NATURAL RESOURCES COMMISSION
Information Bulletin #41
The Public Trust Doctrine on Navigable Waters and Public Freshwater Lakes
March 1, 2004

1. Prologue: The Public Trust Doctrine[1]

Recognizing the great importance of its shoreline on Lake Michigan, Indiana is a participant in the Coastal States Organization. Since 1970, the Coastal States Organization has represented the Governors of the U.S. coastal states as an advocate for improved management of the nation's oceans and the Great Lakes. In 1997, the Coastal States Organization described the "public trust doctrine"[2]:

> The Public Trust Doctrine provides that public trust lands, waters and living resources in a State are held by the State in trust for the benefit of all of the people, and establishes the right of the public to fully enjoy public trust lands, waters and living resources for a wide variety of recognized public uses. The doctrine also sets limits on the States, the public, and private owners, as well as establishing the responsibilities of the States when managing these public trust assets.

The origins of the public trust doctrine are ancient and traced "to the sixth century Institutes and Digest of Justinian, which collectively formed Roman civil law."[3] The best-known application of the public trust doctrine has been for navigable waters. Even before Indiana achieved statehood, the Northwest Ordinance of 1787 recognized the public interest in our territory's navigable waters. The ordinance declared:

> [T]he navigable waters leading into the Mississippi and the St. Lawrence, and the carrying places between the same, shall be common highways, and forever free, as well to the inhabitants of said territory as to the citizens of the United States, and of those of any other states that may be admitted into the confederacy, without any tax, impost, or duty therefor.

Without using the phrase "public trust doctrine", Indiana's high courts have long recognized the concept. In 1918, for example, the Indiana Appellate Court found the state held the bed of Lake Michigan in trust for the people.[4] Several courts have addressed the public interest in navigable waters, including a 1950 decision holding that the test of navigability was whether a river or lake was capable of commercial navigation when Indiana was admitted to statehood in 1816. The West Fork of the White River in Morgan County was found to be legally navigable, and the sand and gravel within the bed of the river to be assets of Indiana citizens.[5]

In 1947, the Indiana General Assembly extended environmental protections to Indiana's "public freshwater lakes".[6] Although there are important statutory exceptions, a "public freshwater lake" is generally any "lake that has been used by the public with the acquiescence of a riparian owner."[7] Public freshwater lakes may or may not meet the judicial test for navigability. Examples of public freshwater lakes include Cedar Lake in Lake County, Pine Lake in LaPorte County, Bass Lake in Starke County, Lake Maxinkuckee in Marshall County, Lake Wawasee in Kosciusko County, and Lake James in Steuben County. The statutory chapter that provided for the protection of public freshwater lakes is commonly called the "Lakes Preservation Act". This act provides the state has "full power and control of all the public freshwater lakes" and holds and controls "all public freshwater lakes in trust for the use of all citizens of Indiana for recreational purposes".[8]

Recently, the Court of Appeals of Indiana reflected that the Lakes Preservation Act was "[p]ublic trust legislation" intended to recognize "the public's right to preserve the natural scenic beauty of our lakes and to recreational values upon the lakes." The Court observed that "Riparian landowners…continue to possess their rights with respect to a public freshwater lake, but their rights are now statutory and must be balanced with the public's rights."[9]

The Indiana General Assembly has assigned regulatory responsibility to the Department of Natural Resources with respect to both navigable waters and public freshwater lakes. The Department has "general charge" of the state's navigable waters[10] and is the licensing authority for navigable waters[11]. The Department is the regulatory authority for public freshwater lakes.[12] Significantly for both these categories of public waters, the Department is also the state agency with primary responsibility for administering boating laws.[13]

An essential element in the Department's analyses for administering its responsibilities, for navigable waters and for public freshwater lakes, must be an appropriate consideration of the public trust doctrine. The agency shall seek to achieve a fair balance among competing users, both public and private. This information bulletin seeks to bring attention to these responsibilities and to acknowledge a new focus on the public trust. In particular, the Natural Resources Commission reflects upon the import of a work group process that began in 1997 and resulted in 2000 and 2003 legislation.

2. Citizens and Legislators Seeking Solutions: the Indiana Lakes Management Work Group

In 1997, the Indiana General Assembly enacted legislation[14] to form the Indiana Lakes Management Work Group. The work group included 26 members chosen from a broad base of lakes organizations, users, and researches. Also included were Senator Robert Meeks (R-LaGrange), Senator Katie Wolf (D-Monticello), State Representative Dennis Kruse (R-Auburn), and State Representative Claire Leuck (D-Fowler). The work group was directed to do the following:

1. Conduct public meetings to hear testimony and receive written comments concerning problems affecting the lakes of Indiana.
2. Develop proposed solutions to problems affecting the lakes of Indiana.

3. Issue reports to the Natural Resources Study Committee of the Indiana General Assembly.

4. Issue an interim report before July 1, 1998, and a final report before December 31, 1999.

Upon completion of its proposed solutions, the work group was to make those solutions available in writing to the Natural Resources Study Committee, the Department of Natural Resources, and the public.

The mission statement for the work group offered a perspective harmonious with the public trust doctrine. "The mission of the Indiana Lakes Management Work Group" was "to develop solutions to problems facing Indiana lakes--solutions that result in:

- Improved water quality--lakes getting better instead of worse.
- Better management of lakes that respects and accommodates multiple users.
- Increased and broadened interest among Hoosiers in safeguarding lakes for future generations.
- Improved recreational opportunities for all lake users."[15]

The work group met 24 times between 1997 and 1999 and adopted 113 recommendations in 48 categories to help implement these solutions. Several of the recommendations anticipated new legislation, sometimes with the need for subsequent rule adoption by the Natural Resources Commission. Others sought renewed focus upon existing legislation. Those that resulted in new legislation, and the rules to assist in implementing the legislation, are discussed next. To be noted is that each of the 48 categories was a consensus document approved by diverse user interests. The resolutions and resulting legislation share a commonality in seeking to protect our great natural resources and in seeking to assure fair enjoyment among competing users. They support the principles of the public trust doctrine.

3. Work Group Resolutions Advanced: 2000 Legislation and 2003 Legislation, with Resulting DNR Programs and NRC Rule Adoptions

Legislation was enacted in 2000[16] and in 2003[17] in response to the efforts of the Indiana Lakes Management Work Group. The work group categories of recommendations and pertinent new legislation, programs, and rules are considered:

Category 3

During the September 28, 1999 meeting, the work group approved the following issue and problem statement with recommendations:

The littoral zone of a lake or reservoir is that area having water shallow enough to support the growth of rooted aquatic plants. While this area is usually associated with shallow, near-shore areas, it also includes shallow bars away from the shoreline where plants can grow. A diverse, native plant community has important functions for a healthy lake ecosystem. Native plants in the littoral zone provide habitat for fish, aquatic insects and other aquatic organisms; dampen wave energy; stabilize lake sediments; and add essential oxygen to the water.

Motorboat use is a major form of recreation on Indiana's lakes and reservoirs. While this activity brings great enjoyment to boat users, motorboats can create significant negative effects on lake quality. When motorboats operate within or too close to rooted floating-leafed and emergent aquatic plant communities, the growth and health of the plants can be reduced three-fold by turbulence and scouring caused by motorboats and their wakes. Research has shown that weakly rooted plant species are eliminated beneath water ski runs to a depth of 10 feet. In addition, boat propellers can cut plant stems and this has been shown to increase the spread of exotic invasive species such as Eurasian watermilfoil. The Wisconsin Department of Natural Resources recommends limiting boat speeds in water depths up to the maximum rooting zone of aquatic plants (10-13 feet in most Indiana lakes.)

Other research has shown that a 50-hp outboard motorboat can resuspend fine clay sediments from lake bottoms to depths of ten feet. Larger motors common on Indiana lakes would likely have effects deeper than 10 feet. Sediment resuspension increases turbidity, decreased water clarity, and liberates sediment phosphorus into the water column that contributes to excessive algal blooms.

The work group noted the then current state statute restricted boat speeds to ten miles per hour within 200 feet of public lake shorelines. A further reduction to speeds in shallow waters would promote "safer use of those waters by canoes, sailboards, and anglers. Due to the plowing effect of boats with large drafts," a ten-mile per hour speed could "increase rather than decrease the intensity of waves generated by the boat wake. Therefore, minimizing damage to shorelines and other aquatic resources can only be guaranteed by instituting a standard that reduces wake and wash, such as implementing a no-wake or idle speed standard." A recommendation of the work group was that the ten-mile per hour speed limit within 200 feet of a lake shoreline be changed to an idle speed limit.[18]

Legislative Response to Recommendations in Category 3

For most lakes, the Indiana General Assembly reduced the maximum speed, at which a person may lawfully operate a motorboat within 200 feet of the shoreline, from ten-miles per hour to idle speed.[19] "Idle speed" means the slowest possible speed, not exceeding five miles per hour, that maintains steerage so that the wake and wash created by the boat is minimal.[20]

Category 20

During the May 19, 1999, meeting, the work group approved the following issue and problem statement with recommendations:

During the Tri-State University meetings in 1996 that led to the formation of the Lakes Management Work Group, law

enforcement was the second highest ranked concern of public freshwater lake users. The view was that more enforcement presence on the water was a significant priority. The greatest support was for additional traditional conservation officers; however, there was also support for the use of other types of enforcement officers as an alternative (i.e., reserve conservation officers or officers from sheriff reserves).

The work group recommended:

a. over the next 4 years, increase the number of full-time conservation officers in areas of Indiana that have a concentration of public lakes by a minimum of 25%; and

b. provide funding to be directed to the Law Enforcement Division of DNR to be utilized on waterway enforcement.[21]

Legislative Response to Recommendations in Category 20

With the enactment of P.L.233-2003, the Indiana General Assembly increases the boat excise tax, on a graduated basis, for boats valued at more than $1,000. Indiana began collection of the increased taxes on January 1, 2004. The Legislative Services Agency estimates total additional revenues of approximately $2,500,000.[22] Pursuant to IC 6-6-11-12, one-third of the total revenues from the boat excise tax (roughly $1,200,000 annually) are deposited in the new "conservation officers marine environment fund". The Department of Natural Resources is to "expend the money in the fund exclusively for marine enforcement efforts associated with recreational boating on Indiana waters", including support for the newly established "special boat patrol needs fund" in an amount not to exceed 20% of total in the marine environmental fund.[23] The Department shall develop a formula for the distribution of grants through the special boat patrol needs fund to counties based on the number and size of lakes located in a county, the extent to which law enforcement is provided on the lakes by the county, and "[a]ny other pertinent factor".[24] This legislative response is also pertinent to the recommendations discussed later in Category 34.

Department of Natural Resources Implementation of Legislative Response to Recommendations in Category 20

The Department's Division of Law Enforcement is identifying priorities for enhanced boating enforcement. These will consider public health and safety, as well as environmental protection on public waters and appropriate implementation of the public trust doctrine. The Division of Law Enforcement will offer an allocation formula and memorandum to assist in the administration of the "special boat patrol needs fund".

Category 21

During the September 28, 1999 meeting, the work group approved the following issue and problem statement with recommendations:

On October 16, 1997, the Court of Appeals ruled that the Indiana Department of Natural Resources (DNR) has no statutory authority under [the] Lakes Preservation Act to require permits for seasonal installation of piers or other structures that are of a temporary nature, so long as the installation method has minimal impact on the bed of the lake.[25]

Although there are other areas of law that suggest DNR has the authority to regulate temporary structures in public freshwater lakes, the authority is not definitive and is cumbersome to apply.

The result of this condition of law is that DNR is unable to effectively manage public freshwater lakes in the full spirit of "public trust" as mandated by law. Additionally, the ability of public freshwater lakes, users, property owners, and local governments to resolve disputes short of expensive court battles is unrealistically limited.

Structures that are considered temporary, and have "de minimis" impact on the lake bed are left to uncontrolled proliferation. The result is loss of public usage of areas within 150 feet of shore, an increase in riparian owner disputes, and environmental harm to the lakes.

DNR has attempted to manage this problem through agency rule-making authority. This process has not adequately dealt with the problem, and clear authority must be re-established by the legislature to protect Indiana's public freshwater lakes for property owners, current users, and future stakeholders.

The work group recommended:

The Indiana Lakes Management Work Group recommends that the Indiana General Assembly amend the public freshwater lake law to add a new section that reads as follows:

IC 14-26-2-5.5. The Commission shall adopt rules under IC 14-10-2-4 to assist in the administration of this chapter. The rules must, as a minimum, do the following:

(1) Provide objective standards for licensing the placement of any temporary or permanent structure or material, or the extraction of material, over, along, or within the shoreline or waterline. These standards shall exempt any class of activities from licensing where the Commission finds the class is unlikely to pose more than a minimal potential for harm to the public rights or public trust as described in IC 14-26-2-5.

(2) Establish a process under IC 4-21.5 for the mediation of a dispute among riparian owners, or by a riparian owner against the department, relative to the usage of an area over, along, or within the shoreline or waterline for a matter within the jurisdiction of this chapter. If after a good faith effort mediation under this subdivision fails to achieve a settlement, the department shall make a determination of the dispute. A person affected by the determination may seek administrative review by the Commission.[26]

Legislative Response to Recommendations in Category 21

The Indiana General Assembly enacted IC 14-26-2-23 to implement the recommendations in Category 21. This statutory section provides:

Sec. 23. The commission shall adopt rules in the manner provided in IC 14-10-2-4 to do the following:

(1) Assist in the administration of this [Lakes Preservation Act] chapter.

(2) Provide objective standards for licensing:

(A) the placement of a temporary or permanent structure or material; or

(B) the extraction of material;

over, along, or within the shoreline or waterline. The standard shall exempt any class of activities from licensing if the commission finds that the class is unlikely to pose more than a minimal potential for harm ot the public rights described in section 5 of this chapter.

(3) Establish a process under IC 4-21.5 for the mediation of disputes among riparian owners or between a riparian owner and the department concerning usage of an area over, along, or within a shoreline or waterline for a matter within the jurisdiction of this chapter. The rule must provide that:

(A) if good faith mediation under the process fails to achieve a settlement, the department shall make a determination of the dispute; and

(B) a person affected by the determination of the department may seek administrative review by the commission.

Natural Resources Commission Rules to Implement Legislative Response to Recommendations in Category 21

Rules to address construction within and along the shorelines of public freshwater lakes already existed before the 2000 statutory reforms. These were called into question, however, by the Department of Natural Resources v. Town of Syracuse decision that was at the heart of Recommendation 21. Included in the rules were provisions for a general license for temporary piers that meet specifications designed to minimize the likelihood of harm to the environment and the public trust.[27] With the enactment IC 14-26-2-23 to clarify agency jurisdiction over temporary structures, the Natural Resources Commission reconsidered the rules but found them to be generally sufficient. The Commission did adopt new rule provisions to help implement the mediation process required by the legislation.[28]

Category 26

During the July 28, 1999 meeting, the work group approved the following issue and problem statement with recommendations: Problems related to boat density and user conflict have been brought forth by lake users of all types. Boat speed limits, wakes, placid fishing locations, shallow water soils damage, wetlands protection, and Eurasian watermilfoil expansion are samples of the related problems brought forth. Due to current Indiana Law, the Indiana Department of Natural Resources (DNR) cannot effectively manage boater density and its associated impacts on the public freshwater lakes.

The DNR needs greater authority to regulate public freshwater lakes. The general public seems to believe the DNR can do anything it needs to do to correct lake problems and user conflicts, but the enabling laws necessary to regulate public freshwater lakes to address specific lake or local needs are not in place.

The work group recommended:

The Indiana Lakes Management Work Group recommends that the General Assembly modify IC 14-15-7-3, giving DNR the ability to regulate public freshwater lakes to the same degree it can already regulate reservoirs. By adding the proposed language below to the existing statute, DNR will be able to consider local issues that relate to individual lakes based on myriad regulatory needs.

a. Add a sixth paragraph stating: "(6) The establishment of zones in which the use of watercraft may be limited or prohibited for the purposes of fish, wildlife or botanical resource management or for the protection of users."

b. Add a seventh paragraph stating: "(7) Watercraft engaged in group or organized activities or tournaments."

Legislative Response to Recommendations in Category 26

The Indiana General Assembly amended IC 14-15-7-3(a) by authorizing the Natural Resources Commission to adopt rules for the following purposes:

(6) The establishment of zones where the use of watercraft may be limited or prohibited for the following purposes:

(A) Fish, wildlife, or botanical resource management.

(B) The protection of users.

(7) The regulation of watercraft engaged in group or organized activities or tournaments.

Natural Resources Commission Rules to Implement Legislative Response to Recommendations in Category 26

The first stage to implementing this legislation was the Commission's incorporation of IC 14-15-7-3(a)(6) into a recodification process for all the state's special boating rules. This stage was an acknowledgement of the new authority but made no substantive changes.[29]

The second stage was the adoption of rules to establish a process for reviewing petitions to establish a licensing requirement under IC 14-15-7-3(a)(7) for fishing tournaments on a designated river or lake. The rules authorize a petition to be filed with the

Commission by the County Executive where the waters are located, the Municipal Executive for the municipality if the waters are located in a municipality, or a Deputy Director for the Department of Natural Resources. Unless a river or lake is designated through this process, a licensing requirement does not apply for fishing tournaments held on public rivers or lakes. Similarly to the first stage, the second stage made no substantive changes. In other words, no new waters were designated for regulation.[30]

The third stage was the adoption of rules to protect designated wetlands on Lake Wawasee and Syracuse Lake in Kosciusko County. This stage followed requests by the Wawasee Area Conservancy Foundation, the Lake Wawasee Property Owners Association, and the Syracuse Lake Association to establish special watercraft zones to protect these fragile resources. Amendments made to 312 IAC 5-6-6 established idle speed zones for the protection of major wetlands on Lake Wawasee and Syracuse Lake, as well as two small zones where boats were prohibited on Lake Wawasee.[31] To date, this rule adoption is the only on-site application of the new authority provided by IC 14-15-7-3(a)(6), although the Commission has received citizen petitions to provide similar protections for wetlands on Lake Manitou in Fulton County and on Crooked Lake in Steuben County.

The fourth stage was rule adoption pertaining to two aspects of the 2000 statutory amendments. First, new standards were provided for the management of major organized boating activities on public waters. A "major organized boating activity" is generally one that involves more than 15 participating boats, more than 50 spectators, a prearranged schedule of limited duration, or is reasonably expected to significantly disrupt boat traffic.[32] Examples of a "major organized boating activity" include fireworks displays, flotillas, and regattas.[33] Second, amendments were directed to fishing tournaments. There were several adjustments and clarifications to the rules described in the second stage, and on-site standards were developed for fishing tournaments on Lake Wawasee and Syracuse Lake.[34] As observed by the Commission's hearing officer, they represented "a final stage in implementation of the 2000 reform legislation. The current amendments are also a logical outgrowth of the values represented by the public trust doctrine."[35]

Category 34

During its November 18, 1999 meeting, the work group approved the following issue and problem statement with recommendations:

> The Indiana Lakes Management Work Group has developed several recommendations that will improve Indiana's surface water quality, ensure recreational opportunities, and safeguard the future of the public lakes for its citizens. However, lake and watershed funding resources of all types are limited and therefore have had an adverse effect on programs that promote lake management efforts. In addition to the limited financial resources that are in place at this time, monies needed to carry forth many of the recommendations set forth in this report cannot be accomplished without additional financial support.

The work group recommended:

> The Indiana Lakes Management Work Group recommends that the "Lake Enhancement Fee" of five dollars ($5.00) paid annually at the time of boat registration be increased to fifteen ($15.00) annually and be allocated as follows:
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> a. one-third to be appropriated as is currently set forth by statute;
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> b. one-third to be appropriated to the Law Enforcement Division of the Indiana Department of Natural Resources to be utilized for enforcement, navigation aids programs, boater education programs, and other public awareness programs related to Indiana's waterways; and
>
> c. one-third to be used for sediment removal within the boundaries of publicly accessible lakes, where sediment was derived from watershed sources, as well as control of non-native, invasive plant and animal species in all waters where there is a clear public benefit.

Legislative Response to Recommendations in Category 34

The enactment of P.L.233-2003 was outlined previously in the consideration of the recommendations in Category 20. As requested by the work group, the legislation retained existing funding for the Lake and River Enhancement Program ("LARE"), administered by the Soil Conservation Board and the Department's Division of Soil Conservation, as previously provided by statute.[36] Revenues provided for the new "conservation officers marine enforcement fund" were discussed in the consideration of Category 20.

The third and final element of recommendations in Category 34 is funded in P.L.233 through amendments to IC 6-6-11-12.5(b)(2). In an augmentation to the LARE program, the Division of Soil Conservation will fund "lake projects, including projects to: (A) remove sediment; or (B) control exotic or invasive plants or animals." As with the "conservation officers marine enforcement fund", Indiana began the collection of increased taxes on January 1, 2004. These are projected to produce approximately $1,200,000 annually for the removal of sediment and the control of invasive species.

Department of Natural Resources Implementation of Legislative Response to Recommendations in Category 34 Regarding Sediment Removal and the Control of Exotic Species in Lakes

The Soil Conservation Board will identify the most appropriate and equitable way to distribute funds for sediment removal and control of exotic species. The Division of Soil Conservation suggested to the Soil Conservation Board that a forum be established. Doing so would allow a cross-section of affected and interested persons, the Department of Natural Resources, and some representatives of the Board to develop a consensus for rational procedures to effectuate this fund. Those recommendations

could then be appropriately circulated for general public evaluation and comment. Finally, they would be presented to the full Board for consideration, discussion, modification, and adoption. It is envisioned that a fall meeting will be held in the northeastern Indiana to solicit public comments. The goal is for the Soil Conservation Board to begin distribution of funding in July 2004.

4. Epilogue: The Public Trust Doctrine

The 2000 statutory reforms were the result of consensus resolutions from citizens with diverse interests in the use of our lakes. These resolutions were developed through legislation applying flexible management approaches that consider diverse interests. The Department of Natural Resources is implementing new programs, and the Natural Resources Commission has adopted complete sets of rules, to help implement the legislation. The resolutions, legislation, and rules provide direction and a legal foundation, but they do not make the public trust doctrine work.

Other regulatory mechanisms must assist. For example, in 2001 the Commission adopted rules to help assure construction activities on Lake Michigan are supportive of the public trust doctrine:

> If the department determines the placement of a structure as described in the application would violate the public trust doctrine, the department shall either deny the application or condition approval of the application upon terms that would allow placement of the structure without violation of the public trust doctrine. The license may be conditioned to assure that any public access will not be impeded and to provide for complete removal of the structure and site restoration, at the expense of the riparian landowner, when the structure is no longer required.[37]

Adequate service to the public trust is dependent upon more than new regulatory structures and new state funding sources. Category 24 of resolutions from the Indiana Lakes Management Work Group addressed the need for increased public access to our public waters:

> Many people have expressed concerns about the impacts of heavy lake use, including damage to lakes' natural resources, property damage, safety concerns, and overcrowding. These concerns are legitimate and are being addressed in many ways by the Lakes Management Work Group. Restricting public access to lakes would be one way to address these impacts. In general, the Work Group feels that access to public freshwater lakes should not be restricted, because all public freshwater lakes belong to all the citizens of Indiana.
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> The Indiana Lakes Management Work Group encourages the Indiana Department of Natural Resources and other entities to acquire, develop, and maintain public access to these waters.

Since 1953, the Department of Natural Resources (or an antecedent agency, the Department of Conservation) has provided access to public waters through the statewide Public Access Program. This program focused initially on inland lakes, but it has since expanded to Lake Michigan, navigable rivers and streams, and publicly-funded reservoirs. State funding is provided primarily through the purchase of noncommercial fishing and hunting licenses for which fees are deposited in the Fish and Wildlife Fund.[38] Under the Sport Fish Restoration Act of 1950, up to 75% of State funding is eligible for reimbursement by through the U.S. Fish and Wildlife Service. Following the Wallop-Breaux amendments to the SFRA, States are required to spend at least 15% of SFRA funding on boating access to public waters.

The Department's Division of Fish and Wildlife manages 238 public access sites and 21 public fishing areas. In addition to maintaining these sites, the management plan for 2003 through 2008 calls for the acquisition, annually, of eight new access sites or fishing areas.

In August 2002, Indiana joined states participating in the national Coastal Zone Management Program. This program provides new opportunities for improving public access to waters in the Indiana Coastal Zone, an area including roughly the northern halves of Lake County and Porter County and the northwestern third of LaPorte County.

Improved public awareness of competing public uses, and how to accommodate them, is also critical to effective management of the public trust. The Department of Natural Resources is developing a website where citizens can identify when fishing tournaments, boat races, fireworks displays, and similar activities are scheduled on our public waters. This site can serve to attract persons who are interested in a scheduled lake activity, and it can help redirect them to another lake when their interests differ.

Much depends upon mutual respect for the interests of competing users. A gratifying product of public participation in our rules for Lake Wawasee and Syracuse Lake was a new sense of understanding and cooperation among a variety of interests. Homeowners, sailboat racers, fishing tournament sponsors and competitors, and fishing enthusiasts opened dialogues that only a few months ago seemed impossible. During the final stage of rule adoption for fishing tournaments and other organized boating activities, there was a genuine consensus. A representative for fishing tournaments indicated a voluntary "code of ethics" was being prepared.

The rights of citizens to fully enjoy our public waters will continue to present new challenges as the population grows and improved financial circumstances support more travel and more varied uses of those waters. Solutions must consider a social and environmental equation that is dynamic. Mutual interests can be properly served only by wisely managing the public trust to ensure the enjoyment of those waters for the present and for the future.

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[1] This information bulletin is adapted, in part, from "Competition for Lakes and Rivers: Recent Indiana Legal Reforms and the Public

Trust", J. Goss, as presented by S. Lucas to the Advanced Environmental Law Seminar, Indiana Continuing Legal Education Foundation (Nov. 13, 2003).
[2] Putting the Public Trust Doctrine to Work, Coastal States Organization (2nd Edition, 1997), p. 1.
[3] Id.
[4] Lake Sand Co. v. State, 68 Ind. App. 439, 120 N.E. 715 (1918).
[5] State v. Kivett, 228 Ind. 623, 95 N.E.2d 145 (1950).
[6] Acts 1947, c. 181 and Acts 1947, c. 301.
[7] IC 14-26-2-3.
[8] IC 14-26-2-5.
[9] Lake of the Woods v. Ralston, 748 N.E.2d 396 (Ind. App. 2001).
[10] IC 14-19-1-1(9).
[11] Notably, IC 14-29-1-8 and 312 IAC 6.
[12] IC 14-26-2 and 312 IAC 11.
[13] IC 14-15 and 312 IAC 5.
[14] Ind. P.L.239-1997.
[15] "Final Report of the Indiana Lakes Management Work Group", (Indiana Department of Environmental Management, Dec. 1999), p. 6.
[16] P.L. 38-2000 and P.L. 64-2000.
[17] P.L. 233-2003.
[18] "Final Report of the Indiana Lakes Management Work Group", pp. 14 and 15.
[19] IC 14-15-3-17. This speed limit is not limited to "public freshwater lakes" and includes, for example, Lake Michigan. Exempted from the restriction are Lake Shafer and Lake Freeman in White County.
[20] IC 14-8-2-129.
[21] "Final Report of the Indiana Lakes Management Work Group", p. 39.
[22] Fiscal Impact Statement for H.B. 1336, Office of Fiscal and Management Analysis, Legislative Services Agency (May 1, 2003).
[23] IC 14-9-8-21.5. The "special boat patrol needs fund" is described at IC 14-9-9-5.
[24] IC 14-9-9-6. The Department's Division of Law Enforcement is currently developing a formula and memorandum to assist in the administration of the "special boat patrol needs fund".
[25] Department of Natural Resources v. Town of Syracuse, 686 N.E.2d 410 (Ind. App. 1997).
[26] "Final Report of the Indiana Lakes Management Work Group", pp. 40 and 41.
[27] 312 IAC 11-3-1.
[28] 312 IAC 11-1-3 was added and 312 IAC 11-3-2 was amended effective July 21, 2001.
[29] The new authority was incorporated into the rules for public freshwater lakes at 312 IAC 5-6-1; for navigable waters other than Lake Michigan at 312 IAC 5-7-1; for Lake Michigan and its navigable tributaries in Northwest Indiana at 312 IAC 5-8-1; and, for waters owned by public utilities at 312 IAC 5-9-1. The recodification was effective January 1, 2002.
[30] 312 IAC 2-4 became effective January 1, 2002. These rules retained fishing tournament requirements that predated the 2000 statutory reforms for lakes managed through the Department's Division of State Parks and Reservoirs. These are Monroe Lake, Salamonie Lake, Mississinewa Lake, Huntington Lake, Brookville Lake, Hardy Lake, Patoka Lake, Lieber Lake, and Raccoon Lake.
[31] The amendments were effective February 15, 2003.
[32] Exempted are boat races, fishing tournaments, and water ski events that were already subject to special licensing requirements.
[33] The Indiana State Boating Law Administrator testified that the concept of "major organized boating activity" was developed in concert with the U.S. Coast Guard and consistent with Indiana's "Memorandum of Understanding with the U.S. Coast Guard for Lake Michigan, Ohio River, and Other Navigable Waters". Minutes of Natural Resources Commission (Aug. 20, 2002), p. 6.
[34] Amendments to 312 IAC 2-4 and 312 IAC 5-3 would become effective October 1, 2003 and have on-site application for the 2004 boating season.
[35] "Report of Public Hearing, Analysis, and Presentation for Final Adoption", Legislative Services Agency Document 02-236 (February 19, 2003).
[36] As provided in IC 14-32-7-12(b)(7), the Department's Division of Soil Conservation administers the LARE program to "(A) Control sediment and associated nutrient inflow into lakes and rivers. (B) Accomplish actions that will forestall or reverse the impact of that inflow and enhance the continued use of Indiana's lakes and rivers."
[37] 312 IAC 6-8-3(c).
[38] IC 14-22-3.

NATURAL RESOURCES COMMISSION
Information Bulletin #42
AOPA Committee
March 1, 2004

Purpose

The purpose of this information bulletin is to assist with the administration of a committee of the Natural Resources Commission to be known as the "AOPA Committee". The AOPA Committee was established by amendments to 312 IAC 3-1-12 that became effective on June 26, 2003.[1] A copy of section 12, as amended, is attached. These amendments authorized the AOPA Committee to grant final agency relief for matters controlled by IC 4-21.5 (commonly referred to as the "Administrative Orders and Procedures Act" or "AOPA") within IC 4-21.5-3-28 through IC 4-21.5-3-31. Perhaps most prominently, the AOPA Committee would review and act upon objections filed by a party to findings of fact, conclusions of law, and a nonfinal order of an administrative law judge.

The AOPA Committee shall provide a forum that is fully supportive of the legal responsibilities set forth in the Administrative Orders and Procedures Act. These responsibilities must be administered with an understanding of the scientific and technical nature of the Department of Natural Resources, the Historic Preservation Review Board, and their allied boards and agencies.

The AOPA Committee shall take all reasonable measures to assure a process that is transparent and consistent with the Open Door Law. Members shall not violate the prohibitions in AOPA against unlawful ex parte communications.

Appointment

As soon as practicable following the annual election required by IC 14-10-1-5, the Chair of the Natural Resources Commission shall appoint the AOPA Committee and the Chair of the AOPA Committee from the members of the Commission. The AOPA Committee shall consist of not fewer than three (3) persons, and a majority of those appointed constitute a quorum. To the extent practicable, the Chair shall include persons on the AOPA Committee who are licensed to practice law in Indiana. The Chair may supplement or modify the membership of the AOPA Committee, as needed for the efficient conduct of the proceedings, during the course of the year. A member of the AOPA Committee may serve through a designate where a designate is authorized under IC 14-10-1-1. The Chair may serve on the AOPA Committee in a capacity other than as Committee Chair.

The AOPA Committee will sometimes conduct proceedings where a member of the Commission enjoys particular scientific or technical expertise but where the person is not a member of the AOPA Committee. In these instances, the Committee Chair may appoint that person as a special advisor. A special advisor is governed by the requirements of AOPA that pertain to a member of the AOPA Committee, including the prohibition on unlawful ex parte communications.

The Director of the Department of Natural Resources is a member of the Natural Resources Commission and provides invaluable insight and guidance to its policy-making functions, particularly for rule adoption and property management. The AOPA Committee was formed with an understanding, however, that adjudicatory functions present special challenges to the Director. If the Director is to enjoy the full benefits of legal and technical advice from the Department, the Director may become disqualified from serving in an adjudicatory role under AOPA. For this reason, and to prevent any appearance of impropriety, the Director will not serve on the AOPA Committee or as a special advisory to the AOPA Committee.

Division of Hearings

The Division of Hearings shall provide logistical and technical support to the AOPA Committee and to the Committee Chair. These responsibilities include:

- Assistance in the conduct of meetings.
- Assistance with drafting orders and other entries.
- Providing updates with respect to statutory changes and reported decisions that may bear upon the responsibilities of the AOPA Committee.
- Assisting with the organization and presentation of workshops to consider crucial legal issues.
- Performing other duties assigned by the Committee Chair.

Application and Modification

The terms of this information bulletin shall be liberally construed to implement its stated purposes and those of IC 4-21.5 and 312 IAC 3-1. The Division of Hearings shall place the information bulletin on the agenda for periodic review with the initial review not later than December 31, 2006. The Chair or the Committee Chair may cause the information bulletin to be reviewed at any meeting of the Natural Resources Commission.

EFFECTIVE DATE

This information bulletin is effective January 20, 2004.

312 IAC 3-1-12 Relief under IC 4-21.5-3-28 through IC 4-21.5-3-31, including disposition of objections to nonfinal orders of administrative law judge; commission objections committee

Authority: IC 14-10-2-4; IC 4-21.5-3-28
Affected: IC 4-21.5-1-6; IC 4-21.5-3; IC 14-10-1-1; IC 25

Sec. 12. (a) This section governs relief under IC 4-21.5-3-28 through IC 4-21.5-3-31, including the disposition of objections under IC 4-21.5-3-29.

(b) A party who wishes to contest whether objections provide reasonable particularity shall move, in writing, for a more definite statement. The administrative law judge may rule upon a motion filed under this subsection, and any other motion filed subsequent to the entry of the nonfinal order by the administrative law judge, and enter an appropriate order (including removal of an item from the commission agenda).

(c) If objections are timely filed, the objections shall be scheduled for argument before the commission committee established by subsection (d), simultaneously with the presentation by the administrative law judge of findings, conclusions, and a nonfinal order. Unless otherwise ordered by the commission committee, argument shall not exceed ten (10) minutes for each party and twenty (20) minutes for each side.

(d) For the review of objections, and to consider any other appropriate relief under IC 4-21.5-3-28 through IC 4-21.5-3-31, the chair of the commission shall appoint a committee consisting of at least three (3) members of the commission. To the extent practicable, the chair shall include persons on the committee who are licensed to practice law in Indiana. The chair shall announce the members of the committee during the first meeting of the commission held in a calendar year. The chair may supplement or modify the membership of the committee, as needed for the efficient conduct of the proceedings, during the course of the year. A member of the committee may serve through a designate where a designate is authorized under IC 14-10-1-1. A final determination by the committee is a final agency action of the commission under IC 4-21.5-1-6.

(e) At least ten (10) days before oral argument is scheduled on objections filed under subsection (c), a nonparty may file a brief with the commission committee. A copy of the brief must be served upon each party. The brief must not be more than five (5) pages long and cannot include evidentiary matters outside the record. Unless otherwise ordered by the commission committee, a nonparty may also present oral argument for not more than five (5) minutes in support of the brief. If more than one (1) nonparty files a brief, the administrative law judge shall order the consolidation of briefs if reasonably necessary to avoid injustice to a party. A nonparty who has not filed a brief at least ten (10) days before oral argument is first scheduled on objections may participate in the argument upon the stipulation of the parties.

(f) Upon the written request of a party filed at least forty-eight (48) hours before an oral argument to consider objections, the commission committee shall provide the services of a stenographer or court reporter to record the argument.

(g) If objections are not filed, the secretary of the commission may affirm the findings and nonfinal order. The secretary has exclusive jurisdiction to affirm, remand, or submit to the commission for final action, any findings and nonfinal order subject to this subsection. No oral argument will be conducted under this subsection unless ordered by the secretary.

(h) A party may move to strike all or any part of objections, a brief by a nonparty, or another pleading under this section that the party believes does not comply with this section. The administrative law judge shall act upon a motion filed under this subsection by providing relief that is consistent with IC 4-21.5 and this rule. *(Natural Resources Commission; 312 IAC 3-1-12; filed Feb 5, 1996; 4:00 p.m.: 19 IR 1320; filed Oct 19, 1998, 10:12 a.m.: 22 IR 749; readopted filed Oct 2, 2002, 9:10 a.m.: 26 IR 546; filed May 27, 2003, 12:30 p.m.: 26 IR 3323)*

[1] A copy of 312 IAC 3-1-12 is attached for the convenience of the Natural Resources Commission.

NATURAL RESOURCES COMMISSION
Information Bulletin #43
CZM Federal Consistency
March 1, 2004

A. PURPOSE

This information bulletin is a nonrule policy document to summarize implementation of "federal consistency" by the Indiana Lake Michigan Coastal Program. Pursuant to "federal consistency" requirements, a federal action that has reasonably foreseeable effects on a land or water use of Indiana's Lake Michigan Coastal Program Area must be consistent with the state laws described in Indiana's program. Federal activities are those that (1) are performed by a federal agency or its contractor; (2) require a federal license or another form of federal approval; or, (3) provide federal financial assistance to state or local government. In adopting the information bulletin, the purpose of the natural resources commission is to maximize benefits to the Lake Michigan Coastal Area while minimizing burdens to the state and its citizens, and the bulletin should be liberally construed to accomplish this purpose.

B. OVERVIEW

In general, a federal consistency review must be submitted:

- By a federal agency conducting an activity that will affect the Lake Michigan Coastal Area;
- By an applicant for a federal license for an activity that will affect the Lake Michigan Coastal Area; or

• By an applicant for a federal assistance project that will affect the Lake Michigan Coastal Area.

Federal consistency in Indiana is conducted through a network of state agencies coordinated through the following office:

Lake Michigan Coastal Program
Division of Soil Conservation
Department of Natural Resources
402 West Washington Street, Room W265
Indianapolis, IN 46204
Electronic mail: coastal@dnr.state.in.us

Under the network approach, whether a federal action is consistent with a state law is reviewed by the agency that administers the law. For example, the Indiana Department of Environmental Management reviews whether a federal action would violate Indiana's air pollution control law. If the law is one for which individual agency responsibility is indeterminate, the LMCP will identify itself or another agency to consider whether there is federal consistency.

Federal consistency review is completed when the LMCP determines the federal action satisfies the state laws described in Indiana's program. A determination of federal consistency does not, however, relieve a person from compliance with state law.

C. DEFINITIONS

These definitions apply throughout this information bulletin:

"General license" means a license for a regulated activity, the terms and conditions of which are defined by law, and to which a person may elect to adhere instead of completing a formal application process for the activity.

"Including" means including but not limited to.

"LMCP" means the Indiana Lake Michigan Coastal Program.

"Law" means a constitutional provision, judicial decision, administrative decision, statute, regulation, rule, or other legally binding document by which Indiana exerts control over private and public land and water uses and natural resources of the LMCP area. A "law" describes the term "enforceable policy" as used in 16 U.S.C. 1453(6a).

"License" means a franchise, permit, certification, approval, registration, charter, or similar form of authorization required by law.

"Nonrule policy document" means a statement by a state agency that is issued under IC 4-22-7-7. Included within the definition, under IC 4-22-7-7(a)(5), is a statement that:

- interprets, supplements, or implements a statute or rule;
- has not been adopted as a rule;
- is not intended to have the effect of law; and
- is used in conducting the agency's external affairs.

"Ordinary high watermark" means the line on the shore of a river, stream, or lake established by the fluctuations of water and indicated by physical characteristics. Examples of these physical characteristics include the following:

- A clear and natural line impressed on the bank;
- Shelving;
- Changes in the character of the soil;
- The destruction of terrestrial vegetation;
- The presence of litter or debris.

For Lake Michigan, the ordinary high watermark defines the extent of the beach and is delineated at 581.5 feet I.G.L.D., 1985 (582.252 feet N.G.V.D., 1929).

"Regulation" means a measure intended to have the force and effect of law and adopted by a federal agency under 5 U.S.C. 551 through 559.

"Rule" means a measure intended to have the force and effect of law and adopted by a state agency under IC 4-22-2; a state agency statement, designed to have the effect of law that implements, interprets, or prescribes either a law or policy or the organization, procedure, or practice requirements of an agency.

D. EXEMPTED ACTIVITIES

This section identifies activities exempted from federal consistency review. These activities are believed unlikely to have more than a minimal potential for harm to a land or water resource within LMPC Area. As a prerequisite to the exemption, the LMCP may require an assurance a person will conduct the activity in compliance with the terms of the general license:

• An activity conducted (even if supported in whole or part by a grant of federal financial assistance to a state or local government) under a general license approved by a State agency. Examples of a general license are as follows:

(1) The placement of beach nourishment to Lake Michigan under 312 IAC 6-6.

(2) The placement of a utility line crossing under 312 IAC 10-5-4(c).

(3) The management of storm water run-off associated with construction under 327 IAC 15-5.

• An activity conducted under a general license approved by a federal agency. Examples are as follows:

(1) The placement of fill under Section 404 of the Clean Water Act (33 U.S.C. 1344), pursuant to a Nationwide Permit from the U.S. Army Corps, unless the activity is one for which Water Quality Certification under Section 401 of the Clean Water Act has been conditioned or denied by the Indiana Department of Environmental Management.

(2) Water quality certification and the placement of fill under Section 401 and Section 404 of the Clean Water Act under a Regional General Permit by the U.S. Army Corps and the Indiana Department of Environmental Management.

• An activity where the only required federal license results from the Section 106 Process (16 U.S.C. 470 and 36 CFR Part 800) of the National Historic Preservation Act (NHPA), unless the activity is in or within 100 feet of the ordinary high watermark of a navigable waterway identified in "Roster of Indiana Waters Declared Navigable or Nonnavigable", 20 IND. REG. 2920 (July 1, 1997) and available online at http://www.in.gov/nrc/policy/navigati.html

• Federal financial assistance to a state or local government where the purposes for which the assistance may be applied are limited to one or a combination of the following:

(1) Training and outreach, including transportation and the reimbursement of expenses associated with attendance at seminars and similar functions.

(2) The preparation or distribution of printed or electronic publications.

(3) The preparation of inventories or conduct of surveys that do not involve the physical disturbance of buildings, lands, waters, plants, or animals.

(4) The acquisition of equipment used primarily for the promotion of public health or safety.

E. APPLICATIONS

This section governs applications to demonstrate federal consistency. No fee is required. No application form is required. The application must include information reasonably required to determine whether an activity would be compliant with state law. A federal consistency application is initiated when the LMCP receives this information for one of the following:

• A consistency determination from a federal agency conducting an activity.

• A copy of an application for a federal license, from the license applicant, accompanied by a federal consistency certification.

• A copy of an application for federal financial assistance accompanied by a federal consistency certification.

An application for a federal consistency certification must be delivered to the LMCP at least 60 days before a federal agency action or the grant of federal financial assistance. An application for a federal consistency certification must be delivered to the LMCP at least 90 days before action on a federal license.

In order to facilitate prompt review by the LMCP, the applicant is encouraged to make submittals in an electronic format that is compatible with agency systems.

F. REVIEW PROCEDURES

This section outlines review procedures by the LMCP following the receipt of an application for a federal consistency certification. An interested person must strictly comply with the timeframes described here. The applicant and the LMCP may, however, enter a written agreement for the extension of a timeframe other than the timeframe described in section F9:

1. The information is filed and assigned a Federal Consistency Project (FCP) number.

2. The information (or a brief summary of the information) is distributed by electronic mail to each networked state agency for federal consistency review. Additional information posted to LMCP website.

3. A public notice of the proposed activity is published on the LMCP's website in the LMCP Federal Consistency Register. The LMCP shall maintain a list of interested parties and notify them when the LMCP Federal Consistency Register is updated. Interested parties may include libraries and designated local officials and any person who wishes to receive the information. The LMCP may establish subscription fee schedules to achieve reimbursement for costs associated with printing and mailing. Where practicable, the primary distribution medium will be electronic.

4. The public may offer comments addressed to federal consistency. These comments may be considered by the LMCP, however, only if received within 10 days of publication of notice on the website or of mailing of the notice, whichever occurs later. Any person who asserts the activity would not meet federal consistency must state with reasonable particularity the state law or laws that would be violated.

5. The LMCP shall provide the applicant, and any person who has offered timely comments, with written notice of its intention to concur or object to a certification of federal consistency:

A. Within 40 days for a federal agency action or a grant of federal financial assistance.

B. Except as provided in section F6, within 70 days for a federal license.

If the LMCP intends to object to the certification, the LMCP shall provide:

(1) The rationale for the disagreement.

(2) An explanation how the proposed activity is inconsistent with state law.

(3) Alternative measures that, if implemented, would make the proposed activity consistent with state law.

(4) If the objection is based on lack of sufficient information, the notice shall describe the type of information needed to determine consistency and the rationale for its need.

6. If the LMCP notifies the applicant and the federal agency within 90 days that additional time is required to complete the state's consistency review, the state automatically receives an additional 90 days to complete the review. Under this section, the LMCP shall provide a written notice of its intention to concur or object within 170 days of the filing of an application for a federal consistency determination.

7. Any person may supplement the record of the LMCP within 5 days of issuance of the notice described in section F5 or F6. In addition, an applicant for the federal consistency certification may request informal review from the Division of Hearings of the Natural Resources Commission. In the request, the applicant must specify whether it seeks facilitated adjudication or mediation. The Division of Hearings shall complete all proceeding and issue a federal consistency objection or concurrence within 10 days of the review request. If the Division of Hearings fails to enter a timely disposition, the LMCP shall reassume jurisdiction and make a final objection or concurrence under section F8.

8. If no request for review is sought under section F7, the LMCP shall either object to or concur with the certification of federal consistency. For a federal agency action or a grant of federal financial assistance, the objection or concurrence must be made within 60 days of the filing of an application for a federal consistency certification. For a federal license, the objection or concurrence must be made within 90 days (or 180 days if an extension of time is obtained under section F6) of the filing. If the state fails to make a timely objection or concurrence under this section or section F7, the applicant is presumed to have received a certification of federal consistency.

9. If there is an objection under section F7 or F8, the LMCP shall notify the federal agency, the Director of the Office of Coastal Resource Management, and the applicant (if other than a federal agency). The notice shall describe the right of administrative review to the Secretary of Commerce under 15 CFR Part 930. A federal agency or applicant who has not exercised the opportunity for informal review under section F7 does not waive the right to review under this section. A person other than the federal agency or applicant lacks standing to seek administrative review under 15 CFR Part 930. There is no right to state judicial review of an objection to or concurrence with a federal consistency certification.

G. EMERGENCIES

The LMCP may authorize action without obtaining a certification of federal consistency where the action is reasonably required to respond to an emergency. An authorization under this part does not relieve a person from compliance with any law or from the possibility that remediation may subsequently be required to achieve federal consistency. Failure by a person to make timely application for a federal consistency certification does not constitute an emergency.

H. SUPPLEMENTAL INFORMATION

Appendix A contains detailed information regarding the requirements of Federal Consistency certification. Appendix A may be referenced in implementation of this information bulletin. Included are the following: Federal Agency Activities and Development Projects requiring Consistency certification (Section III. Table A), Federal License and Permit Actions requiring Consistency certification (Section III. Table B), and Federal Assistance requiring Consistency certification (Section III. Table C). Matrices 5-1 through 5-10 include additional information regarding applicable state laws. Please refer to LMCP program document and website at http://www.in.gov/dnr/lakemich/federal/matrix.html.

I. EFFECTIVE DATES

The effective date of the Coastal Zone Management program in Indiana is August 12, 2002. This information bulletin is effective March 1, 2004.

J. MODIFICATIONS TO INFORMATION BULLETIN

In order to accomplish the stated purpose of this information bulletin, and to remain current with federal law and state law, modifications will be required periodically. The LMCP and Division of Hearings are directed to regularly present the information bulletin to the Natural Resources Commission for review. The first presentation shall occur not later than March 1, 2007.

Appendix A:

Chapter 11: Federal Consistency (Excerpted from the Lake Michigan Coastal Program Document)

Section I

Introduction

The term "federal consistency" refers to the requirement of the Coastal Zone Management Act, (CZMA), 16 U.S.C. 1451, 1456 et seq., and implementing regulations at 15 CFR Part 930, that certain federal actions that affect any land or water use or natural resource of a state's coastal zone be consistent with the state's federally approved coastal program. Indiana's coastal program is based upon existing state laws, which will be considered as Indiana's enforceable policies for the purposes of federal consistency. Therefore, federal consistency will be required for the state laws described in Chapter 5: Existing Management Authorities. It is important to note that Indiana's decisions for federal consistency purposes will be based on whether an existing state law, as described in Chapter 5 [of the Lake Michigan Coastal Document], would apply to the proposed action. Consistency will only be required of actions addressed by state laws, regardless of whether it is conducted by a local, state, or federal entity. Please refer to the cross-reference tables in Chapter 5 for guidance on which activities are applicable to federal consistency.

The following federal actions are subject to federal consistency:

1. Federal agency activities;
2. Federal license or permit activities- activities by private enterprise or by state or local government which require federal approval of some form; and
3. Federal financial assistance to state and local governments.

The federal consistency requirement encourages cooperation, coordination, and communication among governmental entities. Federal consistency also gives the state an effective voice in actions of the federal government affecting the state's coastal zone.

The Indiana Lake Michigan Coastal Program (LMCP) is a comprehensive networked program that relies on the appropriate state agencies to evaluate the federal actions outlined above for consistency. Each of the state agencies networked with the LMCP manages its own responsibilities, issues its own permits, administers its own federal grant monies, etc. The DNR, as the lead state agency, coordinates federal consistency reviews with these state agencies and serves as the point of contact for consistency reviews.

The federal consistency process applies to activities that have a reasonably foreseeable effect on the coastal zone. The coastal zone is defined in Chapter 3: The Coastal Program Area. The LMCP created a list of activities for each of the three categories of federal actions subject to consistency: 1) federal agency activities; 2) federal license or permit activities; and 3) federal financial assistance activities. These lists are Table A, Table B, and Table C respectively in Section III of this chapter. The federal consistency process may apply to activities that are not listed in this chapter if the unlisted activity will have reasonably foreseeable effects on the coastal zone.

For federal agency activities, if the federal agency finds that a proposed activity will affect the coastal zone, then the federal agency must prepare and submit a "consistency determination" to the LMCP.

An applicant for a federal license or permit activity that affects the coastal zone must submit a "consistency certification" in the application to the federal agency, furnishing the LMCP a copy of such certification and data and information necessary to demonstrate consistency. A consistency certification states that the proposed activity complies with and will be conducted in a manner consistent with Indiana's state laws.

For federal financial assistance for projects that will affect Indiana's coastal zone, the applicant must request a "consistency concurrence" from the LMCP.

A detailed description of the federal consistency process for each category of activities is detailed below.

A. Federal Agency Activities

A federal agency activity is any function performed by, or on behalf of, a federal agency in the exercise of its statutory responsibilities, but does not include the granting of a federal license or permit. However, the term includes federal development projects, which involve the planning, construction, modification, or removal of public works, facilities, or other structures, and the acquisition, use, or disposal of land or water resources. To be consistent with the CZMA, Indiana requires that any federal agency activity that affects Indiana's coastal zone be carried out in a manner that is "consistent to the maximum extent practicable" with state laws.

Table A in Section III of this chapter details those federal agency activities that the LMCP believes will require a consistency determination. The LMCP will monitor unlisted federal activities and will properly notify the appropriate federal agency when it discovers an unlisted activity requiring a consistency determination. Even so, the federal agency must at least provide the LMCP with a consistency determination for all development projects (e.g., construction) in the coastal zone, whether such project is listed or unlisted.

Federal consistency requirements for federal agency activities are detailed at 16 U.S.C. 1456(c)(1) and (2), and at 15 CFR Part 930 subpart C. There is no categorical exemption for any federal activity. However, under certain circumstances the President may exempt a specific federal activity. (see 16 U.S.C. 1456(c)(1)(B)).

Consistency Determination and Review Process

The federal agency proposing an activity within or outside of Indiana's coastal zone decides if the proposed activity will affect any land or water use or natural resource of the coastal zone. All "development projects" (i.e., construction) within the coastal zone are construed as activities affecting the zone.

If the federal agency decides that the activity does affect Indiana's coastal zone, it prepares and submits to the LMCP a consistency determination at least 90 days before final approval of the activity. If the agency decides that the activity does not affect the zone, the agency may have to provide the state (at least 90 days prior to final approval of the activity) with a negative determination under 15 CFR 930.35.

A consistency determination for a federal agency activity affecting Indiana's coastal zone is an assertion by a federal agency that the activity will be conducted consistent with state laws to the maximum extent practicable. The words "maximum extent practicable" mean fully consistent, unless compliance is prohibited by existing law applicable to the federal agency's operations. The agency may also deviate from full consistency when unforeseen circumstances arising after approval of the Indiana coastal program present the agency with a substantial obstacle that prevents complete adherence to state laws.

A consistency determination must include a detailed description of the activity, its coastal zone effects, and comprehensive data and information sufficient to support such determination.

The LMCP coordinates the state's review of the consistency determination with the appropriate state agencies. The state has 60 days from receipt (plus appropriate extensions, if granted) to concur with or object to the federal agency's consistency determination. Agreement is presumed if the LMCP does not respond (or request an extension) within 60 days. If the LMCP disagrees with a consistency determination, it must describe how the proposed activity will be inconsistent and should describe any alternative measures that would allow the activity to proceed. If the federal agency has failed to provide sufficient information, the LMCP must describe the nature of the information required and its necessity.

The LMCP will provide public notice according to IC 4-21.5 and 15 CFR 930.42 after a consistency determination has been received, except in cases where earlier public notice on the consistency determination by the Federal agency or State agency provides public notice. Where possible, the LMCP will provide a joint public notice with the relevant federal agency. The public notice shall summarize the activity and announce the availability for public inspection of the consistency certification and accompanying public information and data. The public will be able to provide comment on whether the project is consistent with Indiana's state laws.

If there is a dispute between the federal agency and the LMCP regarding the consistency determination, either party may seek the mediation services of the Secretary of Commerce or the Office of Ocean and Coastal Resource Management (OCRM).

B. Federal License or Permit Actions

Federal license or permit requirements are detailed at 16 U.S.C.1456(c)(3)(A), and at 15 CFR Part 930 Subpart D. An applicant for a federal license or permit must, in its application to the federal agency, certify that its proposed activity complies with and will be conducted in a manner consistent with the Indiana Lake Michigan Coastal Program. The consistency certification shall read as follows: "The proposed activity complies with Indiana's approved coastal management program and will be conducted in a manner consistent with such program." The LMCP, and therefore federal consistency requirements, are based on Indiana's existing state laws.

An applicant for a federal license or permit that affects Indiana's coastal zone should consult with the LMCP prior to submission of the consistency certification. Upon submission of the consistency certification, the applicant shall furnish the LMCP with data, including a detailed description of the activity, maps, and a brief assessment of probable effects to the coastal zone. The LMCP will coordinate with the appropriate state agency to review consistency.

Access to information contained in an application is governed by state law, IC 5-14-3 (sometimes called the "Access to Public Records Act"). An applicant may seek to have records excepted from the Access to Public Records Act to the extent the records are confidential, contain trade secrets, or are otherwise exempted from disclosure at IC 5-14-3-4. An applicant who is dissatisfied with a status certification by the LMCP, relating to public disclosure, may have the certification reviewed pursuant to the Indiana Administrative Orders and Procedures Act (AOPA).

Consistency Certification and Review Process

For an activity listed in Table B in Section III of this chapter, applicants for federal licenses or permits must submit a consistency certification in their application to the federal agency, furnishing the LMCP a copy of such certification and data and information necessary to demonstrate consistency.

For an unlisted activity, an applicant is required to submit a consistency certification if: a) the LMCP decides that such activity will affect Indiana's coastal zone; b) the LMCP properly informs the federal agency, the applicant, and OCRM; and c) OCRM approves of the LMCP's decision. The federal agency and the applicant have 15 days from receipt of the LMCP's decision to provide comments to OCRM. In the event of a dispute between a federal agency and the LMCP regarding whether a listed or unlisted federal license or permit activity is subject to consistency review, either party may seek mediation by the Secretary of Commerce.

The consistency certification consists of a statement in a letter to the LMCP that states, "The proposed activity complies with Indiana's approved coastal management program and will be conducted in a manner consistent with such program." The applicant must also furnish the LMCP with a sufficient project description and data described at 15 CFR 930.58 to demonstrate consistency.

Following the LMCP's receipt of the consistency certification and the required data, it will provide public notice according to IC 4-21.5 and 15 CFR 930.61. Where possible, the LMCP will provide a joint public notice with the relevant federal agency. The public notice shall summarize the activity and announce the availability for public inspection of the consistency certification and accompanying public information and data.

If the consistency review will take over three months, it must notify the applicant and the federal agency. The LMCP will concur or object to the consistency certification within six months.

If the same activity requiring a federal license or permit also requires a state permit, the issuance of a permit by the state will include and constitute a consistency decision.

The state will evaluate project consistency based on applicable state laws as described in Chapter 5 of the LMCP. Consistency will only be required on activities that are subject to state laws. Please refer to the cross-reference tables in Chapter 5 for guidance on which activities are applicable to federal consistency. Early coordination with the LMCP is encouraged for projects affecting the Coastal Program Area.

If the LMCP concurs with the consistency certification, it will notify the federal agency and the applicant immediately. The agency is then free to either issue or deny the federal license or permit. In the latter case, the federal agency must immediately notify

the state and the applicant. If the LMCP objects to the consistency certification, it must notify the applicant, the federal agency, and OCRM, and the federal agency must not issue the license or permit, unless the applicant successfully appeals to the Secretary of Commerce.

C. Federal Financial Assistance

The requirements for federal financial assistance are detailed at 16 U.S.C. 1456(d), and at 15 CFR 930 Subpart F. This provision ensures that any unit of state or local government applying for federal financial aid for activities that affect the state's coastal zone receives such federal aid only when such activities are consistent with Indiana's laws (as described in Chapter 5: Existing Management Authorities).

Federal assistance is categorized in the Catalog of Federal Domestic Assistance, where it is grouped by agency and assigned a five-digit number. Table C reflects such grouping and numbering, and lists those activities which would potentially affect the coastal zone. The LMCP will coordinate these activities for consistency review, and will provide the list to federal agencies and units of State or local government empowered to undertake federally assisted activities that may affect the coastal zone.

Consistency Review Process

A unit of state or local government, or any related public entity, submitting an application for federal financial assistance for an activity affecting Indiana's coastal zone must obtain the LMCP's consistency concurrence in order to receive such assistance. The applicant should submit the application for federal assistance to the LMCP.

The LMCP will conduct the consistency review for federal financial assistance. The LMCP will decide which of the applications are for proposed activities that would affect Indiana's coastal zone, and coordinate with the appropriate state agency for consistency review. In the event of a dispute between a federal agency and the LMCP regarding whether a federal assistance activity is subject to consistency review, either party may request mediation by the Secretary of Commerce.

The LMCP can either concur with or object to the application based on the consistency of proposed actions within the application. The LMCP will notify the applicant and the federal agency of its decision within 60 days of receipt of application for federal assistance. Objections will also be sent to OCRM.

If the LMCP determines that the proposed project is consistent with state laws, the federal agency may approve or deny the request for assistance. If the federal agency denies the request, it must immediately notify the applicant and the LMCP. If the LMCP objects to the proposed project, the federal agency shall not approve assistance for the project, unless the applicant successfully appeals to the Secretary of Commerce.

Section II: CONFLICT RESOLUTION, APPEAL, AND SECRETARIAL REVIEW

Conflict Resolution

In the event of a dispute between the federal agency and Indiana over whether the federal activity, federal license or permit, or federal financial assistance affects the coastal zone or whether a consistency determination for a federal activity was correctly made, either party may seek mediation by the Secretary of Commerce or through OCRM (15 CFR Subpart G). The responding party has the option of participating, but if it declines, it must indicate the basis for its refusal to participate. The Secretary of Commerce will attempt to encourage participation, but if unsuccessful will cease efforts to mediate. Judicial review is available to any party without having to exhaust the mediation process.

Appeal Process

The applicant for a federal license or permit or for federal financial aid who has been subject to a consistency objection by the LMCP may appeal to the Secretary within 30 days of receipt of Indiana's objection. (15 CFR Subpart H). To appeal, the applicant should file a notice of appeal with the Secretary of Commerce, accompanied by a statement in support of the applicant's position and supporting data. The applicant should also send copies of these documents to the LMCP and the federal agency involved.

If the Secretary finds that the proposed activity is consistent with the objectives or purposes of the Act, or is necessary in the interest of national security, the federal agency may issue the license or permit or grant the financial aid. This is called a Secretarial override. If the Secretary does not make either of these findings, the federal agency shall not approve the activity. A Secretarial override does not obviate the need for the applicant to obtain any permit or other authorization required by the state of Indiana.

Section III: Lists of Federal Activities Subject to Federal Consistency

Table A. Federal Agency Activities and Development Projects

Department of Defense- Secretary of the Army and the Army Corps of Engineers –

33 U.S.C. 404-426, 33 U.S.C. 471-472, 33 U.S.C. 540-633, 33 U.S.C. 701, 16 U.S.C. 460d, 42 U.S.C. 1962d-5, 10 U.S.C. 2801, 33 U.S.C. 1251

- Constructing, maintaining and improving channels or subsurface tunnels
- Dredging, storing, testing, sampling, dewatering, and disposing of dredged material
- Selection of storage, dewatering, and disposal sites for dredged material
- Building, maintaining, and repairing breakwaters, jetties, barriers, harbors, piers, docks
- Placing pipes or pipelines on, over, or under the lake bottom
- Establishment of harbor lines

• Creation of permanent sand bypass systems
• Creating habitat areas, including wetlands and offshore islands, from dredged material
• Beach nourishment and replenishment activities, reinforcing dunes and beaches
• Creation of man-made dunes and other man-made land
• Road and roadbed construction activities
• Building and maintaining erosion control structures
• Constructing navigational works, and marking anchorage grounds
• Constructing and maintaining dams and reservoirs, and providing hydroelectric power
• Constructing and maintaining flood control works, i.e., floodwalls, levees, diversion channels
• Granting easements for rights-of-way for public roads on lands acquired by the United States for river and harbor and flood control improvements, 33 U.S.C. 558c
• Land acquisition or disposal, including sites for disposal of dredged material
• Ice management practices
• Cleanup activities in areas contaminated with hazardous waste, radioactive waste, toxic waste, active munitions, hazardous substances or materials, or other wastes or debris
• Design and management of construction for homes, schools, hospitals, day care centers, office buildings, airfields, warehouses, and training ranges for military and their families
• Purchase, management, and disposal of land for the Army and Air Force
• Providing engineering expertise to other fed agencies, state & local governments, and others
• Constructing, operating, and maintaining Army facilities
• Conducting projects that impact existing or planned research projects and contracts
• Coastal surveys, monitoring, aerial photos, Lidar, and coastal erosion mapping efforts
• Activities and other projects with the potential to impact coastal lands and waters
• Constructing, maintaining, and operating park and recreation facilities at water resource development projects

Department of Defense- Air Force, Army, and Navy – 10 U.S.C.

• Location, design, and acquisition of new or expanded defense installations (active or reserve status including associated housing, transportation, or other facilities)
• Improvements to military bases
• Base closures or realignments
• Military or Naval exercises
• Plans, procedures, and facilities for handling storage use zones
• Establishment of impact, compatibility, or restricted use zones
• Disposal of Defense property, including disposal and reuse plans for base closures
• Air Force, Army, or Navy manufacture, storage, transportation, treatment, or disposal of radioactive, hazardous, or other waste or hazardous substances, directly or by contractor
• Manufacture, transport, storage, or disposal of weapons, biological or nerve agents, nerve or mustard gas, napalm, explosives, nuclear power plant waste, etc.
• Causing or discovering the presence of nuclear powered vessels in the coastal zone or in other areas which could reasonably be expected to affect the coastal zone

Department of Interior- National Park Service – 16 U.S.C. 1, 16 U.S.C. 460u

• Acquisitions of land and interest in land; granting rights-of-way
• Area and unit management
• Location, design, acquisition, construction, maintenance, and removal of facilities
• Removal of houses, including leaseback houses
• Entering into concession contracts, establishing and modifying concession facilities
• Activities as natural resources trustee in "Area of Concern", Lake County

Department of Interior- U.S. Fish and Wildlife Service – 16 U.S.C. 742a

• Management of National Wildlife Refuges
• Management of waterfowl production areas
• Construction or modification of hatcheries, refuge facilities, office buildings, residences, laboratories, recreation facilities, water-control structures, and special purpose structures
• Acquisition of lands, wetlands, and other suitable habitat for migratory birds, endangered species, and other wildlife; granting rights-of-way
• Fish habitat creation, maintenance, and management
• Construction of visitor facilities and environmental education centers

• Construction of roadways, dikes, and dams
• Construction of sewerage facilities for domestic and hatchery effluent needs
• Recovery plans under Endangered Species Act, 16 U.S.C. 1531
• Nuisance species (i.e., zebra mussel, lamprey) control measures
• Granting easements for shooting and fishing activities under 16 U.S.C 661
• Classification and leasing of land under 16 U.S.C. 666g
• Activities as natural resources trustee in "Area of Concern", Lake County

Department of Interior- U.S. Geological Survey – 43 U.S.C. 31
• Installation, operation, and maintenance of acoustic water velocity meters or other devices in waters of the coastal zone

Department of Interior- Bureau of Land Management – 43 U.S.C. 2
5 U.S.C.A. Appx.1, Reorg. Plan 3 of 1946. IV
• Disposal and disposition of federal lands and structures, including lighthouses
• Acquisition of land or interest in land, construction of facilities

General Services Administration – 40 U.S.C.
• Acquisition, location, design, construction, development, management, and leasing (as lessor or lessee) of federal government property or buildings, leased or owned by federal government
• Disposition and disposal of federal surplus lands and structures

Department of Transportation- U.S. Coast Guard – 49 U.S.C. 108, 14 U.S.C.
• Location, design, construction, alteration, abandonment, or disposition of Coast Guard stations, bases, and lighthouses
• Location, placement, or removal of navigation devices which are not part of the routine operations under the Aids to Navigation program
• Expansion, abandonment, designation of anchorages, lighting areas, and shipping lanes
• Ice management practices and activities, including ice breaking
• Oil and hazardous material pollution response planning and response activities, and Area Contingency Plans developed under Section 311 of the Clean Water Act, 33 U.S.C. 1321, as amended by the Oil Pollution Control Act of 1990, 33 U.S.C. 2701
• Responses to the release of hazardous substances under CERCLA, 42 U.S.C. 9601
• Designation and management of Regulated Navigation Areas and Limited Access Areas identified in 33 CFR 165
• Designation of Security and Safety Zones and other activities under the Port and Waterways Safety Act, 33 U.S.C. 1221
• Construction, operation, maintaining, improving or expanding Vessel Traffic Services under the Port and Waterways Safety Act, 33 U.S.C. 1221
• Regulating the bulk transport by vessel of hazardous material or petroleum products

Department of Transportation- Federal Aviation Administration – 49 U.S.C. 106, 49 U.S.C. 40101, 49 U.S.C. 44501, 49 U.S.C. 44701, 49 U.S.C. 47501
• Location and design, installation, construction, operation, maintenance, quality assurance, testing, and demolition of airports and other aids to air navigation
• Development and implementation of programs to control aircraft noise and other environmental effects of civil aviation, and allocating use of airspace
• Procedures re transport of radioactive materials on passenger-carrying aircraft

Department of Transportation- Surface Transportation Board – 49 U.S.C. 10101
• Line transfers, leases, and trackage rights
• Line sales, including those to non-carriers
• Line constructions, including line crossings
• Design, construction, expansion, curtailment, or upgrading of railroad facilities or services, including bridges
• Removal of trackage; disposition of right-of-way
• Line abandonment, including Rails to Trails and Public Use Provision for Right-of-way
• Feeder Line Development Program

Department of Transportation-Federal Highway Administration – 49 U.S.C. 104, 49 U.S.C.S. Appx 1653
• Highway, bridge, and causeway design, construction, maintenance, and repair
• Land acquisition
• Implementation of innovative or other technology affecting traffic control or flow
• Highway routing of hazardous materials

Department of Transportation- Maritime Administration – 49 U.S.C. 109, 40 U.S.C. 474, 46 U.S.C.S. Appx 861, 46 U.S.C.S. Appx 1101, 46 U.S.C. Appx 1601
• Port planning

Department of Transportation- Federal Railroad Administration 49 U.S.C. 103
• Orders dealing with dangers caused by unsafe rail transport of hazardous materials

Department of Commerce- National Oceanic and Atmospheric Administration – Reorganization Plan No.4 of 1970 at 5 U.S.C.S. 903, 15 U.S.C. 1501, 33 U.S.C. 1251

• Placement of buoys, platforms, or other objects or structures in coastal waters

• Construction, installation, maintenance, or removal of lake level gauging stations or other structures

Environmental Protection Agency – 42 U.S.C. 6901, 42 U.S.C. 9601, 33 U.S.C. 1341, 42 U.S.C. 300h

• Activities conducted under CERCLA (Superfund), 42 U.S.C. 9601

• Activities conducted under Resource Conservation & Recovery Act, 42 U.S.C. 6901

• Sediment sampling and sediment testing

• Open disposal of dredged material

• Oil and hazardous material pollution response planning and response activities, and Area Contingency Plans developed under the Oil Pollution Control Act, 33 U.S.C. 1321

Department of Energy- Federal Energy Regulatory Commission – 42 U.S.C. 7171, 16 U.S.C. 796

• Delivery of oil or coal by ship

• Orders for furnishing of adequate service under the FPA, 16 U.S.C. 824f

• Licensee's exercise of eminent domain (as agent of the U.S.) under FPA, 16 U.S.C. 814

• Grant of right of eminent domain for right of way for natural gas pipeline under the Natural Gas Act, 15 U.S.C. 717f (h)

Department of Justice- U.S. Marshals Service – 28 U.S.C. 561, 28 U.S.C. 2001

• Disposition of property acquired by the Marshals Service

Nuclear Regulatory Commission – 42 U.S.C. 2011, 42 U.S.C. 5841

• The siting, construction and operation of nuclear generating stations, power plants, fuel storage, and processing centers

• Transportation of nuclear waste through the coastal zone or in any other area where such transport could reasonably be expected to affect the coastal zone

Federal Emergency Management Agency – 42 U.S.C. 4001, 42 U.S.C. 51

• Disaster-related activities (i.e. planning, mitigation activities, monitoring reconstruction) in the coastal zone or in any other area where such activities could be reasonably expected to affect the coastal zone

Table B. Federal License and Permit Actions

Department of Defense- Secretary of the Army, and Army Corps of Engineers

• Permits for construction of dams or dikes in or over navigable waters required under Section 9 of the Rivers and Harbors Act of 1899, 33 U.S.C. 401

• Permits for the construction of structures (i.e. piers, wharves, breakwaters, bulkheads, jetties, weirs, transmission lines, pipes, or pipelines) in, under, or over navigable waters required by Section 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. 403

• Permits for excavating or dredging from navigable waters, or for the alteration or modification of the course, location, condition, or capacity of such waters, required by Section 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. 403

• Permits for disposal of dredged or fill material into navigable waters required by Section 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. 403

• Permits for the disposal of dredged or fill material into waters of the United States required by Section 404 of the Clean Water Act, 33 U.S.C. 1344

• Permits for the alteration or occupation of seawall, bulkhead, jetty, dike, levee, wharf, pier, or other work built by the U.S., or of any piece of plant used in the construction of such work, or of any material composing such work, required by Section 14 of the Rivers and Harbors Act of 1899, 33 U.S.C. 408

• Approval of plans for improvement made at private expense under USACE supervision pursuant to Section 1 of the Rivers and Harbors Act of 1902, 33 U.S.C. 565

Department of Energy- Federal Energy Regulatory Commission – 42 U.S.C. 7101

• Licenses, renewals, or amendments to licenses, or approvals for transfers of licenses or rights thereunder, for nonfederal hydroelectric projects and primary transmission lines under Sec. 3(11), 4(e), 8, and 15 of the Federal Power Act (FPA), 16 U.S.C. 796 (11), 797(e), 801, and 808, and under Sec. 405 of FPA, 16 U.S.C. 2701

• Granting exemptions from Federal Power Act (FPA) requirements, 16 U.S.C. 823a

• Applications for orders for interconnection of electric transmission facilities, and sales and exchanges of energy, under Section 202 of the FPA, 16 U.S.C. 824a

• Application for orders authorizing disposition, consolidation, or merger of facilities or any part thereof under Sec.203 of the FPA, 16 U.S.C. 824b

• Applications for physical connection orders under Section 210 of the FPA, 16 U.S.C. 824i

• Applications for transmission service orders under Section 211 of the FPA, 16 U.S.C. 824j

• Regulation of transportation of natural gas, and the entities engaged in such, under Sec.1 (b) of the Natural Gas Act, 15 U.S.C. 717 (b)

• Orders for extension or improvement of natural gas transportation facilities, and orders to establish physical connection of transportation facilities with distributors under Sec. 7(a) of the Natural Gas Act (NGA), 15 U.S.C. 717f (a)
• Issuing certificates of public convenience and necessity for the construction and operation of interstate natural gas pipelines and pipeline facilities, and for the transportation of natural gas, under 7 (c) of the NGA, 15 U.S.C. 717 f (c)
• Issuing declaratory orders under the Administrative Procedure Act, 5 U.S.C. 554(e)
• Licensing of import and export of natural gas under Sec.3 of the NGA, 15 U.S.C. 717b
• Approval or denial of abandonment of natural gas facilities or service under Sec.7 (b) of the NGA, 15 U.S.C. 717f (b)
• Exemptions from orders prohibiting burning natural gas or petroleum products in certain situations, 15 U.S.C. 792

Department of Transportation- Coast Guard

• Approval of construction or modification of bridges, causeways, pipelines, or other structures over, on, or under navigable waters pursuant to Section 9 or 10 of the Rivers and Harbors Act, 33 U.S.C. 401, 403, and the Bridge Act, 33 U.S.C. 491
• Marine event permits issued under authority of 33 U.S.C. 1233, found at 33 CFR 100.15

Environmental Protection Agency

• National Pollutant Discharge Elimination System (NPDES) permits and other permits for federal installations discharges, sludge runoff, aquaculture permits and all other permits pursuant to Sections 401, 402, 405,and 318 of the Federal Water Pollution Control Act of 1972, 33 U.S.C. 1341, 1342, 1345, and 1328
• Permits pursuant to the Resource Conservation and Recovery Act (RCRA) of 1976, 42 U.S.C. 9601
• Permits pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) of 1980, 42 U.S.C. 6901
• Permits pursuant to the underground injection control program under Section 1424 of the Safe Drinking Water Act, 42 U.S.C. 300h
* Indiana has primacy for Class II injection wells
• Permits pursuant to the Clean Air Act of 1976, 42 U.S.C. 7401
• Permits pursuant to the Marine Protection, Research, and Sanctuaries Act, 16 U.S.C. 1431

Department of Interior- U.S. Fish and Wildlife Service – 16 U.S.C. 742a

• Endangered species permits pursuant to the Endangered Species Act, 16 U.S.C. 1531
• Permits pursuant to the Migratory Bird Treaty Act, 16 U.S.C. 703
• Permits to impound water and coordination activities under the Fish and Wildlife Coordination Act, 16 U.S.C. 661
• Permits and cooperative agreements for use of lands for grazing, timber harvest, farming, and concessions, and agreements with States for operation of Service management units
• Permits and easements for rights-of-way
• Permits for the import-export of regulated wildlife and plants, including interstate shipment of injurious wildlife
• Permits for the taking or banding of migratory birds, including falcons and eagles

Department of Interior- National Park Service – 16 U.S.C. 1

• Permits for rights-of way
• Permits for scientific-collecting purposes
• Permits for special use of real property (including assets and resources or utilities)
• Agreements to permit concession operations

Nuclear Regulatory Commission

• Licensing, certification, and determination of the siting, construction, and operation of nuclear generating stations, fuel storage, and processing centers pursuant to the Atomic Energy Act of 1954, 42 U.S.C. 2011, Title II of the Energy Reorganization Act of 1974, 42 U.S.C. 5841, and the National Environmental Policy Act of 1974, 42 U.S.C. 4321

Department of Transportation- Federal Aviation Administration – 49 U.S.C. 106, 49 U.S.C. 40101, 49 U.S.C. 44501, 49 U.S.C. 44701, 49 U.S.C. 47501,

• Permits, licenses, certifications, and other approvals for construction, operation, or alteration of airports
• Allocating use of airspace or otherwise permitting changes in air traffic resulting in increases of noise pollution over sensitive areas of the coastal zone

Department of Transportation- Surface Transportation Board – 49 U.S.C. 10101

• Permission to abandon railway lines (to the extent that the abandonment involves removal of trackage and disposition of right-of-way)
• Permission to construct, expand, alter, or abandon railroads
• Issuing certificates for water carrier authority
• Granting exemptions from rail regulation
• Granting exemptions from motor carrier regulation
• Rail regulation- emergency service orders
• Rail regulation- competitive access

• Motor carrier regulation- Bus company through-route requirements
• Intermodal regulation- Rail-Water connections for non-contiguous domestic trade

Department of Transportation- Federal Highway Administration – 49 U.S.C. 104, 49 Appdx. U.S.C.S. 1653
• Issuing safety permits regarding highway routing of hazardous materials

Department of Transportation- Research and Special Programs Administration – 49 U.S.C. 5101
• Issuing, modifying, and terminating approvals under the Hazardous Materials Transportation Law (hazmat)
• Issuing, renewing, modifying, and terminating exemptions under hazmat
• Administrative determinations of whether state or local requirements are preempted under hazmat or are issued a waiver of preemption

Table C. Federal Assistance

Numbers refer to the Catalog of Federal Domestic Assistance Programs. Program descriptions can be found at the Catalog's website at www.gsa.gov/fdac

Department of Agriculture

10.760 Water and Waste Disposal Systems for Rural Communities (Consolidated Farm and Rural Development Act, as amended, Section 306, 7 U.S.C. 1926.)
10.766 Community Facilities Loans and Grants (Consolidated Farm and Rural Development Act, as amended, Section 306, 7 U.S.C. 1926.)
10.769 Rural Development Grants (Consolidated Farm and Rural Development Act, Section 310B, as amended, 7 U.S.C. 1932)
10.770 Water and Waste Disposal Loans and Grants (Section 306C) (Consolidated Farm and Rural Development Act, Section 306C, 7 U.S.C. 1926(c), as amended; Food, Agriculture, Conservation, and Trade Act of 1990, Title XXIII, Public Law 101-624)
10.854 Rural Economic Development Loans and Grants (Rural Electrification Act of 1936, as amended, Title III, 7 U.S.C. 930-940c.)
10.901 Resource Conservation and Development (Public Law 97-98, 95 Stat. 1213.)
10.904 Watershed Protection and Flood Prevention (Watershed Protection and Flood Prevention Act, as amended, 16 U.S.C. 1001, 33 U.S.C. 701b)
10.906 Watershed Surveys and Planning (Watershed Protection and Flood Prevention Act, as amended, 16 U.S.C. 1001, 33 U.S.C. 701b)

Department of Commerce

11.300 Economic Development- Grants for Public Works and Infrastructure Development (Public Works and Economic Development Act of 1965, as amended, 42 U.S.C. 3131, 3132, 3135, 3171)
11.304 Economic Development- Public Works Impact Program (Public Works and Economic Development Act of 1965, as amended, 42 U.S.C. 3131, 3135)
11.405 Anadromous Fish Conservation Act Program (Anadromous Fish Conservation Act of 1965, as amended, 16 U.S.C. 757a through f; Reorganization Plan No. 4, 1970)
11.407 Interjurisdictional Fisheries Act of 1986 (Interjurisdictional Fisheries Act of 1986, as amended,16 U.S.C. 4106)
11.427 Fisheries Development and Utilization Research & Development Grants & Coop Agreements (Saltonstall-Kennedy Act, as amended, 15 U.S.C. 713c-3(c))
11.463 Habitat Conservation (Fish and Wildlife Coordination Act of 1956, 16 U.S.C. 661; Coastal Wetlands Planning, Protection, and Restoration Act, 16 U.S.C. 3951; 33 U.S.C. 1901; Department of Commerce Appropriation Act of 1995)

Department of Defense

12.100 Aquatic Plant Control, 33 U.S.C. 610
12.101 Beach Erosion Control Projects (Rivers and Harbors Act of 1962, Section 103, as amended, 33 U.S.C. 426e-g)
12.104 Flood Plain Management Services (Flood Control Act of 1960, Section 206,as amended, 33 U.S.C. 709a)
12.105 Protection of Essential Highways, Highway Bridge Approaches, and Public Works (Flood Control Act of 1946, Section 14, 33 U.S.C. 701r, as amended)
12.106 Flood Control Projects (Flood Control Act of 1948, Section 205, as amended, 33 U.S.C. 701s)
12.107 Navigation Projects (Rivers and Harbors Act of 1960, Section 107, as amended, 33 U.S.C. 577)
12.108 Snagging and Clearing for Flood Control (Flood Control Act of 1937, Section 2, as amended, 33 U.S.C. 701g)
12.109 Protecting, Clearing, and Straightening Channels (Rivers and Harbors Act of 1945, Section 3, as amended, 33 U.S.C. 603a)
12.110 Planning Assistance to States (Water Resources Development Act of 1974, Section 22, as amended, 42 U.S.C. 1962d-16)
12.610 Joint Land Use Studies (Defense Authorization Act, 10 U.S.C. 2391)
12.613 Growth Management Planning Assistance (Defense Authorization Act, 10 U.S.C. 2391)

Department of Housing and Urban Development (Sections refer to the National Housing Act)

14.218 Community Development Block Grants/ Entitlement Grants (Housing and Community Development Act of 1974, Title I, as amended, 42 U.S.C. 5301-5317**)**
14.219 Community Development Block Grants/ Small Cities Grants (Housing and Community Development Act of 1974, Title I, as amended, 42 U.S.C. 5301-5317)
14.246 Community Development Block Grants/ Economic Development Initiative (Housing and Community Development Act of 1974, Sec.108(q), as amended, 42 U.S.C. 5308(q)
14.866 Revitalization of Severely Distressed Public Housing (HUD Appropriations Act of 1993, Public Law 102-389)

Department of the Interior

15.605 Sport Fish Restoration (Federal Aid in Sportfish Restoration Act of 1950, as amended, 16 U.S.C. 777-777k)
15.611 Wildlife Restoration (Federal Aid in Wildlife Restoration Act of 1937, as amended, 16 U.S.C. 669-669b, 669-669I)
15.614 Coastal Wetlands Planning, Protection, and Restoration Act (Coastal Wetlands Planning, Protection, and Restoration Act, Section 305, Title III, 16 U.S.C. 3954)
15.615 Cooperative Endangered Species Conservation Fund (Endangered Species Act of 1973, as amended, 16 U.S.C. 1531)
15.616 Clean Vessel Act Pumpout Grant Program (Clean Vessel Act of 1992, Section 5604, 33 U.S.C. 1322, note, and 16 U.S.C. 777c and 777g)
15.617 Wildlife Conservation and Appreciation (Partnerships for Wildlife Act, Title VII, Sec.7105(g), 16 U.S.C. 3744(g))
15.904 Historic Preservation Fund Grants-in-Aid (National Historic Preservation Act of 1966, as amended, 16 U.S.C. 470)
15.916 Outdoor Recreation- Acquisition, Development, and Planning (16 U.S.C. 1-4; Land and Water Conservation Fund Act of 1965, 16 U.S.C. 460d, 460l-4 to 460l-11, as amended)
15.919 Urban Park and Recreation Recovery Program (Urban Park and Recreation Recovery Act of 1978, Title 1, 16 U.S.C. 2501-2514)

Department of Transportation

20.005 Boating Safety Financial Assistance, 46 U.S.C. 13101-13110
20.006 State Access to the Oil Spill Liability Trust Fund (Oil Pollution Act of 1990, Sec.1012(d)(1), 33 U.S.C. 2712(d)(1))
20.007 Bridge Alteration (River and Harbor Act of 1899, Section 18, 33 U.S.C. 502; Bridge Act of 1906, Sections 4 and 5, 33 U.S.C. 494-5; Act of June 21, 1940, as amended; Truman-Hobbs Act, 33 U.S.C. 511-23)
20.106 Airport Improvement Program (Public Law 103-272)
20.205 Highway Planning and Construction, 23 U.S.C.
20.219 Recreational Trails Program (Transportation Equity Act for the 21st Century, Sec. 1101(a)(7); 23 U.S.C. 104(h); 23 U.S.C. 206)
20.500 Federal Transit Capital Improvement Grants, 49 U.S.C. 5309
20.509 Public Transportation for Nonurbanized Areas, 49 U.S.C. 5311
20.514 Transit Planning and Research, 49 U.S.C. 5314(a)
20.600 State and Community Highway Safety (Highway Safety Act of 1966, as amended, 23 U.S.C. 401)
20.801 Development and Promotion of Ports and Intermodal Transportation (Merchant Marine Act of 1920, Section 8, as amended, 46 U.S.C. 867; Merchant Marine Act of 1936, Sections 209 and 212, as amended, 46 U.S.C. 1119, 1122; Section 2, Public Law 96-371; Defense Production Act of 1950, as amended, 50 Appx. U.S.C. 2061, 2062, 2071-2073, 2081, 2091-2094, 2101-2110, 2121-2123, 2131-2135, 2151-2166; Executive Order 10480; Executive Order 12656)

Environmental Protection Agency

66.001 Air Pollution Control Program Support (Clean Air Act of 1977, Section 105, as amended, Clean Air Act Amendments of 1990, 42 U.S.C. 7405)
66.419 Water Pollution Control- State and Interstate Program Support (Clean Water Act, Section 106, as amended, 33 U.S.C. 1256)
66.432 State Public Water System Supervision (Public Health Service Act, as amended, 42 U.S.C. 201; Safe Drinking Water Act, as amended, 42 U.S.C. 300f)
66.433 State Underground Water Source Protection (Safe Drinking Water Act, as amended, 42 U.S.C. 300f)
66.454 Water Quality Management Planning (Clean Water Act, Sections 205(j) and 604(b), as amended, Water Quality Act of 1987, 33 U.S.C. 1285(j) and 33 U.S.C. 1384(b))
66.456 National Estuary Program (Clean Water Act, Section 320, as amended, 33 U.S.C. 1330)
66.458 Capitalization Grants for State Revolving Funds (Clean Water Act, as amended, Water Quality Act of 1987, Sections 601-607, 205(m), 33 U.S.C. 1381-1387, 33 U.S.C. 1285 (m))
66.460 Non-Point Source Implementation Grants (Clean Water Act, Section 319(h), 33 U.S.C. 1329(h))
66.461 Wetlands Protection- Development Grants (Clean Water Act, Section 104(b)(3), as amended, 33 U.S.C. 1254(b)(3))
66.463 National Pollutant Discharge Elimination System (NPDES) Related State Program Grants (Clean Water Act, Section

104(b)(3), as amended, 33 U.S.C. 1254(b)(3))
66.468 Capitalization Grants for Drinking Water State Revolving Fund (Safe Drinking Water Act Amendments of 1996, Section 130, 42 U.S.C. 300 j-12)
66.469 Great Lakes Program (Clean Water Act, Sections 104 and 118, 33 U.S.C. 1254, 33 U.S.C. 1268)
66.700 Consolidated Pesticide Enforcement Cooperative Agreements (Federal Insecticide, Fungicide, and Rodenticide Act, Section 23, as amended, 7 U.S.C. 136u)
66.701 Toxic Substances Compliance Monitoring Cooperative Agreements (Toxic Substances Control Act, Sections 28 and 404(g), as amended, 15 U.S.C. 2627 and 2684(g))
66.708 Pollution Prevention Grants Program (Pollution Prevention Act of 1990, Section 6605, 42 U.S.C. 13104)
66.801 Hazardous Waste Management State Program Support (Solid Waste Disposal Act, Section 3011, as amended, Resource Conservation and Recovery Act (RCRA) of 1976, 42 U.S.C. 6931)
66.802 Superfund State Site-Specific Cooperative Agreements (Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) of 1980, Section 104, as amended, Superfund Amendments and Reauthorization Act (SARA) of 1986, as amended, 42 U.S.C. 9604)
66.804 State Underground Storage Tanks Program (Solid Waste Disposal Act, Section 2007(f)(2), as amended, and Section 8001(a);Resource Conservation and Recovery Act (RCRA) of 1976, as amended, Hazardous and Solid Waste Amendments (HSWA) of 1984, 42 U.S.C. 6901 et seq.)
66.805 Leaking Underground Storage Tank Trust Fund Program (Solid Waste Disposal Act, Section 9003(h)(7), as amended; Section 8001(a); Resource Conservation and Recovery Act (RCRA) of 1976, as amended, 42 U.S.C. 6901 et seq.; Superfund Amendments and Reauthorization Act (SARA) of 1986, as amended, 42 U.S.C. 9601 et seq.)
66.807 Superfund Innovative Technology Evaluation Program (SITE) (Comprehensive Environmental Response, Compensation, & Liability Act (CERCLA) of 1980, Sec 311(b), as amended, Superfund Amendments Reauthorization Act of 1986, as amended, 42 U.S.C. 9660(b)
66.808 Solid Waste Management Assistance (Solid Waste Disposal Act, Section 8001, as amended, Resource Conservation and Recovery Act (RCRA) of 1976, as amended, 42 U.S.C. 6981)
66.809 Superfund State Core Program Cooperative Agreements (CERCLA, as amd., 42 U.S.C. 9601)
66.810 CEPP Technical Assistance Grants Program (Clean Air Act, Secs.103(b)(3),112(L)(4), 42 U.S.C. 7403(b)(3), 7412(L)(4); Toxic Substances Control Act, Secs.10(a),28(d), 15 U.S.C. 2609(a), 2627(d))

Department of Energy (DOE)

81.041 State Energy Program (Energy Policy and Conservation Act, Title III, Sections 361-366, Part C, 42 U.S.C. 6321-6326; Dept. of Energy Organization Act of 1977, as amended, 42 U.S.C. 7101; National Energy Conservation Policy Act of 1978, Public Law 95-619, Public Law 101-440; Balanced Budget Down Payment Act II of 1996, Public Law 104-134)

Federal Emergency Management Agency (FEMA)

83.505 State Disaster Preparedness Grants
83.534 Emergency Management- State and Local Assistance (Robert T. Stafford Disaster Relief and Emergency Assistance Act, as amended, Stafford Act, Title VI, Sections 611 and 613, as amended, 42 U.S.C. 5196 and 5196b)
83.536 Flood Mitigation Assistance (National Flood Insurance Reform Act of 1994, Title V, Sections 553 and 554, 42 U.S.C. 4104c, 4104d, 4017)

Department of Health and Human Services (HHS)

93.887 Project Grants for Renovation or Construction of Non-Acute Health Care Facilities (Public Health Service Act, Section 1610 (b), 42 U.S.C. 300r (b))

DEPARTMENT OF STATE REVENUE

IN REGARDS TO THE MATTER OF:
OGDEN DUNES VOLUNTEER FIRE DEPARTMENT INC.
DOCKET NO. 29-2002-0179

PROPOSED ORDER

The letter denying Petitioner's raffle license request was dated on March 18, 2002 and was received by the Petitioner on March 26, 2002.The Petitioner, was represented by Eric D. Kurtz, Fire Chief. Attorney, Steve Carpenter, appeared on behalf of the Indiana Department of State Revenue.

FINDINGS OF FACTS

1) Petitioner wished to conduct a raffle on March 9, 2002.

2) The Petitioner's charity gaming application Form CG-1 (Indiana Charity Gaming Qualification Application) was received on February 13, 2002.
3) Petitioner's charity gaming application Form CG-3 (Indiana Department of Revenue Single Event License Application) was received on February 13, 2002.
4) The Indiana Department of Revenue Charity Gaming Section received the necessary information on March 13, 2002 to complete the qualification process.
5) Petitioner received a letter of qualification dated March 14, 2002 on March 26, 2002.This was after the date of Petitioner's scheduled event as indicated on Form CG-3.
6) Form CG-3 states in bold letters: "**You must file this application at least six (6) weeks before your scheduled event**."
7) The letter of denial was dated on March 18, 2002 and was received by the Petitioner on March 26, 2002.
8) The Petitioner applied for and was subsequently issued a license and an event was held on March 8, 2003.

STATEMENT OF LAW

1) IC 4-32-9-2 provides, "Except as provided in section 3 of this chapter, a qualified organization must obtain a license from the department to conduct an allowable event."
2) IC 4-32-9-4 provides, "Each organization applying for a bingo license, special bingo license, charity game night license, raffle license, door prize drawing license, or festival license must submit to the department a written application on a form prescribed by the department…"
3) There is no provision in IC 4-32 et.seq., that allows the Department to grant a license retroactively.

CONCLUSIONS OF LAW

1) The fact that information needed by the Department in order to qualify the Petitioner as a qualified organization was not received until after the date of the proposed event makes the issue moot.
2) Petitioner's appeal of the denial of a single event license is considered "moot" because it no longer presents a justiciable controversy and the issues involved have become academic or dead.
3) This appeal raised issues that have already been resolved and are not entitled to judicial intervention.
4) This issues involved in Petitioner's original appeal are not recurring ones and cannot be raised again between the parties since the information needed by the Department in order to qualify the Petitioner as a qualified organization was not received until after the date of the proposed event.

PROPOSED ORDER

The Administrative Law Judge orders the following:
Petitioner's appeal is dismissed pursuant to IC 4-21.5.
1) Administrative review of this proposed decision may be obtained by filing, with the Commissioner of the Indiana Department of State Revenue, a written document identifying the basis for each objection within fifteen (15) days after service of this proposed decision. IC 4-21.5-3-29(d).
2) Judicial review of a final order may be sought under IC 4-21.5-5.

THIS PROPOSED ORDER SHALL BECOME THE FINAL ORDER OF THE INDIANA DEPARTMENT OF STATE REVENUE UNLESS OBJECTIONS ARE FILED WITHIN FIFTEEN (15) DAYS FROM THE DATE THE ORDER IS SERVED ON THE PETITIONER.

Dated: December 18, 2003

Bruce R. Kolb / Administrative Law Judge

DEPARTMENT OF STATE REVENUE

IN REGARDS TO THE MATTER OF:
ANDERSON P.A.L. CLUB INCORPORATED
DOCKET NO. 29-2003-0195

PROPOSED ORDER

The Criminal Investigation Division of the Indiana Department of Revenue conducted an investigation of the Anderson P.A.L. Club Incorporated. The Petitioner was assessed civil penalties of eleven thousand dollars ($11,000), and its license was revoked. The Petitioner was represented by John N. Shanks II of Ayres, Carr & Sullivan P.C., 338 Historical W. 8th Street, Anderson, IN 46016. Steve Carpenter, appeared on behalf of the Indiana Department of State Revenue.

FINDINGS OF FACTS

1) The Criminal Investigation Division of the Indiana Department of Revenue conducted an investigation of the Anderson P.A.L. Club Incorporated on January 29, 2003.
2) As a result of the investigation, on May 15, 2003, the Petitioner was assessed civil penalties of eleven thousand dollars

($11,000), and its license was revoked pursuant to 45 IAC 18-6-3.
3) Petitioner protested the Department's proposed actions on May 19, 2003.
4) The Department acknowledged the Petitioner's appeal in a letter dated May 20, 2003.
5) Pursuant to IC 4-21.5-3-1, notice was given to Petitioner on September 4, 2003 regarding a possible dismissal of the appeal if no response was received by the Department on or before November 7, 2003.
6) Petitioner has failed to respond to the Department's correspondence.

STATEMENT OF LAW

1) IC 4-21.5-3-24 states, "(a) At any stage of a proceeding, if a party fails to:
(1) file a responsive pleading required by statute or rule;
(2) attend or participate in a prehearing conference, hearing, or other stage of the proceeding; or
(3) take action on a matter for a period of sixty (60) days, if the party is responsible for taking the action;
the administrative law judge may serve upon all parties written notice of a proposed default or dismissal order, including a statement of the grounds.

(b) Within seven (7) days after service of a proposed default or dismissal order, the party against whom it was issued may file a written motion requesting that the proposed default order not be imposed and stating the grounds relied upon. During the time within which a party may file a written motion under this subsection, the administrative law judge may adjourn the proceedings or conduct them without the participation of the party against whom a proposed default order was issued, having due regard for the interest of justice and the orderly and prompt conduct of the proceedings.

(c) If the party has failed to file a written motion under subsection (b), the administrative law judge shall issue the default or dismissal order. If the party has filed a written motion under subsection (b), the administrative law judge may either enter the order or refuse to enter the order.

(d) After issuing a default order, the administrative law judge shall conduct any further proceedings necessary to complete the proceeding without the participation of the party in default and shall determine all issues in the adjudication, including those affecting the defaulting party. The administrative law judge may conduct proceedings in accordance with section 23 of this chapter to resolve any issue of fact.

CONCLUSIONS OF LAW

1) IC 4-21.5-3-24 states, "(a) At any stage of a proceeding, if a party fails to: (1) file a responsive pleading required by statute or rule; (2) attend or participate in a prehearing conference, hearing, or other stage of the proceeding; or (3) take action on a matter for a period of sixty (60) days, if the party is responsible for taking the action; the administrative law judge may serve upon all parties written notice of a proposed default or dismissal order, including a statement of the grounds.
2) The Petitioner's failure to respond to the Department is grounds for a proposed dismissal order pursuant to IC 4-21.5-3-24.

PROPOSED ORDER

The Administrative Law Judge orders the following:
Petitioner's appeal is dismissed pursuant to IC 4-21.5-3-24.
1) Administrative review of this proposed decision may be obtained by filing, with the Commissioner of the Indiana Department of State Revenue, a written document identifying the basis for each objection within fifteen (15) days after service of this proposed decision. IC 4-21.5-3-29(d).
2) Judicial review of a final order may be sought under IC 4-21.5-5.

THIS PROPOSED ORDER SHALL BECOME THE FINAL ORDER OF THE INDIANA DEPARTMENT OF STATE REVENUE UNLESS OBJECTIONS ARE FILED WITHIN FIFTEEN (15) DAYS FROM THE DATE THE ORDER IS SERVED ON THE PETITIONER.

Dated: December 2, 2003

Bruce R. Kolb / Administrative Law Judge

DEPARTMENT OF STATE REVENUE

IN REGARDS TO THE MATTER OF:
ATLAS FOUNDATION LIMITED
DOCKET NO. 29-2003-0335

FINDINGS OF FACT, CONCLUSIONS OF LAW AND PROPOSED ORDER

An administrative hearing was held on Wednesday, October 15, 2003 in the office of the Indiana Department of State Revenue, 100 N. Senate Avenue, Room N248, Indianapolis, Indiana 46204 before Bruce R. Kolb, Administrative Law Judge acting on behalf of and under the authority of the Commissioner of the Indiana Department of State Revenue.

Petitioner, Atlas Foundation Limited, was represented by its President Glen Voris. Steve Carpenter appeared on behalf of the

Indiana Department of State Revenue.

A hearing was conducted pursuant to IC 4-32-8-5, evidence was submitted, and testimony given. The Department maintains a record of the proceedings. Being duly advised and having considered the entire record, the Administrative Law Judge makes the following Findings of Fact, Conclusions of Law and Proposed Order.

REASON FOR HEARING

On August 13, 2003, the Petitioner was assessed civil penalties in the amount of one thousand dollars ($1,000) and its license was suspended for a period of three (3) years. The Petitioner protested in a timely manner.

SUMMARY OF FACTS

1) The Indiana Department of Revenue Criminal Investigation Division conducted an investigation of the Petitioner on August 7, 2003.

2) According to the Department's letter dated August 13, 2003, the Criminal Investigation Division (CID) found, "Mr. Calhoun offered to operate Atlas Foundation LTD's charity gaming events on behalf of the organization and the organization accepted Mr. Calhoun's offer. According to the CID report, Mr. Calhoun spent his money on supplies for the gaming events. It was originally intended that Mr. Calhoun would operate the organization's bingo events under the direction of the board of directors. However, in reality, Mr. Calhoun assumed complete control of the organization's bingo events. Mr. Calhoun did not provide any accounting to the organization's board of directors and utilized his family members and friends to operate the organization's bingo events. On July 10, 2003, the organization's board of directors agreed to remove John Calhoun as treasurer of the organization and from any involvement in the organization's bingo events. The Fort Wayne City Police were present to ensure a smooth transition. According to the board of director's minutes, while John Calhoun operated the bingo events, individuals not listed as operators or workers were involved; also, the workers and operators were accepting tips from patrons. On August 1, 2003, the organization's board of directors agreed to voluntarily surrender the organization's bingo license..."

3) On August 13, 2003, the Petitioner was assessed civil penalties in the amount of one thousand dollars ($1,000) and its license was suspended for a period of three (3) years.

FINDINGS OF FACTS

1) The Indiana Department of Revenue Criminal Investigation Division initiated an investigation of the Petitioner on August 1, 2003. (Record at 8).

2) According to the Department's Criminal Investigation Division Agent, the Petitioner had entered into an agreement with John Calhoun to operate its charitable gaming activities. (Record at 10).

3) John Calhoun was a member of the Petitioner's organization. (Record at 14).

4) Petitioner's representative stated during the hearing, "Earlier that fall John Calhoun became involved and he brought all his--…and John showed up at some of these events with his people and they become members. And in the meantime I learned that John had run bingo, was successful at bingo and he was helpful with everything…" (Record at 16).

5) Petitioner's representative talking about the Petitioner' new location for conducting its charity gaming stated, "John Calhoun found the location." (Record at 16).

6) Petitioner's representative speaking about his role in Petitioner' charity gaming operations contends, "I knew right then I had lost the game. I knew at that time in the following week John changed the locks on me and I was an outsider." (Record at 19).

7) Petitioner's representative opines, "He just simply wouldn't leave, he just wouldn't leave. And so I went to the police department and got a policeman to be there on Sunday night and what we were going to do at the break time is give John this minutes of the meeting here simply telling the board of directors has relieved him of all his duties, he is no longer treasurer."(Record at 21, See also Petitioner's Exhibit #2).

8) Petitioner continued to use Mr. Calhoun to run its charity gaming operation. Petitioner's representative stated, "…I met with John Monday morning and John said if I could stay another month or six weeks or something like that then we could have a smooth transition. And so I thought, well, that's my way of getting the bingo up and running without being stripped of everything because they had been running stuff out the back door, I don't know what they were taking out. And so…we agreed that John would stay on for a period of time…"(Record at 23).

9) Questioning the Petitioner's representative about Mr. Calhoun's involvement with the Petitioner's charity gaming is as follows:

MR. CARPENTER: Did he or did he not offer to the Atlas Foundation to operate their bingo?

MR. VORIS: Yes.

MR. CARPENTER: You also heard Ms. Klinkose say that the Atlas Foundation accepted that offer, is that true? He ran the bingo, didn't he?

MR. VORIS: Oh, yes.

MR. CARPENTER: So you accepted the offer, correct?

MR. VORIS: Yes.
MR. CARPENTER: Okay. You also stated of Ms Klinkose stated that Mr. Calhoun purchased the gaming supplies; is that true?
MR. VORIS: Yeah, because I didn't--
MR. CARPENTER: Isn't it also true that Mr. Voris made the decisions to operate the game including, but not limited to, hiring and firing the workers, resolving disputes, and handling all the money?
MR. VORIS: We has a pool of volunteer—
MR. CARPENTER: Did he do those things, yes or no, sir?
MR. VORIS: He did yes.
(Record at 56).

10) The Department then notified Petitioner by letter on August 13, 2003 that its Indiana Charity Gaming License was suspended for a period of three (3) years and assessed one thousand dollars ($1,000).

STATEMENT OF LAW

1) Pursuant to 45 IAC 18-8-4, the burden of proving that the Department's findings are incorrect rests with the individual or organization against which the department's findings are made. The department's investigation establishes a prima facie presumption of the validity of the department's findings.
2) The Department's administrative hearings are conducted pursuant to IC § 4-21.5 et seq. (See, House Enrolled Act No. 1556).
3) "[B]ecause Pendelton's interest in his insurance license was a property interest, and not a liberty interest. Rather, a preponderance of the evidence would have been sufficient." Pendelton v. McCarty, 747 N.E. 2d 56, 65 (Ind. App. 2001).
4) "It is reasonable…to adopt a preponderance of the evidence standard where it can be demonstrated that a protected property interest exists." Burke v. City of Anderson, 612 N.E.2d 559, 565 (Ind.App. 1993).
5) IC 4-32-9-15 **A qualified organization may not** contract or otherwise **enter into an agreement with an individual, a corporation, a partnership, a limited liability company, or other association to conduct an allowable event for the benefit of the organization. A qualified organization shall use only operators and workers meeting the requirements of this chapter to manage and conduct an allowable event**." (Emphasis added).
6) IC 4-32-9-17 states, "A qualified organization shall maintain accurate records of all financial aspects of an allowable event under this article…"
7) IC 4-32-9-17 further states, "…A qualified organization shall make accurate reports of all financial aspects of an allowable event to the department within the time established by the department..."
8) According to IC 4-32-9-17, "…The department shall, by rule, require a qualified organization to deposit funds received from an allowable event in a separate and segregated account set up for that purpose…"
9) Pursuant to IC 4-32-9-17 "…**All expenses of the qualified organization with respect to an allowable event shall be paid from the separate account**."(Emphasis added).
10) IC 4-32-9-23 provides, "An operator or a worker may not be a person who has been convicted of or entered a plea of nolo contendere to a felony committed in the preceding ten (10) years, regardless of the adjudication, unless the department determines that: (1) the person has been pardoned or the person's civil rights have been restored; or (2) subsequent to the conviction or entry of the plea the person has engaged in the kind of good citizenship that would reflect well upon the integrity of the qualified organization and the department."
11) IC 4-32-9-27 states, "An operator or a worker may not directly of indirectly participate, other than in a capacity as operator or worker, in an allowable event…"
12) IC 4-32-9-28 states, "An operator must be a member in good standing of the qualified organization that is conducting an allowable event for at least one (1) year at the time of the allowable event."
13) According to IC 4-32-9-29, "A worker must be a member in good standing of a qualified organization that is conducting an allowable event for at least thirty (30) days at the time of the allowable event."
14) IC 4-32-9-25 states, "Except as provided in subsection (b), an operator or a worker may not receive remuneration…"
15) IC 4-32-12-2 states, "The department **may impose** upon a qualified organization or an individual the following **civil penalties**: (1) Not more than one thousand dollars ($1,000) for the first violation. (2) Not more than two thousand five hundred dollars ($2,500) for the second violation. (3) Not more than five thousand dollars ($5,000) for each additional violation." (Emphasis added).
16) IC 4-32-12-1(a) provides in pertinent part, "The Department may suspend… an individual …for any of the following: (1) Violation of a provision of this article or of a rule of the department..."
17) IC 4-32-12-3 states, In addition to the penalties described in section 2 of this chapter, the department may do all or any of the following:
(1) Suspend or revoke the license.

(2) Lengthen a period of suspension of the license.
(3) Prohibit an operator or an individual who has been found to be in violation of this article from associating with charity gaming conducted by a qualified organization.
(4) Impose an additional civil penalty of not more than one hundred dollars ($100) for each day the civil penalty goes unpaid.

CONCLUSIONS OF LAW

1) On August 13, 2003, the Petitioner was assessed civil penalties in the amount of one thousand dollars ($1,000) and its license was suspended for a period of three (3) years.
2) It is clear from the testimony of Petitioner's representative that Mr. Calhoun was retained by the Petitioner to operate its charity gaming in violation of IC 4-32-9-15.

PROPOSED ORDER

Following due consideration of the entire record, the Administrative Law Judge orders the following:
The Petitioner's appeal is denied.
1) Administrative review of this proposed decision may be obtained by filing, with the Commissioner of the Indiana Department of State Revenue, a written document identifying the basis for each objection within fifteen (15) days after service of this proposed decision. IC 4-21.5-3-29(d).
2) Judicial review of a final order may be sought under IC 4-21.5-5.

THIS PROPOSED ORDER SHALL BECOME THE FINAL ORDER OF THE INDIANA DEPARTMENT OF STATE REVENUE UNLESS OBJECTIONS ARE FILED WITHIN FIFTEEN (15) DAYS FROM THE DATE THE ORDER IS SERVED ON THE PETITIONER.

Dated: _____

_____
Bruce R. Kolb / Administrative Law Judge

DEPARTMENT OF STATE REVENUE

IN REGARDS TO THE MATTER OF:
AMVETS POST #55, INC.
30 BIRCH DRIVE
YODER, IN 46798
DOCKET NO. 29-2003-0419

PROPOSED ORDER

1) The Criminal Investigation Division of the Indiana Department of Revenue conducted an investigation of the Petitioner on August 28, 2003.
2) As a result of the investigation, on September 29, 2003, the Petitioner's application to engage in charity gaming was denied.
3) Petitioner appealed the Department's proposed actions on October 7, 2003.
4) The Department acknowledged the Petitioner's appeal in a letter dated October 10, 2003.
5) Petitioner's counsel filed a memorandum in support of Petitioner's appeal on November 14, 2003.
6) The Petitioner, by counsel, withdrew its appeal on December 23, 2003.
The Administrative Law Judge orders the following:
Petitioner's appeal is hereby dismissed.
Administrative review of this proposed decision may be obtained by filing, with the Commissioner of the Indiana Department of State Revenue, a written document identifying the basis for each objection within fifteen (15) days after service of this proposed decision. IC 4-21.5-3-29(d).
Judicial review of a final order may be sought under IC 4-21.5-5.

THIS PROPOSED ORDER SHALL BECOME THE FINAL ORDER OF THE INDIANA DEPARTMENT OF STATE REVENUE UNLESS OBJECTIONS ARE FILED WITHIN FIFTEEN (15) DAYS FROM THE DATE THE ORDER IS SERVED ON THE PETITIONER.

Dated: December 31, 2003

_____
Bruce R. Kolb / Administrative Law Judge

DEPARTMENT OF STATE REVENUE

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LETTER OF FINDINGS NUMBER: 97-0077
Sales and Use Tax
For The Tax Periods: 1993 through 1995

NOTICE: Under IC 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUES

I. Use Tax – Manufacturing Exemption: Lab and Water Treatment Chemicals

Authority: IC 6-2.5-3-2, IC 6-8.1-5-1, 45 IAC 2.2-5-70, 45 IAC 2.2-5-8.

Taxpayer protests amount of use tax assessed on its purchase of water treatment chemicals.

II. Use Tax – Manufacturing Exemption: Equipment

Authority: IC 6-2.5-3-2, IC 6-2.5-5-3, 45 IAC 2.2-5-8.

Taxpayer protests use tax assessed on its scales, balers and conveyers.

STATEMENT OF FACTS

Taxpayer is engaged in the business of recycling of waste paper. The paper is collected and processed into packaged rolls for use by its customers. Additional facts will be provided as needed.

I. Use Tax – Manufacturing Equipment Exemption: Water Treatment Chemicals

DISCUSSION

During the audit, Taxpayer was assessed use tax on their purchases of lab and water treatment items. Taxpayer states that the purchases are exempt because they are used to comply with local environmental quality standards and/or that the supplies are used in the production process.

Indiana imposes "an excise tax, known as 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 the retail merchant making that transaction." IC 6-2.5-3-2.

Taxpayer contends that 90% of the water is discharged into the local sewer system and is not re-used and the remaining 10% is treated and re-utilized in the pulping or production process.

Taxpayer claims that the 90% of the water which is discharged into the municipal sewer system is required to meet certain specifications. In order to ensure the water meets these specifications the water must be treated and tested. Pursuant to 45 IAC 2.2-5-70:

> 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 environmental quality statutes, regulations or standards; and the person acquiring the property is engaged in the business of manufacturing, processing, refining, mining, or agriculture.

Taxpayer goes on to argue that the remaining 10% of the water is re-utilized after testing and treatment. They state that the water is constantly processed and re-introduced into the pulping process and if it were not treated could not be used in the production process. 45 IAC 2.2-5-8(c) states:

> the state gross retail tax does not apply to purchases of manufacturing machinery, tools, and equipment that are directly used in the production process; i.e., they have an immediate effect on the article being produced. Property 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.

The audit notes that the testing of the water is performed after the production process is complete and before the water is used again in the first operation. The water is not used in production at the time it is being treated. Rather, the treatment takes place prior to its use. Consequently, it is not directly used in the direct production of the recycled paper. In addition, Taxpayer does not provide documentation verifying how they came up with their percentages used in their breakdown. "The notice of proposed assessment is prima facie evidence that the department's claim for unpaid tax is valid, and the burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made." IC 6-8.1-5-1 (emphasis added). Taxpayer's protest must be denied.

FINDING

Taxpayer's protest is denied.

II. Use Tax – Manufacturing Exemption: Equipment

DISCUSSION

Taxpayer protests the assessment of use tax upon their scales, compactor, baler and upender/conveyor system. The auditor

assessed these items after determining that they were either used before or after the production process.

Taxpayer contends that these items should be exempt from the gross retail tax in accordance with 45 IAC 2.2-5-8.

As stated above, "an excise tax, known as 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 the retail merchant making that transaction." IC 6-2.5-3-2.

However, an exemption is allowed for certain tools used in the production process. IC 6-2.5-5-3(b) states:

Transactions involving manufacturing machinery, tools, and equipment 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.

More specifically, 45 IAC 2.2-5-8(c) states:

The state gross retail tax does not apply to purchases of manufacturing machinery, tools, and equipment that are directly used in the production process; i.e., they have an immediate effect on the article being produced. Property 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.

In addition, 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.

Taxpayer argues that the production process begins with the weighing of the raw waste paper used the system. The scale and foundation are utilized to ensure that the proper amounts of waste paper are collected for introduction into the system. Taxpayer states that the scales measure the cardboard and waste to achieve the proper percentages when it is boiled. Taxpayer compares these scales to the example of exempt items described in 45 IAC 2.2-5-8(c)(2)(G). There, the regulation states that "[a]n automated scale process which measures quantities of raw aluminum for use in the next production step of the casting process in the foundry" is exempt. Id. Taxpayer argues that the introduction of the raw waste materials to be boiled is similar to the above referenced example.

Taxpayer also argues that the compactor/conveyor and baler is used to compress loose waste paper into a dense format for processing. The recycling system requires large, but controlled quantities of specific types of waste paper. Taxpayer goes on to state that if the waste paper is not in a dense compressed form or a "baled" form it cannot be introduced at a sufficient rate and the equipment is not designed to handle loose, uncompressed waste paper.

Finally, Taxpayer argues that the upending and movement of the banded rolls or recycled paper is also an essential and integral step in processing of the final product. Taxpayer notes that the upending and conveyance of paper rolls occurs within the plant after the rolls are banded, but prior to the final wrapping. The upender/conveyor helps move the rolls in order that they may be wrapped and labeled prior to shipping.

The Department finds that the process at issue begins with the first step in altering the material to its completed form, which is the boiling of the waste material. The regulation cited by taxpayer references a weighing and measuring step within an integrated process, not prior to the process starting. The Department also finds that the production process ends with the banding of the rolls, a point that the production has altered the item to its completed form, including required packaging.

FINDING

Taxpayer's protest is respectfully denied.

DEPARTMENT OF STATE REVENUE

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LETTER OF FINDINGS: 01-0123
Indiana Gross Income Tax
For the Years 1997 and 1998

NOTICE: Under IC 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of the document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUE

I. Income Received from Computer Service Maintenance Contracts – High Rate Gross Income Tax.

Authority: IC 6-2.1-2-2(a)(1); IC 6-2.1-2-2(a)(2); IC 6-2.1-2-2(b); IC 6-2.1-2-3; IC 6-2.1-2-4; IC 6-2.1-2-4(4); IC 6-2.1-2-5; 45 IAC 1-1-121.

Taxpayer argues that the Department of Revenue (Department) erred when it determined that money taxpayer received from

entering into and performing service maintenance agreements with Indiana customers was subject to Indiana's gross income tax at the high rate.

STATEMENT OF FACTS

Taxpayer is an out-of-state business which sells, installs, and services computer memory and computer peripherals. Along with selling computer equipment, taxpayer offers customers maintenance contracts for service work only. Taxpayer received money from service contracts with Indiana customers.

The Department conducted an audit review of taxpayer's business records and tax returns. The final audit report concluded that taxpayer owed Indiana gross income tax on the money received from the service contracts with Indiana customers. The tax was assessed at the high rate.

On December 5, 2000, taxpayer submitted a protest letter challenging the assessment of gross income tax at the high rate. Despite repeated requests to do so, taxpayer declined the opportunity to take part in an administrative hearing or to supply additional information supplementing the initial protest letter. Accordingly, this Letter of Findings was written based upon the information contained with the audit report and within taxpayer's original December 2000 protest letter.

DISCUSSION

I. Income Received from Computer Service Maintenance Contracts – High Rate Gross Income Tax.

IC 6-2.1-2-2(a)(1) imposes a gross income tax on the "entire taxable gross income of a taxpayer who is a resident or a domiciliary of Indiana...." The gross income tax is also imposed on a non-resident taxpayer who receives "gross income derived from activities or businesses or any other sources within Indiana...." IC 6-2.1-2-2(a)(2). The gross income tax is imposed at two rates, a "high rate" of 1.2 percent and a "low rate" of.3 percent. IC 6-2.1-2-3 "The rate of tax is determined by the type of transaction from which the taxable gross income is received." IC 6-2.1-2-2(b). The receipts from wholesale sales and from selling at retail are taxed at the low rate. IC 6-2.1-2-4. Receipts from service activities and certain other business activities are taxed at the high rate. IC 6-2.1-2-5.

The issue is whether the money received from entering into maintenance contracts for the performance of services is subject to Indiana's Gross Income Tax at the high rate.

45 IAC 1-1-121 (in effect at the time taxpayer received money from these service contracts) provides in relevant part as follows. "Gross income derived from the performance of a contract or service within Indiana is subject to gross income tax."

From the information available, it is apparent that the service contracts here at issue were just what they say; these contracts were arrangements by which taxpayer agreed to provide computer services to Indiana customers. These agreements do not include the provision of parts and equipment which would have potentially brought the agreements with the "selling at retail provision" found in IC 6-2.1-2-4(4). Because the service contracts were for the unalloyed provision of computer services, the money received from these agreements does not fall under the "low rate" provisions of IC 6-2.1-2-4.

Therefore, because the income received was attributable to services provided for Indiana customers, that income is subject to imposition of the state's gross income tax at the high rate as provided for under IC 6-2.1-2-4(4), IC 6-2.1-2-5, and 45 IAC 1-1-121.

FINDING

Taxpayer's protest is respectfully denied.

DEPARTMENT OF STATE REVENUE

0420020391.LOF

LETTER OF FINDINGS NUMBER: 02-0391
Sales and Use Tax
For the Years 1998, 1999, 2000

NOTICE: Under IC 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUES

I. Sales and Use Tax- Retail Sales

Authority: IC 6-2.5-2-1, IC 6-8.1-5-1, IC 2.5-4-4, IC 6-2.5-5-26 (b), 45 IAC 2.2-5-58, Indiana Bell Telephone Co. v. Indiana Department of Revenue, 627 N.E. 2d 1386, Ind. Tax Court (1994), Raintree Friends Housing v. Indiana Department of Revenue, 667 N.E.2d 810 (Ind. Tax 1996), Black's Law Dictionary 213 (5th ed. 1979).

The taxpayer protests the assessment of sales tax on certain retail sales.

II. Sales and Use Tax-Capital Assets

Authority: IC 6-2.5-3-2 (a), IC 6-2.5-5-25 (a), 45 IAC 2.2-3-8, Sales Tax Division Information Bulletin #10 Revised February 10, 1986.

The taxpayer protests the assessment of use tax on certain capital assets.

III. Sales and Use Tax-Supplies

Authority: IC 6-2.5-3-2 (a), IC 6-2.5-5-25 (a), Sales Tax Division Information Bulletin #10 Revised February 10, 1986.

The taxpayer protests the assessment of use tax on certain supplies.

IV. Tax Administration-Penalty

Authority: IC 6-8.1-10-2.1, 45 IAC 15-11-2.

The taxpayer protests the assessment of the negligence penalty.

STATEMENT OF FACTS

The taxpayer is a not-for-profit corporation that operates a living museum with demonstrations and a recreation of a turn-of-the-century village and farmstead. The corporation also operates a hotel adjacent to, and affiliated with, the living museum. After an audit, the Indiana Department of Revenue, hereinafter referred to as the "department," assessed additional sales and use tax, interest and penalty. The taxpayer protested the assessment and a hearing was held.

I. Sales and Use Tax- Retail Sales

DISCUSSION

All tax assessments are presumed to be accurate and the taxpayer bears the burden of proving that any assessment is incorrect. IC 6-8.1-5-1 (b). Indiana imposes an excise tax, the sales tax, on retail sales of tangible personal property. IC 6-2.5-2-1 (a). The rental of a hotel room and booths for less than thirty (30) is defined as a retail sale subject to the sales tax. IC 2.5-4-4. Purchasers are liable for the tax that the retail merchants collect and remit to the state. IC 6-2.5-2-1(b). Sales by not-for-profit corporations are exempt from the sales tax if "the property sold is designed and intended primarily either for the organization's educational, cultural, or religious purposes,..." IC 6-2.5-5-26 (b). It is established law that all tax exemptions must be strictly construed against taxpayers. Indiana Bell Telephone Co. v. Indiana Department of Revenue, 627 N.E. 2d 1386, Ind. Tax Court (1994).

Throughout the year, the taxpayer operates a hotel, gift shops, a general store, a refreshment stand and a farmhouse that sells prepared meals. The taxpayer provided the department a trial balance for 1998, 1999, and 2000. Each account was examined and it was determined from this list what accounts sales tax should have been collected on. The accounts included sales tax collected, innkeeper tax collected, exempt sales for which the taxpayer had exemption certificates for room rental at the Inn and the fifteen (15) percent of sales such as jams and jellies that were allowed as exempt from the General Store. Credit was also given for the sales tax remitted. These amounts were deducted from total taxable sales to arrive at additional taxable sales.

The taxpayer protested the sales tax imposed on its hotel room rentals, vending machine sales, consignment sales, penny machine sales, pony feeding machine sales, booth rentals and booth utility fees. The taxpayer argued that these sales were exempt from the imposition of the sales tax pursuant to the exemption granted not-for-profit corporations.

The Indiana Tax Court dealt with the not-for-profit exemptions from income taxes and sales tax in the case Raintree Friends Housing v. Indiana Department of Revenue, 667 N.E.2d 810 (Ind. Tax 1996). In this case, the Court found that a housing corporation that provided retirement housing qualified for the charitable purposes exemptions from the gross income tax, adjusted gross income tax, supplemental net income tax, and sales tax. Since the tax statute does not define the term "charitable," the Court looked to the definition found in Black's Law Dictionary 213 (5th ed. 1979) as follows:

Charity is broadly defined as:

A gift for, or institution engaged in, public benevolent purposes. [It is a}n attempt in good faith, spiritually, physically, intellectually, socially and economically to advance and benefit mankind in general, or those in need of advancement and benefit in particular, without regard to their ability to supply that need from other sources and without hope or expectation, if not with positive abnegation, of gain or profit by donor or by instrumentality of charity.

The taxpayer does provide the benevolent service of educating people about a turn of the century Indiana farming village. The education of individuals about the history of Indiana benefits all of society. Further, the taxpayer does not gain personally from the provision of these educational services. The taxpayer's activities meet the definition of charitable as did the retirement center in the Raintree Case. Therefore, the taxpayer's sales that are intended to and do provide this beneficial and educational service qualify for the not-for-profit charitable purpose exemption from the sales tax.

45 IAC 2.2-5-58 discusses the application of sales tax to retail sales made by qualified not-for-profit organizations as follows:

(a) The state gross retail tax shall not apply to sales by qualified not-for-profit organizations of tangible personal property of a kind designated and intended primarily for the educational, cultural or religious purposes of such qualified not-for-profit organization and not used in carrying out a private or proprietary business.

(b) The gross receipts from each sale of tangible personal property by a qualified not-for-profit organization are exempt under this rule only if:

(1) The nature of the property sold will further the educational, cultural or religious purposes of the organization; and

(2) The organization is not carrying on a private or proprietary business with respect to such sales.

(c) Furthering the educational, cultural or religious purpose. The primary purpose of the property sold must be to further the educational, cultural or religious purpose of the qualified not-for-profit organization.

-EXAMPLE-

(1) The sale of textbooks and supplies by a parochial, public or private not-for-profit school is exempt if made to students of the school in grades one through twelve. Such sales are primarily intended to further the educational purposes of the school.

(2) The sale of bibles, choir robes and prayer books by a religious organization is exempt. Such sales are primarily intended to further the religious purposes of the organization.

(3) The sale of meals by an art gallery is taxable. The meals are intended primarily for the convenience of visitors.

(The sale of textbooks and other educational materials by a secretarial school which is operated for profit is taxable. A profit-making educational enterprise is not a qualified not-for-profit organization under this regulation.

(5) The sale of greeting cards by a church bookstore is taxable. Such sales are not primarily intended to further the religious purposes of the organization.

Not-for-profit status as a charitable corporation does not automatically qualify a corporation for charitable purpose exemption on all sales. Paragraph 2 (c) limits the exemption to those sales that will further the charitable and educational purposes of the not-for-profit corporation.

Feeding the ponies gives visitors the opportunity to engage in an activity appropriate to the time period of taxpayer's facility. This active participation of a visitor in the time specific activity furthers the visitor's knowledge and understanding of a village and farm at the turn of the century. The vending machine sale of pony food is analogous to the exempt sales in example 2. This sale, upon which sales tax was imposed, meets the test of being directly related to the educational and charitable purposes of the taxpayer.

The taxed sources of revenue include income from refreshment stands, product sales in the general store, hotel revenues, product sales outside the general store but within the village and the penny machine. While handmade dolls, candles, vending machine revenues and other sales taxed by the department are appropriate to the taxpayer's setting, their sale does not further the educational not-for-profit purpose of the taxpayer. These activities are not substantially related to the taxpayer's educational purpose. Therefore, these protested sales are most like the taxable sales of greeting cards by a church bookstore listed in example 5. Except for the sales of pony feed, the taxpayer's sales upon which sales tax was imposed do not directly further the taxpayer's educational and charitable purposes.

FINDING

The taxpayer's protest is sustained as to the imposition of sales tax on the vending machine sales of pony food. The remainder of the taxpayer's protests to the imposition of sales tax is denied.

II. Sales and Use Tax-Capital Assets

DISCUSSION

During the tax period, the taxpayer had several structures constructed. No sales tax was paid on the materials used in these building projects. The audit assessed use tax on the materials used in the construction of these capital assets. The taxpayer protested the assessments on the materials used in the construction of the Chautauqua Pavilion, the fixtures in the Chatauqua Pavilion and the materials used in building a Comfort Station on the basis that these capital assets further the taxpayer's exempt purpose.

Indiana imposes an excise tax on tangible personal property stored, used, or consumed in Indiana unless the sales tax is paid on the transaction. IC 6-2.5-3-2 (a).

The application of the use tax as it pertains to materials used in construction projects is clarified at 45 IAC 2.2-3-8 as follows:

(a) In general, all sales of tangible personal property are taxable, and all sales of real property are not taxable. The conversion of tangible personal property into realty does not relieve the taxpayer from a liability for any owing and unpaid state gross retail tax or use tax with respect to such tangible personal property.

(b) All construction material purchased by a contractor is taxable either at the time of purchaser or if purchased exempt (or otherwise acquired exempt) upon disposition unless the ultimate recipient could have purchased it exempt.

Exemption from the use tax is granted to property used by qualified not-for-profit organizations under certain conditions at IC 6-2.5-5-25 (a) as follows:

Transactions involving tangible personal property or service are exempt from the state gross retail tax, if the person acquiring the property or service:

(a) is an organization which is granted a gross income tax exemption under IC 6-2.1-3-20, IC 6-2.1-3-21, or IC 6-2.1-3-22;

(2) primarily used the property or service to carry on or to raise money to carry on the not-for-profit purpose for which it receives the gross income tax exemption; and

(3) is not an organization operated predominantly for social purposes.

Sales Tax Division Information Bulletin #10 Revised February 10, 1986 deals with the exemption of not-for-profit corporation purchases for its own use from the use tax as follows:

1. In order to qualify for sales tax exemption on purchases as a not-for-profit organization the following conditions must prevail:

(a) The organization must be named or described in IC 6-2.1-3-19, 6-2.1-3-20, 6-2.1-3-21 or 6-2.1-3-22. This includes not-for-profit organizations organized and operated exclusively for one or more of the following purposes... Educational....

(c) The organization is not operated predominantly for social purposes.

(d) In order for a purchase by a not-for-profit organization to qualify for exemption, the article purchased must be used for the same purpose as that for which the organization is being exempted. Purchases for the private benefit of any member of the organization or for any other individual, such as meals or lodgings, are not eligible for exemption. Purchases used for social purposes are never exempt.

The Pavilion and Comfort Station were both built in the village area of the taxpayer's operations. The Pavilion is covered with a cement floor that can be enclosed in inclement weather. The Comfort Station is a restroom facility in the village. These two facilities clearly meet the first three cited requirements to qualify for exemption. The issue is whether or not they meet the fourth requirement, that they are used for the "same purpose as that for which the organization is being exempted." School and other groups use it as a gathering and meeting place while in the village to further their understanding of a turn of the century village. The Comfort Station is also utilized by persons engaged in educational activities in the village. The use of these facilities and their fixtures further the exempt purpose, education, of the taxpayer. Therefore, the tangible personal property used in the construction of the Pavilion and the Comfort Station is exempt from the use tax.

FINDING

The taxpayer's protest to the assessments of use tax on materials used in the construction of the Pavilion, its fixtures, and the Comfort Station is sustained.

III. Sales and Use Tax-Supplies

DISCUSSION

Indiana imposes an excise tax on tangible personal property stored, used, or consumed in Indiana unless the sales tax is paid on the transaction. IC 6-2.5-3-2 (a). Exemption from the use tax is granted to property used by qualified not-for-profit organizations under certain conditions at IC 6-2.5-5-25 (a) and Sales Tax Division Information Bulletin #10 Revised February 10, 1986 as cited in the discussion of the taxpayer's use tax liability on materials used in the construction of capital assets.

During the audit period, the taxpayer did not pay sales tax when it purchased supplies for the operation of the village, farmstead and inn. The department assessed use tax on the use of these supplies and the taxpayer protested this assessment.. The taxpayer divided its protest into four categories: 100% village use; 100% use for production of membership mailings, promotions and related activities; proportionate uses for the inn and the village; and 100% inn use. The taxpayer meets the first three criteria for exemption. The issue to be determined is whether the taxpayer's purchase of supplies in the various categories further the taxpayer's educational purpose.

The supplies used 100 % in the village and for membership needs include such items as repair of village buildings, rock for village roadways, an antique carousel, trash bags, admission wrist bands, and bunting for decorations. The use of these items helps to maintain the village and add to the historical and educational experience. The supplies used in the membership area add to the member's utilization of the village and educational experiences there. Supplies purchased for use in these categories are exempt from the use tax.

The inn is a related proprietary business that doesn't further the exempt educational experience of the visitors. As such, supplies used at the inn are subject to the imposition of the use tax.

The last category, supplies that were purchased in bulk and a portion used in the village and a portion used in the inn are subject to the use tax to the extent they were used in the inn for the non-exempt purpose.

FINDING

The taxpayer's protest to the imposition of use tax on supplies is sustained to the extent the supplies were used in the village or for membership purposes. The taxpayer's protest to the imposition of use tax on supplies used in the inn is denied.

IV. Tax Administration-Penalty

DISCUSSION

The taxpayer's final protest concerns the imposition of the ten percent (10%) negligence penalty pursuant to IC 6-8.1-10-2.1. Negligence is defined at 45 IAC 15-11-2(b) as "the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer." Negligence is to "be determined on a case-by-case basis according to the facts and circumstances of each taxpayer." Id.

IC 6-8.1-10-2.1(d) allows the department to waive the penalty upon a showing that the failure to pay the deficiency was based on "reasonable cause and not due to willful neglect." Departmental regulation 45 IAC 15-11-2 (c) requires that in order to establish "reasonable cause," the taxpayer must demonstrate that it "exercised ordinary business care and prudence in carrying out or failing to carry out a duty giving rise to the penalty imposed... " The taxpayer presented substantial evidence showing that it met this burden. The negligence penalty does not apply in this situation.

FINDING

The taxpayer's protest is sustained.

DEPARTMENT OF STATE REVENUE

0220020407.LOF

LETTER OF FINDINGS NUMBER: 02-0407
Corporate Income Tax
For the Years 1998-2000

NOTICE: Under IC 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUES

I. Gross Income Tax-Imposition of Tax

Authority: IC 6-8.1-5-1 (b), IC 6-2.1-2-2(a)(2), 45 IAC 1.1-2-5(f)(2).

The taxpayer protests the imposition of tax on certain income.

II. Tax Administration- Penalty

Authority: IC 6-8.1-10-2.1, 45 IAC 15-11-2.

The taxpayer protests the imposition of penalty.

STATEMENT OF FACTS

The taxpayer sold direct broadcasting services (DBS) to customers in Indiana. The DBS services consisted of programming that was first collected by an affiliate of the taxpayer from numerous providers at "uplink" centers in states other than Indiana. At the uplink centers, sophisticated computer hardware and software were used to encrypt and reformat the signals. The signal was then transmitted to various satellites owned by one of taxpayer's affiliates. The satellites transmitted the programming signals to customers throughout the Untied States, including Indiana. The taxpayer sold its services primarily through independent retailers. These retailers solicited orders from potential customers and obtained approval of such customers from sales centers located outside of Indiana. Upon acceptance of his or her order, the customer may personally install or utilize a contractor affiliated with the retailer to install the satellite receiver and "set top" box at the customer's residence. In such instances, the independent retailers received the necessary equipment directly from manufacturers. The taxpayer never acquired title to such equipment. In the recent past, the taxpayer sold its services directly to customers, complementing the sales by retailers. The taxpayer consummated all such direct sales from sales centers located outside Indiana. Until recently, all of the taxpayer's customers were required to purchase the equipment when they initiated programming service, and thereafter, retained title to the equipment. In approximately mid-1999, the taxpayer acquired the assets of a competitor, including that competitor's Indiana customers. Because certain of those customers had leased their equipment, the taxpayer allowed these customers to continue to lease the equipment after the acquisition. During the tax period, all the taxpayer's employees and offices were located outside Indiana. The taxpayer's records indicate that the company may have stored a small amount of inventory in Indiana in facilities owned by others.

After an audit, the Indiana Department of Revenue, hereinafter referred to as the "department," determined that there was no additional gross income tax liability for 1998 and assessed additional gross income tax, interest, and penalty for 1999 and 2000. The taxpayer protested the assessment and penalty. A hearing was held and this Letter of Findings results.

I. Gross Income Tax-Imposition of Tax

All tax assessments are presumed to be accurate and the taxpayer bears the burden of proving that any assessment is incorrect. IC 6-8.1-5-1 (b). Indiana imposes a gross income tax on the "taxable gross income derived from activities or businesses or any other sources within Indiana by a taxpayer who is not a resident or a domiciliary of Indiana." IC 6-2.1-2-2(a)(2). The taxpayer contends that since its gross income in 1999 and 2000 was derived in the same manner as the 1998 nontaxable income, the 1999 and 2000 income is also not subject to Indiana gross income tax.

The distinction lies in the regulation promulgated by the department and effective as of January 1, 1999 that clarifies the department's interpretation of the gross income tax for the telecommunications industry. The definition of "services performed within Indiana," for the telecommunications industry is found at 45 IAC 1.1-2-5(f)(2) as follows:

> ...sale of telecommunications, including telephone, telegraph, and non-cable television, if the telecommunications originate or terminate in Indiana and are charged to an Indiana address, and the charges are not taxable under the laws of another state.

The taxpayer and department agree that the taxpayer is selling telecommunications that are received in Indiana and charged to an Indiana address. The taxpayer contends, however, that the income received from Indiana is taxable under the laws of California and Colorado. To substantiate this contention, the taxpayer submitted copies of federal tax returns, California tax returns, and Colorado tax returns. Those returns indicate that in California and Colorado the taxpayer pays tax on less than fifty percent (50%) of its total federal income. This does not satisfy the taxpayer's burden of proving that it is properly subject to tax in California and Colorado on the income derived from its Indiana customers.

The taxpayer also argues that the regulation is unconstitutional. An administrative hearing is not the proper forum to determine the constitutionality of an administrative regulation.

FINDING

The taxpayer's protest is denied.

II. Tax Administration- Penalty

DISCUSSION

The taxpayer protests the imposition of the ten percent (10%) negligence penalty pursuant to IC 6-8.1-10-2.1. Indiana Regulation 45 IAC 15-11-2 (b) clarifies the standard for the imposition of the negligence penalty as follows:

> Negligence, on behalf of a taxpayer is defined as the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Negligence would result from a taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations. Ignorance of the listed tax laws, rules and/or regulations is treated as negligence. Further, failure to reach and follow instructions provided by the department is treated as negligence. Negligence shall be determined on a case by case basis according to the facts and circumstances of each taxpayer.

The taxpayer ignored the listed regulations and failed to report its income as required by said regulation. This failure to follow department's instructions constitutes negligence.

FINDING

The taxpayer's protest to the imposition of the penalty is denied.

DEPARTMENT OF STATE REVENUE

0220020408.LOF

LETTER OF FINDINGS NUMBER: 02-0408
Income Tax
For the Years 1996- 2000

NOTICE: Under IC 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUES

I. Income Tax-Unrelated Business Income

The taxpayer protests the assessment of tax on certain income.

Authority: 26 IRC Sec. 513, IC 6-8.1-5-1 (b), IC 6-2.1-2-2, IC 6-3-8-1, IC 6-3-2-1, IC 6-2.1-3-20(a), IC 6-3-2-2.8, IC 6-3-8-5, IC 6-2.1-3-23 and IC 6-3-2-3.1, Black's Law Dictionary 213 (5th ed. 1979), Indiana Bell Telephone Co. v. Indiana Department of Revenue, 627 N.E. 2d 1386, Ind. Tax Court (1994), Raintree Friends Housing v. Indiana Department of Revenue, 667 N.E.2d 810 (Ind. Tax 1996).

II. Tax Administration-Penalty

The taxpayer protests the assessment of the ten per cent penalty.

Authority: IC 6-8.1-10-2.1, 45 IAC 15-11-2(b).

STATEMENT OF FACTS

The taxpayer is a not-for-profit corporation that operates a living museum with demonstrations and a recreation of a turn-of-the-century village and farmstead. The corporation also operates a hotel adjacent to and affiliated with the living museum. After an audit, the Indiana Department of Revenue, hereinafter referred to as the "department," assessed additional gross income tax, adjusted gross income tax, supplemental net income tax, interest and penalty. The taxpayer protested the assessment and a hearing was held.

I. Income Tax-Unrelated Business Income

DISCUSSION

The taxpayer considered all of its income exempt from gross income tax and adjusted gross income tax due to its not-for-profit status. The department assessed gross and adjusted gross income tax on the portion of the taxpayer's income considered unrelated to its not-for-profit purpose.

IC 6-2.1-2-2 imposes gross income tax on "... the entire taxable gross income of a taxpayer who is a resident or domiciliary of Indiana..." IC 6-3-2-1 imposes adjusted gross income tax on... the adjusted gross income of every resident person,..." IC 6-3-8-1 imposes the supplemental net income tax on corporations. The taxpayer, as an Indiana corporation, is subject to these taxes unless a specific exemption is provided elsewhere in the law. All tax assessments are presumed to be accurate and the taxpayer bears the burden of proving that any assessment is incorrect. IC 6-8.1-5-1 (b). Further, it is established law that all tax exemptions must be strictly construed against taxpayers. Indiana Bell Telephone Co. v. Indiana Department of Revenue, 627 N.E. 2d 1386, Ind. Tax Court (1994).

IC 6-2.1-3-20(a) and IC 6-3-2-2.8 provide exemptions from the gross income tax and adjusted gross income tax for the income of a qualified not-for profit corporation derived from the corporation's activities promoting the corporation's charitable purpose. Pursuant to IC 6-3-8-5, the supplemental net income tax has the same exemptions as the adjusted gross income tax. The Indiana Tax Court dealt with these exemptions in the case Raintree Friends Housing v. Indiana Department of Revenue, 667 N.E.2d 810 (Ind. Tax 1996). In this case, the Court found that a housing corporation that provided retirement housing qualified for the charitable purposes exemptions from the gross income tax, adjusted gross income tax, and supplemental net income tax. Since the tax statute does not define the term "charitable," the Court looked to the definition found in Black's Law Dictionary 213 (5th ed. 1979) as follows:

> Charity is broadly defined as:
>
> A gift for, or institution engaged in, public benevolent purposes. [It is a}n attempt in good faith, spiritually, physically, intellectually, socially and economically to advance and benefit mankind in general, or those in need of advancement and benefit in particular, without regard to their ability to supply that need from other sources and without hope or expectation, if not with positive abnegation, of gain or profit by donor or by instrumentality of charity.

The taxpayer does provide the benevolent service of educating people about a turn of the century Indiana farming village. Individuals learning about the history of Indiana benefits all of society. Further, the taxpayer does not gain personally from the provision of these educational services. The taxpayer's activities meet the definition of charitable as did the retirement center in the Raintree Case. Therefore, the taxpayer's income derived from activities directly involved in providing this beneficial and educational service qualify for the charitable purpose exemption.

Not-for-profit status as a charitable corporation, however, does not automatically qualify a corporation for the charitable purpose exemption on all income. The exemptions are limited by IC 6-2.1-3-23 and IC 6-3-2-3.1 respectively that impose gross and adjusted gross income tax on a charitable not-for-profit's unrelated business income as defined in Section 513 of the Internal Revenue Code. The department's assessment of gross and adjusted gross income tax was guided by the provisions of 26 IRC Sec. 513 as follows:

> ... The term "unrelated trade or business" means, in the case of any organization subject to the tax imposed by section 511, any trade or business the conduct of which is not substantially related (aside from the need of such organization for income or funds or the use it makes of the profits derived) to the exercise or performance by such organization of its charitable, educational, or other purpose or function constituting the basis for its exemption under section 501.

The department agreed with the taxpayer that the village income from general admission charges, blacksmithing, and special events is directly related to and furthers the historical and educational purpose of the taxpayer. The horse feed vending machine also furthers the taxpayer's charitable purpose in that the feeding of horses is an activity routinely engaged in during the turn of the century and it is beneficial and educational for visitors to engage in that historical experience. However, the department considered several of the activities and sources of income as unrelated to the primary charitable, educational purpose of the taxpayer and assessed gross income tax, adjusted gross income tax and supplemental net income tax on the proceeds from these activities. The taxed sources of revenue include income from refreshment stands, product sales in the general store, hotel revenues, product sales outside the general store but within the village and the penny machine. These activities are not substantially related to the taxpayer's educational purpose. Therefore, this income does not qualify for exemption.

FINDING

The taxpayer's protest to the tax assessed on the income from the horse feed machine is sustained. The remainder of the taxpayer's protest is denied.

II. Tax Administration-Penalty

DISCUSSION

The taxpayer also protests the imposition of the ten percent (10%) negligence penalty pursuant to IC 6-8.1-10-2.1. Negligence is defined at 45 IAC 15-11-2(b) as "the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer." Negligence is to "be determined on a case-by-case basis according to the facts and circumstances of each taxpayer." Id.

IC 6-8.1-10-2.1(d) allows the department to waive the penalty upon a showing that the failure to pay the deficiency was based on "reasonable cause and not due to willful neglect." Departmental regulation 45 IAC 15-11-2 (c) requires that in order to establish "reasonable cause," the taxpayer must demonstrate that it "exercised ordinary business care and prudence in carrying out or failing to carry out a duty giving rise to the penalty imposed... " The taxpayer presented substantial evidence showing that it met this burden. The negligence penalty does not apply in this situation.

FINDING

The taxpayer's protest is sustained.

DEPARTMENT OF STATE REVENUE

04-20020460.LOF

LETTER OF FINDINGS NUMBER: 02-0460
SALES/USE TAX
For Year 1998

NOTICE: Under Ind. Code § 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUES

I. Sales & Use Tax – Manufacturing Equipment

Authority: IC 6-2.5-5-3(b); General Motors Corp. v. Indiana Department of Revenue, 578 N.E.2d 399 (Ind. Tax Ct. 1991).

Taxpayer claims that cranes purchased for the erection of houses are manufacturing equipment that are eligible for exemption from imposition of sales and use tax.

II. Tax Administration – Credit for Prior Tax Paid

Taxpayer requests credit for a Michigan sale for which Indiana use tax has already been paid.

STATEMENT OF FACTS

Taxpayer is engaged in the manufacture and the construction of prefabricated houses. It builds houses it has manufactured along with houses that have been manufactured by other house manufacturers. It constructs panelized walls, cornices, soffets, and trusses for the roof and rafters. It sells doors and windows for which it collects sales taxes, as it does when it works for other house builders.

In 1998, taxpayer purchased two trucks on which cranes were mounted. The cranes are used to hoist the trusses, cornices, soffets, and wall panels so that they can be assembled on the building site in the construction of a house.

DISCUSSION

I. Sales & Use Tax – Manufacturing Equipment

Taxpayer believes that, because the cranes are used in the production of homes, the purchase of the cranes was exempt from the imposition of sales and use tax under IC 6-2.5-5-3(b), which reads:

> Transactions involving manufacturing machinery, tools, and equipment 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.

Because the cranes are not utilized in the manufacturing of the components of the houses, but are used in the construction of the houses themselves, the issue then becomes whether or not a house is tangible personal property. Clearly it is not.

Houses are real property. Because taxpayer builds buildings situated on land located in Indiana, it uses its cranes to makes improvements to realty. Therefore, taxpayer is not eligible for the manufacturing exemption to the sales and use tax imposed on the purchase of the cranes.

Taxpayer argues that its situation is governed by the case of General Motors Corp. v. Indiana Department of Revenue, 578 N.E.2d 399 (Ind. Tax Ct. 1991). In General Motors, the taxpayer was successful in claiming the exemption for packing material that was used to ship automobile parts from its manufacturing facility to its assembly plant, where the finished product (an automobile) was assembled. The taxpayer asserts that it is engaged in an integrated production process that ends when a finished marketable product is produced. By undertaking the manufacture of the components of the house that are incorporated into the finished product, an argument could be made that the entire process, including the operation of the cranes to put the components into place, is an integrated production process within the mandate of General Motors.

Taxpayer in General Motors was involved in the manufacture of automobiles, which are tangible personal property. Once again, because taxpayer is making improvements to realty that fall outside of the scope of the manufacturing exemption of IC 6-2.5-5-3(b), taxpayer is not entitled to relief.

FINDINGS

The taxpayer is respectfully denied.

II. Tax Administration – Credit for Prior Tax Paid

Taxpayer claims that its only notice of this credit was in a report from the auditor. Taxpayer has submitted corroborating documentation to the Department. However, the auditor's list of adjustments shows that credit for the sale to Michigan has already been given.

FINDINGS

The taxpayer is respectfully denied.

DEPARTMENT OF STATE REVENUE

02-20020498.LOF

LETTER OF FINDINGS NUMBER: 02-0498
ADJUSTED GROSS INCOME TAX
FOR THE YEARS 1998, 1999, 2000

NOTICE: Under IC § 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUES

I. Adjusted Gross Income Tax-Throwback sales

Authority: IC § 6-3-1-3.5; IC § 6-3-2-1; IC § 6-3-2-2; IC § 6-8.1-5-1(b); 45 IAC 1-1-119; 45 IAC 3.1-1-53; 45 IAC 3.1-1-64; Public Law 86-272 (15 USCS § 381); Wisconsin Department of Revenue v. William Wrigley, Jr. Co., 505 U.S. 214; 112 S. Ct. 2447; 120 L.Ed.2d 174 (1992)

Taxpayer protests the Department's assessment of additional gross income tax on sales the audit determined should be thrown back to Indiana.

II. Tax Administration-Reliance and retroactivity

Authority: 45 IAC 15-3-2; Tax Policy Directive #9

Taxpayer protests the Department's assessment of additional adjusted gross income tax on sales the audit determined should be thrown back to Indiana. A prior Letter of Findings for this taxpayer had determined sufficient nexus existed to prevent throwback sales.

III. Adjusted Gross Income Tax-Numerator of property factor

Authority: 45 IAC 3.1-1-44.

Taxpayer protests the change to the denominator of the property factor without a concomitant change in the numerator, alleging that such failure to change the numerator distorts taxpayer's tax liability.

STATEMENT OF FACTS

The taxpayer distributes electronic equipment throughout the United States, Canada, and Latin America. In addition to distribution activities, taxpayer is also responsible for marketing and servicing its products in North and South America. The taxpayer has three divisions: Branded products, original equipment manufacturer products (OEM), and customer service and support. The branded products division offers products such as printers, scanners, and personal computers. The OEM division supplies a wide range of OEM products throughout North, Central, and South America. The products marketed by OEM include integrated chips, floppy disks, memory cards, and power supplies. The customer service and support division provides support for customers both before and after the sale. Customer support handles customer relation issues, warranty administration, and technical assistance.

The taxpayer agrees that the Department's adjustment of adjusted gross income tax for state income taxes, property taxes, and charitable contributions was correct. The taxpayer also agrees to the property factor adjustment for rent expenses and inventory. The only issue still in protest is whether or not the adjustment for throwback sales was proper. Taxpayer was sustained in a previous Letter of Findings on the same issue.

Additional facts will be provided below as necessary.

I. Adjusted Gross Income Tax-Throwback sales

DISCUSSION

Under IC § 6-8.1-5-1(b), a "notice of proposed assessment is prima facie evidence that the department's claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made."

IC § 6-3-1-3.5, subsection (b), defines "adjusted gross income" for corporations as "the same as 'taxable income' (as defined in Section 63 of the Internal Revenue Code)" with four adjustments not at issue here. IC § 6-3-2-1 establishes the rate of the tax imposed on adjusted gross income; IC § 6-3-2-2 defines "adjusted gross income derived from sources in Indiana." Subsection (n) states that a "taxpayer is taxable in another state if:

(1) in that state the taxpayer is subject to a net income tax, a franchise tax measured by net income, a franchise tax for the privilege of doing business, or a corporate stock tax; or

(2) that state has jurisdiction to subject the taxpayer to a net income tax regardless of whether, in fact, the state does or does not.

With respect to Indiana's adjusted gross income tax statute, 45 IAC 3.1-1-53 provides in pertinent part:

When Sales of Tangible Personal Property Are in This State. Gross receipts from the sales of tangible personal property (except sales to the United States Government—See Regulation 6-3-2-2(e)(050) *[45 IAC 3.1-1-54]* are in this state: (a) if the property is delivered or shipped to a purchaser within this state regardless of the F.O.B. point or other conditions of sales; or

(b) if the property is shipped from an office, store, factory, or other place of storage in this state, and the taxpayer is not taxable in the state of the purchaser.

Subsection (5) provides in pertinent part:

If the taxpayer is not taxable in the state of the purchaser, the sale is attributed to this state if the property is shipped from an office, store, warehouse, factory, or other place of storage in this state. Such sale is termed a "Throwback" sale.

45 IAC 3.1-1-64 defines "taxable in another state" as "when such state has jurisdiction to subject it to a net income tax. This test applies if the taxpayer's business activities are sufficient to give the state jurisdiction to impose a net income tax under the Constitution and laws of the United States. **Jurisdiction to tax is not present where the state is prohibited from imposing the tax by reason of the provision of Public Law 86-272, 15 U.S.C.A. § 381-385.**" **(Emphasis added).**

Public Law 86-272 provides in pertinent part:

No State... shall have power to imposes, for any taxable year..., a net income tax on the income derived within such State by any person from interstate commerce if the only business activities within such State by or on behalf of such person during such taxable year are either, or both, of the following:

(1) the solicitation of orders by such person, or his representative, in such State for sales of tangible personal property, which orders are sent outside the State for approval or rejection, and, if approved, are filled by shipment or delivery from a point outside the State; and

(2) the solicitation of orders by such person, or his representative, in such State in the name of or for the benefit of a prospective customer of such person, if orders by such customer to such person to enable such customer to fill orders resulting from such solicitation are orders described in paragraph (1)

15 USCS § 381(a).

The United States Supreme Court, in Wisconsin Department of Revenue v. William Wrigley, Jr. Co., 505 U.S. 214, 112 S.Ct. 2447, 120 L.Ed.2d 174 (1992), construed the above statutory language to hold that a business's in-state activities could subject it to that state's taxing jurisdiction if those activities involved more than the "mere solicitation of orders" and more than de minimis contact in connection with the solicitation of orders. The Court set forth a method of analysis by which to determine whether or not a business's in-state activities cause it to lose the tax immunity 15 USCS § 381 confers: "Section 381 was designed to increase... the connection that a company could have with a State before subjecting itself to tax. Accordingly, whether in-state activity other than 'solicitation of orders' is sufficiently de minimis to avoid loss of the tax immunity conferred by § 381 depends upon whether that activity establishes a nontrivial additional connection with the taxing State." Unless activities are "ancillary to" ordering product or de minimis, then a business can be taxed in another jurisdiction without that jurisdiction violating § 381.

The previous LOF issued to the taxpayer stated that it was not required to "throwback" sales to the numerator of the sales factor in its consolidated return because the taxpayer had nexus in the states where the sales were made. The previous LOF did not specifically address the significance of the fact that the sales at issue were made by a member of the affiliated group that did not have nexus in the states at issue, but another member of the affiliated group, the parent company, did have nexus in those states. Electing to file a consolidated return does not change the rules for attributing sales to the numerator of the sales factor. Since the attribution of such sales is done prior to the aggregation of those sales into the consolidated factor, only those tax attributes of the member are relevant.

The audit report assumes that the previous LOF was based on a unitary analysis relating to a combined return. Whether this is true or not, it is incorrect and irrelevant. The taxpayer has not petitioned to file a combined return and the Department is not attempting to require such a return. Therefore, concepts and analysis in making such a determination in the context of a combined filing are inapplicable. The previous LOF was incorrect and the taxpayer is required to throwback those sales made by members of the affiliated group into states in which the member did not have nexus, even though another member of the group did have nexus in that state.

FINDING

The taxpayer's protest concerning the issue of throwback sales is denied.

II. Adjusted Gross Income Tax-Reliance, and retroactivity

DISCUSSION

Taxpayer's protest is based on the extent to which taxpayer may rely on a Departmental Ruling issued as to its particular set of facts and circumstances, and the extent to which the Department may retroactively change the application of a prior Ruling involving the same taxpayer, facts, and issues. The auditor stated in the Audit Summary for tax years 1998, 1999 and 2000 that there have been no changes in the facts since the issuance of the prior Letter of Findings. That Letter of Findings did not, as the auditor alleged, rely on case law that has since been discredited. There is no mention of cases explicating unitary filings, i.e., Finnegan. The prior Letter relied on statutes, regulations, and a United States Supreme Court case, Wisconsin Department of Revenue v. William Wrigley, Jr. Co., 505 U.S. 214; 112 S. Ct. 2447; 120 L.Ed.2d 174 (1992); this case is still good law. The prior Letter did not rely on a unitary analysis. Taxpayer has always filed consolidated tax returns. The statutes and regulations have not changed. Therefore, the analysis in the prior Letter of Findings is still an applicable final ruling by the Department.

The Department's statutes, regulations, and policy directives set forth strict limits on the Department's ability to retroactively change the application of a prior ruling involving the same taxpayer, the same set of facts and issues. The standards are set forth generally at 45 IAC 15-3-2. 45 IAC 15-3-2(d)(3) specifically sets forth the extent to which a taxpayer may rely on a prior ruling:

> (3) In respect to rulings issued by the department, based on a particular fact situation which may affect the tax liability of the taxpayer, only the taxpayer to whom the ruling was issued is entitled to rely on it. Since the department publicizes summaries of rulings which it makes, other taxpayers with substantially identical factual situations may rely on the publicized rulings for informational purposes in preparing returns and making tax decisions. Generally, department publications may be relied on by any taxpayer if their fact situation does not vary substantially from those facts upon which the department based its publication. If a taxpayer relies on a publicized ruling and the department discovers, upon examination, that the fact situation of the particular taxpayer is different in any material respect from that situation on which the original ruling was issued, the ruling will afford the taxpayer no protection and the examination will apply to all open years under the statutes. Letters of findings that are issued by the department, as a result of protested assessments, are to be considered rulings of the department as applied to the particular facts protested.

Pursuant to the two most important statements above, i.e., "only the taxpayer to whom the ruling was issued is entitled to rely on it," and "[l]etters of findings that are issued by the department, as a result of protested assessments, are to be considered rulings of the department as applied to the particular facts protested," taxpayer was entitled to rely on the previous Letter of Findings in continuing to file consolidated returns that did not throw back sales to Indiana.

Tax policy directive #9, effective since December 1995, sets forth the time limits on reliance: "a departmental ruling will automatically become null and void and no longer of any effect for tax years beginning after December 31 of the sixth (6^{th}) year after the year in which the ruling is issued." In conjunction with 45 IAC 15-3-2(c) and (d)(2), Tax Policy Directive # 9 states in relevant part:

> A ruling may become null and void prior to the end of the six (6) year period given above under the appropriate circumstances. For instance, a change in the Department's position, a change in the tax laws, or a change due to a final court decision may cause a revocation of a ruling. The revocation of the ruling will be effective on the following dates:
>
> (1) The date of the notice sent by the Department to the taxpayer to whom the ruling was issued that the Department's position has changed.
>
> (2) The effective date of a change in the statutory law or a change in the rules interpreting the statutory law.
>
> (3) The beginning date of the open tax year to which a final court decision applies.

Revocations can be applied retroactively "under the appropriate circumstances." Such revocations are made on a case-by-case-basis "taking into account all relevant facts and circumstances." The following circumstances are not all-inclusive: misstatement or omission of material facts by a taxpayer or his representative in the original request for a ruling; the facts, as developed after the ruling, turn out to be materially different from the facts on which the department based its original ruling; taxpayer's lack of good faith; incorrect interpretation of the law. Under the foregoing circumstances, a ruling "would be revoked retroactively and treated as if it had never been issued."

45 IAC 15-3-2(c) and (d)(2) provide in relevant part:

> (c) As a general rule, the modification of a rule will not be applied retroactively. If a rule is later found to be inconsistent with changes in the law by statute or by decisions of a court of precedence, the rule will not protect a taxpayer in the same or subsequent years once the rule has been determined to be inconsistent with the law.
>
> (d) (2) As a general rule, the revocation or modification of a ruling will not be applied retroactively with respect to the taxpayer to whom the ruling was originally issued or to a taxpayer whose tax liability was directly involved in such a ruling.

The regulation then goes on to repeat what can be found in Tax policy directive #9. Both the taxpayer in the present taxpayer protest and the auditor in the current audit state with authority that none of the factors set forth for retroactive application appear in the current protest.

It is the Department's considered decision that taxpayer was entitled to rely on the prior Letter of Findings for the entire six (6) years provided for by Regulation and Tax Policy Directive #9, until the publication of this Letter of Findings which finds that the Taxpayer has incorrectly interpreted the law for reasons set forth in Issue I.

FINDING

Taxpayer's protest concerning the assessment of additional adjusted gross income tax under Indiana's throw back rule is sustained because taxpayer was entitled to rely on a prior Letter of Findings which addressed the same set of facts and issues in a previous audit.

III. Adjusted Gross Income Tax-Numerator of the property factor

DISCUSSION

Taxpayer protests an alleged lack of consistency in the application of the adjustment for inventory obsolescence, and requests that the numerator of the Indiana property factor be adjusted on a proportionate basis to the adjustment relating to obsolete inventory made to the denominator of the property factor. The auditor relied on 45 IAC 3.1-1-44 to make an adjustment to the denominator,

and stated that during the audit, taxpayer did not provide documents showing that taxpayer's calculations for its Indiana inventory included obsolescence. The auditor relied on the valuation method taxpayer used for Federal income tax purposes as the proper valuation to be used in the property factor.

45 IAC 3.1-1-44 provides that " [i]nventory is included in the property factor in accordance with the valuation method used by the taxpayer for Federal income tax purposes." Although taxpayer did not provide documentation to support its position during the audit, the suggestions made in taxpayer's protest letter and at the hearing indicate that the property factor should be re-examined:

> For the tax period in question (taxpayer) utilized the cost basis for purposes of determining the value of inventory used to calculate its Indiana property factor. During the audit, the auditor adjusted the denominator of (taxpayer's) property factor to reflect inventory obsolescence utilized to calculate inventory values for purposes of the Federal 1120 Schedule L Balance Sheet (see Audit Report, page 14). (Taxpayer agrees with the auditor's adjustment to the denominator of the property factor to reflect the their federal inventory valuation in accordance with 45 IAC 3.1-1-44. The inventory obsolescence adjustment relates directly to inventory maintained in (taxpayer's) Indiana warehouse. In doing so, the auditor adjusted the denominator of (taxpayer's) property factor to appropriately consider inventory obsolescence so as to tie the denominator of the property factor to the total inventory value reflected on the Federal 1120 Schedule L Balance Sheet. However, the auditor did not adjust the numerator of the property factor to reflect obsolescence related to inventory located in Indiana. This would result in an apportionment percentage of more than 100% as it relates to inventory for the company if all states' factors were totaled.

Subsequent to the hearing, taxpayer provided a type of balance sheet analysis of the property factor issue that supports another look at the original analysis.

FINDING

Taxpayer's protest is sustained subject to review by Audit.

DEPARTMENT OF STATE REVENUE

02-20030017.LOF

LETTER OF FINDINGS NUMBER: 03-0017
INCOME TAX
For Year 1998

NOTICE: Under Ind. Code § 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUES

I. Gross Income Tax—Agency exemption

Authority: Lindemann v. Wood, No. 49T10-0204-TA-39, 2002 Ind. Tax LEXIS 81 (Ind. Tax Ct. 2002); 45 IAC 15-3-2(d)(3).

Taxpayer, as manager of a hotel chain, protests the imposition of gross income tax on transfers of money between the hotels' owners and taxpayer's employees who work in the hotels, claiming an agency exemption exists.

STATEMENT OF FACTS

Taxpayer is a corporation that, at the request of various hotel owners (hereinafter "owners"), manages all of the operations of the hotel for the account of the owner, including the hiring and management of the hotel's employees (hereinafter "employees"), on behalf of the owners. At various times throughout the audit period, taxpayer disbursed funds to the employees from accounts that the owners had with taxpayer. These disbursements covered the payroll expenses associated with the employees who work for the hotel. These employees work for taxpayer; taxpayer is their technical employer. Income tax was imposed on the receipt of funds by taxpayer from the owners when those funds were later disbursed to compensate taxpayer's employees as payroll expenses.

The owners furnish and own all of the tools, materials, and equipment the employees used in performing their jobs. The owners also incur the cost of training the employees. Taxpayer disburses salaries and benefits to the employees and remits payroll taxes to federal and state governments using the owners' funds.

All funds that are derived from the operation of the hotel are deposited in accounts under the owners' names, and all disbursements, including payroll, are made from these funds. These accounts are in the name of the owners and are subject to claims against them by owners' creditors. If revenues are insufficient to pay for the hotel's expenses, including payroll, the owners provide additional working capital to sustain hotel operations.

Journal entries record payroll disbursements sufficient to offset dollar-for-dollar the payroll disbursements shown on taxpayer's books, and taxpayer notes on its books that it is passing along directly to the employees the amounts advanced to taxpayer by the owners to cover payroll expenses. All federal and state employment credits flow back to the owners.

DISCUSSION

I. Gross Income Tax—Agency exemption

Taxpayer relies on two legal theories in its assertion that the funds were transferred to taxpayer's employees by taxpayer as an agent for the hotels' owners, and therefore not subject to income tax. The first is that the facts at hand fall squarely within the ambit of an unpublished Tax Court case. The second is that the facts at hand fall squarely within the ambit of a previously written Supplemental Letter of Findings by the Department. Both cases found in favor of taxpayer's position.

First, as is the case with all unreported Tax Court decisions, the decision in the case referenced by taxpayer has no weight as binding precedent. According to Rule 17 of the Indiana Tax Court:

> All judgments shall be incorporated in written memorandum decisions by the court. Unless specifically designated "For Publication," such written memorandum decisions shall not be published and shall not be regarded as precedent nor cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case. Judgment shall be subject to review as prescribed by relevant Indiana rules and statutes.

The Tax Court has declared as much in Lindemann v. Wood, No. 49T10-0204-TA-39, 2002 Ind. Tax LEXIS 81 (Ind. Tax Ct. 2002). Because the case is an unpublished case, the Department declines taxpayer's request to apply its analysis to the case at hand.

Second, the Department also declines taxpayer's invitation to apply directly the reasoning in its former Supplemental Letter of Findings 95-0265 IT. As is the case with all tax protests, no two protests are created equal. Letters of Findings that are issued by the department, as a result of protested assessments, are to be considered rulings of the department as applied to the particular facts protested. 45 IAC 15-3-2(d)(3). Therefore, Letters of Findings are unique to each individual taxpayer and are of no precedential value to any other taxpayer's protest.

However, taxpayer's argument may clearly be determined through its submissions to the Department and through the language of the legal determinations upon which taxpayer wishes the Department to base its determination.

Taxpayer believes it acted as an agent when it transferred funds from the owners to taxpayer's employees as salaries. As one of the aspects of showing that the agency relationship exists, taxpayer must show that it does not receive any beneficial interest in the funds as they are transferred through taxpayer from the owners to the employees. Taxpayer insists, and has shown, that the funds that flow through match dollar for dollar the payroll expenses that the employees accrue. And while this is some indicia that taxpayer receives no benefit from paying the owners' expenses from the owners own accounts, to say that taxpayer has no beneficial interest in the funds would dramatically undermine the importance of the employer/employee relationship between taxpayer and the hotels' employees.

Taxpayer freely admits that the employees are its own, although it contends that without the owners, taxpayer would have no need for the employees. Taxpayer also admits that it has the power to hire and fire these employees at will, although taxpayer suggests that it does so only with the owners' best interests in mind. And while taxpayer has shown some evidence that the employees understand that they are working for the benefit of the owners, it cannot be disregarded the extent to which employees' efforts benefit taxpayer.

Part of taxpayer's submissions to the Department includes a management agreement between one of the owners and taxpayer. This agreement details the arrangement between owners and taxpayer and outlines the method of reimbursement of taxpayer by owners. This "management fee" structure clearly demonstrates how taxpayer takes a beneficial interest in both the performance of its employees and their compensation.

The "management fee" structure is made up of two parts: The Base Management Fee and the Incentive Management Fee. The Base Management Fee represents a percentage of the gross revenues, which flow from the hotels to their respective owners. These gross revenues are generated through a variety of manners, including (but not limited to) the renting of rooms, offices, and meeting space. For these revenues to be generated, customers must be willing to pay for them. Therefore, customer satisfaction plays a large role in the generation of gross revenues. If hotels' employees do not perform their jobs satisfactorily, customers will not do business with the hotels, and gross revenues will not be generated for the owners. Subsequently, taxpayer's Base Management Fee will suffer. Because taxpayer has a financial interest in the revenues it generates through its employees, and because taxpayer has the power to terminate any employee not performing his job to taxpayer's satisfaction, taxpayer has a beneficial interest in the conduct of its employees.

The Incentive Management Fee takes it one step further. Here, taxpayer receives a percentage of Available Cash Flow, at an amount not to exceed the Operating Profit for the fiscal year. Available Cash Flow, therefore, to some degree, is a function of Operating Profit. Operating Profit is defined as gross revenues minus certain enumerated deductions. Among these deductions are "[t]he cost of sales including salaries, wages, employee benefits, …" Here it is clearly demonstrated how employee wages affect taxpayer's compensation, because as taxpayer has a direct power over the number of employees and their salaries, it can manipulate its own Incentive Management Fee by increasing Operating Profit. This demonstrates how taxpayer receives a beneficial interest in its employees, regardless of who their technical employer is.

FINDINGS

The taxpayer is respectfully denied.

DEPARTMENT OF STATE REVENUE

02-20030032.LOF

LETTER OF FINDINGS NUMBER: 03-0032
INCOME TAX
For Years 1994, 1995, and 1996

NOTICE: Under Ind. Code § 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUES

I. Gross Income Tax—Agency exemption

Authority: Lindemann v. Wood, No. 49T10-0204-TA-39, 2002 Ind. Tax LEXIS 81 (Ind. Tax Ct. 2002); 45 IAC 15-3-2(d)(3).

Taxpayer, as manager of a hotel chain, protests the imposition of gross income tax on transfers of money between the hotels' owners and taxpayer's employees who work in the hotels, claiming an agency exemption exists.

II. Gross Income Tax—Intercompany Royalties

Authority: IC 6-2.1-4-6

Taxpayer claims that the auditor has erroneously imposed gross income tax at the high rate on royalties paid within the company. As such, taxpayer believes these royalties should not subject taxpayer to gross income tax.

STATEMENT OF FACTS

Taxpayer is a corporation that, at the request of various hotel owners (hereinafter "owners"), manages all of the operations of the hotel for the account of the owner, including the hiring and management of the hotel's employees (hereinafter "employees"), on behalf of the owners. At various times throughout the audit period, taxpayer disbursed funds to the employees from accounts that the owners had with taxpayer. These disbursements covered the payroll expenses associated with the employees who work for the hotel. These employees work for taxpayer; taxpayer is their technical employer. Income tax was imposed on the receipt of funds by taxpayer from the owners when those funds were later disbursed to compensate taxpayer's employees as payroll expenses.

The owners furnish and own all of the tools, materials, and equipment the employees used in performing their jobs. The owners also incur the cost of training the employees. Taxpayer disburses salaries and benefits to the employees and remits payroll taxes to federal and state governments using the owners' funds.

All funds that are derived from the operation of the hotel are deposited in accounts under the owners' names, and all disbursements, including payroll, are made from these funds. These accounts are in the name of the owners and are subject to claims against them by owners' creditors. If revenues are insufficient to pay for the hotel's expenses, including payroll, the owners provide additional working capital to sustain hotel operations.

Journal entries record payroll disbursements sufficient to offset dollar-for-dollar the payroll disbursements shown on taxpayer's books, and taxpayer notes on its books that it is passing along directly to the employees the amounts advanced to taxpayer by the owners to cover payroll expenses. All federal and state employment credits flow back to the owners.

DISCUSSION

I. Gross Income Tax—Agency exemption

Taxpayer relies on two legal theories in its assertion that the funds were transferred to taxpayer's employees by taxpayer as an agent for the hotels' owners, and therefore not subject to income tax. The first is that the facts at hand fall squarely within the ambit of an unreported Tax Court opinion. The second is that the facts at hand fall squarely within the ambit of a previously written Supplemental Letter of Findings by the Department. Both cases found in favor of taxpayer's position.

First, as is the case with all unreported Tax Court decisions, the decision referenced by taxpayer has no weight as binding precedent. According to Rule 17 of the Indiana Tax Court:

> All judgments shall be incorporated in written memorandum decisions by the court. Unless specifically designated "For Publication," such written memorandum decisions shall not be published and shall not be regarded as precedent nor cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case. Judgment shall be subject to review as prescribed by relevant Indiana rules and statutes.

The Tax Court has declared as much in Lindemann v. Wood, No. 49T10-0204-TA-39, 2002 Ind. Tax LEXIS 81 (Ind. Tax Ct. 2002). Because the case cited is an unpublished case, the Department declined taxpayer's request to apply its analysis to the case at hand.

Second, the Department also declines taxpayer's invitation to apply directly the reasoning in its former Supplemental Letter of Findings. As is the case with all tax protests, no two protests are created equal. Letters of Findings that are issued by the department, as a result of protested assessments, are to be considered rulings of the department as applied to the particular facts protested. 45 IAC 15-3-2(d)(3). Therefore, Letters of Findings are unique to each individual taxpayer and are of no precedential value to any other taxpayer's protest.

However, taxpayer's argument may clearly be determined through its submissions to the Department and through the language of the legal determinations upon which taxpayer wishes the Department to base its determination.

Taxpayer believes it acted as an agent when it transferred funds from the owners to taxpayer's employees as salaries. As one of the aspects of showing that the agency relationship exists, taxpayer must show that it does not receive any beneficial interest in the funds as they are transferred through taxpayer from the owners to the employees. Taxpayer insists, and has shown, that the funds that flow through match dollar for dollar the payroll expenses that the employees accrue. And while this is some indicia that taxpayer receives no benefit from paying the owners' expenses from the owners own accounts, to say that taxpayer has no beneficial interest in the funds would dramatically undermine the importance of the employer/employee relationship between taxpayer and the hotels' employees.

Taxpayer freely admits that the employees are its own, although it contends that without the owners, taxpayer would have no need for the employees. Taxpayer also admits that it has the power to hire and fire these employees at will, although taxpayer suggests that it does so only with the owners' best interests in mind. And while taxpayer has shown some evidence that the employees understand that they are working for the benefit of the owners, it cannot be disregarded the extent to which employees' efforts benefit taxpayer.

Part of taxpayer's submissions to the Department includes a management agreement between one of the owners and taxpayer. This agreement details the arrangement between owners and taxpayer and outlines the method of reimbursement of taxpayer by owners. This "management fee" structure clearly demonstrates how taxpayer takes a beneficial interest in both the performance of its employees and their compensation.

The "management fee" structure is made up of two parts: The Base Management Fee and the Incentive Management Fee. The Base Management Fee represents a percentage of the gross revenues, which flow from the hotels to their respective owners. These gross revenues are generated through a variety of manners, including (but not limited to) the renting of rooms, offices, and meeting space. For these revenues to be generated, customers must be willing to pay for them. Therefore, customer satisfaction plays a large role in the generation of gross revenues. If hotels' employees do not perform their jobs satisfactorily, customers will not do business with the hotels, and gross revenues will not be generated for the owners. Subsequently, taxpayer's Base Management Fee will suffer. Because taxpayer has a financial interest in the revenues it generates through its employees, and because taxpayer has the power to terminate any employee not performing his job to taxpayer's satisfaction, taxpayer has a beneficial interest in the conduct of its employees.

The Incentive Management Fee takes it one step further. Here, taxpayer receives a percentage of Available Cash Flow, at an amount not to exceed the Operating Profit for the fiscal year. Available Cash Flow, therefore, to some degree, is a function of Operating Profit. Operating Profit is defined as gross revenues minus certain enumerated deductions. Among these deductions are "[t]he cost of sales including salaries, wages, employee benefits, …" Here it is clearly demonstrated how employee wages affect taxpayer's compensation, because as taxpayer has a direct power over the number of employees and their salaries, it can manipulate its own Incentive Management Fee by increasing Operating Profit. This clearly demonstrates how taxpayer receives a beneficial interest in its employees, regardless of who their technical employer is.

FINDINGS

The taxpayer is respectfully denied.

II. Gross Income Tax—Intercompany Royalties

Taxpayer, under IC 6-2.1-4-6, as both the payer and the payee of the Intercompany royalties, was qualified and did file a consolidated Indiana gross income tax return for 1996. Therefore, these royalties are not to be included in taxpayer's gross income.

FINDINGS

The taxpayer is sustained, subject to verification by the audit department.

DEPARTMENT OF STATE REVENUE

04-20030075.LOF

LETTER OF FINDINGS NUMBER: 03-0075
SALES TAX
For Years 1999, 2000, and 2001

NOTICE: Under Ind. Code § 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUES

I. Sales Tax—Application to tangible personal property purchased in Indiana for use outside the state

Authority: IC 6-2.5-5-15

Taxpayer protests the imposition of sales tax on truck campers purchased in Indiana and subsequently used outside the state because the Indiana Code makes exempt purchases where certain items are to be transferred and used out of state.

II. Sales Tax—Ability to impose sales tax on items where other states have imposed their own gross retail taxes

Authority: IC 6-2.5-2-1(b)

Taxpayer protests the imposition of sales tax on truck campers purchased in Indiana and subsequently used outside the state because the other states have imposed their own gross retail tax upon taxpayer's customers

III. Tax Administration- Ten Percent (10%) Negligence Penalty

Authority: IC 6-8.1-10-2.1, 45 IAC 15-11-2 (b).

The taxpayer protests the imposition of the ten percent (10%) negligence penalty.

STATEMENT OF FACTS

Taxpayer sells new and used campers, travel trailers, fifth wheels, and truck campers. Taxpayer also sells parts and services all makes and models. The transactions at issue here all involve out-of-state customers who signed a form (ST-137) attesting to the fact that the customers were taking their purchase (truck campers, in this case) out of state. Taxpayer has been assessed sales tax on these sales, and in some instances the customers have also been assessed use tax by their home state.

DISCUSSION

I. Sales Tax—Application to tangible personal property purchased in Indiana for use outside the state

Taxpayer is in the business of selling new and used campers, travel trailers, and fifth wheels. As part of its business, taxpayer also sells a line of truck campers. These campers differ from normal trailers in that they don't attach to the end and aren't towed by the truck. Instead, these campers are placed onto the bed of a truck. Despite this very relevant difference, the truck campers are quite similar to ordinary trailer campers on the inside.

When taxpayer sells ordinary campers and trailers to its out-of-state customers, the customers are then able to claim an exemption from Indiana sales tax through IC 6-2.5-5-15. To take advantage of this statutory exemption, taxpayer has its customers fill out a form ST-137. This form may be used for such items as aircraft, manufactured homes, motor vehicles, trailers, and watercraft. The form, which implements IC 6-2.5-5-15, is intended to be used only on those particular items which are to be registered and/or titled outside the state of Indiana.

IC 6-2.5-5-15 reads:

Transactions involving motor vehicles, trailers, watercraft, and aircraft are exempt from the state gross retail tax, if:

(1) Upon receiving delivery of the motor vehicle, trailer, watercraft, or aircraft, the person immediately transports it to a destination outside Indiana;

(2) The motor vehicle, trailer, watercraft, or aircraft is to be titled or registered for use in another state; and

(3) The motor vehicle, trailer, watercraft, or aircraft is not to be titled or registered for use in Indiana.

Truck campers are in a class of their own, being neither trailers nor free-moving campers. They are attached to trucks that are typically independently registered or titled, but are themselves very infrequently registered or titled. Because taxpayer has offered no proof that these particular truck campers were in fact titled or registered out of state, and because they do not fall into any of the classes of vehicles described in form ST-137 or identified in IC 6-2.5-5-15, these forms should not have been used by taxpayer because they offer no exemption for the sale of truck campers, regardless of the state of residence of the customer.

FINDINGS

The taxpayer is respectfully denied.

II. Sales Tax—Ability to impose sales tax on items where other states have imposed their own gross retail taxes

DISCUSSION

Because taxpayer has been incorrectly filing ST-137 forms with Indiana, Indiana has been in contact with those states in which taxpayer's customers have been taking their purchases. Subsequently, because the form signals those other states that no retail tax has been paid on the purchase, and because taxpayer's customer claims that he will be using the property in that state, those states have been assessing taxpayer's customers with their own version of a use tax, should one exist in that state. Taxpayer believes that, should it be found liable for sales tax to Indiana, that unfair double taxation results on each individual transaction where two states impose their own tax. And while taxpayer's contention has some merit, it is the assessment of the use tax by the customer's home state and not the imposition of sales tax by Indiana that results in the double taxation.

According to IC 6-2.5-2-1(b), the person who acquires property in a retail transaction is liable for the tax on the transaction and, except as otherwise provided in this chapter, shall pay the tax to the retail merchant as a separate added amount to the consideration in the transaction. The retail merchant shall collect the tax as agent for the state. IC 6-2.5-2-1(b). Therefore, even though taxpayer collected no sales tax from its customer, taxpayer remains liable for the tax because it was to act as the state's agent and collect the tax. The fact that taxpayer incorrectly thought itself exempt is irrelevant.

Because taxpayer should have collected sales tax from its customers, taxpayer's course of action to get that money back is against its customers, not against the state of Indiana. Consequently, if this results in taxpayer's customers being unfairly double

taxed, then taxpayer's customers have a cause of action for a refund from their home state, not Indiana.

FINDINGS

The taxpayer is respectfully denied.

DISCUSSION

III. Tax Administration- Ten Percent (10%) Negligence Penalty

The taxpayer protests the imposition of the ten percent (10%) negligence penalty pursuant to IC 6-8.1-10-2.1. Indiana Regulation 45 IAC 15-11-2 (b) clarifies the standard for the imposition of the negligence penalty as follows:

"Negligence" on behalf of a taxpayer is defined as the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Negligence would result from a taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations. Ignorance of the listed tax laws, rules and/or regulations is treated as negligence. Further, failure to reach and follow instructions provided by the department is treated as negligence. Negligence shall be determined on a case by case basis according to the facts and circumstances of each taxpayer.

Taxpayer has demonstrated its efforts to comply in good faith with the tax laws of Indiana. These factors show that taxpayer was not negligent in its duty to collect and remit sales tax.

FINDINGS

The taxpayer is sustained.

DEPARTMENT OF STATE REVENUE

0220030430P.LOF

LETTER OF FINDINGS NUMBER: 03-0430P
Corporate Income Tax
For the Year 2001-2002

NOTICE: Under IC 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUE

I. Tax Administration- Penalty

Authority: IC 6-2.1-5-1.1, IC 6-8.1-10-2.1.

The taxpayer protests the imposition of penalty on the tax liability for 2002.

II. Tax Administration- Interest

Authority: IC 6-8.1-10-1 (a) (e).

The taxpayer protests the imposition of interest.

STATEMENT OF FACTS

The taxpayer is an out-of-state corporation that performs janitorial services and sells products in Indiana. After an audit, the Indiana Department of Revenue, hereinafter the "department," assessed gross income tax against the taxpayer. The taxpayer protested the penalty and interest. No penalty was imposed on the adjustment resulting from the audit of the tax year ending December 31, 2001. A penalty was imposed for the failure to file the return and pay the tax by the due date for the tax year ending December 31, 2002. Although the taxpayer was given adequate time, the taxpayer never requested a hearing on the imposition of the penalty and interest. Therefore, this Letter of Findings is based upon the documentation in the file.

I. Tax Administration- Penalty

DISCUSSION

IC 6-2.1-5-1.1 requires taxpayers to file gross income tax returns and pay at least twenty-five percent (25%) of the total estimated liability on a quarterly basis. IC 6-8.1-10-2.1 imposes a ten percent (10%) penalty on taxpayers who fail to file a return or fail to timely pay the total tax liability. The taxpayer failed to file the required quarterly gross income tax returns for the year 2002. The taxpayer also failed to timely pay the estimated gross income tax due for the year 2002. The department properly imposed the penalty on the taxpayer for the year 2002.

FINDING

The taxpayer's protest is denied.

II. Tax Administration- Interest

DISCUSSION

The taxpayer protests the imposition of interest pursuant to IC 6-8.1-10-1 (a) as follows:

If a person fails to file a return for any of the listed taxes, fails to pay the full amount of tax shown on his return by the due date for the return or the payment, or incurs a deficiency upon a determination by the department, the person is subject to interest on the nonpayment.

The law goes on to state at IC 6-8.1-10-1 (e) that "... the department may not waive the interest imposed under this section." Clearly, the department does not have the authority to waive interest under any circumstance. Therefore, the interest cannot be waived in this taxpayer's cause.

FINDING

The taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

02-20030438P.LOF

LETTER OF FINDINGS NUMBER: 03-0438P
Negligence Penalty
For Years 1998, 1999 and 2000

NOTICE: Under IC 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUE

I. Tax Administration- Ten Percent (10%) Negligence Penalty

Authority: IC 6-8.1-10-2.1, 45 IAC 15-11-2 (b); 45 IAC 1.1-2-13; IRC 704; 45 IAC 1.1-2-4; 45 IAC 1.1-3-3; 45 IAC 3.1-1-153

The taxpayer protests the imposition of the ten percent (10%) negligence penalty.

STATEMENT OF FACTS

Taxpayer manufactures glass containers for food and beverages. Taxpayer has 18 manufacturing plants throughout the country, including two in Indiana. Taxpayer is a 50% owner in a partnership that manufactures glass bottles. Taxpayer is also a 49% owner in a limited partnership that manufactures, reconditions, and repairs molds used to make the containers. Taxpayer has a unitary relationship with the partnerships and files a unitary return with the same.

I. Tax Administration- Ten Percent (10%) Negligence Penalty

DISCUSSION

The taxpayer protests the imposition of the ten percent (10%) negligence penalty pursuant to IC 6-8.1-10-2.1. Indiana Regulation 45 IAC 15-11-2 (b) clarifies the standard for the imposition of the negligence penalty as follows:

"Negligence" on behalf of a taxpayer is defined as the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Negligence would result from a taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations. Ignorance of the listed tax laws, rules and/or regulations is treated as negligence. Further, failure to reach and follow instructions provided by the department is treated as negligence. Negligence shall be determined on a case by case basis according to the facts and circumstances of each taxpayer.

For all three years under audit, taxpayer did not report the partnership distributions for gross income tax. 45 IAC 1.1-2-13 imposes gross income tax on the portion of the partner's distributive share of partnership income under Section 704 of the Internal Revenue Code that was derived from sources in Indiana. Accordingly, taxpayer was assessed and paid gross income tax on these distributions.

For 1998, taxpayer failed to report receipts from management fees characterized as other income for gross income tax at the high rate. 45 IAC 1.1-2-4 imposes gross income tax at the high rate on services of any kind. The management fees were earned for accounting and managerial services performed at the headquarters in Indiana. Taxpayer was assessed and paid gross income tax on these fees.

For 1998, taxpayer did not report miscellaneous income characterized as other income for gross income tax at the high rate. 45 IAC 1.1-2-4 imposes gross income at the high rate on other income taxpayer fails to segregate on its records. Indiana miscellaneous income was unavailable, so it had to be determined with the best information available. Taxpayer was assessed and paid gross income tax on this income.

For 1998, 1999, and 2000, taxpayer did not report sales shipped from locations outside the state to customers in Indiana for gross income tax. 45 IAC 1.1-3-3 imposes gross income tax on sales shipped in interstate commerce if the sales are channeled through, associated with, or otherwise connected to a business situs in Indiana. Taxpayer agreed that the sales were channeled through the headquarters in Indiana. Taxpayer was assessed and paid gross income tax at the low rate for these sales.

For 1998, taxpayer reported the net income from the partnership distribution from the 50%-owned partnership as a net loss rather than a net gain. No source for this error was discovered. Taxpayer was assessed and paid adjusted gross income tax on this distribution.

For all three years under audit, taxpayer did not add back the gross income deducted on the federal return to federal taxable income to determine Indiana adjusted gross income. For all three years, taxpayer failed to add back gross income tax deducted on the federal return or the pro rata share of state income tax deducted on the partnership return of the 49%-owned partnership to determine the net income of the 49%-owned partnership that is included in the taxpayer's final federal taxable income. Taxpayer was assessed and paid adjusted gross income tax on these items.

For 1998, taxpayer did not add back the pro rata share of property tax deducted on the partnership return of the 49%-owned partnership. Taxpayer was assessed and paid adjusted gross income tax on this item.

45 IAC 3.1-1-153 requires the inclusion of the pro rata share of the partnerships' property, payroll, and sales in the calculation of the partner's apportionment percentage if taxpayer and the partnership have a unitary relationship under established standards, disregarding ownership requirements. The auditor found that taxpayer has the requisite control and flow of value with the partnerships to establish a unitary relationship which is evidenced by financial, managerial, and administrative functions provided by the taxpayer on behalf of the partnerships.

For 1998, taxpayer did not include the pro rata share of the 49%-owned partnership's property, payroll, and sales in its calculation of the Indiana apportionment percentage. Taxpayer agrees that there is a unitary relationship with the partnerships that requires inclusion of the partnership factors in the calculation of the Indiana apportionment percentage under 45 IAC 3.1-1-153. Taxpayer was assessed and paid adjusted gross income tax on these items.

Taxpayer's assertion is that, despite its numerous errors and oversights, it made a good faith effort to comply with the tax laws of Indiana. Taxpayer claims that it harbored no intent to defraud the State or deprive the State of tax revenues. However, as is stated in 45 IAC 15-11-2 (b), the standard is a negligence standard, not a standard of intentional misconduct. The regulation goes on to provide an example of negligence in "failure to reach and follow instructions provided by the department." In every case, taxpayer has shown it failed to comply with the written provisions of the Indiana Code and its corresponding regulations. Taxpayer has made no argument that the language in said provisions was ambiguous or misleading. In fact, in several instances taxpayer agreed with and admitted some of the auditor's more complex conclusions (e.g. the unitary nature of the business relationship).

Taxpayer has made no assertions that its actions were non-negligent, and in spite of that oversight, taxpayer has demonstrated its ignorance of the tax laws. Ignorance is not a defense to negligence.

FINDING

The taxpayer's protest is respectfully denied.

DEPARTMENT OF STATE REVENUE

0420030441P.LOF

LETTER OF FINDINGS NUMBER: 03-0441P
Sales & Use Tax
For the month of September 2003

NOTICE: Under IC 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUE

I. Tax Administration – Penalty

Authority: IC 6-8.1-10-2.1(d); 45 IAC 15-11-2

The taxpayer protests the late penalty.

STATEMENT OF FACTS

The late penalty was assessed on the late filing of a monthly sales tax return for the month of September 2003.

The taxpayer is a company with operations in Indiana and headquartered out-of-state.

I. Tax Administration – Penalty

DISCUSSION

The taxpayer requests waiver of penalty as the taxpayer has a history of timely payment and the taxpayer has been responsible in the handling of tax duties. Furthermore, the taxpayer asks the Department to consider the severity of the penalty relative to the offense. In this instance the taxpayer is being penalized a very substantial amount for being one day late and where no intentional delay occurred.

45 IAC 15-11-2(b) states, "Negligence, on behalf of a taxpayer is defined as the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Negligence would result from a taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations. Ignorance of the listed tax laws, rules and/or regulations is treated as negligence. Further, failure to read and follow instructions provided by the department is treated as negligence. Negligence shall be determined on a case by case basis according to the facts and circumstances of each taxpayer."

The Department finds the taxpayer was inattentive of tax duties. Inattention is negligence and negligence is subject to penalty. As such, the Department finds the penalty proper and denies the penalty protest.

FINDING

The taxpayer's penalty protest is denied.

DEPARTMENT OF STATE REVENUE

0420030444P.LOF

LETTER OF FINDINGS NUMBER: 03-0444P
Sales & Use Tax
For the months January through May 2003

NOTICE: Under IC 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUE

I. Tax Administration – Penalty

Authority: IC 6-8.1-10-2.1(d); 45 IAC 15-11-2

The taxpayer protests the late penalty.

STATEMENT OF FACTS

The late penalty was assessed on the late filing of monthly sales tax returns for the months January thru May 2003.

The taxpayer is a company located in Indiana.

I. Tax Administration – Penalty

DISCUSSION

The taxpayer requests the late penalty be waived as the error was the result of an accounting change, and, the difficulty of learning a new computer system.

45 IAC 15-11-2(b) states, "Negligence, on behalf of a taxpayer is defined as the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Negligence would result from a taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations. Ignorance of the listed tax laws, rules and/or regulations is treated as negligence. Further, failure to read and follow instructions provided by the department is treated as negligence. Negligence shall be determined on a case by case basis according to the facts and circumstances of each taxpayer."

The Department finds the taxpayer was inattentive of tax duties. Inattention is negligence and negligence is subject to penalty. As such, the Department finds the penalty proper and denies the penalty protest.

FINDING

The taxpayer's penalty protest is denied.

DEPARTMENT OF STATE REVENUE

0420030463P.LOF

LETTER OF FINDINGS NUMBER: 03-0463P
Sales and Use Tax
For the Years 2000-2002

NOTICE: Under IC 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUE

I. Tax Administration- Ten Percent (10%) Negligence Penalty

Authority: IC 6-8.1-10-2.1, 45 IAC 15-11-2 (b).

The taxpayer protests the imposition of the ten percent (10%) negligence penalty.

STATEMENT OF FACTS

The taxpayer operates a restaurant. After an audit, the Indiana Department of Revenue, hereinafter referred to as the "department," assessed additional use tax, interest, and penalty. The taxpayer protested the imposition of the ten percent (10%) negligence penalty. The taxpayer was given ample opportunity to schedule a hearing on the protest and/or submit additional information. Since the taxpayer did neither, this finding is based on the information in the file.

I. Tax Administration- Ten Percent (10%) Negligence Penalty

DISCUSSION

The taxpayer protests the imposition of the ten percent (10%) negligence penalty pursuant to IC 6-8.1-10-2.1. Indiana Regulation 45 IAC 15-11-2 (b) clarifies the standard for the imposition of the negligence penalty as follows:

> Negligence, on behalf of a taxpayer is defined as the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Negligence would result from a taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations. Ignorance of the listed tax laws, rules and/or regulations is treated as negligence. Further, failure to reach and follow instructions provided by the department is treated as negligence. Negligence shall be determined on a case by case basis according to the facts and circumstances of each taxpayer.

The taxpayer argued that the failure to pay the proper amount of use tax on certain capital equipment purchases was an error due to the taxpayer's implementation of a new general ledger system that interrupted some of the taxpayer's tax accrual procedures at the corporate office. The taxpayer's carelessness in the accrual of the proper amount of use tax is a breach of the taxpayer's duty that constitutes negligence.

FINDING

The taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

04-20020314.SLOF

SUPPLEMENTAL LETTER OF FINDINGS NUMBER: 02-0314
Gross Retail & Use Tax
For the Years 1998, 1999, 2000

NOTICE: Under IC § 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUES

I. Gross Retail & Use Tax-Purchases of oil for rental cars

Authority: IC § 6-2.5-2-1; IC § 6-2.5-3-2; IC § 6-2.5-3-4; IC § 6-2.5-3-6; IC § 6-2.5-5-8; 45 IAC 2.2-4-27(d)(4).

Taxpayer continues to protest the tax assessment on oil and oil filter purchases to maintain the operation of vehicles in its rental car business.

STATEMENT OF FACTS

Taxpayer operates short-term automobile rental locations in Indiana and several surrounding states. During the audit period, taxpayer had five Indiana locations. The audit raised a number of issues; the only one taxpayer protested concerns taxpayer's purchases of oil and oil filters used in the regular maintenance of the vehicle fleet. Taxpayer did not pay gross retail tax at the time of purchase. Taxpayer did not self-assess and remit use tax on these purchases. Therefore, the auditor made those adjustments to taxpayer's tax liability. Taxpayer's original protest was a purely legal argument based on differing interpretations of the applicable Indiana statutes and regulations. Taxpayer also protested the assessment of the 10% negligence penalty. Taxpayer's original protest was denied in part and granted in part. That part of the protest concerning the assessment of use tax on purchases of oil and oil filters where no gross retail tax was paid at the time of purchase was denied. That part of the protest concerning the penalty assessment was granted. Taxpayer timely requested a rehearing solely on the legal issue of interpreting the applicable Indiana statutes and regulations the Department relied upon to issue the original Letter of Findings. Taxpayer's request was granted based on its submission, in the request, of a complete analysis of the statutes and regulations at issue. That part of the original Letter of Findings pertaining to the penalty issue stands. Further facts will be added as required.

I. Gross Retail & Use Tax-Purchases of oil for rental cars

DISCUSSION

Taxpayer originally protested the assessment of use tax on its purchases of oil and oil filters. Taxpayer did not pay Indiana gross retail tax on the items of tangible personal property at the time of purchase. In its protest letter and written brief submitted as its hearing on the protest, taxpayer argued that oil changes were necessary for the proper maintenance of the cars that were rented out and were therefore not subject to tax. Taxpayer also argued that there was no basis in Indiana's statutes and regulations to tax oil and oil filters used in maintaining cars in businesses that rent out those cars to customers.

IC § 6-2.5-2-1 provides in relevant part:

(a) An excise tax, known as the state gross retail tax, is imposed on retail transactions made in Indiana.

(b) The person who acquires property in a retail transaction is liable for the tax on the transaction and, except as otherwise provided in this chapter, shall pay the tax to the retail merchant as a separate added amount to the consideration in the transaction. The retail merchant shall collect the tax as agent for the state.

IC § 6-2.5-3-2 and IC § 6-2.5-3-4 impose the use tax on items of tangible personal property if the gross retail tax was not paid at the time of purchase. Therefore, pursuant to IC § 6-2.5-3-6, taxpayer was liable for payment of use tax on the oil and oil filters purchased to change the oil on a regular basis for the proper maintenance of the vehicles in the rental fleet. These statutes and their governing regulations, at first blush, provided ample support for taxing these items of tangible personal property. There were no exemptions in the statutes or regulations that would relieve taxpayer of the duty either to pay the gross retail tax at the time of purchase, or to self-assess and remit the use tax.

Taxpayer argued that these items are necessary to maintain the proper operation of the rental vehicles; otherwise, they would be inoperable. Taxpayer also argued that inasmuch as IC § 6-2.5-5-8 did not require tax on the purchase of the cars for rental, the maintenance oil and filters should have been exempt as well. On the surface, taxpayer's argument was attractive; however, the department ruled that 45 IAC 2.2-4-27(d)(4) settled the issue:

Supplies furnished with leased property. A person engaged in the business of renting or leasing tangible personal property is considered the consumer of supplies, fuels, and other consumables which are furnished with the property which is rented or leased.

Therefore, the department reasoned, when taxpayer purchased oil and oil filters to change the oil in its vehicles, taxpayer consumed these supplies and either had to pay gross retail tax on them at the time of purchase or self-assess use tax and remit it to the Indiana Department of Revenue.

In its brief accompanying the request for rehearing, taxpayer presented arguments that touch upon the interpretation of 45 IAC 2.2-4-27(d)(4) as it relates to the rental car business. Specifically, taxpayer argued that oil and oil filters are not furnished "with" the vehicles taxpayer rents out. Instead, taxpayer argues, oil and oil filters should be considered component parts of the vehicles because when a customer rents a vehicle, that vehicle is a complete vehicle. That is, a rental vehicle consists of an engine, drive train, brake system, and cooling system and all these systems' component parts. Taxpayer drew an analogy between oil and oil filters as essential to engine performance as Freon to air conditioning, transmission fluid and filters to transmissions, etc. Under this interpretation, oil and oil filters are part of the property rented to customers; they are not supplies, fuels, or consumables furnished "with" the property.

Taxpayer also argues on rehearing that oil and oil filters are not "consumed" within the meaning of 45 IAC 2.2-4-27(d)(4). Rather, they are replaced because they become filled with particulate matter, not dissipated or consumed, subject to periodic replacement, such as fuel, air, and transmission fluids and filters. For that reason, oil and oil filters are replacement parts similar to tires, brake linings, shock absorbers, etc. Just because oil and oil filters need replacing more often than tires or brake linings does not, taxpayer argues, make them subject to Indiana's gross retail or use taxes. As stated by taxpayer, "there is nothing in 45 IAC 2.2-4-27(d)(4) or otherwise justifying treating them differently than other replacement parts."

Taxpayer has proffered sustainable reasons for supporting its interpretation of the regulation at issue. That supported interpretation of the regulation is sufficient to support taxpayer's argument that oil and oil filters are not subject to either the state's gross retail tax or use tax in the context of taxpayer's rental car business.

FINDING

Taxpayer's protest concerning the assessment of use tax on the purchase and consumption of oil and oil filters, used in regular oil changes for its fleet of rental vehicles, is granted, based on the complete analysis of the applicable statutes and regulations submitted in the request for rehearing.