend the requirements for ELTF at [328 IAC 1](#), including updates to existing cost guidelines, requirements for the preapproval of projected costs and work to be performed, clarification of the requirements for eligibility and fund access priority, establishment of a regulatory framework for performing audits of ELTF claims, simplification of the ELTF claim application and submittal requirements, resolution of any remaining statutory and legal conflicts in the existing rules, and an overall reorganization and restructuring of the rules to improve clarity and ease of use, as necessary to achieve the overall purpose of the rulemaking.

- Is this alternative an incorporation of federal standards, either by reference or full text incorporation? No.
- Is this alternative imposed by federal law or is there a comparable federal law? This alternative is not imposed by federal law and there is no comparable federal law. It is a "state-only" requirement.
- If it is a federal requirement, is it different from federal law? Not applicable.
- If it is different, describe the differences. Not applicable.

Alternative 2. Do not amend existing rules at [328 IAC 1](#).

- Is this alternative an incorporation of federal standards, either by reference or full text incorporation? No.
- Is this alternative imposed by federal law or is there a comparable federal law? No.
- If it is a federal requirement, is it different from federal law? Not applicable.
- If it is different, describe the differences. Not applicable.

Applicable Federal Law

While no applicable federal laws or regulations specifically require Indiana to establish requirements for ELTF, there are federal laws and regulations that pertain to the management of USTs, financial responsibility for USTs, and the approval of state UST programs. Because ELTF is an option to satisfy the financial responsibility requirements for UST owners and operators in Indiana, ELTF serves as a component of Indiana's approved state UST program, which is subject to federal laws and regulations.

The Solid Waste Disposal Act, Subtitle I, as amended by the Hazardous and Solid Waste Amendments of 1984 and codified at 42 U.S.C. 6991, gives the United States Environmental Protection Agency (U.S. EPA) the authority to develop regulations for the management of USTs. The law also gives U.S. EPA the authority to approve states to administer a UST program in lieu of U.S. EPA. Federal regulations pertaining to USTs and the approval of state UST programs are at 40 CFR 280 and 40 CFR 281, respectively. These regulations expand upon the authority granted by federal law to establish specific requirements for the management of USTs and the approval of state UST programs.

The federal UST regulations at 40 CFR 280 include financial responsibility for USTs and the option for owners and operators to use a state fund to satisfy financial responsibility requirements. Specifically, 40 CFR 280.101 allows UST owners and operators to satisfy their financial responsibility requirements in 40 CFR 280.93 by using a state fund, as long as U.S. EPA determines that the state fund is capable of fulfilling the owners' and operators' financial responsibility requirements. U.S. EPA has previously determined that UST owners and operators in Indiana may use ELTF to satisfy their financial responsibility requirements, as long as the UST owners and operators obtain qualified coverage for their deductible listed in 40 CFR 280.95 through 40 CFR 280.103, or 40 CFR 280.104 through 40 CFR 280.107 for local governments.

IDEM obtained final approval from U.S. EPA to operate an approved state UST program on July 12, 2006 (71 FR 39213). Because Indiana has an approved state UST program, Indiana has state-specific rule requirements for USTs at [329 IAC 9](#), including financial responsibility requirements. At [329 IAC 9-8-11](#), owners and operators have the option to satisfy the financial responsibility requirements by participating in ELTF and complying with [328 IAC 1](#). While the ELTF requirements in [328 IAC 1](#) are not directly required by federal laws or regulations, ELTF serves as a component of satisfying the federal requirements for financial responsibility for Indiana's approved state UST program.

Potential Fiscal Impact

Potential Fiscal Impact of Alternative 1. This alternative will have a potential fiscal impact by amending the requirements for reimbursement of costs and ELTF indemnity claims, requiring preapproval for costs and work to be performed, adding audit procedures for ELTF claims, clarifying the requirements for ELTF eligibility and access, and affecting the overall disbursements from ELTF for claim payments. The proposed amendments will likely reduce costs related to corrective action and, therefore, decrease the average dollar amount of ELTF claim payments. By clarifying and reorganizing the rule to reduce regulatory uncertainty and risk, the proposed amendments likely will decrease overall costs borne by IDEM and the regulated community. Because the proposed changes will reduce costs and regulatory uncertainty, this alternative will have a potential positive fiscal impact on a dedicated state fund and regulated entities.

Potential Fiscal Impact of Alternative 2. This alternative does not amend the existing rules at [328 IAC 1](#) and, therefore, does not have a potential fiscal impact. However, in the absence of amendments to the existing rules, IDEM and the UST Financial Assurance Board will have difficulty ensuring the long-term financial solvency of ELTF.

Small Business Assistance Information

IDEM established a compliance and technical assistance program (CTAP) under [IC 13-28-3](#). The program provides assistance to small businesses and information regarding compliance with environmental regulations. In accordance with [IC 13-28-3](#) and [IC 13-28-5](#), there is a small business assistance program ombudsman to provide a point of contact for small businesses affected by environmental regulations. Information on CTAP and other resources available can be found at:

www.in.gov/idem/ctap

For purposes of [IC 4-22-2-28.1](#), small businesses affected by this rulemaking may contact the Small Business Regulatory Coordinator:

Angela Taylor
IDEM Small Business Regulatory Coordinator/CTAP Small Business Liaison
IGCN 1316
100 North Senate Avenue
Indianapolis, IN 46204-2251
(317) 233-0572 or (800) 988-7901
ctap@idem.in.gov

For purposes of [IC 4-22-2-28.1](#), the Small Business Ombudsman designated by [IC 5-28-17-6](#) is:

Katelyn Colclazier
Small Business Ombudsman
Indiana Economic Development Corporation
One North Capitol, Suite 700
Indianapolis, IN 46204
(317) 431-1560
kcolclazier@iedc.in.gov

Resources available to regulated entities through the small business ombudsman include the ombudsman's duties stated in [IC 5-28-17-6](#), specifically [IC 5-28-17-6\(9\)](#), investigating and attempting to resolve any matter regarding compliance by a small business with a law, rule, or policy administered by a state agency, either as a party to a proceeding or as a mediator.

The Small Business Assistance Program Ombudsman is:

Erin Moorhous
IDEM Small Business Assistance Program Ombudsman/Business, Agricultural, and Legislative Liaison
IGCN 1301
100 North Senate Avenue
Indianapolis, IN 46204-2251
(317) 232-8921 or (800) 451-6027
emoorhou@idem.in.gov

Public Participation and Work Group Information

An external work group will be established to discuss issues involved in this rulemaking. The work group will be made up of IDEM staff and a cross-section of stakeholders. IDEM plans to establish this work group during the development of the draft rule language after the completion of this comment period.

If you wish to provide comments to the work group on the rulemaking, attend meetings, or have suggestions related to the work group process, please contact Dan Watts, Rules Development Branch, Office of Legal Counsel at (317) 234-5345 or (800) 451-6027 (in Indiana). Please provide your name, phone number, and e-mail address, if applicable, where you can be contacted. The public is also encouraged to submit comments and questions to members of the work group who represent their particular interests in the rulemaking.

REQUEST FOR PUBLIC COMMENTS

At this time, IDEM solicits the following:

- (1) The submission of alternative ways to achieve the purpose of the rule.
 - (2) The submission of suggestions for the development of draft rule language.
- Comments may be submitted in one of the following ways:

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

LSA Document #19-390 Excess Liability Trust Fund
Dan Watts
Rules 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 faxed comments by calling the Rules

Development Branch at (317) 232-8922.

(3) By electronic mail to dwatts1@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, in order 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 not later than September 6, 2019. 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 Dan Watts, Rules Development Branch, Office of Legal Counsel, (317) 234-5345 or (800) 451-6027 (in Indiana).

Christine Pedersen, Section Chief
Rules Development Branch
Office of Legal Counsel

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An [html](#) version of this document.