TITLE 328 UNDERGROUND STORAGE TANK FINANCIAL ASSURANCE BOARD

LSA Document #26-13

SUMMARY/RESPONSE TO COMMENTS FROM THE FIRST COMMENT PERIOD

The Indiana Department of Environmental Management (IDEM) requested public comment from January 29, 2026 through February 27, 2026, on IDEM's draft rule language. IDEM received comments from the following parties:

Christopher Braun, the Indiana Food and Fuel Association (IFFA)
Mandy Hall, IWM Consulting Group, LCC (IWM)
Lisa Hendershot, Creek Run, LLC (CR)
Lauren Nielsen, Keramida (Keramida)

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

Comment: In reviewing the proposed amendments and rules, the IFFA appreciates the excellent work done by IDEM to improve the clarity and consistency of the Excess Liability Trust Fund (ELTF) rules, eligibility for the ELTF program and the eligibility and payment of costs. These changes should allow the owners and operators of USTs and ASTs and their consultants to consistently achieve timely, cost-effective environmental investigations and remediations while also securing reimbursement of eligible expenses from the ELTF. In addition, these changes should also enhance and elevate IDEM's program using ELTF funds to satisfy liabilities for corrective action for owners and operators of ASTs while also providing for reimbursement of 50% of the cost of decommissioning or replacing a UST.

The IFFA requests that IDEM consider one additional change to its proposed amendments. A recurring issue that our members and their environmental consultants often experience is that things occur on site during environmental investigation and/or remediation activities that need to be addressed at the time, even though they may be beyond the initial or proposed scope of work. The issue to be addressed does not warrant stopping work and then undertaking the time, delay, and expense of completing a three bid process or seeking IDEM pre-approval for this unexpected additional work. In these instances, the consultant is already on-site and can effectively and efficiently take care of the matter. In those instances, we want the tank owner and/or the consultant to have the ability to promptly address the unexpected site development and secure ELTF reimbursement for such expenses. The requested change would give IDEM the flexibility and authority to approve in these situations the change orders or change in scope developments. (IFFA)

Comment: IDEM is proposing to get rid of all excavation costs and require three bids. Our concern with this is when we are already onsite with a contractor working on a job and something comes up that is beyond the three bids. We would like to see some language added to the ELTF rules that addresses work already in progress. It would be silly to stop working in order to get three more bids for the extra tasks beyond the three bids. (IWM)

Response: IDEM appreciates the commenter's concerns. In the context of soil excavation, if additional soil should be removed beyond the original scope, IDEM will honor the unit rate included in the bid for additional soil removal. The requirement to obtain three bids is in conjunction with an approved Corrective Action Plan. If the scope of the work being completed unexpectedly changes while field work is being conducted, IDEM would expect the consultant and the owner or operator to consider IC 13-23-9-1.5 and 328 IAC 1-3-5(b) in determining which costs are ELTF eligible. IDEM also recommends notifying the Petroleum Remediation Project Manager to explain and justify the necessity of this additional work.

Comment: These cost guidelines are itemized by personnel rates. We would suggest adding clarification in the rule stating that the lump costs are still accepted and will increase as rates increase. (IWM)

*Response**:*** IDEM agrees with the commenter's suggested change. IDEM will propose to modify language at 328 IAC 1-3-5.1 to clarify the usage of lump sum reimbursement based on task-based rates. Specifically, IDEM will propose to add a new subsection at 328 IAC 1-3-5.1 to read: "For each task, the sum of the maximum reimbursable hours may be invoiced and requested as a lump sum."

Comment: This rule states that tank fees must be up to date prior to a release being reported. I understand that this language is already included in IC-13-23-8-9. However, IDEM has been giving owners a grace period after a release is reported to get tank fees paid. We feel this grace period is important because not only does it benefit the owners and the state in order to get investigations and cleanups completed, but also, we have experienced many issues with IDEM's record keeping when it comes to tank fees. We have had multiple clients who have paid their tanks fees, yet IDEM doesn't show that they have been paid. So, the owner is forced to show proof that they paid their tank fees in order for IDEM to remove the amount owed from the system. Owners cannot always show proof of payment. There have been some cases where the owners have paid their tank fees twice, just to be able to stay ELTF eligible if a release were to happen. If IDEM cannot accurately keep track of tank fee payments, it is unfair to the owners that they cannot access the ELTF fund due to a potential error on IDEM's part. Therefore, a grace period to get tank fees caught up would be beneficial. (IWM)

Response: IDEM appreciates the commenter's concerns. The language in IC 13-23-8-9, which provides authority for the proposed language in 328 IAC 1-3-5.3, explains a separate reimbursement scenario from the eligible release as defined in IC 13-11-2-62.7.

Per IC 13-23-9-1.3(a)(2), if annual registration fees that were due in 2014 or later are not paid in full before the submittal of the initial site characterization as required by the rules adopted by the environmental rules board, an additional amount available from the ELTF in connection with an eligible release is subject to subsection IC 13-23-9-1.3(b).

The requirement to pay the fees in full prior to the submittal of the initial site characterization, paired with the ISC submittal requirement in 60 days, 40 CFR 280.63(b), allows 60 days to pay all fees in full prior to an additional amount being assessed with the $15,000 deductible for each eligible release.

IDEM is not proposing any rule language changes in response to this comment because the statutes regarding tank fee payment requirements are clear.

Comment: Our primary comment concerns the proposed addition of 328 IAC 1-3-5.1. Based on our review, it appears that IDEM intends to incorporate portions of the existing ELTF Cost Guidance Nonrule Policy Document (NPD) into the rule. We believe the NPD should be incorporated into the rule by reference rather than the addition of selected portions directly into the rule text. Fixed fees and unit rates require periodic adjustment to remain reasonable and reflective of actual costs. If they are embedded directly into the rule language, updates would require formal rulemaking which is time-consuming. Incorporation by reference would allow IDEM to revise cost guidance through its established non-rule policy process and provide IDEM with greater administrative flexibility to adjust allowable fixed fee amounts as market conditions change, without requiring a formal rulemaking process. For these reasons, we strongly recommend that IDEM incorporate the ELTF Cost Guidance NPD by reference rather than codifying selected provisions into 328 IAC 1-3-5.1. (CR)

Response: IDEM appreciates the commenter's concerns. IDEM has attempted to accommodate changing market rates by calculating each task-based rate on the sum of appropriate personnel classifications. As required in 328 IAC 1-3-5(e), the labor rates will be re-calculated each year, and thus the allowed lump sums will fluctuate as the market dictates. As site characterization and remedial approaches change, IDEM will deliberate with stakeholders on updating cost guidance and suggest necessary rule changes.

Comment: If incorporating the ELTF Cost Guidance NPD by reference is not possible, it is important to note that several provisions currently included in the NPD that allow reimbursement of additional field labor charges beyond the fixed unit rates are not reflected in the proposed rule language. Specifically, the following reimbursable items included in the NPD have been omitted from the proposed rule:

- Labor charge of up to one-half hour for drill rig set-up time between borings, and one-half hour for every soil or groundwater sample submitted for laboratory analysis during drilling and well installation oversight
- Travel time to/from sites for all field work required
- Fees for obtaining a warranty deed, recordation fee, and travel time to county recorder's office for property deed retrieval and/or to record Environmental Restrictive Covenants (ERCs)
- Additional time for specialized sampling methodologies during groundwater sampling
- Attorney costs, not exceeding $1,000, for off-site access negotiations

We recommend that these provisions be incorporated into the proposed rule. If they cannot be added, IDEM should provide clarification and guidance as to whether these costs will remain eligible for reimbursement once the rule is adopted. (CR)

Response: IDEM appreciates the comment. The drill rig set-up and sampling time will be added to the draft language at 328 IAC 1-3-5.1(b)(5). Additional labor required to complete travel time and additional fees necessary to record environmental restrictive covenants will remain reimbursable as outlined in the existing guidance, Waste-0078-NPD. Attorney costs, not exceeding $1,000, for off-site access negotiations are allowable per 328 IAC 1-3-5(h)(1)(c).

Comment: In addition, the following sections of the NPD have been omitted entirely from the proposed rule:

- Appendix E: Well Abandonment
- Appendix F: Utility Locate

We recommend adding the omitted sections listed above into the proposed rule. If they cannot be incorporated, IDEM should clarify what labor charges are considered reasonable and cost effective to perform these tasks under the revised rule. (CR)

Response: IDEM appreciates the commenter's concerns; however, well abandonment rates and utility clearance are provided in 328 IAC 1-3-5.1(m) and 328 IAC 1-3-5.1(n), respectively.

Comment: Under 328 IAC 1-3-5.2 Eligible Costs After "No Further Action" or "NFA" Designation Section 5.2(c), we recommend the addition of the following as eligible costs:

- Monitoring well decommissioning activities
- Preparation and submittal of well abandonment logs to the Indiana Department of Natural Resources
- Preparation of the final ELTF claim as eligible costs. (CR)

Response: Well abandonment activities should be completed after No Further Action status is granted, in accordance with 312 IAC 13-10-2. These costs remain reimbursable under the ELTF eligible Leaking UST or AST release. IDEM appreciates the comment regarding ELTF claim submittal for costs allowed under section 5.2 and will add language accordingly.

Comment: We also recommend the inclusion of the $30 per boring and well sampling supply allowance outlined in IDEM's NPD Waste-0063-NPD dated March 15, 2014. (CR)

Response: IDEM agrees with the commenter's suggestions and will propose an addition to the rule language.

Comment: We recommend the following revisions for clarity and technical accuracy:

- Section 5.1(a)(1) and (2): Specify that the maximum reimbursable hours listed apply to preparation and planning activities associated with soil boring and groundwater monitoring well installation.
- Section 5.1(b)(4): Replace "direct push technology" with "hollow stem auger techniques" in the sentence: "Sixteen dollars ($16) per foot for groundwater monitoring well installation using direct push technology."
- Section 5.1(d)(1)(A): Replace the word "disclosure" with "closure" in the following sentence: "Twelve (12) hours for an NFA request report with unconditional disclosure, comprising…"
- Section 5.1 (k): Under small equipment daily reimbursement rates, water level indicator is listed with the daily rate of $1. We assume this is an error and should be $15. (CR)

Response: IDEM agrees with the commenter's suggestions and will make changes to the rule language.

Comment: The tasks that have been assigned predefined costs predominantly reflect conventional or traditional approaches that have been shown to be unreliable on their own and have been superseded by preferred methodologies. As the EPA states on their webpage article The Leaking Underground Storage Tank Cleanup Process, "relying solely on conventional techniques is no longer considered best practice."

While predictability is certainly favorable in concept, excluding cost guidance for modern site characterization techniques will have the unintended consequence of disincentivizing more defensible, and therefore ultimately more cost-effective, methodologies because of the comparative uncertainty surrounding the eligibility of their costs. To ensure that proposed state environmental regulations and policies are supported by the best available science, cost guidance should also be provided for tasks, including but not limited to:

- Optical or tracer technologies to pinpoint the location of new/recent releases from a regulated tank system
- HRSC1 and real-time measurement technologies
- Long-term passive soil gas and indoor air sampling
- Incremental Sampling Methodology
- NSZD4 rate measurement

We agree that improving the efficiency to maximize the defensibility of such decisions and ensure the effectiveness of clean-ups, added emphasis must be placed on achieving thorough LNAPL CSMs by employing the most suitable strategies, which will require incorporating modern characterization methods into the task-based reimbursement mechanism. (Keramida)

Response: IDEM appreciates the commenter's suggestions; however, the agency does not have an understanding of prices associated with these technologies. During the public comment period for Waste-0078-NPD, IDEM suggested a rate for High Resolution Site Characterization. It was suggested that the site-specific details were too variable to assign a rate to such a task. IDEM agreed and subsequently removed the rate from the guidance. Without a better understanding or adoption of these technologies in Indiana, we believe it is premature to assign task-based rates. IDEM encourages the commenter to remain in contact with the agency regarding these technologies.

Comment: Reimbursement for the costs of replacement systems should be contingent on demonstrating that the new system adheres to 329 IAC 9 and 40 CFR 280. For instance, providing substantiating documentation of compliance with spill and overfill control and release detection requirements. In the spirit of transparency and responsible stewardship, it is suggested that verification of compliance via an inspection by an unbiased third party (ideally IDEM) be required as a condition of reimbursement approval. (Keramida)

Response: The statute does not contemplate nor give IDEM authority to consider compliance in our reimbursement decisions for the tank decommissioning and replacement reimbursement mechanism. New systems, however, are subject to 329 IAC 9 and 40 CFR 280.

Comment: For 328 IAC 1-1-3, the commenter agrees with eliminating the obsolete reference but recommends including "site characterization and investigation" in the definition to maintain clarity and consistency with other statutes and rules, and the way the phrase is used in the LSA [sic]. (Keramida)

Response: The proposed definition of "corrective action" at 328 IAC 1-1-3 is identical to the long-used, but now repealed, definition of the term that was found at 329 IAC 9-1-14.5. To avoid potential ambiguity and to maintain consistency with past usage of the term, IDEM does not wish to alter that definition at this time.

Comment: For 328 IAC 1-1-5.1, the commenter recommends adding the condition of vapors entering a building that results in the evacuation of the structure. (Keramida)

Response: IDEM appreciates the commenter's suggestion; however the agency intends for the rule to mirror the statute. Since the statute does not include the condition of vapors entering a building, IDEM declines to make this change. Furthermore, the existing condition at subsection 5.1(1) already addresses vapor intrusion.

Comment: For 328 IAC 1-1-8.4, please provide the definition for “responsible party.” (Keramida)

Response: IDEM apologizes for any confusion. The term “responsible party” was defined in earlier drafts of the rule, however the term is no longer used in Title 328. Therefore, the definition is no longer necessary. The commenter appears to be referencing the mention of 328 IAC 1-1-8.4 in the regulatory analysis. This mention was an inadvertent reference to these earlier, obsolete rule drafts.

Comment: For 328 IAC 1-1-8.5, the commenter would like to suggest the following: "Site characterization" means the work performed under the initial site characterization (ISC) described at IC 13-23-13-1(c)**(d)** and 40 CFR 280.63* or investigations described in 40 CFR 280.65*, or any alternative procedure proposed by the owner or operator and approved by the commissioner under IC 13-23-13-1(c)**(d)**. This work may include **identifying the specific portions or components of the regulated tank system that caused a subsurface release and**, as necessary, quarterly monitoring and pilot studies to determine the feasibility of remediation alternatives. (Keramida)

Response: IC 13-23-9-1.5(a)(2) specifies the costs the ELTF administrator may pay. Investigating the mechanical cause of a release falls outside of the scope of these allowable costs. Therefore, IDEM declines to make this change in the rule.

Comment: Because the pending language in Title 13 defines only the project lifecycle stages of initial site characterization and the evaluation of potential remedial activities to achieve remedial objectives, it is recommended that the rule incorporate language clarifying that an evaluation of remedial options must be predicated on an adequate LCSM. (Keramida)

Response: This type of language, which deals with the technical aspects of leaking UST project lifecycles, would be more appropriate in Title 329 and is beyond the scope of this rulemaking action.

Comment: For 328 IAC 1-3-5, rather than prescribing dollar amounts, the commenter would like to suggest referencing a consumer price index or a method to demonstrate fair market value for the items in proposed 328 IAC 1-3-5.1 (g) through (k) and for other goods and services integral to corrective action. (Keramida)

Response: IDEM appreciates the comment. Instead of implementing an annual adjustment, as is prescribed for labor rates, IDEM welcomes further future discussion on the applicable and appropriate market rate for these prices. While IDEM acknowledges the fair market value of these goods and services changes over time, implementing a blanket annual adjustment without evaluating the starting rate seems premature.

Comment: Currently, among the costs that are not reimbursable from the ELTF are: 328 IAC 1-3-5(d)(4) “The costs of environmental investigation and remediation not directly related to an eligible release, including the cost of testing for nonpetroleum contamination...”

However, it should be noted that risk assessment entails quantifying the combined risk to receptors posed by each chemical constituent. In the case of comingled plumes, an adequate risk assessment that does not underestimate risk necessitates an understanding of the contribution from petroleum and nonpetroleum constituents. The commenter would recommend including clarifying language that allows flexibility in cost eligibility for instances when defining remedial objectives for a petroleum release requires characterization of other inextricable constituents to which receptors would be similarly exposed. (Keramida)

Response: The ELTF is a financial responsibility mechanism for eligible releases of petroleum related to USTs and ASTs, not for defining risks from other contaminant sources.

Comment: For 328 IAC 1-3-5.2, the commenter recommends the following change:

(b) Before reopening ELTF eligibility and funding, ~~the administrator may require~~ the applicant to **shall** provide information regarding the planned future use of the site. (Keramida)

Response: IDEM appreciates the commenter's suggestion; however, the agency wants to allow the administrator to have discretion over whether to request this information.

Comment: For 328 IAC 1-3-5.3, the commenter believes this section is ambiguous and open-ended. Under what circumstances is this meant to apply? Is the intent to facilitate the transfer of properties near UST facilities that are encumbered by ERCs? Clarification on the application, purpose, and intent of this provision would be appreciated. (Keramida)

Response: The draft rule language is intended to mirror IC 13-23-8-9(b) and further clarify the remediation objectives must comply with the risk-based standards articulated in IC 13-25-5-8.5. While IDEM cannot determine the General Assembly's intent regarding IC 13-23-8-9(b), the agency will implement the statute as written.