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August 28, 2009

***Via E-Mail, Fax
& Hand Delivery***

Ms. Janet Pittman
Rules Development Branch
Office of Legal Counsel
Indiana Department of Environmental Management
100 N. Senate Ave., MC 65-46
Indianapolis, IN 46204-2251

**Re: IPCA's Comments On LSA Document #08-684: Development of
Amendments to Rules Concerning The Underground Storage Tank
Excess Liability Trust Fund (ELTF).**

Dear Ms. Pittman:

On behalf of the Indiana Petroleum Marketers and Convenience Store Association and its members ("IPCA"), this letter is sent to provide comments in response to the Indiana Department of Environmental Management's ("IDEM") Second Notice of Comment Period For LSA Document #08-684: Development of Amendments to Rules Concerning the Underground Storage Tank Excess Liability Trust Fund ("ELTF").

I. Background on the IPCA

The IPCA is a nonprofit association formed in 1922. It represents more than 200 companies engaged in the wholesaling and retailing of refined petroleum products. IPCA's

members include convenience store and truck stop owners and operators, service station dealers, lube oil dealers and others engaged in the independent marketing of petroleum products throughout the State of Indiana. These primarily small to medium sized, family owned businesses own and operate thousands of underground storage tanks (“USTs”) at service stations and convenience stores throughout the State of Indiana.

The IPCA’s members are deeply concerned that IDEM is seeking to restrict access to the ELTF and narrow eligibility for reimbursement. Funding mechanisms for environmental investigation and remediation costs related to petroleum releases from USTs are of critical importance to the IPCA’s members. Such cleanups are one of the major liabilities associated with the UST and petroleum-handling industry. IDEM previously reported that the average cost to clean up a typical petroleum release from a corner gas station site is approximately \$400,000. The General Assembly created the ELTF with the stated purpose of “[p]roviding a source of money to satisfy liabilities incurred by owners and operators of underground petroleum storage tanks under IC 13-23-13-8 for corrective action.” IC 13-23-7(2). The environmental funding currently afforded under the ELTF provides certainty, fairness and economic rationality in an industry where the UST owners and operators and the motoring public provide 100% of the funding for the ELTF to pay for these environmental liabilities. None of the ELTF funding comes from the IDEM, however, as more fully detailed below, IDEM continues to charge millions of dollars annually to process and reimburse claims to be paid by the ELTF, an exorbitant and unjustified amount to pay for such services.

II. Statutory History of the ELTF

The ELTF is a dedicated trust fund created by the Indiana legislature in 1988 to help UST owners meet a federal mandate that owners possess \$1 million of financial assurance to cover costs arising from leaking underground storage tank systems. Since it began reimbursing expenses in the early 1990’s through June 30, 2009, the ELTF program has received **\$389,832,192.22** in total claims and has reimbursed **\$236,492,722.34** (61% of the claims submitted) to successfully clean up thousands of UST sites in Indiana.

Consistent with the intent of the Indiana General Assembly, the ELTF program has been able to: (a) provide UST owners with the financial assurance to meet their federal EPA requirements, thereby allowing them to remain in business and provide jobs to thousands of Hoosiers; (b) provide funding for the environmental investigation and remediation of leaking UST sites at those locations that have satisfied the ELTF eligibility requirements; and (c) clean up the petroleum-impacted soil and groundwater at thousands of UST sites throughout Indiana, thereby significantly improving the environment for the residents of the State of Indiana.

A. Current Status of the ELTF Program

It is important to remember that the ELTF was recently in severe financial straits and was placed into statutory “priority payment” mode for payment of claims for several years beginning in 2005 due to the lack of sufficient funds. Due to legislation enacted in 2005, the ELTF

received additional funding on gasoline and diesel sales, resulting in the ELTF's balance sheet steadily improving over the past three years. Thus, as of June 30, 2009 and for the first time since 2005, the ELTF had an unencumbered balance in excess of the \$25,000,000 statutory minimum.

In the fiscal year that ended June 30, 2009, the ELTF received claims totaling **\$66,352,687.52**, but only received revenue totaling **\$51,785,470**, and paid only **\$35,304,109** in eligible environmental expenses. In other words, even in the most recent fiscal year claims still exceeded revenue by more than \$15 million and more than \$31 million beyond the amount of claims paid. In addition, while the ELTF had a balance of **\$52,668,163** as of June 30, 2009, there are **\$16,392,034.58** in total expenses pending from fiscal years 2006-09 that have already been approved by the ELTF but not yet paid due to the annual \$3,000,000 reimbursement limits for any one UST owner (these monies are owed to Fortune 500 company Speedway). This results in a net unencumbered balance of **\$36,276,129**, thereby technically taking the ELTF out of priority payment mode for the first time since 2005 even though claims still exceed the annual revenue received by the ELTF.

B. 2008 ELTF Legislative Compromise

The ELTF authorizing statute is codified at Indiana Code § 13-23-7 and, until 2008, read as follows:

Purposes of fund; limitation on use of fund

Sec. 1. (a) Subject to subsection (b), the underground petroleum storage tank excess liability trust fund is established for the following purposes:

(1) Assisting owners and operators of underground petroleum storage tanks to establish evidence of financial responsibility as required under IC 13-23-4.

(2) Providing a source of money to satisfy liabilities incurred by owners and operators of underground petroleum storage tanks under IC 13-23-13-8 for corrective action.

(3) Providing a source of money for the indemnification of third parties under IC 13-23-9-3.

(4) Providing a source of money to pay for the expenses of the department incurred in paying and administering claims against the trust fund. Money may be provided under this subdivision only for those job activities and expenses that consist exclusively of administering the excess liability trust fund.

IC 13-23-7-1. Despite the explicit enumerated purposes for the use of these dedicated trust funds, according to IDEM's own reports to the FAB, during the past five years IDEM has charged the ELTF a whopping **\$29,310,856** to administer the ELTF. This equates to roughly \$6,000,000 a year being charged by IDEM to administer and pay roughly \$37,000,000 a year in claims. What makes this an even egregious is that most of these expenses are not authorized by statute, thereby rendering these expenses improper.

In 2008 IDEM sought to amend the authorizing statute to allow ELTF to fund IDEM's UST program and negotiated with the IPCA and other stakeholders for an amendment that would cap IDEM funding from the ELTF. Specifically, the bill added a fifth purpose of ELTF, but with express use and funding limitations:

(5) Providing a source of money to pay for the expenses of the department incurred in inspecting underground storage tanks.

(b) The combined amount of payments described in subsection (a)(4) and (a)(5) from the underground petroleum storage tank excess liability trust fund in a state fiscal year **may not exceed ten percent (10%) of the fund income in the immediately preceding state fiscal year.**

P.L.114-2008, SEC.23 (emphasis added).

However, rather than being satisfied with the funding and use compromise negotiated in 2008 that was passed by the Indiana General Assembly, IDEM advanced legislation during the 2009 session of the Indiana General Assembly that sought, among other things, to limit reimbursement to tank owners/operators, reduce ELTF eligibility for tank owners, and increase IDEM's ability to access the funds for agency-wide use. IDEM's proposed legislation was expressly defeated. Senator Gard and the Senate Energy and Environmental Affairs Committee agreed to refer to the EQSC for further study the portions of SB 461 relating to ELTF, the Underground Storage Tank Petroleum Trust Fund, and changes to the definition of "owner" for purposes of the UST Act. Here, IDEM is again attempting to reduce ELTF access for UST owners and operators and increase IDEM's ability to use funds for agency-wide services.

III. IDEM Has Failed to Justify The Reasons For Its Proposed Changes to the ELTF Program.

As more fully detailed in the IPCA's specific comments below, while there are a few positive changes in the proposed rulemaking there are a number of objectionable changes being proposed by IDEM/ELTF that, if adopted, would, among other things, restrict the definition of a UST operating system eligible for the ELTF, significantly reduce ELTF eligibility, remove ELTF eligibility for UST sites with historical petroleum releases as opposed to an active, on-going release at the time site work is being performed, impose unreasonable obligations on UST owners/operators and third parties, and confuse ELTF eligibility as of the date a release is discovered with subsequent reporting obligations. If adopted as proposed these changes would significantly increase the liability and unfunded exposure of UST owners and operators for the environmental investigation and remediation of UST sites, substantially increase their cost of doing business, and result in fewer petroleum releases being cleaned up. Moreover, IDEM fails to set forth a rationale or demonstrated need for seeking to impose these changes. Consequently, the objectionable changes should not be adopted.

IV. IDEM Does Not Have the Statutory Authority to Make the Proposed Changes to ELTF.

This rulemaking constitutes an *ultra vires* action by IDEM. IC 13-23-7-1 established the ELTF, set forth the enumerated purposes of the dedicated trust fund and limits IDEM's ability to use the funds. IDEM cannot promulgate rules without express authority from the Legislature and certainly cannot impose regulatory hurdles and rules that run counter to the Indiana General Assembly's stated purpose of "[p]roviding a source of money to satisfy liabilities incurred by owners and operators of underground petroleum storage tanks under IC 13-23-13-8 for corrective action." IC 13-23-7(2).

First, IDEM inaccurately describes the subject matter of the rulemaking by declaring that "UST owners and operators would benefit from an adjustment for investigation and remediation costs reimbursable from the ELTF." While the proposed rule changes may benefit UST owners and operators by slightly increasing certain rates and expenses of environmental consultants that would be eligible for reimbursement, the remaining proposed rule changes are highly detrimental to UST owners and operators by making it much more difficult for them to receive reimbursement for the most common types of petroleum releases that have historically been covered by ELTF.

Second, IDEM has not followed the rulemaking procedures in IC 13-14-9 as discussed further below. None of the statutes cited by IDEM as providing authority for this rulemaking authorizes IDEM to materially change the purpose or function of the ELTF as contemplated in the proposed rule. IDEM incorrectly cites the following statutes as granting the Financial Assurance Board ("FAB"), the entity responsible for overseeing the ELTF, authority to adopt the proposed rule changes: IC 13-14-9 (rulemaking procedures for the FAB), IC 13-23-8-1 (authorized uses of ELTF funds), IC 13-23-8-4.5 (allows FAB to adopt rules regarding use of ELTF funds), IC 13-23-8-5 (allows FAB to adopt rules defining priority of claims), IC 13-23-11-7 (duties of the FAB).

Third, IC 13-23-8-1 sets forth the specific –and only– permissible uses of ELTF funds, and IC 13-23-8-4.5 only grants the FAB authority to do the following:

- (1) Establish standards, procedures, and penalties for submitting or resubmitting a claim under section 1 of this chapter when the owner or operator has failed to:
 - (A) register an underground petroleum storage tank from which a -release has occurred; or
 - (B) pay all registration fees that are due under IC 13-23-12-1 by the date the fees are due.
- (2) Determine eligibility for new owners or operators that acquire ownership or operation of the underground petroleum storage tank as a result of:
 - (A) a bona fide, good faith transaction, negotiated at arm's length, between parties under separate ownership and control;
 - (B) a foreclosure or a deed transferred in lieu of a foreclosure;

- (C) the exercise of the person's lien rights; or
- (D) an inheritance.

IC 13-23-8-5 further allows the FAB only to “define the manner in which the priority order of liability claims and loan guarantees is established.” What IDEM is asking the FAB to approve with this proposed rulemaking runs afoul of the FAB’s above referenced authority. What the IDEM is seeking can only be accomplished through the Indiana General Assembly, not through an agency rulemaking. Lastly, nothing in IC 13-23-11-7 allows the FAB to fundamentally alter the purpose or use of ELTF funds.

In sum, the General Assembly expressly limited the FAB’s authority over the administration of ELTF fund, and many of the proposed changes can only be adopted by statutory amendment, not through a rulemaking.

V. The Proposed Rule is Invalid Because Applicable Procedures Were Not Followed.

A. IDEM Failed to Follow Notice Requirements Under IC 13-14-9-3 and 4.

IC 13-14-9 sets forth the procedures for rulemaking by boards, including the FAB. IDEM is required in its First Notice of Comment Period to include the following:

- (1) Identify the authority under which the proposed rule is to be adopted.
- (2) Describe the subject matter and the basic purpose of the proposed rule. The description required by this subdivision must:
 - (A) list all alternatives being considered by the department at the time of the notice;
 - (B) state whether each alternative listed under clause (A) creates:
 - (i) a restriction or requirement more stringent than a restriction or requirement imposed under federal law; or
 - (ii) a restriction or requirement in a subject area in which federal law does not impose restrictions or requirements;
 - (C) state the extent to which each alternative listed under clause (A) differs from federal law;
 - (D) include any information known to the department about the potential fiscal impact of each alternative under clause (A) that creates:
 - (i) a restriction or requirement more stringent than a restriction or requirement imposed under federal law; or
 - (ii) a restriction or requirement in a subject area in which federal law does not impose restrictions or requirements; and
 - (E) set forth the basis for each alternative listed under clause (A).
- (3) Describe the relevant statutory or regulatory requirements or restrictions relating to the subject matter of the proposed rule that exist before the adoption of the proposed rule.

- (4) Request the submission of alternative ways to achieve the purpose of the proposed rule.
- (5) Request the submission of comments, including suggestions of specific language for the proposed rule.
- (6) Include a detailed statement of the issue to be addressed by adoption of the proposed rule.

IC 13-14-9-3(a).

In its Second Notice of Comment Period, IDEM must, among other things:

- (5) Identify each element of the proposed rule that imposes a restriction or requirement on persons to whom the proposed rule applies that:
 - (A) is more stringent than a restriction or requirement imposed under federal law; or
 - (B) applies in a subject area in which federal law does not impose a restriction or requirement.
- (6) With respect to each element identified under subdivision (5), identify:
 - (A) the environmental circumstance or hazard that dictates the imposition of the proposed restriction or requirement to protect human health and the environment;
 - (B) examples in which federal law is inadequate to provide the protection referred to in clause (A); and
 - (C) the:
 - (i) estimated fiscal impact; and
 - (ii) expected benefits;

based on the extent to which the proposed rule is more stringent than the restrictions or requirements of federal law, or on the creation of restrictions or requirements in a subject area in which federal law does not impose restrictions or requirements.
- (7) For any element of the proposed rule that imposes a restriction or requirement that is more stringent than a restriction or requirement imposed under federal law or that applies in a subject area in which federal law does not impose restrictions or requirements, describe the availability for public inspection of all materials relied upon by the department in the development of the proposed rule, including, if applicable:
 - (A) health criteria;
 - (B) analytical methods;
 - (C) treatment technology;
 - (D) economic impact data;
 - (E) environmental assessment data;
 - (F) analyses of methods to effectively implement the proposed rule; and
 - (G) other background data.

IC 13-14-9-4(a). IDEM failed to comply with the rulemaking requirements. First, IDEM failed to identify the proper authority for this rulemaking. Second, IDEM described the rule changes in a patently misleading and inaccurate manner. The proposed rule changes serve almost entirely to reduce and restrict UST owners' and operators' ability to obtain ELTF funding. Third, given the deficiencies in its First Notice, IDEM admitted that "IDEM received no comments in response to the first notice of public comment period."

B. IDEM Failed to Determine the Fiscal Impact of the Proposed Changes

The fiscal impact of IDEM's proposed changes must be studied and appropriately assessed. The considerable restrictions IDEM seeks to place on ELTF reimbursements will have a substantial negative economic impact on the regulated community, yet IDEM states only that the proposed rule "may impact the amount of reimbursement." IDEM further requested in its First Notice that commentators provide more specific fiscal impact information. IDEM, not the regulated community, however, has the burden to satisfy this requirement. Specifically, IDEM is required by statute to provide "the fiscal impact statement prepared by the office of management and budget with respect to the proposed rule..." prior to a board's preliminary adoption of that proposed rule. *IC 13-14-9-4.2*. Consequently IDEM must evaluate the fiscal impact of IDEM's proposed new policies and proposed changes to ELTF and then disclose this information. IDEM failed to do so, which failure to do so undermines the statutory process and renders the rulemaking invalid.

VI. IDEM's Proposed Rule Violates IC 4-22-2-19.5

Pursuant to IC 4-22-2-19.5(a), a rule must: "(1) Minimize the expenses to: (A) regulated entities that are required to comply with the rule; (B) persons who pay taxes or pay fees for government services affected by the rules; and (C) consumers of products and services of regulated entities affected by the rule;" and "(2) Achieve the regulatory goal in the least restrictive manner." These proposed rule changes do not benefit UST owners but instead make it more difficult for them to receive reimbursement for the most common types of releases that have historically been covered by the ELTF.

VII. IPCA's Specific Comments to Proposed Rule Changes

The IPCA's comments to specific provisions in the proposed rule are provided directly below the proposed rule changes, which appear in bold. The IPCA's suggested changes to the proposed rules appear in bold under "suggested change."

328 IAC 1-1-2.6 "Confirmed occurrence" defined

Authority: IC 13-23

Affected: IC 13-23

Sec. 2.6. "Confirmed occurrence" means an incident that is the result of a release of

petroleum from a registered UST system and is not a surface spill or overfill. This occurrence must:

- (1) be directly attributable to a failure in the UST system; and**
- (2) have been assigned an IDEM incident number.**

(Underground Storage Tank Financial Assurance Board; 328 IAC 1-1-2.6)

IPCA Comments:

IDEM should delete its proposed language “and is not a surface spill or overfill.” Instead, a “confirmed occurrence” should be defined to include all releases of petroleum from a registered UST system. There are, unfortunately, occasions when customers spill product during the dispensing process, resulting in petroleum impacts to the soil and/or groundwater. These petroleum impacts arise from the UST system and should be included in the definition of “confirmed occurrence” rather than creating an artificial distinction between petroleum impacts located above the USTs versus those at or below the USTs.

Another proposed change discussed below under 328 IAC 1-1-9 "Substantial compliance" places an obligation on the owner/operator to report a “suspected” release. Therefore, if an owner/operator suspects a release from the UST system, by definition the reporting of the suspected incident makes it a “confirmed occurrence” before any visual or data confirmation occurs. No clarification is gained by making a suspected release a confirmed occurrence. Instead, IDEM should place an obligation on the owner/operator to report a petroleum release only after it has been confirmed by either visual or lab data confirmation.

IPCA Suggested change:

Sec. 2.6. "Confirmed occurrence" means an incident that is the result of a release of petroleum from a registered UST system, ~~and is not a~~ **including** surface spills ~~or~~ **and** overfills. This occurrence must:

- (1) be directly attributable to a failure in the UST system; and**
- (2) have been assigned an IDEM incident number.**

328 IAC 1-1-6.5 "Fund qualifying occurrence" defined

Authority: IC 13-23

Affected: IC 13-23-7-1; IC 13-23-8

Sec. 6.5. "Fund qualifying occurrence" means an incident that is the result of a release of petroleum from a registered UST system and is not a surface spill or overfill. This confirmed occurrence must:

- (1) be directly attributable to a failure in the UST system; and**
- (2) have been assigned an IDEM incident number;**

and the owner or operator must have submitted an initial site characterization (ISC) to the department.

(Underground Storage Tank Financial Assurance Board; 328 IAC 1-1-6.5)

IPCA Comments:

For the reasons stated above, “fund qualifying occurrence” should include surface spills and overfills.

ELTF eligibility is determined as of the date a petroleum release is discovered and reported to IDEM; in other words, it is a “snapshot in time.” This eligibility is principally based on the status of the tank owner/operator’s compliance with tank registration, tank fee payments, and timely reporting of the discovery of a petroleum release to IDEM. *See* IC 13-23-8-3(1)(B). It is improper and creates greater confusion for IDEM to seek to substantially alter the ELTF eligibility determination process by including the submission of an initial site characterization (“ISC”), which is a reporting document that is not submitted to IDEM until several months after the release is discovered. Requiring an ISC also unnecessarily delays ELTF eligibility determinations. Given that the average UST cleanup in Indiana costs roughly \$400,000, UST owners and operators need to have the certainty of ELTF eligibility as soon as possible after a release is discovered.

In addition, IDEM has sufficient mechanisms in place to ensure that ISCs are submitted. For example, a UST owner/operator is not entitled to get its environmental investigation expenses reimbursed by the ELTF until IDEM approves the ISC. Moreover, if a UST owner/operator does not submit an ISC then IDEM can initiate an enforcement process with substantial penalties of up to \$10,000 per day to ensure that the UST owner/operator files an ISC with IDEM. For these reasons, IDEM should delete the language requiring UST owners/operators to submit an ISC as part of the definition of a “fund qualifying occurrence,” thereby avoiding confusing ELTF eligibility with post-discovery UST reporting and compliance requirements.

IPCA Suggested change:

Sec. 6.5. "Fund qualifying occurrence" means an incident that is the result of a release of petroleum from a registered UST system, ~~and is not a~~ **including** surface spills ~~or~~ **and** overfills. This confirmed occurrence must:

- (1) be directly attributable to a failure in the UST system; and
- (2) have been assigned an IDEM incident number;

~~and the owner or operator must have submitted an initial site characterization (ISC) to the department.~~

328 IAC 1-1-9 "Substantial compliance" defined

Authority: IC 13-23

Affected: IC 13-23-8-4; IC 13-23-12-1

Sec. 9. (a) "Substantial compliance" means that, at the time a release was first ~~discovered or confirmed:~~ **suspected:**

(1) the owner or operator has met the requirements of IC 13-23-8-4(a), with the exception of minor violations of:

(A) statutory deadlines;

(B) regulatory deadlines; or

(C) regulatory requirements;

that do not cause harm or threaten to harm human health or the environment; and

(2) registration fees have been paid as required under IC 13-23-12 and 328 IAC 1-3-3. **Tank fees under IC 13-23-12-1(a) must be paid on any tanks that are:**

(A) operable; or

(B) in temporary closure.

(b) An owner or operator is not in substantial compliance if the release, **as follows:**

(1) Has not been reported within ~~seven (7)~~ **fourteen (14)** days of the date the release was required to be reported under the spill reporting rule at 329 IAC 9-4-4, in effect at the time of the release.

(2) Harms public health or the environment. ~~and was not timely reported under the spill reporting rule applicable at the time of the release.~~

(c) When site access is granted by the owner or operator to a third party for the purposes of an environmental investigation, the owner or operator is not in substantial compliance if the owner or operator:

(1) within forty-five (45) days from the date the third party accessed the site, did not request, in a letter sent by certified mail, the results of the investigation that identified a potential release on that site; or

(2) did not report any spill or release, as required.

(Underground Storage Tank Financial Assurance Board; 328 IAC 1-1-9; filed Dec 4, 1992, 11:00 a.m.: 16 IR 1052; filed Nov 1, 1995, 8:30 a.m.: 19 IR 343; readopted filed Jan 10, 2001, 3:21 p.m.: 24 IR 1534; filed Oct 17, 2001, 4:30 p.m.: 25 IR 789; filed Aug 30, 2004, 9:40 a.m.: 28 IR 125; readopted filed May 14, 2007, 1:52 p.m.: 20070523-IR-328070137BFA)

IPCA Comments:

As discussed above, for purposes of ELTF eligibility, substantial compliance is determined at the time a release is discovered. IDEM, however, seeks to change the trigger in section 9(a) from a definite event - "discovered or confirmed" - to the ambiguous, undefined term "suspected." In addition, section 9(b)(1) refers to the spill reporting rule under 329 IAC 9-4-4, which requires action in the [actual] event of a "spill or overfill," and does not require action when a spill or overfill is "suspected." If IDEM's vague "suspected" language is adopted, IDEM could conceivably deny ELTF eligibility on the ground that the UST owner/operator should have "suspected" a release long before it was actually "discovered or confirmed," thereby imposing an unreasonable standard on UST owners and operators and raise an improper bar to ELTF eligibility. For example, a pin-hole leak could release such small amounts of petroleum that it

may go undetected for some time, despite the fact that the owner/operator is otherwise complying with all monitoring and release prevention requirements. Use of the word "suspected" does not clarify the rule at all.

Requiring reporting within 14 days of a "discovered" release as opposed to a "confirmed" release would serve IDEM's goal of earlier reporting without allowing for such wide interpretation of the term "suspected."

Section 9(b)(2) is similarly problematic in that IDEM could deny ELTF eligibility for every single release because all releases "harm public health or the environment." The General Assembly expressly prohibited this: "A release from an underground petroleum storage tank may not prevent an owner or operator from establishing compliance with this subdivision to receive money from the [ELTF]." IC 13-23-8-4(a)(1). The proposed change conflicts with a code provision and cannot be adopted.

The proposed addition of section 9(c) must be stricken completely as it makes compliance turn on the actions of a third party not subject to these rules. Under the proposed rule as currently drafted, if a third party does not provide an owner/operator with the subsurface investigation results that may have detected a release, the owner/operator will not be in substantial compliance if a release is later discovered. IDEM simply cannot make substantial compliance dependent upon the actions of a party out of the control of the owner/operator. Furthermore, if adopted, this provision would have serious economic consequences as it would have a chilling effect on real estate transactions involving USTs.

IPCA Suggested Change:

Sec. 9. (a) "Substantial compliance" is **determined** at the time a release was first ~~suspected~~ **discovered, and means that:**

(1) the owner or operator has met the requirements of IC 13-23-8-4(a), with the exception of minor violations of:

(A) statutory deadlines;

(B) regulatory deadlines; or

(C) regulatory requirements;

that do not cause harm or threaten to harm human health or the environment; and

(2) registration fees have been paid as required under IC 13-23-12 and 328 IAC 1-3-3. Tank fees under IC 13-23-12-1(a) must be paid on any tanks that are:

(A) operable; or

(B) in temporary closure.

(b) An owner or operator is not in substantial compliance if the release, as follows:

(1) Has not been reported within fourteen (14) days of the date the release was required to be reported under the spill reporting rule at 329 IAC 9-4-4, in effect at the time of the release.

~~(2) Harms public health or the environment~~

~~(c) When site access is granted by the owner or operator to a third party for the purposes of an~~

environmental investigation, the owner or operator is not in substantial compliance if the owner or operator:

- ~~(1) within forty five (45) days from the date the third party accessed the site, did not request, in a letter sent by certified mail, the results of the investigation that identified a potential release on that site; or~~
- ~~(2) did not report any spill or release, as required.~~

328 IAC 1-1-12 "UST system" or "tank system" defined

Authority: IC 13-23

Affected: IC 13-23

Sec. 12. (a) "UST system" or "tank system" means the following:

- (1) An underground storage tank.**
- (2) Connected underground piping.**
- (3) Underground ancillary equipment.**
- (4) A containment system, if any.**

(b) The term does not include a dispensing system dispensing components above the surface of the ground.

(Underground Storage Tank Financial Assurance Board; 329 IAC 1-1-12)

IPCA Comments:

The proposed changes seek to exclude a large portion of the UST system and create unnecessary ambiguity. First, "Ancillary equipment" is already defined in 329 IAC 9-1-5 and means "any device that may include any: (1) piping; (2) fittings; (3) flanges; (4) valves; or (5) pumps used to distribute, meter or control the flow of regulated substances to and from an underground storage tank." There is no distinction among these devices between above ground or under ground. Nor should there be as all are integral to the storage and dispensing of petroleum products. Other than the dispenser's meter, hose, and nozzle, the ancillary equipment that IDEM may characterize as "dispensing components" are located in a pump island and are not easily observable or accessible. Any contamination would immediately enter the "underground" portion of the UST system and should not be treated any differently than an "underground" release. In sum, dispensing components are indivisible from the rest of the UST system and should be covered by ELTF. The dispensers and related ancillary equipment are an integral to the use and sale of petroleum to the motoring public.

Second, the phrase "dispensing components" is vague and could be interpreted to include equipment that is, in fact, underground.

Third, differentiating between "above the ground" and "underground" components serves no conceivable purpose in this context.

IPCA Suggested Change:

Sec. 12. (a) "UST system" or "tank system" means the following:

- (1) An underground storage tank.
- (2) Connected underground piping.
- (3) ~~Underground~~ Ancillary equipment, **including dispensing equipment**;
- (4) A containment system, if any.

~~(b) The term does not include a dispensing system dispensing components above the surface of the ground.~~

328 IAC 1-3-1 Fund access

Authority: IC 13-23

Affected: IC 13-23-7; IC 13-23-8-4

Sec. 1. (a) The following persons may apply to the fund for payment of reimbursable costs or for third party liability claims:

- (1) Tank owners and operators, including a person as described in section 3(d) of this rule.
- (2) Persons assigned the right of reimbursement by any person described in subdivision (1).
- (3) Subsequent owners of the property upon which tanks were located, if the tanks were closed by a previous property owner, tank owner, or operator who is eligible, as specified in IC 13-23-8-4(e).

(b) Any or all persons listed under subsection (a) may apply to the fund for payment of reimbursable costs or third party liability claims if the following have occurred:

- (1) ~~The Evidence of payment for of costs incurred equal to the applicable deductible amount must be provided prior to receiving any reimbursement from the ELTF for the release has been made.~~ **fund qualifying occurrence.**
- (2) A claim for the same costs has not been submitted to or paid by the fund. A claim for the same costs will not be paid more than once by the fund.
- (3) **All claims must be submitted within nine (9) months after the incident is granted a status of no further action (NFA). All resubmittals associated with any claim must be received by the department within fifteen (15) months after the status of NFA was granted.**
- (4) **All incidents with an existing status of NFA will have:**
 - (A) **six (6) months from the effective date of the 2009 amendments to this rule to submit any remaining costs; and**
 - (B) **an additional six (6) months to resubmit any denied costs.**
- (5) **Initial eligibility applications will not be considered without an initial site characterization (ISC) approval from an IDEM project manager.**

(c) The department may determine the identity of the tank owner or tank operator based on the

notification submitted under 329 IAC 9-2-2. The department may require an affirmation that an applicant is a person, as described in section 3(d) of this rule, or a subsequent owner of the property, as specified in subsection (a)(3).

(d) A person who owns property with a tank is considered a tank owner.

(e) The fund will not pay for any of the following actions or activities:

- (1) Creating a release or occurrence.**
- (2) Making the contamination at the site worse.**
- (3) Misusing equipment at the site that results in worse contamination.**
- (4) Failing to monitor equipment properly by the certified operator at the time of filling.**

(f) Preapproval of eligibility under 328 IAC 1-5-2(c) is not an application for reimbursable costs, and preapproval may only be requested by the owner or operator or responsible parties.

(Underground Storage Tank Financial Assurance Board; 328 IAC 1-3-1; filed Dec 4, 1992, 11:00 a.m.: 16 IR 1053; filed Jan 9, 1997, 4:00 p.m.: 20 IR 1103; readopted filed Jan 10, 2001, 3:21 p.m.: 24 IR 1534; filed Oct 17, 2001, 4:30 p.m.: 25 IR 790; filed Aug 30, 2004, 9:40 a.m.: 28 IR 126)

IPCA Comments:

As an initial matter, the FAB is only authorized to adopt rules concerning fund administration, not fund access. See IC 13-23-8-4.5. Sec. 1(b)(1) should include the term “applicable” since IC 13-23-8-3 establishes a sliding scale for ELTF deductibles. Additionally, adoption of this rule should not shorten the time allowed to submit claims after the incident has been granted NFA status. Therefore, Section 1(b)(4) should provide that claims for incidents with existing status of NFA shall be submitted within nine (9) months of the effective date of the 2009 amendments to this rule.

Section 1(e) provides no clarification whatsoever. It is not clear if items (1)-(4) concern eligibility, *ergo* further define “fund qualifying occurrence,” or if they refer to the types of costs that are not reimbursable. In any event, the language is so vague, broad, and undefined that, if enacted, IDEM would have the discretion to disallow virtually all claims and costs. Moreover, IDEM’s lengthy delays of many months to review and comment on reports such as ISC, FSI and CAP, make the contamination at a site worse because the UST owner/operator cannot proceed with the preparation and installation of a CAP until IDEM first approves the ISC, FSI and then the CAP, a process that routinely takes more than a year or two.

Regarding (e)(1)-(3), IDEM could argue that all releases or occurrences were “created” by the action or inaction of someone, but, again, the Indiana General Assembly has already determined that “[a] release from an underground petroleum storage tank may not prevent an owner or operator from establishing compliance with this subdivision to receive money from the [ELTF].” IC 13-23-8-4(a)(1). Hence, this proposed language cannot be adopted.

As discussed in more detail above, given the average cost to cleanup leaking UST sites, UST owners and operators need to have ELTF eligibility determinations made soon after a release has been reported to IDEM, and not wait for many months or years while an initial site characterization investigation and report are prepared and then wait several more months for IDEM's response and, ideally, approval.

IPCA Suggested Change:

Sec. 1. (a) The following persons may apply to the fund for payment of reimbursable costs or for third party liability claims:

- (1) Tank owners and operators, including a person as described in section 3(d) of this rule.
- (2) Persons assigned the right of reimbursement by any person described in subdivision (1).
- (3) Subsequent owners of the property upon which tanks were located, if the tanks were closed by a previous property owner, tank owner, or operator who is eligible, as specified in IC 13-23-8-4(e).

(b) Any or all persons listed under subsection (a) may apply to the fund for payment of reimbursable costs or third party liability claims if the following have occurred:

(1) Evidence of payment of costs incurred equal to the **applicable** deductible amount must be provided prior to receiving any reimbursement from the ELTF for the fund qualifying occurrence.

(2) A claim for the same costs has not been submitted to or paid by the fund. A claim for the same costs will not be paid more than once by the fund.

(3) All claims must be submitted within nine (9) months after the incident is granted a status of no further action (NFA). All resubmittals associated with any claim must be received by the department within fifteen (15) months after the status of NFA was granted.

(4) All **claims for** incidents with an existing status of NFA will have:

(A) ~~six~~ **nine (6-9)** months from the effective date of the 2009 amendments to this rule to submit any remaining costs; and

(B) an additional six (6) months to resubmit any denied costs.

~~(5) Initial eligibility applications will not be considered without an initial site characterization (ISC) approval from an IDEM project manager.~~

(c) The department may determine the identity of the tank owner or tank operator based on the notification submitted under 329 IAC 9-2-2. The department may require an affirmation that an applicant is a person, as described in section 3(d) of this rule, or a subsequent owner of the property, as specified in subsection (a)(3).

(d) A person who owns property with a tank is considered a tank owner.

(e) The fund will not pay for any of the following actions or activities:

(1) ~~Creating a release or occurrence.~~

(2) ~~Making the contamination at the site worse.~~

(3) ~~Misusing equipment at the site that results in worse contamination.~~

~~(4) Failing to monitor equipment properly by the certified operator at the time of filling.~~

(f) Preapproval of eligibility under 328 IAC 1-5-2(c) is not an application for reimbursable costs, and preapproval may only be requested by the owner or operator or responsible parties.

328 IAC 1-3-3 Eligibility requirements

Authority: IC 13-23

Affected: IC 6-8.1-1-1; IC 6-8.1-10-1; IC 13-23

Sec. 3. (a) A person listed in section 1 of this rule shall comply with the following for a claim for reimbursable costs or a third party liability claim to be considered for reimbursement from the fund by the administrator:

(1) Demonstrate that the requirements in IC 13-23-8-4(a)(1) through IC 13-23-8-4(a)(4) have been met. **Demonstrate that the initial site characterization (ISC) as required by rules of the solid waste management board at 329 IAC 9-5-5.1 has been completed and submitted to the department within sixty (60) days of reporting a release to the department. If this requirement is not met, the ELTF eligibility percentage will be reduced by five percent (5%). An additional five percent (5%) will then be deducted for every six (6) months that pass prior to the ISC report being submitted to the department.** The CAP as required by IC 13-23-8-4(a)(4) and 329 IAC 9-5-7 must be submitted with projected costs that describe in detail the costs for work to be completed under the CAP. The projected costs must be in a form or format approved by the administrator.

(2) Demonstrate that the tank owner or operator was in substantial compliance with the spill reporting rule or law applicable at the time the release is ~~discovered~~ suspected. **When site access is granted by the owner or operator to a third party for the purposes of an environmental investigation, the owner or operator is not in substantial compliance if, within forty-five (45) days from the date the third party accessed the site, the owner or operator did not request, in a letter sent by certified mail, the results of the investigation that identified a potential release on that site and reported any spill or release, as required. If this requirement is not met, five percent (5%) will be deducted from the ELTF eligibility percentage. An additional five percent (5%) will then be deducted for every six (6) months that pass prior to the release incident being reported to the department.**

(3) Pay all:

(A) past and currently due fees under IC 13-23-12-1; and all

(B) interest and penalties that are due under subsections (e) and (f).

Tank fees under IC 13-23-12-1(a) must be paid on any tanks that are operable or that are in temporary closure.

(4) For a person who acquires ownership in accordance with subsection (d), make timely payment of all past due tank fees, interest, and penalties in accordance with subsection (f) to make a claim for reimbursable costs for any site characterization or corrective action related to a release that is first suspected, discovered, or confirmed after the payment of all past and currently due fees, interest, and penalties. **Tank fees under IC 13-23-12-1(a) must be paid on any tanks**

that are:

(A) operable; or

(B) in temporary closure.

(5) Register the tank or tanks within thirty (30) days of the time the tank or tanks were first put into use, even if a release is discovered or confirmed before the tank or tanks were registered.

Tanks are considered in use when the tank:

(A) contains or has ever contained a regulated substance; and

(B) has not been closed under 329 IAC 9-6.

(6) Comply with the requirements of IC 13-23, 329 IAC 9, and this title.

(b) Persons listed in section 1 of this rule shall be eligible to apply to the fund for reimbursement from the fund according to the following formula:

(1) Determine the number of payments that were owed under IC 13-23-12-1 on all regulated tanks at the facility from which a release occurred:

(A) beginning with the date that the fees for each tank first became due under IC 13-23-12; and

(B) continuing until the date on which the release occurred.

Tank fees under IC 13-23-12-1(a) must be paid on any tanks that are operable or that are in temporary closure.

(2) Determine the number of payments actually made under IC 13-23-12-1 on all regulated tanks at the facility from which a release occurred:

(A) beginning with the date each tank became regulated under IC 13-23; and

(B) continuing until the date on which the release occurred.

Divide the number of payments actually made by the number of payments due as determined in subdivision (1).

(3) Determine the additional percentage deduction related to either release reporting or ISC submittal.

~~(3)~~ **(4) Determine the amount of money the person would have received from the fund if all payments due on the date the release occurred had been paid when due and multiply the amount by**

~~(A) the percentage determined in ~~subdivision~~ subdivisions (2) if the percentage is fifty percent (50%) or more; or~~

~~(B) zero (0), if the percentage determined in subdivision (2) is less than fifty percent (50%). and (3).~~

(c) Payments that were made or could have been paid four (4) times per year under IC 13-23-12-3 count as one (1) payment for purposes of this section.

(d) A person who acquires ownership or operation of an underground petroleum storage tank under IC 13-23-8-4.5(2) may not become eligible for reimbursement from the fund for any releases reported after the date that the commissioner receives the "Intent to Acquire UST and Reinstate Eligibility" form **(Form)** unless the person does the following:

(1) ~~Submit an "Intent to Acquire UST and Reinstate Eligibility" form~~ **Submits a Form** as prescribed by the commissioner at least sixty (60) days prior to acquiring ownership or operation of an underground petroleum storage tank. This form will be kept confidential up to the earlier of

the following:

- (A) The date of the transfer of the property.
- (B) The administrator's receipt of the monies as owed under subsection (e).
- (C) Ninety (90) days after the administrator receives the Form.

The administrator will provide a listing of environmental penalties, interest due to the fund, and fees due to the prospective purchaser and the property owner within forty-five (45) days of receipt of the Form.

(2) **Pay Pays** all applicable tank fees, including past due fees, interest, and penalties, for each tank not more than thirty (30) days after the transaction whereby the person acquires ownership or operation of each tank. **Tank fees under IC 13-23-12-1(a) must be paid on any tanks that are:**

(A) operable; or

(B) in temporary closure.

(3) The seller of the underground petroleum storage tank site is liable for any and all unpaid tank fees, interest, and penalties that are assessed by the administrator in accordance with subsection (e). The purchaser is to:

(A) collect all past due tank fees, interest, and penalties from the noncompliant seller; and

(B) remit to the administrator the full amount of the assessment for the subject underground petroleum storage tank provided by the administrator in accordance with subsection (e) prior to a release.

The timely remittance of these monies is a condition of fund eligibility for the purchaser. **Tank fees under IC 13-23-12-1(a) must be paid on any tanks that are operable or that are in temporary closure.**

(e) Persons listed in section 1 of this rule who fail to pay tank fees when due are subject to payment of interest and penalties on those fees in order to become eligible for the fund. Interest and penalties due include the following:

(1) Penalties and interest due the department of state revenue.

(2) All past due underground storage tank fees under IC 13-23-12. **Tank fees under IC 13-23-12-1(a) must be paid on any tanks that are:**

(A) operable; or

(B) in temporary closure.

(3) An environmental penalty as specified in subsection (f)(2). This penalty will be distributed into the fund and into the petroleum trust fund in accordance with IC 13-23-12-7(b).

(4) Interest will be charged for the missed fee or fees at the percent per year based on subsection (f) and IC 6-8.1-10-1 until all fees due have been paid in full for each tank. This interest will be deposited into the fund.

Payment of all fees, interest, and penalties due within thirty (30) days of the date of transfer of the subject property is a requirement for fund eligibility for the purchaser.

(f) In addition to all past due fees owed, the amount of interest and penalties owed by a particular owner or operator is to be determined by the following formula:

(1) Interest, under IC 6-8.1-1-1 and IC 6-8.1-10-1, as follows:

$$\text{Number of delinquent days} \times \text{daily interest rate} = \text{interest due}$$

Interest will be calculated according to IC 6-8.1-10-1.

(2) Penalty as follows:

(A) For sites containing only tanks that were never registered, or sites containing only tanks for which no tank fees were paid when due, the penalty will be calculated at two thousand dollars (\$2,000) under IC 13-23-12-7(a) per petroleum underground storage tank per year that passes after each year's fee is due. ~~The table (as an example) or the following formula (to calculate any length of time) may be used to calculate the penalty per tank:~~ **The penalty will be calculated by multiplying the total number of years that have passed since the fee was due by the total number of tanks and multiplying the result by two thousand dollars (\$2,000).**

Where: n = Total number of years late.

Y_{ij} = Each year with an unpaid fee or a fee that was paid at least one (1) year late.

Y_0 = First year a fee was unpaid or paid at least one (1) year late.

m = ~~Most recent year where tank fees were unpaid or paid at least one (1) year late.~~

~~$$(2000) \left(\sum_{j=Y_0}^m \left(\sum_{i=1}^n Y_{i,j} \right) \right) = \text{penalty}$$~~

Year due	1 year past year due	2 years past year due	3 years past year due	4 years past year due
Year 1	2,000	2,000	2,000	2,000
Year 2		2,000	2,000	2,000
Year 3			2,000	2,000
Year 4				2,000
Total per tank	2,000	6,000	12,000	20,000

(B) For sites with tanks that are registered but not all fees have been completely paid, the penalty will be calculated at one thousand dollars (\$1,000) per petroleum underground storage tank for each missed fee payment. If a quarterly fee payment is missed, the penalty is applied at one-fourth (1/4) the amount listed in the table. ~~The following table is an example of how penalties must be paid per tank:~~ **The penalty will be calculated by multiplying the total number of years that have passed since the fee was due by the total number of tanks and multiplying the result by one thousand dollars (\$1,000).**

Year due	1 year past year due	2 years past year due	3 years past year due	4 years past year due
Year 1	1,000	1,000	1,000	1,000

Year 2		1,000	1,000	1,000
Year 3			1,000	1,000
Year 4				1,000
Total per tank	1,000	2,000	3,000	4,000

(C) The penalty is incurred:

(i) nine (9) months after the fee is due; or

(ii) three (3) months after the final quarterly installment is due.

~~Subsequent penalties are calculated yearly and are cumulative as specified in clause (A).~~

(D) Penalties will not be collected for fees due before December 1, 2001.

(Underground Storage Tank Financial Assurance Board; 328 IAC 1-3-3; filed Dec 4, 1992, 11:00 a.m.: 16 IR 1053; filed Jan 9, 1997, 4:00 p.m.: 20 IR 1104; errata, 20 IR 1593; readopted filed Jan 10, 2001, 3:21 p.m.: 24 IR 1534; filed Oct 17, 2001, 4:30 p.m.: 25 IR 790; errata filed Feb 27, 2002, 9:58 a.m.: 25 IR 2254; filed Aug 30, 2004, 9:40 a.m.: 28 IR 127; errata filed Oct 7, 2004, 11:45 a.m.: 28 IR 608)

IPCA Comments:

Sixty days is an unrealistic time frame to adequately prepare an ISC. In many instances, an owner/operator will need to get approval from neighboring land owners to adequately perform an environmental investigation and prepare an initial site characterization. Ninety (90) days from the date that the UST owner/operator obtains written approval from all affected land owners would be more appropriate.

Imposing a spill reporting requirement as a threshold requirement is starkly inconsistent with a plain reading of I.C. § 13-23-8-4, which requires “*substantial* compliance” of the applicable UST laws “*at the time the release was discovered.*” (emphasis added). The inclusion of the phrase, “at the time the release was discovered,” demonstrates the explicit intent to use the discovery of the release as the point, or “compliance date,” before which substantial compliance with the applicable UST requirements must have been met. Compliance is, therefore, retrospective, and spill reporting is a requirement that cannot possibly be met before the time of discovery, or compliance date, and therefore cannot be a mandatory eligibility requirement under Ind. Code § 13-23-8-4. But IDEM’s imposition of spill reporting as a threshold requirement undermines the plain meaning of I.C. § 13-23-8-4 and 328 IAC 1-1-9.

The percentage reduction in eligibility proposed by IDEM is inconsistent with the spirit and purpose of the ELTF program. As discussed above, to encourage UST owners/operators to maintain UST compliance the percentage of ELTF eligibility is established as of the date the release is discovered. IDEM already possesses sufficient regulatory and enforcement powers to ensure that UST owners/operators meet their reporting and cleanup obligations. The percentage reduction is simply an effort by IDEM to short circuit the due process afforded UST owners/operators in the traditional enforcement process that includes a notice of violation,

initiation of an enforcement proceeding and a hearing before the OEA and, if necessary, an appeal to the local trial courts.

The proposed addition of section 3(a)(2) must be stricken as it makes compliance turn on the actions of a third party not subject to these rules. Under the proposed rule as currently drafted, if a third party does not provide an owner/operator with the subsurface investigation results that may have detected a release, the owner/operator will not be in substantial compliance if a release is later discovered. IDEM simply cannot make ELTF eligibility dependent upon the actions of a party out of the control of the owner/operator. Furthermore, if adopted, this provision would have serious economic consequences as it would have a chilling effect on real estate transactions involving USTs.

Regarding the penalties for missed tank fee payments, IDEM and the Indiana Department of Revenue should be required to include in their annual UST fee statements a line reflecting the amount of any prior UST fee payments that are due and owing. This is done in other States and provides a customary current outstanding balance so that the UST owner/operator is provided timely notice of a missed fee payment. Given that UST fee payments are only \$90 per tank but IDEM is seeking to assess a \$2,000 per year late fee, the amount of the fee is usurious and the lack of notice highly objectionable.

IPCA Suggested Change:

Sec. 3. (a) A person listed in section 1 of this rule shall comply with the following for a claim for reimbursable costs or a third party liability claim to be considered for reimbursement from the fund by the administrator:

(1) Demonstrate **substantial compliance with** ~~that~~ the requirements in IC 13-23-8-4(a)(1) through IC 13-23-8-4(a)(4) ~~have been met~~. Demonstrate that the initial site characterization (ISC) as required by rules of the solid waste management board at 329 IAC 9-5-5.1 has been completed and submitted to the department within ~~sixty (60)~~ **after receiving written access to all affected properties of reporting a release to the department**. ~~If this requirement is not met, the ELTF eligibility percentage will be reduced by five percent (5%). An additional five percent (5%) will then be deducted for every six (6) months that pass prior to the ISC report being submitted to the department.~~ The CAP as required by IC 13-23-8-4(a)(4) and 329 IAC 9-5-7 must be submitted with projected costs that describe in detail the costs for work to be completed under the CAP. The projected costs must be in a form or format approved by the administrator.

(2) Demonstrate that the tank owner or operator was in substantial compliance with the spill reporting rule or law applicable at the time the release is **discovered suspected**. ~~When site access is granted by the owner or operator to a third party for the purposes of an environmental investigation, the owner or operator is not in substantial compliance if, within forty five (45) days from the date the third party accessed the site, the owner or operator did not request, in a letter sent by certified mail, the results of the investigation that identified a potential release on that site and reported any spill or release, as required. If this requirement is not met, five percent (5%) will be deducted from the ELTF eligibility percentage. An additional five percent (5%) will~~

~~then be deducted for every six (6) months that pass prior to the release incident being reported to the department.~~

(3) Pay all:

(A) past and currently due fees under IC 13-23-12-1 **as stated on the annual UST fee statement**; and

(B) interest and penalties that are due under subsections (e) and (f) **with penalties being no more than two times the amount of the missed tank fee payment.**

Tank fees under IC 13-23-12-1(a) must be paid on any tanks that are operable or that are in temporary closure.

(4) For a person who acquires ownership in accordance with subsection (d), make timely payment of all past due tank fees, interest, and penalties in accordance with subsection (f) to make a claim for reimbursable costs for any site characterization or corrective action related to a release that is first ~~suspected~~, discovered, or confirmed after the payment of all past and currently due fees, interest, and penalties. Tank fees under IC 13-23-12-1(a) must be paid on any tanks that are:

(A) operable; or

(B) in temporary closure.

(5) Register the tank or tanks within thirty (30) days of the time the tank or tanks were first put into use, even if a release is discovered or confirmed before the tank or tanks were registered.

Tanks are considered in use when the tank:

(A) contains or has ever contained a regulated substance; and

(B) has not been closed under 329 IAC 9-6;

(C) is not in temporary closure.

VIII. Conclusion: The Proposed Rules Cannot Be Adopted

In closing, the IPCA and its members are supportive of formulating sound, fiscally responsible environmental policies and rules that will serve the citizens of Indiana and provide certainty and clarity in the administration of the ELTF program. This will result in leaking UST sites being remediated in a timely, cost-effective manner and being funded by the ELTF. However, it is clear that IDEM cannot promulgate this rulemaking. Many of the proposed changes are ill-conceived and are well outside the scope of IDEM's statutory authority and run counter to the express statutory language adopted by the Indiana General Assembly. These changes are so objectionable that, if adopted, they would leave the IPCA and its members with no choice but to challenge IDEM's proposed rules in a different forum.

If you have any questions or would like to meet to discuss these comments do not hesitate to contact me or the IPCA's Executive Director, Mr. Scot Imus. Otherwise, on behalf of the IPCA we appreciate your careful consideration and adoption of these comments.

Very Truly Yours,

PLEWS SHADLEY RACHER & BRAUN LLP



Christopher J. Braun, Esq.

Angela M. Dorrell, Esq.

General Counsel to the IPCA

CJB/amd

cc: Members of the Financial Assurance Board (see attached list)
Commissioner Tom Easterly, IDEM
Deputy Commissioner Bruce Palin, IDEM
Mr. Skip Powers, IDEM UST Section Chief
Mr. Scot Imus
John D. Moriarty, Esq.