

<b>INDIANA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT</b>	<b>STATUS:</b> Effective	<b>POLICY NUMBER:</b> MP-008-NPD-R	
<b>AGENCY NONRULE POLICY DOCUMENT</b>  <b>SUBJECT:</b> <i>Applicability of RCRA Corrective Action Laws to Current Owners of Hazardous Waste Sites</i>	<b>AUTHORIZED:</b> Bruno L. Pigott, Commissioner		
	<b>SUPERSEDES:</b> MP-008-NPD	<b>ISSUING OFFICE(S):</b> Office of Land Quality Office of Legal Counsel	
	<b>ORIGINALLY EFFECTIVE:</b> November 13, 2015	<b>RENEWED/REVISED:</b> June 12, 2021	

**Disclaimer:** This Nonrule Policy Document (NPD) is being established by the Indiana Department of Environmental Management (IDEM) consistent with its authority under IC 13-14-1-11.5. It is intended solely to provide guidance and shall be used in conjunction with applicable rules or laws. It does not replace applicable rules and laws, and if it conflicts with these rules or laws, the rules or laws shall control. Pursuant to IC 13-14-1-11.5, this policy will be available for public inspection for at least 45 days prior to presentation to the appropriate State Environmental Board, and may be put into effect by IDEM 30 days afterward. If the nonrule policy is presented to more than one board, it will be effective 30 days after presentation to the last. IDEM also will submit the policy to the Indiana Register for publication.

## 1.0 PURPOSE

The purpose of this NPD is to outline the factors that may be considered when determining who is responsible to address cleanup responsibilities at former hazardous waste facilities.

## 2.0 SCOPE

This NPD applies to former hazardous waste facilities in the State of Indiana that have ceased operations.

## 3.0 SUMMARY

IDEM has multiple and often overlapping authorities under IC 13-22-13 and IC 13-25-4 with which to address releases of hazardous wastes or constituents of hazardous waste at a given site. This NPD outlines factors IDEM will take into account when determining which authority is most appropriate on a site-specific basis and describes the two-part decision-making process IDEM will utilize in making these decisions.

## 4.0 DEFINITIONS

- 4.1. "Agency" or "IDEM" means the Indiana Department of Environmental Management.
- 4.2. "Bona Fide Prospective Purchaser" has the meaning set forth in 42 USC 9601(40) as incorporated by IC 13-25-4-8.
- 4.3. "CERCLA" means the Comprehensive Environmental Response, Compensation, and Liability Act, 42 USC 9601 et seq.
- 4.4. "Converter" means a facility that, at one time, was treating or storing hazardous waste and filed a Part A application, but never received a permit and has now converted its operations such that it no longer treats or stores hazardous waste. *See 54 Fed. Reg. 41000 for more information.*
- 4.5. "Corrective Action", for purposes of this NPD, means those actions needed to investigate and clean up releases of hazardous waste or hazardous constituents.

- 4.6. "Facility" has the meanings set forth in 40 CFR 260.10 as incorporated by 329 IAC 3.1-4-1, and/or 42 USC 9601(9) as incorporated by IC 13-11-2-77.
- 4.7. "Hazardous Constituents", for purposes of this NPD, means those substances listed in Appendix VIII to 40 CFR Part 261, which lists constituents causing the EPA to list a waste as a Toxicity Characteristic Waste or Toxic Waste pursuant to 40 CFR 261.30(b) or Appendix IX to 40 CFR Part 264, which lists constituents which must be monitored in groundwater following a release from a solid waste management unit.
- 4.8. "Hazardous Substances" has the meaning set forth in 42 US 9601(14), as incorporated by IC 13-11-2-98.
- 4.9. "Hazardous Waste" has the meaning set forth in IC 13-11-2-99.
- 4.10. "Hazardous Waste Facility" has the meaning set forth in IC 13-11-2-100.
- 4.11. "Non-Filer" means a facility that was treating, storing or disposing of hazardous waste after November 19, 1980 (the effective date of the first RCRA federal regulations) without filing a Part A application and acquiring interim status or a permit.
- 4.12. "Nonrule policy" means the term assigned by IDEM to those policies identified in IC 13-14-1-11.5 as any policy that: 1) interprets, supplements, or implements a statute or rule; 2) has not been adopted in compliance with IC 4-22-2; 3) is not intended by IDEM to have the effect of law; and 4) does not apply solely to the internal IDEM organization (is not an Administrative Policy).
- 4.13. "OLC" means IDEM's Office of Legal Counsel.
- 4.14. "OLQ" means IDEM's Office of Land Quality.
- 4.15. "Operator" has the meanings set forth in 40 CFR 260.10, as incorporated by 329 IAC 3.1-4-1, and/or 42 USC 9601(20) as incorporated by IC 13-25-4-8.
- 4.16. "Owner" has the meanings set forth in 40 CFR 260.10, as incorporated by 329 IAC 3.1-4-1, and/or 42 USC 9601(20) as incorporated by IC 13-25-4-8.
- 4.17. "Person" has the meaning set forth in 40 CFR 260.10, as incorporated by 329 IAC 3.1-4-1.
- 4.18. "Pre-HSWA Permittee" means a facility with a RCRA permit for treatment, storage or disposal of hazardous wastes that was issued prior to the enactment of the Hazardous and Solid Waste Amendments of 1984 (HSWA) that significantly expanded RCRA's corrective action authorities.
- 4.19. "Protective filer" means a facility that filed a RCRA Part A application for the treatment, storage or disposal of hazardous waste as a protective measure only. These may be generators, transporters, or recyclers of hazardous waste that filed as a precautionary measure due to incomplete or incorrect understanding of new RCRA regulations. *See 54 Fed. Reg. 41000, for more information.*
- 4.20. "RCRA" means the Resources Conservation and Recovery Act of 1976, 42 USC 6901 et seq., as amended by the 1984 Hazardous and Solid Waste Amendments (HSWA) to RCRA and subsequent amendments.
- 4.21. "Release" has the meanings set forth in IC 13-11-2-184.
- 4.22. "Removal/remedial action", for purposes of this NPD, has the meanings set forth in IC 13-11-2-185 and IC 13-11-2-187.
- 4.23. "Solid Waste Management Unit", for purposes of this NPD, means any unit at a facility from which hazardous constituents might migrate, irrespective of whether the units were intended for the management of solid and/or hazardous wastes.

## 5.0 ROLES

- 5.1 If OLQ determines that there has been a release of hazardous waste or a hazardous constituent, from a former hazardous waste facility, OLQ will analyze the factors outlined

below in determining which person or entity to contact and which program will manage the site.

- 5.2 Upon request, OLC will advise and assist OLQ with regard to any legal matters arising out of the application of this policy.
- 5.3 The agency as a whole will work collaboratively with affected parties to the extent possible during this process.

## 6.0 POLICY

- 6.1 The federal Resource Conservation and Recovery Act (RCRA) created a “cradle to grave” regulatory scheme for hazardous waste that was intended to track and manage hazardous waste from generation to disposal. All treatment, storage and disposal facilities were and are to be permitted in order to require proper management of hazardous waste and prevent releases and resulting corrective action. Additionally, all solid waste management units at a facility are required to be properly closed pursuant to applicable rules, and a condition of such closure is the performance of any necessary corrective action to address any release that occurred during the life of the unit. IDEM has either passed or adopted similar state statutory measures in IC 13-22 and furthermore, incorporates the vast majority of the federal hazardous waste regulations. There are no specific landowner liability protections for purchasers of contaminated properties under RCRA.
- 6.2 The federal Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) created a broad liability scheme to address releases of hazardous substances. This scheme encompasses not only current owners/operators of facilities that may currently engage, or in the past have engaged, in the use or management of hazardous substances, but also those who owned/operated such facilities at the time of a release. IDEM has a similar regulatory scheme in IC 13-25-4. Unlike RCRA, exceptions to removal/remedial action liability exist in CERCLA; however, even those excepted from liability may have obligations such as bona fide prospective purchaser (BFPP) obligations to stop continuing releases, prevent threatened future releases, and mitigate risks associated with those releases.
- 6.3 Depending on specific facts, both current and former owners/operators of facilities/sites regulated by either RCRA or CERCLA, or their state equivalents, may have cleanup responsibilities. The myriad of potential liability scenarios that may exist suggest a factor-based approach may be appropriate when making agency decisions regarding cleanup. IDEM will work collaboratively with affected parties to the extent possible during this process.
- 6.4 Initially, a determination must be made as to applicable authority regarding the facility itself.
  - 6.4.1 Releases at or from hazardous waste facilities subject to IC 13-22-13 are also potentially subject to IC 13-25-4 as all hazardous wastes are hazardous substances. This does not necessarily dictate which program should address a release from a given facility, but both IDEM’s Hazardous Waste Permits Section and State Cleanup Section could potentially have jurisdiction.
  - 6.4.2 Other facilities potentially subject to IC 13-22-13 Corrective Action include:
    - 6.4.2.1 Facilities for which a RCRA Part A application was filed.
    - 6.4.2.2 Facilities that had or have interim status or an IC 13-22 permit.<sup>1</sup>
    - 6.4.2.3 “Converters”, or facilities that at one time treated or stored hazardous waste but do no longer.

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<sup>1</sup> Facilities that were “Pre-HSWA Permittees” that did not continue to seek operating permits with expanded corrective action requirements are not subject to the expanded corrective action requirements of IC 13-22-13 but may have more abbreviated corrective action requirements under their pre-HSWA permit.

- 6.4.2.4 “Non-filers”, or facilities at which hazardous waste was treated, stored or disposed of but for which no Part A application was filed and for which no interim status or IC 13-22 permit was obtained.
- 6.4.3 Facilities not subject to IC 13-22-13 Corrective Action, but potentially subject to IC 13-25-4 State Cleanup authority, include:
  - 6.4.3.1 A facility involved in the generation or transportation of hazardous waste.
  - 6.4.3.2 A facility that ceased accepting hazardous waste for treatment, storage or disposal prior to November 19, 1980, the effective date of the first RCRA federal regulations.
  - 6.4.3.3 “Protective Filers” of the RCRA Part A application only where their activities did not and do not constitute regulated hazardous waste activity.
- 6.5** Secondly, a determination must be made regarding the person to whom or entity to which IDEM will direct communications, including any cleanup request or demand.
  - 6.5.1 Factors to consider in determining which person/entity will be the recipient of IDEM cleanup request or demand include the following non-exhaustive list:
    - 6.5.2.1 Is the facility currently permitted under IC 13-22?<sup>2</sup>
    - 6.5.2.2 Was the facility permitted under IC 13-22 at any time in the past?
    - 6.5.2.3 Did current owners/operators engage in hazardous waste TSD activities?
    - 6.5.2.4 Did current owners/operators know or have reason to know about previous TSD activities prior to their involvement with the site?
    - 6.5.2.5 Are former owners/operators/permittees still in existence/viable?
    - 6.5.2.6 Are there site-specific factors to consider such as subdivision of the land originally subject to a permit or engaged in TSD activities?
    - 6.5.2.7 Is there a party known to be responsible for the release?
    - 6.5.2.8 Are the same RCRA-regulated activities ongoing at the site?
    - 6.5.2.9 What are the hazardous wastes or constituents at issue?
- 6.6** IDEM reserves the right to manage sites as may be appropriate within its authority and as agency resources allow.
- 6.7** There may other potential defenses to cleanup liability that are not specifically discussed herein. This NPD in and of itself does not negate those defenses.

## 7.0 REFERENCES

- 7.1. Federal Laws or Rules:
  - A. Resources Conservation and Recovery Act of 1976, 42 USC 6901 et seq., as amended by the 1984 Hazardous and Solid Waste Amendments (HSWA)
  - B. Comprehensive Environmental Response, Compensation, and Liability Act, 42 USC 9601 et seq.
  - C. 40 CFR 260.10
  - D. 40 CFR 261.30(b)
  - E. Appendix VIII to 40 CFR Part 261
  - F. Appendix IX to 40 CFR Part 264

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<sup>2</sup> Current owners and operators of hazardous waste facilities with effective permits issued under IC 13-22 are subject to corrective action requirements through enforcement of permit conditions.

G. 54 Fed. Reg. 41000

7.2. Indiana Administrative Codes:

A. 329 IAC 3.1

7.3. Indiana Statutes:

A. IC 13-11-2 (applicable definitions)

B. IC 13-14-1-11.5

C. IC 13-22-13

D. IC 13-25-4

## 8.0 SIGNATURES



12/29/2020

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Bruno Pigott, Commissioner  
Indiana Department of Environmental Management

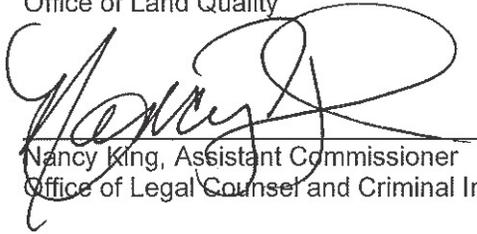
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Date



12/28/2020

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Peggy Dorsey, Assistant Commissioner  
Office of Land Quality

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Date



12/29/20

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Nancy King, Assistant Commissioner  
Office of Legal Counsel and Criminal Investigations

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Date

This policy is consistent with Agency requirements.



30 Dec 2020

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Quality Assurance Program, Planning and Assessment  
Indiana Department of Environmental Management

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Date