

# **IDEM**

Nonrule Policy Document

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**Title:** Property Containing Contaminated Aquifers

**Identification Number:** W0047 (formerly OER NPD#0008)

**Date Originally Adopted:** January 30, 1997

**Dates Revised:** None

**Other Policies Repealed or Amended:** [if none, insert "none"]

**Brief Description of Subject Matter:** IDEM's policy regarding liability for response costs for cleanup of a release of petroleum or a hazardous substance due to subsurface migration in an aquifer.

**Citations Affected:** IC 13-24-1; IC 13-25-4

This nonrule policy document is intended solely as guidance and does not have the effect of law or represent formal Indiana Department of Environmental Management (IDEM) decisions or final actions. This nonrule policy document shall be used in conjunction with applicable laws. It does not replace applicable laws, and if it conflicts with these laws, the laws shall control. A revision to this nonrule policy document may be put into effect by IDEM once the revised nonrule policy document is made available for public inspection and copying. IDEM will submit revisions to the Indiana Register for publication.

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## **Policy Statement**

Pursuant to IDEM's petroleum cleanup authority (Ind. Code 13-24-1) and its hazardous substance cleanup authority (Ind. Code 13-25-4) it hereby informs the public that it will utilize its enforcement discretion to not pursue any person for government response costs related to, or require them to respond to, a release of petroleum or a hazardous substance if the person can substantiate the existence of a third party defense that demonstrates the following:

(1) the hazardous substance or petroleum has come to be located on the property solely as the result of subsurface migration in-an aquifer from a source outside the boundaries of the property; and

(2) the landowner did not cause, contribute to, or exacerbate the release or threat of release of the hazardous substance or petroleum.

## Conditions

(A) The landowner did not cause, contribute to, or knowingly exacerbate the release or threat of release of the hazardous substance or petroleum, through an act or omission. The failure to take affirmative steps to mitigate or address groundwater contamination, such as conducting groundwater investigations or installing groundwater remediation systems, will not, in the absence of exceptional circumstances, constitute an “omission” by the landowner within the meaning of this condition. This policy may not apply where the property contains a groundwater well, the existence or operation of which may affect the migration of contamination in the affected aquifer. These cases will require fact-specific analysis.

(B) The person who caused the release is not an agent or employee of the landowner, and was not in a direct or indirect contractual relationship with the landowner. In cases where the landowner acquired the property, directly or indirectly, from a person who caused the original release, this policy will not apply if, at the time the property was acquired, the landowner knew or had reason to know of the disposal of hazardous substances or petroleum that gave rise to the contamination in the aquifer.

(C) There is no alternative basis for the landowner’s liability for the contaminated aquifer, such as liability as a generator or transporter under Section 107(a)(3) or (4) of CERCLA or liability as an owner by reason of the existence of a source of contamination on the landowner’s property other than the contamination that migrated in an aquifer from a source outside the property.

## Discussion

Natural subsurface processes, such as infiltration and groundwater flow, often carry contaminants relatively large distances from their sources. Thus, the plume of contaminated groundwater may be relatively long and/or extend over a large area. For this reason, it is sometimes difficult to determine the source or sources of such contamination.

Any person owning property to which contamination has migrated in an aquifer faces uncertainty with respect to liability as an “owner” under Section 107(a)(1) of CERCLA, 42 U.S.C. § 9601(a)(1), IC 13-24-1, or IC 13-25-4, even where such owner has had no participation in the handling of hazardous substances or petroleum and has taken no action to exacerbate the release.

Some owners of property containing contaminated aquifers have experienced difficulty selling these properties or obtaining financing for development because prospective purchasers and lenders sometimes view the potential for CERCLA or State Cleanup liability as a significant risk. The Agency is concerned that such unintended effects are having an adverse impact on property owners and on the ability of communities to develop or redevelop property.

IDEM is issuing this policy to address the concerns raised by owners of property to which contamination has migrated in an aquifer, as well as lenders and prospective purchasers of such property and to compliment the EPA's Final Policy Toward Owners of Property Containing Contaminated Aquifers, dated May 24, 1995. The intent is to lower the barriers to transfers of such property by reducing uncertainty regarding the possibility that IDEM may take actions against these landowners.

This policy is simply meant to inform the public that under certain circumstances they can take certain steps and keep certain records to prevent themselves from falling into the broad net of State Cleanup liability. This policy is based on a statutory defense commonly referred to as the "third party defense" established pursuant to 42 U.S.C. 9607(b)(3).

In order to better delineate what IDEM considers the basis for a third party defense it has set forth the following standards. Further, this policy contains an explanation of what constitutes Due Care. Much of this directly tracks the U.S. EPA guidance published in 1995 on this same topic (60 FR 34790). This policy does not intend, nor could it legally set a judicial standard; this policy merely provides comfort to prospective purchasers and current owners of property that IDEM will choose not to pursue enforcement against them if they meet the criteria.

### **Third Party Defense**

An owner of real property shall not be held liable when the release or the threat of a release is caused solely by "an act or omission of a third party, other than an employee or agent of the defendant, other than one whose act or omission occurs in connection with a contractual relationship existing directly or indirectly with the defendant..." (the Section 107 (b)(3) defense).

In order to invoke this defense, the defendant must additionally be able to establish, by a preponderance of the evidence, that, "(a) he exercised due care with respect to the hazardous substance [or petroleum] concerned taking into consideration the characteristics of such hazardous substance [or petroleum], in light of all relevant facts and circumstances, and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions; "42 U.S.C. § 9607(b)(3).

### **Due Care and Precautions**

An owner of property may typically be unable to detect by reasonable means when or whether hazardous substances have come to be located beneath the property due to subsurface migration in an aquifer from a source or sources outside the property. It is the Agency' position that where the release or threat of release was caused solely by an unrelated third party at a location off the landowner's property, the landowner is not required to take any affirmative steps to investigate

or prevent the activities that gave rise to the original release in order to satisfy the “due care” or “precaution” elements of the defense.

Not only is groundwater contamination difficult to detect, but once identified, it is often difficult to mitigate or address without extensive studies and pump and treat remediation. Based on IDEM’s technical experience and the Agency’s interpretation of CERCLA, IDEM has concluded that the failure by such an owner to take affirmative actions, such as conducting groundwater investigations or installing groundwater remediation systems is not, in the absence of exceptional circumstances, a failure to exercise “due care” or “take precautions” within the meaning of the defense.

The latter conclusion does not necessarily apply in the case where the property contains a groundwater well and the existence or operation of this well may affect the migration of contamination in the affected aquifer. In such a case, application of the “due care” and “precautions” tests of the CERCLA Section 107(b)(3) defense requires a fact-specific analysis of the circumstances, including, but not limited to, the impact of the well and/or the owner’s use of it on the spread or containment of the contamination in the aquifer. Accordingly, this policy may not apply in the case where the property contains a groundwater well, the existence or operation of which may affect the migration of contamination in the affected aquifer. In such a case, however, the landowner may choose to assert a Section 107(b)(3) defense, depending on the case-specific facts and circumstances.

## **References**

Indiana Code 13-25-4 Hazardous Substances Response Trust Fund

Indiana Code 13-24-1 Petroleum Releases

Final Policy Toward Owners of Property Containing Contaminated Aquifers, U.S. EPA Office of Site Remediation Enforcement, Office of Enforcement and Compliance Assurance, U.S. Environmental Protection Agency, Washington D.C. 20460, May 24, 1996.

Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 USC 9601

Superfund Amendments and Reauthorization Act of 1986, Pub. L. 99-499.