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Title: Property Containing Contaminated Aquifers/Underground Storage Tanks

Identification Number: WASTE-0038-NPD

Date Originally Adopted: April 20, 2000

Dates Revised: None

Other Policies Repealed or Amended: None

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

Citations Affected: IC 13-23; 329 IAC 9

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Property Containing Contaminated Aquifers/Underground Storage Tanks

Pursuant to IDEM's Leaking Underground Storage Tank corrective action authority (IC 13-23 and 329 Indiana Administrative Code (IAC) 9), IDEM 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 regulated substance from an underground storage tank if the person can substantiate the existence of a third party defense that demonstrates the following:

- (1) the petroleum or regulated substance 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 petroleum or regulated substance.

Conditions

(A) The landowner did not cause, contribute to, or knowingly exacerbate the release or threat of release of the petroleum or regulated substance, 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.

(C) There is no alternative basis for the landowner’s liability for the contaminated aquifer, such as liability as an owner or operator 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 the Solid Waste Disposal Act (42 U.S.C. 6991(b), as amended), 40 Code of Federal Regulations (CFR), Part 280, IC 13-23, or 329 IAC 9 even where such owner has had no participation in the handling of petroleum or regulated substance 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 Leaking Underground Storage Tank 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. 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.

References

Indiana Code 13-23 Underground Storage Tanks

329 IAC Article 9 Underground Storage Tanks

Solid Waste Disposal Act, as amended (42 U.S.C. 6991(b), as amended)

40 CFR Part 280: Technical Standards and Corrective Action Requirements for Owners and Operators of Underground Storage Tanks (UST)