DEPARTMENT OF STATE REVENUE

04-20231300.ODR

Final Order Denying Refund: 04-20321300
Indiana Gross Retail Tax
For the Years 2018 to 2020

NOTICE: IC 4-22-7-7 permits the publication of this document in the Indiana Register. The publication of this document provides the general public with information about the Indiana Department of Revenue's official position concerning a specific set of facts and issues. The "Holding" section of this document is provided for the convenience of the reader and is not part of the analysis contained in this Final Order Denying Refund.

HOLDING

Public Water Utility was not entitled to a refund of sales tax paid on the purchase of materials and equipment employed in the processing and distribution of water. Water Utility was unable to establish that the water it sold its customer underwent a "substantial change" attributable to the materials and equipment at issue or that the same items were purchased pursuant to local, state, or federal environmental regulations.

ISSUE

I. Gross Retail Tax - Water Utility Exempt Purchases.

Authority: IC 6-2.5-2-1; IC 6-2.5-3-1; IC 6-2.5-3-2; IC 6-2.5-5-3; IC 6-2.5-5-5.1; IC 6-2.5-5-5.1 (Effective to June 30, 2011); IC 6-2.5-5-30; *Dept. of State Revenue v. Caterpillar, Inc.*, 15 N.E.3d 579 (Ind. 2014); *Indiana Department of Revenue v. Interstate Warehousing, Inc.,* 783 N.E.2d 248 (Ind. 2003); *Rhoade v. Ind. Dep't of State Revenue*, 774 N.E.2d 1044 (Ind. Tax Ct. 2002); *Tri-States Double Cola Bottling Co. v. Dep't of State Revenue*, 706 N.E.2d 282 (Ind. Tax Ct. 1999); *Mynsberge v. Dep't of State Revenue*, 716 N.E.2d 629 (Ind. Tax Ct. 1999); *Mid-America Energy Resources v. Indiana Dept. of State Revenue*, 681 N.E.2d 259 (Ind. Tax Ct. 1997); *Mechs. Laundry & Supply v. Ind. Dept. of State Revenue*, 650 N.E.2d 1223 (Ind. Tax Ct. 1995); *Indiana Waste Systems of Indiana, Inc. v. Indiana Department of State Revenue*. 633 N.E.2d 359 (Ind. Tax Ct. 1994); *General Motors Corp. v. Indiana Dept. of State Revenue*, 578 N.E.2d 399 (Ind. Tax Ct. 1991); *Energy Supply, Inc. v. Indiana Dep't of State Revenue,* 549 N.E.2d 1110 (Ind. Tax Ct. 1990); 45 IAC 2.2-5-8; 45 IAC 2.2-5-70; 327 IAC 8-2-8; 327 IAC 8-3.5-5; 327 IAC 8-3.2-17; *Environment,* BLACK'S LAW DICTIONARY (11th ed. 2019); *Environment*, *Merriam-Webster*, https://www.merriam- webster.com/dictionary/environmental; *Environmental, Cambridge Dictionary,* https://dictionary.cambridge.org/dictionary/english/environmentdictionary.cambridge.or/us/dictional/english/environmental; *Pipe Bedding and Backfill - Bureau of Reclamation*, https://usbr.gov/tsc/techreferences/mands/mands-pdfs/pipebed.pdf.; *Vita- D-Chlor Tablets*, https://vita-d-chlor.com/product_tablets.asp?gclid.

Taxpayer argues it is entitled to an additional refund of sales tax paid on the purchase of items, supplies, and equipment used to condition and provide water to its utility customers.

STATEMENT OF FACTS

Taxpayer is an Indiana utility company in the business of providing water to its customers. Taxpayer submitted a refund request (GA-110L) seeking a refund of approximately $1,400,000 in previously paid sales tax.

The Indiana Department of Revenue ("Department") reviewed the refund request. In a letter dated June 2022, the Department informed Taxpayer that it was granting a portion of the request but denying the remaining amount. The Department agreed that Taxpayer was entitled to a refund of approximately $70,000. The Department explained why the remainder of the refund amount was denied.

> The [T]axpayer is a subsidiary of a for-profit corporation which is based out of [non-Indiana location]. Since the [T]axpayer operates as a public utility, the exemptions outlined [under Indiana law] are those available to the [T]axpayer.
> . . . .
>
> However, the [Department] determined that most of the purchases were not provided an exemption due to the [T]axpayer is not a municipal operated utility company [and] the purchases were used in areas which are outside of the wastewater and water treatment exemptions.

The Department's June 2022 letter outlined categories of items which the Department determined were not exempt:

- Piping used in repairs and the transportation of water;
- Meters used to measure the amount of water consumed by Taxpayer's customers;
- Other pipe repair materials;
- Workman's tools used by Taxpayer's employees;
- Items used by employees such as barriers, flags, and consumables;
- Equipment including truck parts;
- Information Technology ["IT"] equipment such as Taxpayer's employees' iPads and iPhones.

The Department also denied refunds of sales tax paid when Taxpayer purchased items not directly related to the delivery of water, such as office supplies, furniture, and cleaning supplies.

Taxpayer disagreed with the Department's decision denying a portion of the refund request and submitted a protest to that effect. In that protest, Taxpayer presented a revised refund amount of approximately $990,000. Administrative hearings were conducted by telephone during which Taxpayer's representatives explained the basis for the protest. This Final Order Denying Refund results.

I. Gross Retail Tax - Water Utility Exempt Purchases.

DISCUSSION

The issue is whether Taxpayer has established that it is entitled to a refund of sales tax paid on the purchase of materials, supplies, and equipment utilized in the operation of a public water utility company.

A. Taxpayer's Argument.

Taxpayer argues that it is entitled to the $990,000 refund because it made purchases of equipment acquired "for direct use in the direct production, manufacture, fabrication, assembly, extraction, mining, processing, refining, or finishing of other tangible personal property." IC 6-2.5-5-3(b).

Taxpayer points out that Indiana law specifically incorporates "water" in its definition of "tangible personal property," and because it is in the business of providing water, it is entitled to the "manufacturing exemption" under IC 6-2.5-5-3(b). The provision on which Taxpayer relies provides in part as follows:

> [T]ransactions involving manufacturing machinery, tools, and equipment, including material handling equipment purchased for the purpose of transporting materials into activities described in this subsection from an onsite location, are exempt from the state gross retail tax if the person acquiring that property acquires it for direct use in the direct production, manufacture, fabrication, assembly, extraction, mining, processing, refining, or finishing of other tangible personal property. *See also* 45 IAC 2.2-5-8(a).

Taxpayer believes that because Indiana law, IC 6-2.5-5-5.1, specifically classifies "water" as "tangible personal property," the equipment and materials used to produce and distribute water are exempt.

B. Indiana's Sales and Use Tax.

Indiana imposes an excise tax called "the state gross retail tax" (or "sales tax") on retail transactions made in Indiana. IC 6-2.5-2-1(a). A person who acquires property in a retail transaction (a "retail purchaser") is liable for the tax on the transaction. IC 6-2.5-2-1(b).

Indiana also imposes a complementary excise tax called "the use tax" on "the storage, use, or consumption of tangible personal property in Indiana if the property was acquired in a retail transaction, regardless of the location of that transaction or of the retail merchant making that transaction." IC 6-2.5-3-2(a). Use means the "exercise of any right or power of ownership over tangible personal property." IC 6-2.5-3-1(a).

In effect and practice, the use tax is functionally equivalent to the sales tax. *See Rhoade v. Ind. Dep't of State Revenue*, 774 N.E.2d 1044, 1047 (Ind. Tax Ct. 2002).

Taxpayer is in the business of providing water to its customers. The general rule is that - absent a specific exemption to the contrary - *all* purchases of tangible personal property by persons engaged in the direct production, manufacture, fabrication, assembly, or finishing of tangible personal property - such as Taxpayer's

pipes, wrenches, and equipment - *are* taxable. 45 IAC 2.2-5-8(a).

C. Indiana's Manufacturing Exemption - Directly Used.

Indiana law, IC 6-2.5-5-3(b), and the Department's regulation, 45 IAC 2.2-5-8, explain that a taxpayer is entitled to purchase machinery, tools, and equipment without paying the gross retail tax when the equipment is used in the direct production of tangible personal property. 45 IAC 2.2-5-8(a) emphasizes that the exemption is limited to that equipment "directly used by the purchaser in direct production." 45 IAC 2.2-5-8(c) specifies that "directly used" means that the equipment has "an immediate effect on the article being produced."

1. Indiana's Double-Direct Standard.

Indiana's "double direct" standard is part and parcel of Indiana tax law and is "the touchstone of the equipment exemption from sales/use tax." *General Motors Corp. v. Indiana Dept. of State Revenue*, 578 N.E.2d 399, 401 (Ind. Tax Ct. 1991). *See also Energy Supply, Inc. v. Indiana Dep't of State Revenue*, 549 N.E.2d 1110, 1112 (Ind. Tax Ct. 1990); *Indiana Waste Systems of Indiana, Inc. v. Indiana Department of State Revenue*. 633 N.E.2d 359, 362 (Ind. Tax Ct. 1994)

45 IAC 2.2-5-8(c) explains that "[p]roperty has an immediate effect on the article being produced if it is an essential and integral part of an integrated process which produces tangible personal property." *Id*. *See* IC 6-2.5-5-3(b). The "immediate" rule is straightforward and is directly attributable to the "double-direct" standard.

> To qualify for this exemption, taxpayers must meet two requirements. First, the taxpayer must acquire the property for his direct use. Second, the taxpayer must use that property in direct production, manufacture, fabrication, assembly, extraction, mining, processing, refining, or finishing of other tangible personal property. *Mid-America Energy Resources v. Indiana Dept. of State Revenue*, 681 N.E.2d 259, 262 (Ind. Tax Ct. 1997).

However, it should also be noted that - as pointed out in the Department's response - "[t]he fact that particular property may be considered essential to the conduct of the business of manufacturing because its use is required . . . by practical necessity does not itself mean that the property 'has an immediate effect upon the article being produced.'" 45 IAC 2.2-5-8(g).

2. Production Begins and Ends.

Proper application of the exemptions requires determining at what point "production" begins and at what point "production" ends. 45 IAC 2.2-5-8(d) states:

> Pre-production and post-production activities. "Direct use in the production process" begins at the point of the *first* operation or activity constituting part of the integrated production process and *ends* at the point that the production has altered the item to its completed form, including packaging, if required. (*Emphasis added*).

3. Substantial Change.

Finally, 45 IAC 2.2-5-8(k) specifies that, in order to qualify for the exemption, the articles being produced have undergone a "substantial change."

> "Direct production, manufacture, fabrication, assembly, or finishing of tangible personal property" is performance as a business of an integrated series of operations which places tangible personal property in a form, composition, or character *different from that in which it was acquired*. The change in form, composition, or character must be a substantial change, and it must result in a transformation of property into a different product having a distinctive name, character, and use. Operations such as compounding, fabricating, or assembling are illustrative of the types of operations which may qualify under this definition. (*Emphasis added*).

To summarize, every item of machinery, tools, and equipment purchased for use in the production of goods is subject to sales or use tax unless the property has a direct and immediate effect on the goods, is essential to the integrated process producing the goods, is employed within the process of producing the goods, and leads to a substantial change in the goods.

D. Applying the Manufacturing Exemptions.

The "manufacturing exemption" found at IC 6-2.5-5-3(b) and 45 IAC 2.2-5-8 as with all tax exemption provisions, is strictly construed against exemption from the tax. *Tri-States Double Cola Bottling Co. v. Dep't of State Revenue*, 706 N.E.2d 282, 283 (Ind. Tax Ct. 1999); *Mynsberge v. Dep't of State Revenue*, 716 N.E.2d 629, 636 (Ind. Tax Ct. 1999). As the Tax Court explained, "The burden is a difficult one for ambiguities in exemption statutes are strictly construed against the taxpayer." *Mechs. Laundry & Supply v. Ind. Dept. of State Revenue*, 650 N.E.2d 1223, 1227 (Ind. Tax Ct. 1995).

Nevertheless, the Department is well aware of the countervailing rule that a "statute must not be construed so narrowly that it does not give effect to legislative intent because the intent of the legislature embodied in a statute constitutes the law." *General Motors Corp. v. Indiana Dept. of State Revenue*, 578 N.E.2d 399, 404 (Ind. Tax Ct. 1991).

However, in weighing Taxpayer's arguments the Department points out, "[W]hen [courts] examine a statute that an agency is 'charged with enforcing . . . [courts] defer to the agency's reasonable interpretation of [the] statute even over an equally reasonable interpretation by another party.'" *Dept. of State Revenue v. Caterpillar, Inc.*, 15 N.E.3d 579, 583 (Ind. 2014). Thus, interpretations of Indiana tax law contained within this decision, as well as the preceding audit, are entitled to deference.

1. Applying the Exemption - Specifics.

a. *Mid-America Resources*.

In *Mid-America Energy Resources v. Indiana Dept. of State Revenue*, 681 N.E.2d 259 (Ind. Tax Ct. 1997), the court agreed with Mid-America that its "central processing plant," which cooled and conditioned water sold to its subscribers, qualified for the equipment exemption pursuant to IC 6-2.5-5-3(b) and the consumption exemption found at IC 6-2.5-5-5.1 *Id.* 263-64 IC 6-2.5-5-3(b) provided:

> Transactions involving manufacturing machinery, tools, and equipment are exempt from the state gross retail tax if the person acquiring that property acquires it for his direct use in the direct production, manufacture, fabrication, assembly, extraction, mining, processing, refining, or finishing of other tangible personal property.

Relevant to *Mid-America*'s analysis, IC 6-2.5-5-5.1 (Effective to June 30, 2011) provided:

> Transactions involving tangible personal property are exempt from the state gross retail tax if the person acquiring the property acquires it for direct consumption as a material to be consumed in the direct production of other tangible personal property in the person's business of manufacturing, processing, refining, repairing, mining, agriculture, horticulture, floriculture, or arboriculture. This exemption includes transactions involving acquisitions of tangible personal property used in commercial printing.

The court referred to IC 6-2.5-5-3(b) and IC 6-2.5-5-5.1 as one of the "three industrial exemptions [with] the consumption exemption [] treated, in most respects, identically to the equipment exemption." *Id.* at 253.

The Department had assessed Mid-America use tax on purchases of equipment and consumables used or consumed in its processing of the chilled water. *Id.* at 261. The Department did so because it found that Mid-America was a service provider and that Mid-America's "chilling of water did not significantly change the water [and] no 'production' or 'processing' occurred, and no 'other tangible personal property' was produced." *Id.* at 261-62.

Mid-America did not sell the chilled water to its subscribers but simply distributed water to its customers at 40 degrees Fahrenheit. The subscribers then recycled back to Mid-America the same water but a temperature of 52 degrees. *Id*. at 260.

The court rejected the Department's analysis and conclusion. Instead, it held that Mid-America *was* "engaged in the 'direct production' of 'other tangible personal property' because Mid- America was engaged in the "'direct production' of 'other tangible personal property' for purposes of the industrial exemptions." *Id.* at 264. Under both IC 6-2.5-5-3(b) and IC 6-2.5-5-5.1, Mid-America was entitled to purchase treatments chemicals, steam utilities, and the equipment directly involved in chilling the water distributed to its subscribers.

b. *Interstate Warehousing*.

Indiana's Supreme Court, in *Indiana Department of Revenue v. Interstate Warehousing, Inc.,* 783 N.E.2d 248

(Ind. 2003), addressed an issue similar to that raised here by Taxpayer. Interstate (the petitioner in this case) operated refrigerated warehouse facilities in which the warehouse contents were cooled by refrigerated ammonia. *Id* at 249. Interstate argued that its purchase of electricity was exempt from sales tax because the electricity was used to chill ammonia distributed in a closed loop system for purposes of maintaining its customers' frozen food products. *Id.* The court concluded that chilling of ammonia was "not sufficient to constitute 'production of other tangible personal property' under the [exemption] statute." *Id.* at 250. The court recognized the similarity of Mid-America's circumstances and those of Interstate acknowledging that both "companies distributed their coolants through a closed loop system with similar types of machinery." *Id.* at 253. However, the court criticized the Tax Court's Interstate decision because "the Tax Court failed to apply the 'distinct marketable good' requirement." The court concluded that:

> The process Interstate uses to achieve an air-conditioned environment is incidental to the service of providing storage for frozen goods. [Interstate's] customers are neither purchasing, nor paying sales or use taxes on the goods used to provide the service. *Id.*

E. "Industrial Exemption" Interpretation and Conclusion.

The Department agrees that Taxpayer's water treatment facilities might well fall within the Industrial exemptions as described in the Tax Court's *Mid-America Energy* decision. However, the circumstances raised here by Taxpayer and the circumstances addressed in *Mid-America* are not necessarily one and the same,

In order to understand that distinction, the Department refers to the particulars of Taxpayer's refund request. That request incorporates some 2,400 items, including such items as limestone, iron pipe, tires, office chairs, iPads, pumps, meters, and meter covers. A representative sample of those items - simply chosen as the first item on each of Taxpayer's 60-page spreadsheet - includes the following.

- Water system repairs;
- Master wrench;
- Water system repairs;
- Toilet brush;
- Water system parts and tools including flanges;
- Marking paint;
- Screw on valve;
- Water system repairs;
- Metal yoke parts;
- Meter yoke parts;
- Water system parts and tools;
- Lead free brass bushing;
- Water system repairs;
- 32 oz. filled eyewash bottle;
- Marking paint;
- Absorbent pad;
- Mechanics drill set;
- Prybar;
- Fire hydrant;
- Reciprocating saw blade;
- Metal box parts;
- Screw on valve box parts;
- Metal parts including expanders;
- Install new valve box;
- Water system repairs;
- 48 alloy T-probes;
- Water system repairs;
- Hook and loop fastener;
- Cordless impact wrench;
- Fabricated tapping sleeves;
- Water system repairs;
- 1 man crew contract labor;
- Water system repairs;
- Service truck w/ driver;
- OMNI water meter;
- Water system repairs;

- Marking paint;
- Metal yoke parts;
- Water system repairs;
- Metal yoke parts;
- Water system repairs;
- Disposable hot cups;
- Pulley puller set;
- Tapping sleeves;
- Submersible pump;
- D-Chlor tablets;
- Solvent-based paint;
- Battery;
- Ladder;
- Copper meter;
- 2-inch metal flange gasket;
- Meter box parts;
- Metal yoke parts;
- Spin-on thread;
- Clutch cup
- Metal yoke parts;
- Double shot through bolt wrench;
- Metal box parts;
- Water system repairs;
- Special 4x5 blue;
- Sonoscope leak detector.

As to the majority of these items, there is little that establishes that each of the items are "directly used" in the production of the water sold to its customers. There is little or no evidence that the items have a "direct, immediate and substantial effect on the [water] produced" and sold to its customers. Each appears to be - to some degree or another - useful or even necessary to Taxpayer's utility business. Some of the items (ladder, paint, yoke, toilet brush) seem unlikely to have a direct effect on the water Taxpayer processes and sells to its customers. Some of the other items (valves, brass fittings, flanges) might indeed be directly integrated into the processing of the water. However, exemptions from tax are "strictly construed" and the Department does not agree that Taxpayer has met that "difficult" benchmark. *Mechs. Laundry*, 650 N.E.2d at 1227.

In reviewing these purchases, the Department must conclude that Taxpayer's interpretation and application of the manufacturing sales tax exemption ranges far afield from the four-corners of the manufacturing exemption. 45 IAC 2.2-5-8(g) seems particularly relevant here when it reminds both taxpayers and the Department that "[t]he fact that a particular property may be considered essential to the conduct of the business of manufacturing because its use is required . . . by practical necessity does not itself mean that the property 'has an immediate effect upon the article being produced.'"

F. Environmental Regulation Exemption.

Taxpayer raises a secondary argument and argues that its purchases of equipment and items were exempt. Taxpayer argues that the items were necessary to comply with local, state, or federal environmental regulations.

Taxpayer's "environmental" list includes some 2,577 items largely - but not entirely - duplicating the items listed on Taxpayer's "manufacturing" list.

To restate the standards described above, Indiana imposes it sales tax on retail transactions and a complimentary use tax on tangible personal property that is stored, used, or consumed in the state. IC 6-2.5-1-1 et seq. However, Indiana law allows manufacturers an exemption for items which are purchased for the purpose of complying with local, state, or federal environmental quality standards.

The exemption is set out in IC 6-2.5-5-30 which states in part that,

> (a) Sales of tangible personal property are exempt from the state gross retail tax if:
> (1) the property constitutes, is incorporated into, or is consumed in the operation of, a device, facility, or structure **predominantly used and acquired for the purpose of complying with any state, local, or federal environmental quality statutes, regulations, or standards; and**

> **(2) the person acquiring the property is engaged in the business of manufacturing,** processing, refining, mining, recycling (as defined in section 45.8 of this chapter), or agriculture
>
> (b) The portion of the sales price of tangible personal property which is exempt from state gross retail and use taxes under this section equals the product of:
>
> (1) the total sales price; multiplied by
>
> (2) one hundred percent (100[percent]). (**Emphasis added**).

The Department's regulation, 45 IAC 2.2-5-70, restates the exemption as follows:

> The state gross retail tax does not apply to sales of tangible personal property which constitutes, is incorporated into, or is consumed in the operation of, a device, facility, or structure predominately used and acquired for the purpose of complying with any state, local or federal environment [quality] statutes, regulations or standards; and the **person acquiring the property is engaged in the business of manufacturing, processing, refining, mining, or agriculture.**
>
> (1) Consumed as used in this regulation . . . means the dissipation or expenditure by combustion, use or application, and does not mean or include the obsolescence, discarding, disuse, depreciation, damage, wear or breakage of tools, machinery, devices or furnishings.
>
> (2) Incorporated as used in this regulation . . . means the material must be physically combined into and become a component of the environmental quality device, facility, or structure. The material must constitute a material or integral part of the finished product. 45 IAC 2.2-5-70(a).

As noted previously, IC 6-2.5-5-30, like all tax exemption provisions, is strictly construed against exemption from the tax. *Tri-States Double Cola Bottling Co. v. Dep't of State Revenue*, 706 N.E.2d 282, 283 (Ind. Tax Ct. 1999).

1. Environment or Environmental.

So, what then is an "environmental" standard as opposed to any other standard? One dictionary indicates that "environment" refers to "the complex of physical, chemical, and biotic factors (such as climate, soil, and living things) that act upon an organism or an ecological community and ultimately determine its form and survival." *Environment*, *Merriam-Webster*, https://www.merriam-webster.com/dictionary/environmental (last visited October 11, 2023); Another explains that "environmental" means, "Relating to the environment in which people, animals, and plants live." *Environmental, Cambridge Dictionary,* https://dictionary.cambridge.org/dictionary/english/environmentdictionary.cambridge.or/us/dictional/english/environmental (last visited October 11, 2023). Elsewhere, the term is defined as "[t]he natural world in which living things dwell and grow. The conditions affecting the development, growth, or performance or thing." *Environment,* BLACK'S LAW DICTIONARY (11th ed. 2019).

Borrowing from those sources and for purposes of this written decision, the Department will assume that an "environmental regulation" is one in which a local, state, or federal authority imposes rules aimed to protect or affect the natural world and the living things which live and grow within that world.

2. Taxpayer's "Environmental" Regulations.

Taxpayer cites to Indiana regulations as requiring certain environmental standards directly leading to the equipment and supply purchases.

a. Water Testing Bacterial Standards.

In the first instances, Taxpayer cites to 327 IAC 8-2-8 as authority for claiming that the "water main materials" it bought are exempt from sales tax because the materials are required "to protect or affect the natural world and the living things on that world."

> (a) A [public water system] must collect total coliform samples at sites that are representative of water throughout the distribution system as follows:
>
> (1) According to a written sample siting plan approved by the commissioner.
>
> (2) Beginning on April 1, 2016, each [public water system], based on the population served by the [public water system], must meet the monitoring requirements of 40 CFR 141, Subpart Y.
>
> (b) The monitoring frequency for total coliforms for a [community water system] is based on the population served by the [community water system] and is required through March 31, 2016, as follows unless the commissioner determines that more frequent sampling is appropriate[.]
>
> . . . .

327 IAC 8-2-8 specifies which water utilities are required to perform coliform bacteria testing as follows:

> [T]hat have at least fifteen (15) service connections but serve fewer than twenty- five (25) persons. If a [community water system] serving twenty-five (25) to one thousand (1,000) persons has no history of total coliform contamination in its current configuration and a sanitary survey conducted in the past five (5) years shows that the [community water system] is supplied solely by a protected ground water source and is free of sanitary defects, the commissioner may reduce the monitoring frequency specified in this subsection, in writing, except that in no case may the commissioner reduce the monitoring frequency to less than one (1) sample per quarter.
> (c) The monitoring frequency for total coliforms for an [non-community water system] is required through March 31, 2016, as follows:
> (1) An [non-community water system] using only ground water (except ground water under the direct influence of surface water, as defined in section 1(45) of this rule) that serves:
> (A) one thousand (1,000) or fewer persons:
> (i) must monitor each calendar quarter that the [non- community water system] provides water to the public; and
> (ii) may monitor under a reduced frequency allowed in writing by the commissioner if:
> (AA) a sanitary survey shows that the [non- community water system] is free of sanitary defects; and
> (BB) not less than once per year monitoring is conducted after June 29, 1994; and
> (B) more than one thousand (1,000) persons during any month:
> (i) must monitor at the same frequency as a like-sized [community water system], as specified in subsection (b); and
> (ii) may monitor under a reduced frequency allowed in writing by the commissioner for:
> (AA) any month the [non-community water system] serves one thousand (1,000) or fewer persons; and
> (BB) not less than once per year monitoring.
> For an [non-community water system] using ground water under the direct influence of surface water, subdivision (3) applies.
> (2) An [non-community water system] using surface water, in total or in part, must monitor at the same frequency as a like-sized [community water system], as specified in subsection (b), regardless of the number of persons it serves.
> (3) An [non-community water system] using ground water under the direct influence of surface water, as defined in section 1(45) of this rule, must monitor at the:
> (A) same frequency as a like-sized [community water system] specified in subsection (b); and
> (B) frequency under clause (A) beginning six (6) months after the commissioner determines that the ground water is under the direct influence of surface water.
> (d) The [public water system] must collect samples through March 31, 2016, at regular time intervals throughout the month, except a [public water system] that:
> (1) uses only ground water (except ground water under the direct influence of surface water, as defined in section 1(45) of this rule); and
> (2) serves four thousand nine hundred (4,900) persons or fewer; may collect all required samples on a single day if they are taken from different sites.
> (e) Through March 31, 2016, special purpose samples, such as those taken to determine whether disinfection practices are sufficient following pipe placement, replacement, or repair, must not be used to determine compliance with the [maximum containment level] for total coliforms in section 7 of this rule. Repeat samples taken under section 8.1 of this rule:
> (1) are not considered special purpose samples; and
> (2) must be used to determine compliance with the [maximum containment level] for total coliforms required by section 7 of this rule. Any sample not designated as special purpose before analysis by the laboratory must be used to determine compliance with the [maximum containment level] for total coliforms in section 7 of this rule.
> (f) The provisions of this subsection are applicable until all required repeat monitoring under section 8.1 of this rule and fecal coliform or E. coli testing required under section 8.3 of this rule that was initiated by a total coliform positive sample taken before April 1, 2016, is completed as well as analytical method, reporting, record keeping, public notification, and consumer confidence report requirements associated with that monitoring and testing. A total coliform- positive sample invalidated under this subsection does not count towards meeting the minimum monitoring requirements of this section. The total coliform-positive sample may be invalidated only if the following conditions are met:
> (1) The laboratory establishes that improper sample analysis caused the total coliform-positive result.
> (2) The commissioner, on the basis of the results of repeat samples collected as required by section 8.1(a)

through 8.1(d) of this rule, determines that the total coliform-positive sample resulted from a domestic or other nondistribution system plumbing problem. The commissioner cannot invalidate a:

(A) sample on the basis of repeat sample results unless all repeat samples collected:

(i) at the same tap as the original total coliform-positive sample are also total coliform-positive; and

(ii) within five (5) service connections of the original tap are total coliform-negative; and

(B) total coliform-positive sample on the basis of repeat samples if:

(i) all the repeat samples are total coliform-negative; or

(ii) the [public water system] has only one (1) service connection.

(3) The commissioner has substantial grounds to believe that a total coliform-positive result is due to a circumstance or condition that does not reflect water quality in the distribution system. In this case, the [public water system] must still collect all repeat samples required by section 8.1(a) through 8.1(d) of this rule and use them to determine compliance with the [maximum containment level] for total coliforms in section 7 of this rule. To invalidate a total coliform-positive sample under this subsection, the decision must be documented, in writing, and approved and signed by the supervisor of the state official who recommended the decision. The commissioner shall make this document available to U.S. EPA and the public. The written documentation must state the following:

(A) The specific cause of the total coliform-positive sample.

(B) What action the [public water system] has taken, or will take, to correct this problem. The commissioner may not invalidate a total coliform-positive sample solely on the grounds that all repeat samples are total coliform-negative.

(4) A laboratory must invalidate a total coliform sample, unless total coliforms are detected, if the sample:

(A) produces a turbid culture in the absence of:

(i) gas production using an analytical method where gas formation is examined, for example, the multiple-tube fermentation technique; or

(ii) an acid reaction in the presence-absence (P-A) coliform test; or

(B) exhibits confluent growth or produces colonies too numerous to count with an analytical method using a membrane filter, for example, the membrane filter technique.

If a laboratory invalidates a sample because of interference as described in this subdivision, the [public water system] must collect another sample from the same location as the original sample within twenty-four (24) hours of being notified of the interference problem and have it analyzed for the presence of total coliforms. The [public water system] must continue to resample within twenty-four (24) hours and have the samples analyzed until it obtains a valid result. The commissioner may waive the twenty-four (24) hour time limit on a case-by-case basis.

(g) Beginning on April 1, 2016, the provisions of 40 CFR 141, Subpart Y*, are applicable, with a [public water system] required to begin monitoring at the same frequency as the [public water system] specific frequency required on March 31, 2016.

b. Business Water Meters.

For purchases of "nonresidential, business water meters," Taxpayer cites to 327 IAC 8-3.5-5(i) which provides:

All nonresidential service connections must be equipped with a meter, and the size of the meter must be specified on the plans and specification of the water main. The metering devices must not be capable of exceeding the corresponding "Safe Maximum Operating Capacity" as specified on Table 1 of AWWA C700-02, AWWA C702-01, or AWWA C703-96(04).

c. Pipe Installation.

For its "buried pipe bedding," Taxpayer cites to 327 IAC 8-3.2-17(b) which provides:

Continuous and uniform bedding shall be provided in the trench for all buried pipe. Backfill material shall be tamped in layers around the pipe and to a sufficient height above the pipe to adequately support and protect the pipe. All stones unable to pass through a U.S. Standard Sieve opening of two (2) inches that are found in the trench within six (6) inches of the outside edge of the pipe shall be removed.

The Department finds helpful the United States Bureau of Reclamation which defines pipe "bedding" as:

The material placed in the bottom of the trench on which the pipe is laid. The embedment is the soil placed to support the load on the pipe. For rigid pipe, embedment helps distribute the load over the foundation. For flexible pipe, embedment resists the deflection of the pipe due to load. *Pipe Bedding and Backfill - Bureau of Reclamation*, https://usbr.gov/tsc/techreferences/mands/mands-pdfs/pipebed.pdf (last visited October 11,

2023).

3. "Environmental" Analysis and Conclusion.

The Department here is faced with the same or similar difficulties as noted above. The first is whether or not the three regulations on which Taxpayer is relying are or are not directly related to protecting the environment. 327 IAC 8-2-8 seems to be the best "environmental" fit because it relates to bacteriological safety testing. The Department is less convinced that the water meter requirement set out in 327 IAC 8-3.5-5(i) is related to preserving and "protect[ing] or affect[ing] the natural world and the living things which live and grow within that world." Instead, the Department assumes that businesses are required to install water meters which meet a safety, mechanical, or practical standard. The Department is even less inclined to agree that 327 IAC 8-3.2-17(b) addresses an environmental issue. Perhaps it does, but 327 IAC 8-3.2-17(b) may well simply impose a construction standard designed to assure that water utility pipes are sufficiently protected from the vagaries of Indiana's weather.

Even if the Department were to agree that Taxpayer has met the "heavy burden" of establishing that 327 IAC 8-3.2-8, 327 IAC 8-3.5-5(i), and 327 IAC 8-3.2-17(b) are designed to protect the world and its inhabitants, the Department is unable to agree that all the transactions for which Taxpayer now seeks a refund are necessarily related to the regulations' implementation. Perhaps "D-Chlor tablets" do fit the bill because the tablets are described by the manufacturer as used in "treating potable water in dewatering and flushing applications." *Vita-D-Chlor Tablets*, https://vita-d-chlor.com/product_tablets.asp?gclid (last visited October 13, 2023). But even to this very limited extent, granting Taxpayer a refund requires the Department to speculate to a degree not plainly warranted. Moreover, the Department is even less inclined to agree that Taxpayer has met its burden of establishing that many of the items contained in Taxpayer's refund list (battery, hoop and loop fastener, hot cups, ladder) are directly related to local, state, or federal environmental regulations.

FINDING

Taxpayer's protest is respectfully denied.

November 15, 2023

Finding Replaces: New

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