

TITLE 328 UNDERGROUND STORAGE TANK FINANCIAL ASSURANCE BOARD

LSA Document #15-231

SUMMARY/RESPONSE TO COMMENTS RECEIVED AT THE FIRST PUBLIC HEARING

On August 10, 2017, the Underground Storage Tank Financial Assurance Board (board) conducted the first public hearing/board meeting concerning the development of amendments to 328 IAC 1. Comments were made by the following parties:

Chris Braun, Indiana Petroleum Marketers and Convenience Store Association (CB)
Karla McDonald, Golars Environmental and Remediation Services (KM)
Om Narla, Golars Environmental and Remediation Services (ON)

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

Comment: While Golars agrees that these new amendments include many fiscal changes that will benefit eligible parties in terms of fund access and available dollar amounts, we do not completely agree with IDEM's statement of "The rule amendments that become effective with this rulemaking will not have an additional fiscal impact beyond the fiscal impact from the legislative changes".

Due to changes in technical policy and procedures undertaken by IDEM as part of these amendments, financial impacts to eligible parties relating to future property use and off-site property owners are of concern and not addressed by IDEM. (KM)

Comment: We do believe that there are some fiscal impacts to owners and operators and even off-site property owners, in regards to some of the definitions that are provided in the new rule. That really relates to future property use and financing available to a new property owner or even an existing property owner. (KM)

Response: Rather than attempt to address the general nature of the subject matter in this comment, IDEM will examine and respond to the subsequent, more specific comments that elaborate upon the general subject matter. In addition, this comment focuses on IDEM's technical policy and procedures for ELTF, a subject which IDEM does not address in this rulemaking. The purpose of this rulemaking is to address cost reimbursement procedures for ELTF and implement the recent statutory changes.

Comment: The new proposed definition for "cost effectiveness" at 328 IAC 1-1-3.2 allows for IDEM to measure corrective action based on a "reasonableness and cost effectiveness" standard (328 IAC 1-3-1(c)(2)). Under the Administrative Rules and Procedures Act codified at IC 4-22-2-19.5, a rule adopted by an agency should be written for "ease of comprehension" and fails if it is too "vague, arbitrary or capricious" upon judicial review.

The cost effectiveness definition at 328 IAC 1-1-3.2 is too vague and is very subjective. The proposed definition does not identify the entity that "approves" the CAP and site characterization. The proposed definition considers "cost relative to outcome" – this terminology is subjective and could allow for misinterpretation.

The proposed definition considers "reliability of the remediation alternative", reliability as determined by whom? The environmental consultant? IDEM? This terminology also is subjective as written. This proposed definition potentially allows IDEM to become the entity which determines/develops the corrective action approach instead of the eligible party's environmental consultant.

The definitional changes that seek to address the "cost effectiveness" at 328 IAC 1-1-3.2 do not provide sufficient guidance to propose CAP and site characterization. The standard of "reasonableness and cost effectiveness" (328 IAC 1-3-1(c)(2)) compounds the vague, subjective nature of the definition that will likely lead to a lack of clarity rather than one that is easily comprehended. We would respectfully request more clarity in the definition either by adding language with more specificity or in addressing the specific comments with greater guidance.

Under previous IDEM guidance, it was understood that IDEM would approve a certain level of remediation costs, i.e. industrial closure levels. The new proposed definition seems to allow IDEM to deny potential remediation costs/CAP for a "cost effective approach" that may impact the responsible party's ability regarding future property use. This process is ultimately limiting corrective action at the time when resources are available and based on a subjective "cost effective/reliable" determination from IDEM. (KM)

Comment: We do feel that the "cost effectiveness" definition in the rule is somewhat vague, and we would like to point out that, in accordance to the Administrative Rules and Procedure Act, rules should be written for ease of comprehensive, and we don't feel necessarily that the ease of comprehension is there with the "cost effectiveness" definition. The discussion of that definition is that technical reviews will be done on the capability of the corrective action program to achieve remediation in regards to a cost-relative outcome, and that's all well and good and we wholeheartedly agree to that.

However, we pose the question of who truly can make that decision? Is it a site's consultant who works with the owner and their idea of where they want to be with that property next year, three years, five years from now? Or is that IDEM that makes the decision that this is the most cost-effective approach, with no necessarily thought of a year or three years from now what that property use may be, or the ability for the property owner to get financing for that property for any future use?

We just really would like that definition to be looked at and maybe clarified a little bit, because it could be where on the owner's and operator's side, that cost and availability to achieve remediation may be one answer and it's in a different thought with the agency. (KM)

Response: IDEM agrees with the reasoning stated by the commenter and will delete the "cost effectiveness" definition at 328 IAC 1-1-3.2 in the draft rule proposed for final adoption. The proposed definition could be interpreted as vague, subjective, and confusing, although the intent was to clarify "cost effectiveness." The proposed definition at 328 IAC 1-1-3.2 is not necessary to clarify cost effectiveness and will be removed. The existing procedures in 328 IAC 1 for determining cost effectiveness, which clearly state that the administrator determines cost effectiveness, will be retained.

Comment: On May 12, 2017, IDEM denied an active remediation CAP for a site located at 1702 Allison Lane, Jeffersonville, IN. Contamination from the site has migrated off-site, including free product. IDEM stated that it believes active remediation would only have limited success and that an environmental restrictive covenant (ERC) should be used to address the off-site impacts. In addition to the legal implications at this site, the CAP denial letter stated an alternative approach

without details or reasoning nor did it provide an option to contest IDEM's denial. The technical review panel option and the administrative appeal option are missing on this letter. Did IDEM change the policy? Additionally, IDEM's OLQ Technical Review Panel, which would review CAP disputes, is not available for LUST sites.

At this site, the off-site property is a commercial building and the owner has been very cooperative in providing access after some initial struggles. However, the owner will not allow us to leave the free product on-site as it will diminish the property value and could be potential liability for them.

At a different site, a third-party claim was brought against one of our clients for over \$400,000 due to off-site impacts below residential closure levels. With the free product present at the Jeffersonville site, the off-site owner can bring a large lawsuit against the responsible party and, if they win, IDEM will end up paying the bill. Golars does not believe that this is in the best interest of IDEM. In accordance to current rules, the plaintiff's attorney fees will be unlimited while the defendant's attorney fees are limited to \$30,000 or 25% of the settlement, whichever is lower. There is a large incentive for plaintiffs' lawyers to file a lawsuit. (KM)

Comment: Recently we have received a CAP denial from a site, where we had proposed a more active approach in remediation. The site has significant off-site issues. We have off-site owners who sometimes work with us, sometimes don't. Our active approach was denied, and the "cost-effectiveness and that capability to achieve receive remediation" statements were included in that denial letter. However, that was it.

The LUST group did come back and say, "We want you to do Plan B instead," with very little information on what Plan B really was, and said "have your response with us in 30 days." We looked at that letter and we didn't know where to go with this. For all of the information we had to provide in the CAP and our justification of why we thought the CAP was appropriate, we get a page-and-a-half letter back that says, "No, just do this, and get an environmental restrictive covenant, with the off-site owner," which will not happen in this case. Another kind of notation on that is in that letter is "If you would like—if you want to contest this denial or whatever, contact so-and-so," and that language was taken out of the letter. This is your CAP approach.

And also, IDEM does have a technical review panel available to take when a consultant and the project manager or technical team don't agree, they come in and sit down with that panel. However, to our knowledge, that tech review panel is not available for LUST sites. So, we're back to sitting down the group that already said, "No, and we want you to do this approach." (KM)

Response: Many of the issues included in this comment are site-specific technical or procedural matters that are outside the scope of this rulemaking. IDEM has never included LUST sites in the Technical Review Panel. Agency decisions may be appealed through the applicable administrative procedures outlined in IC 4-21.5.

With regards to attorney's fees, the limits of \$30,000 or 25% of an ELTF indemnity claim, whichever is less, is located at 328 IAC 1-6-2(d)(3). However, IDEM does not have the discretion to determine the reimbursement for a third party lawsuit that does not meet that exact requirement. Making that determination is outside the scope of this rulemaking.

Comment: A concern with IDEM's new approach on CAP approvals is that during the entire course of a denial process, IDEM does not pay for the costs incurred by the responsible party until it is resolved. This puts the eligible party at a disadvantage. (KM)

Response: IDEM is uncertain of the exact section of the rulemaking that the commenter is

referencing. For reimbursement related to CAP approvals, the rulemaking proposes to remove the technical milestones as a necessary condition of reimbursement at 329 IAC 1-3-5(a), which includes CAP approvals. The proposed rule language references the statutory requirements at IC 13-23-9-1.5 for activities that are reimbursable for ELTF claims. In addition, IC 13-23-9-2.2 describes the approval and denial process for CAPs, and IDEM does not have the authority to amend the statutes with a rulemaking.

Comment: At Golars, we are not comfortable recommending leaving contamination on- or off-site and closing the incident because it is the less expensive and quickest option. This approach could potentially create future issues. Although IDEM states that their decisions are based strictly on a technical basis, those decisions also affect sites financially now and particularly in the future. Below is an example:

(1) Site: 5801 National Road, Richmond, IN

(a) IDEM issues NFA on February 18, 2009 (with contamination above closure levels on-site).

(b) The owner removed the USTs at the site on November 18, 2009, ONLY after confirming that there were no new leaks by performing tank tightness tests. During UST removal, residual contamination from the closed incident was encountered. IDEM made the determination this was a new release and issued a violation letter requesting site investigation.

(c) Golars replied stating that the contamination was from previous release. IDEM did not agree and again requested a full investigation.

(d) The site owner spent over \$80,000 to conduct a new site investigation. Upon investigation report review, IDEM decided the impacts were part of the original release and deactivated the new release stating there was no new contamination.

(2) The purpose of this example is to demonstrate that the whole process is very subjective and stressful for the small business owners. During issues like this one, the properties cannot access needed financing. Golars believes that this would seem to risk adding to the Brownfield sites many communities are left to address at a future point. (KM)

Comment: We also think that, as a consultant, we are somewhat hesitant to go to a client and say, "We're just going to leave this contamination here, because, technically, I can get a case together that says it's not going to hurt anybody if we leave it here," on a human health level.

However, the owner/operator has a lot more issues than that. I go back to the financial responsibility that they have to this property and future use of that property. If the tools are not there for this property owner to use towards that property, then it could very well be the owner eventually walks away, and then who's left with it? (KM)

Response: With regards to the type of situation described by the commenter, IDEM's goal is to ensure that UST owners and operators understand their legal obligations to complete corrective action in accordance with the applicable laws and rules. IDEM understands the need for timeliness and attempts to complete its oversight, review, and approval so UST owners and operators can quickly obtain a no further action determination for an eligible release.

Comment: For the proposed rule language at 328 IAC 1-3-1(c), there is only one eligible party per incident, but there may be more than one party granted the rights to access the fund. Again, this is subjective and vague. (KM)

Response: The proposed rule language at 328 IAC 1-3-1(c) and (d) is intended to clarify how the administrator determines reimbursement if more than one eligible party submits a claim for duplicative acts, as the ELTF statutes do not include requirements for such a situation. IDEM recognizes that 328 IAC 1-3-1(c) is somewhat unclear and vague, so IDEM is proposing to combine 328 IAC 1-3-1(c) and (d) to clarify that these requirements are related. This change will be included in the draft rule proposed for final adoption.

Comment: IDEM proposed rule language at 328 IAC 1-3-1.3(a) to read "the administrator shall determine if work to be performed or the work already performed, or a portion thereof, under an approved CAP is cost effective...".

IDEM is currently utilizing this policy/procedure to alter approved CAP activities and to limit remediation with both on-site and off-site properties. This approach adds to current and future fiscal impacts for eligible parties and off-site owners that does not seem to be a part of IDEM's decision process. (KM)

Response: The proposed amendment for the rule language at 328 IAC 1-3-1.3(a) is a reorganization of existing language and is not a new requirement. The movement of the phrase to the beginning of the sentence does not modify the intent of the existing requirement. In this subsection, the rule language is being reorganized from the end of the sentence to the beginning of the sentence, as the proposed phrase is more accurate and appropriate at the beginning of the sentence and in compliance with the recommendations set forth in the Administrative Rules Drafting Manual regarding sentence structure in tabulated lists.

Comment: The draft of the rule was so well done and it adhered so closely to the legislation that was adopted in 2016 and 2017 that we had not a single comment. On behalf of the IPCA and its UST owners and operators, we fully support the preliminary adoption of the rule. (CB)

Response: IDEM appreciates the commenter's support of this rulemaking and their continued involvement as IDEM seeks to continuously improve the various aspects of the ELTF and UST programs.

Comment: This comment pertains to the management of ELTF, procedures for quarterly monitoring and well drilling, and data collection and evaluation. The commenter commends IDEM and the board for their sustainable management of ELTF, while suggesting that Indiana could continue examining similar rules and funds in other states to evaluate and compare monitoring procedures. The commenter also describes some of the challenges they encounter with well drilling, monitoring, ground water flow, and data collection and evaluation. They ask IDEM to further examine the procedures and challenges associated with these activities under the current rule requirements. (ON)

Response: While IDEM values the feedback for these aspects of the ELTF program, IDEM is uncertain which aspects of the rulemaking that the commenter is referring to. IDEM also finds these comments to be beyond the scope of this rulemaking, as the foci of the rulemaking are amendments as a result of the recent statutory changes and clarifications of existing rule language.