

## 2. INDIANA BROWNFIELDS PROGRAM

### 2.1 Purpose and Scope

The Indiana Brownfields Program (IBP) ([www.IN.gov/ifa/brownfields](http://www.IN.gov/ifa/brownfields)) was created by 2005 legislation (*Senate Enrolled Act 578*) that merged the brownfield financial and environmental programs into one program under the management of the Indiana Finance Authority (IFA), thereby combining existing brownfield resources to better assist communities with brownfield redevelopment. The IBP provides financial, technical, legal, and educational assistance, and works in partnership with the U.S. Environmental Protection Agency (U.S. EPA) and other Indiana agencies to assist communities in making productive use of their brownfield properties.

#### Indiana Defines a Brownfield as:

- A parcel of real estate that is abandoned or inactive, or may not be operated at its appropriate use. and on which expansion, redevelopment, or reuse is complicated because of the presence or potential presence of a hazardous substance, a contaminant, petroleum, or a petroleum product that poses a risk to human health and the environment (*IC 13-11-2-19.3*).

Concerns about cleanup liability for lenders and prospective purchasers are among the main potential obstacles to brownfields redevelopment. Through the issuance of Comfort Letters, the IBP attempts to eliminate liability concerns for stakeholders at sites where either an enforcement discretion policy or an exemption from liability based in statute applies. Through the issuance of Site Status Letters, the program also addresses the potential for IDEM to require a cleanup based on comparing site conditions to objective, risk-based screening levels found in the *Remediation Closure Guide (Waste-0046-R1)* ([www.IN.gov/idem/4694.htm](http://www.IN.gov/idem/4694.htm)) or to site-specific risk based levels that provide the basis for remediation objectives. Comfort and Site Status Letters are made available under the IDEM Nonrule Policy Document *Brownfields Program Comfort and Site Status Letters Policy (Waste-0051)* ([www.IN.gov/idem/4694.htm](http://www.IN.gov/idem/4694.htm)).

#### State Mechanisms for Minimizing and Managing Liability:

- Statutory liability exemptions for political subdivisions, lenders, trustees, fiduciaries, innocent landowners, prospective purchasers, and contiguous property owners
- Risk-based remediation objectives
- Enforcement discretion policies

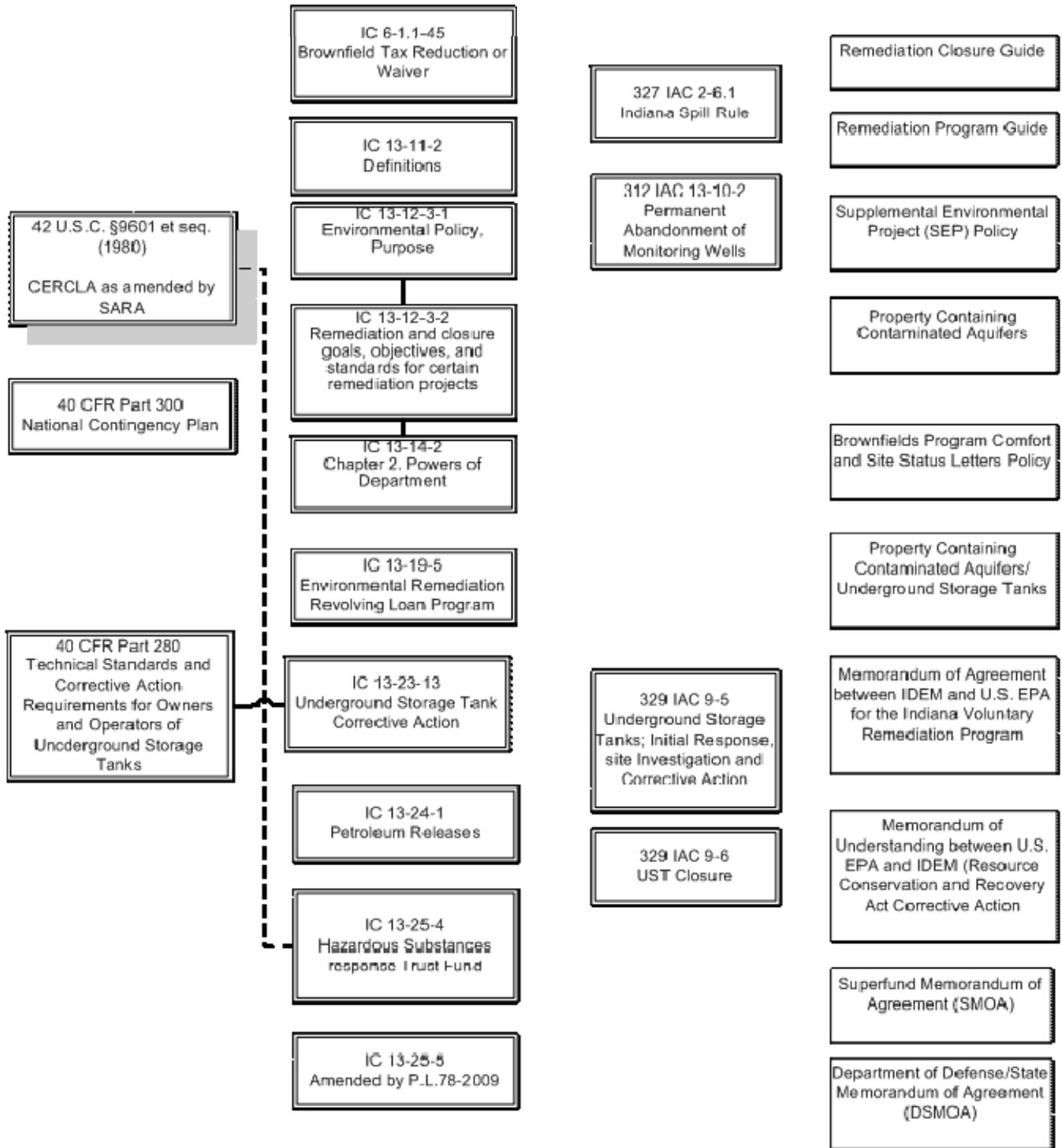
Although not a regulatory program, the IBP is authorized by a statute (*IC 13-19-5*) that allows for the provision of services and the distribution of financial assistance for communities to assess and cleanup brownfield properties. When providing assistance at brownfield sites, the IBP must adhere to all existing laws, regulations and policies that relate to protection of human health and the environment and that apply to other IDEM remediation programs.

The IBP issues the following types of liability determination and closure documentation to promote brownfield site reuse:

- Comfort Letters
- Site Status Letters
- No Further Action Letters

## 2.2 Rules and Laws

Figure 2.1 Laws, Rules, and Regulations Related to Indiana Brownfields Program



## Indiana's Environmental Rules and Statutes

Over the years, several laws have been enacted that expanded landowner liability protections and indirectly encouraged brownfield redevelopment. The scope and nature of risk-based remediation practices also have been modified through legislation. Rulemakings typically affect the IBP to a much lesser extent. Changes to any of the remediation-based statutes or related rules have the potential to impact IBP practices.

### Federal Laws and Rules

- *Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)* ([www.epa.gov/lawsregs/laws/cercla.htm](http://www.epa.gov/lawsregs/laws/cercla.htm)) of 1980; 42 U.S.C. §§ 9601-9675  
Section 101 – Definitions  
Section 104 – Response Authorities  
Section 107 – Liability
- *Standards and Practices for All Appropriate Inquiries (40 CFR Pt. 312)* ([www.epa.gov/brownfields/aai/index.htm](http://www.epa.gov/brownfields/aai/index.htm)). Prepurchase due diligence environmental site assessment rule associated with qualifying for certain landowner liability protections.
- *Federal Brownfields Tax Incentive* ([www.epa.gov/brownfields/tax/index.htm](http://www.epa.gov/brownfields/tax/index.htm)). Under the Federal Brownfields Tax Incentive, environmental cleanup costs are fully deductible in the year incurred, rather than capitalized and spread over time.
- *National Contingency Plan (40 CFR Pt. 300)* ([www.epa.gov/superfund/policy/index.htm](http://www.epa.gov/superfund/policy/index.htm)). The federal government's blueprint for responding to oil spills and hazardous substance releases. Also promotes overall coordination among responders and contingency plans.
- *Resource Conservation and Recovery Act (RCRA)* ([www.epa.gov/brownfields/laws/other\\_bf\\_related\\_laws.htm](http://www.epa.gov/brownfields/laws/other_bf_related_laws.htm)) of 1976; 42 U.S.C. §§ 6991a – 6991m  
Section 9003(h) (9). U.S. EPA response program for petroleum; definition of owner or operator
- *Technical Standards and Corrective Action Requirements for Owners and Operators of Underground Storage Tanks (40 CFR Pt. 280)* ([www.epa.gov/swerust1/fedlaws/index.htm](http://www.epa.gov/swerust1/fedlaws/index.htm))  
40 CFR Pt. 280.200 – 280.230 (*Subpart I - Lender Liability*)
- *Federal Small Business Liability Relief and Brownfields Revitalization Act* ([www.epa.gov/brownfields/laws/index.htm](http://www.epa.gov/brownfields/laws/index.htm)) passed 2001

### Indiana Statutory Authority ([www.IN.gov/legislative/ic\\_iac](http://www.IN.gov/legislative/ic_iac))

- Indiana Code (IC) 13-19-5      *Environmental Remediation Revolving Loan Program*. Established to assist in the remediation of brownfields, to encourage the rehabilitation, redevelopment, and reuse of real property by providing grants, loans, forgivable loans, or other financial assistance to political subdivisions.
- IC 6-1.1-45.5      *Brownfield Tax Reduction or Waiver*. The program's role is to make a determination that the property to which the delinquent tax liability is attached is a brownfield.
- IC 13-11-2      *Definitions*. Defines key terms such as brownfield, owner, participate in management, etc.
- IC 13-12-3-2      *Remediation and closure goals, objectives, and standards for certain remediation projects*

- IC 13-23-13 *Underground Storage Tank Corrective Actions.* Requires corrective action of a regulated substance release from an underground storage tank.
- IC 13-24-1 *Petroleum Releases.* Requires removal or remediation of petroleum at a petroleum facility.
- IC 13-25-4 *Hazardous Substances Response Trust Fund*
  - (1) Financing contracts or cooperative agreements
  - (2) Providing state assistance in the form of supplies, materials, services, and equipment
  - (3) Financing response actions
  - (4) Paying expenses related to releases of regulated substances (*other than petroleum from underground storage tanks*), hazardous substances, or contaminants
  - (6) Paying expenses and providing grants for household hazardous waste and conditionally exempt small quantity generator waste collection, recycling, or disposal projects
  - (9) Transferring funds to the environmental remediation revolving loan fund
- IC 13-25-5 *Voluntary Remediation of Hazardous Substances & Petroleum.* Provides an alternative procedure to assure compliance with the law and to encourage the voluntary remediation of hazardous substances and petroleum.

**Indiana Administrative Code (IAC) ([www.IN.gov/legislative/ic\\_iac](http://www.IN.gov/legislative/ic_iac))**

- 327 IAC 2-6.1 *Indiana Spill Rule – Spills; Reporting, containment and response*
- 312 IAC 13-10-2 *Permanent abandonment of monitoring wells*
- 329 IAC 9-5 *Underground Storage Tanks (UST); initial response, site investigation, and corrective action*
- 329 IAC 9-6 *UST Closure*

### **Nonrule Policies ([www.IN.gov/idem/4694.htm](http://www.IN.gov/idem/4694.htm))**

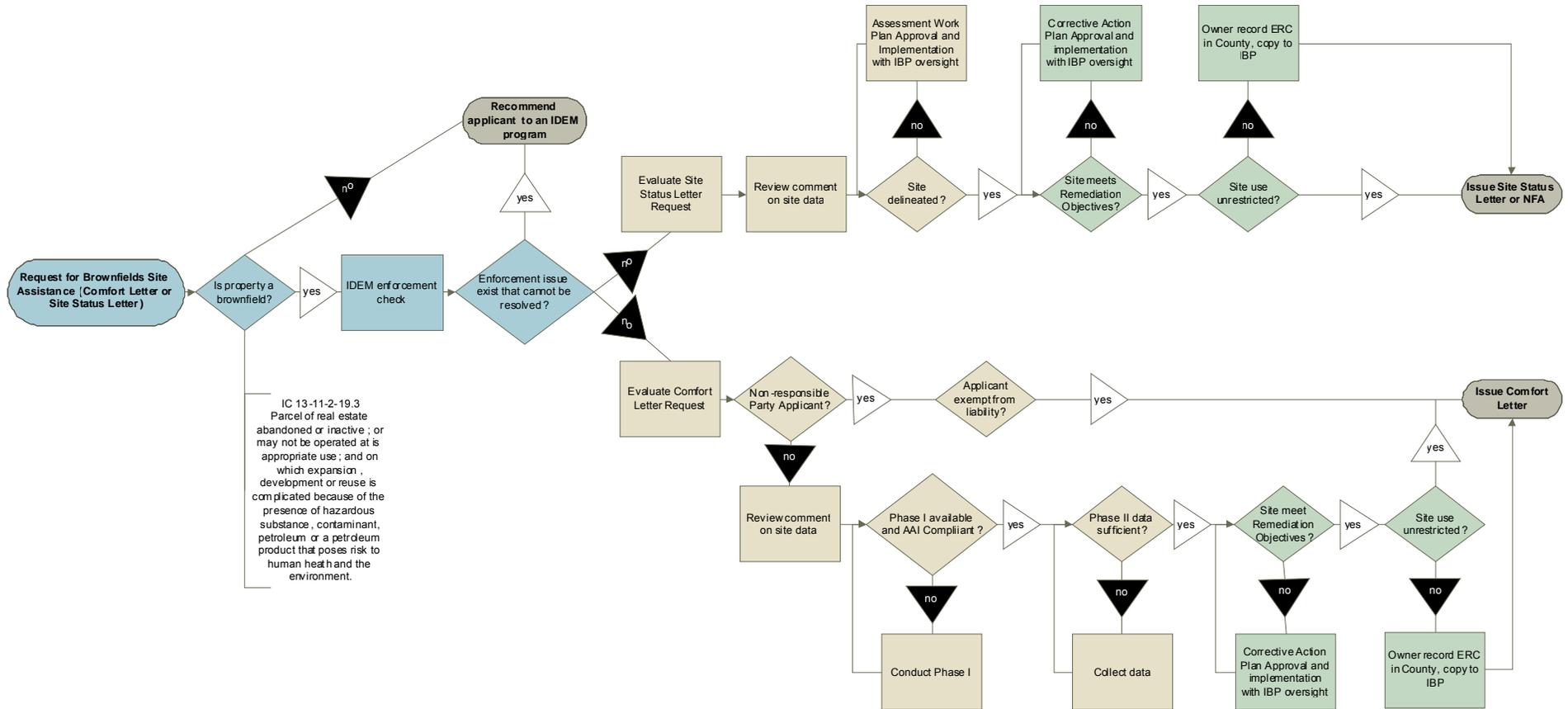
- *Risk Integrated System of Closure (RISC), Technical Guide and Users Guide (Waste-0046, February 15, 2001 and revisions).*
- *Supplemental Environmental Project Policy (ENF-08-003, June 20, 2008).* Policy regarding an enforcement penalty directed toward a brownfield project.
- *Property Containing Contaminated Aquifers (Waste-0047, January 30, 1997).* Policy regarding liability for response costs for cleanup of a release of petroleum or a hazardous substance due to subsurface migration in an aquifer.
- *Brownfields Program Comfort and Site Status Letters Policy (Waste-0051, April 18, 2003).* Policy regarding issuance of a Comfort or Site Status Letter to stakeholders redeveloping contaminated property.
- *Property Containing Contaminated Aquifers/Underground Storage Tanks (Waste-0038, April 20, 2000).* Policy regarding liability for response costs for cleanup of a release of petroleum or a regulated substance due to subsurface migration in an aquifer.

### **Other**

- *Memorandum of Agreement between IDEM and U.S. EPA for the Indiana Voluntary Remediation Program (December 4, 1995) ([www.IN.gov/idem/4127.htm](http://www.IN.gov/idem/4127.htm)).* Under this MOA, for any site receiving a Certificate of Completion from the Voluntary Remediation Program, the U.S. EPA will not plan or anticipate any federal action under the Superfund law, unless it poses an imminent and substantial threat to human health or the environment. This agreement does not apply to sites on the Superfund National Priorities List (NPL) or sites currently subject to orders of enforcement under Superfund.
- *Memorandum of Understanding between U.S. EPA and IDEM Resource Conservation and Recovery Act Corrective Action (September 3, 2004) ([www.IN.gov/idem/4127.htm](http://www.IN.gov/idem/4127.htm)).* To implement RCRA Subtitle C Corrective Action requirements, and to facilitate brownfield redevelopment in Indiana.

## 2.3 Process Overview

Figure 2.2 Indiana Brownfields Program Process Overview



## 2.4 How Does a Site Enter the Program?

Sites typically enter the program as a result of a request for technical or legal assistance or as a result of an award of financial assistance by IBP. Applicants typically submit a request for services, such as a Comfort/Site Status Letter Request - State Form 51493 ([www.IN.gov/ifa/brownfields/2364.htm](http://www.IN.gov/ifa/brownfields/2364.htm)). Requests are accepted on an ongoing basis and there is no application fee. A site must meet the definition of a brownfield as defined by IC 13-11-2-19.31 ([www.IN.gov/legislative/ic\\_iac](http://www.IN.gov/legislative/ic_iac)).

Anytime a site is new to the program, the program performs an agency-wide, confidential enforcement check to determine if the site is actively being managed in another IDEM program, if there are any known “imminent and substantial threats to human health and/or the environment,” and if there are any unresolved enforcement issues related to the site. Ongoing enforcement actions or imminent threats may prevent issuance of a letter until such issues are resolved. After the site clears an enforcement check, a brownfields project manager is assigned and conducts a comprehensive review of the submitted data. Based on the information evaluated, the program issues the applicable requested Comfort Letter, Site Status Letter, No Further Action Letter, comment letter, and/or other document, as appropriate. Relative to financial assistance, the enforcement check process is tied to determining site or recipient eligibility for funding.

### Eligibility (Comfort Letter)

A Comfort Letter is issued to a party that qualifies for an applicable exemption to liability found in Indiana law and/or an IDEM nonrule policy document (NPD). A Comfort Letter is not a legal release from liability<sup>1</sup>. The Comfort Letter outlines the applicable liability exemption and/or IDEM’s exercise of enforcement discretion under an applicable IDEM NPD. Comfort Letters are not transferable to another party; a party desiring liability protection must independently qualify for a liability exemption or an applicable nonrule policy.

There are seven (7) potentially applicable liability exemptions:

1. Stakeholder is a government entity (*political subdivision*) exempt from liability under IC 13-25-4-8(e), IC 13-11-2-150(c), or IC 13-11-2-151(b).
2. Stakeholder is a creditor, lender, or fiduciary exempt from liability under IC 13-23-13-14, IC 13-24-1-10, or IC 13-25-4-8(c); Current/prospective lender or trustee did not participate in the active management of the site.
3. Stakeholder is not the statutory owner of an underground storage tank pursuant to IC 13-11-2-150(a) because the tanks were not used after November 8, 1984, and the stakeholder was not the person who owned the tank immediately before the discontinuation of the tank’s use, or the stakeholder meets one of the exceptions to the owner definition (*for example, bona fide prospective purchaser, nonprofit corporation that acquires a tank site for recreational redevelopment*).

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<sup>1</sup> A Comfort Letter is not a legal release from liability because it is an enforcement discretion decision made by IDEM under a nonrule policy, rather than a legal settlement authorized by the agency or a court.

4. Stakeholder satisfies the conditions of IDEM Nonrule Policy Document (NPD) *Property Containing Contaminated Aquifers (Waste-0047) (20 IR 1674, January 30, 1997)*, or IDEM NPD *Property Containing Contaminated Aquifers/Underground Storage Tanks (Waste 0038) (23 IR 2141, April 20, 2000)* ([www.IN.gov/idem/4694.htm](http://www.IN.gov/idem/4694.htm)):
  - Sampling data must verify that identified contamination has been coming from an off-site source onto the subject property via ground water.
  - There can be no on-site source of contamination or off-site contamination co-mingled with site-derived contamination.
  - A Phase I Environmental Site Assessment of the property is required to determine site history and prior ownership.
  - If free product is present and its presence constitutes either an imminent threat or could potentially be an imminent threat, a Comfort Letter may not be issued until the free product has been abated.
  
5. Stakeholder is exempt from liability or eligible for a defense to liability as a bona fide prospective purchaser (BFPP), contiguous property owner (CPO), or innocent landowner (ILO) pursuant to IC 13-25-4-8(b). Federal laws and rules cited below may be viewed at the U.S. EPA Brownfields and Land Revitalization Laws and Statutes website ([www.epa.gov/brownfields/laws/index.htm](http://www.epa.gov/brownfields/laws/index.htm)).
  - a. Bona fide prospective purchaser (BFPP):
    - Purchaser must have acquired title to the property after January 11, 2002.
    - Purchaser also must meet CERCLA § 101(35), CERCLA § 101(40), and CERCLA § 107(r) criteria. (*Also see IC 13-25-4-8[b]*).
    - For the Indiana petroleum BFPP liability exemption, the purchaser also must satisfy IC 13-11-2-150(f) or IC 13-11-2-151(g), including property acquisition after June 30, 2009.
    - BFPPs must perform All Appropriate Inquiry (AAI) prior to acquiring the property and may buy knowing, or having reason to know, of contamination on the property. AAI rule (*40 CFR Pt. 312*) may be satisfied by completing an AAI-compliant Phase I Environmental Site Assessment to ASTM standard E1527-05. Certain activities must be conducted within 180 days of acquisition.
    - Post acquisition, the purchaser must satisfy certain statutory continuing obligations with respect to known site contamination to maintain exemption.
    - BFPP liability exemption does not address RCRA liability.
    - BFPP liability exemption does not include protection from third party lawsuits.

While a Phase II environmental investigation is not a threshold criteria to qualify as a BFPP, a prospective buyer may elect to do a Phase II investigation, especially if indicated by the Phase I Environmental Site Assessment in order to be able to better determine how to comply with a BFPP's reasonable steps/continuing obligations. As part of drafting a comfort letter, the program evaluates all available site information, historical and current, in order to determine whether land use restrictions (*recording of an environmental restrictive covenant*) may be necessary to eliminate exposure pathways, and to inform a technical opinion on appropriate reasonable steps for a BFPP to undertake, to try to maintain the liability exemption. An additional benefit of conducting a Phase II

investigation is that it establishes a baseline of environmental conditions on the site prior to purchase. Having such investigation data could prove useful in the future should questions arise as to a buyer's potential contribution to existing (pre-purchase) contamination.

b. Contiguous property owner (CPO):

- Property owner meets CERCLA § 101(35) and CERCLA § 107(q) criteria. *Also see IC 13-25-4-8[b]*). Owners of property that is or may be contaminated by a release or threatened release and that is not the source of the contamination.
- For the Indiana petroleum CPO liability exemption, the purchaser also must satisfy IC 13-11-2-150(e) or IC 13-11-2-151(f), including property acquisition after June 30, 2009.
- Such property is "contiguous" to or otherwise similarly situated to contaminated real property that is not owned by the person and is the source of the known or suspected contamination.
- CPOs must perform AAI prior to acquiring the property and not know or have reason to know that the property was or could be contaminated by a release or threat of release of contamination from other real property not owned or operated by the person. AAI rule (*40 CFR Pt. 312*) may be satisfied by completing an AAI-compliant Phase I Environmental Site Assessment to ASTM standard E1527-05. Certain activities must be conducted within 180 days of acquisition.
- A person that does not qualify as a CPO because the person had or had reason to have knowledge of contamination may qualify as a BFPP in the alternative if BFPP criteria are met.

c. Innocent landowner (ILO):

- Property owner meets CERCLA §107(b) (3) criteria (*including due care requirements*) and CERCLA § 101(35) criteria. (*Also see IC 13-25-4-8[b]*).
- ILOs must perform AAI prior to acquiring the property and not know or have reason to know that the property was or could be contaminated by a release or threat of release of contamination. AAI rule (*40 CFR Pt. 312*) may be satisfied by completing an AAI-compliant Phase I Environmental Site Assessment to ASTM standard E1527-05. Certain activities must be conducted within 180 days of acquisition.

To maintain liability protection, landowners must meet the following continuing obligations during their property ownership.

### **Compliance With Land Use Restrictions and Institutional Controls**

BFPPs, CPOs, and ILOs must:

- Be in compliance with any land use restrictions established or relied on in connection with the response action
- Not impede the effectiveness or integrity of any institutional control employed in connection with a response action

BFPPs, CPOs, and ILOs also should:

- Comply with land use restrictions and implement institutional controls even if the restrictions/controls were not in place at the time of purchase
- Comply with land use restrictions relied on in connection with the response action even if restrictions haven't been implemented through an enforceable institutional control

### **Reasonable Steps**

BFPPs, CPOs, and ILOs are required to take reasonable steps to:

- Stop any continuing release
- Prevent any threatened future release
- Prevent or limit any human, environmental or natural resource exposure to any previously released hazardous substance

### **Cooperation, Assistance, and Access**

BFPPs, CPOs, and ILOs must provide full cooperation, assistance, and access to persons authorized to conduct response actions or natural resource restoration, including the cooperation and access necessary for the installation, integrity, operation, and maintenance of any complete or partial response action or natural resource restoration.

### **Compliance With Information Requests and Administrative Subpoenas**

BFPPs and CPOs must comply with CERCLA information requests and administrative subpoenas.

### **Provision of Legally Required Notices**

BFPPs and CPOs must provide legally required notices related to the discovery or release of hazardous substances at the facility.

“Legally required notices” may include those required under federal, state, and local laws. Examples of federal notice requirements include: CERCLA § 103 (*notification requirements regarding released substances*); Emergency Planning and Community Right-to-Know Act (EPCRA) § 304 (“*emergency notification*”); and RCRA § 9002 (*underground storage tanks notification provisions*).

### **Eligibility (Site Status Letter)**

Applicants for a Site Status Letter (SSL) must:

- Not have caused, contributed to, or knowingly exacerbated the release or threat of release of the hazardous substance or petroleum through an act or omission
- Not have any ownership interest in any entity that caused, contributed to, or knowingly exacerbated the release or threat of release
- Have no alternative basis for liability for the contaminated property, such as liability as a disposer, generator, or transporter of the contaminants or liability as an owner or operator by reason of the existence of a new source of contaminants on the site
- Be able to demonstrate that current levels of contaminants at the brownfield substantially meet current remediation objectives, as established by IDEM under the *Remediation Closure Guide (Waste-0046-R1)* ([www.IN.gov/idem/4694.htm](http://www.IN.gov/idem/4694.htm))

An SSL does not address the potential liability of the party requesting the letter. The SSL states that based on a technical analysis of information pertaining to site conditions submitted, or otherwise available, to IDEM, IDEM concludes that current site conditions do not present a threat to human health or the environment and that IDEM does not plan to take or require a response action at the brownfield site. It is the functional equivalent of a No Further Action (NFA) letter. SSLs:

- Incorporate Indiana's *Remediation Closure Guide (Waste-0046-R1)* ([www.IN.gov/idem/4694.htm](http://www.IN.gov/idem/4694.htm)) investigation methodology and remediation objectives in the decision making process
- Are potentially transferrable to subsequent owners who similarly qualify for a letter
- Cannot be issued to property owners who owned the site at the time of the release

## **2.5 *Emergency or Immediate Actions***

The IBP is not designed to address sites with active emergency or immediate action needs. The program may reject an application for assistance if conditions constitute an imminent and substantial threat to human health or the environment. However, once the emergency or immediate action has been resolved, an applicant may apply for program assistance. Regardless of whether the IBP has accepted an application for financial, legal, or technical assistance, the program may determine later that an imminent and substantial threat exists that requires a site to be referred to another IDEM program for remediation and/or enforcement.

## **2.6 *How Is the Public Involved or Notified?***

While public involvement and participation is preferred, it is not a requirement to receive assistance from the IBP unless certain federal funding is involved. Public participation is typically a factor in applications for financial assistance, and the Comfort/Site Status Letter Request Form - State Form 51493 ([www.IN.gov/ifa/brownfields/2364.htm](http://www.IN.gov/ifa/brownfields/2364.htm)) inquires about any public involvement in the redevelopment project.

When a remedy will include the use of an Environmental Restrictive Ordinance (ERO), it is important to obtain feedback from the water utility and from the local government unit that has enacted or that has proposed adoption of the ERO. Consultants are encouraged to work directly with the local government unit. Because IDEM must rely on local governments to enforce EROs, municipal involvement throughout the review process will help IDEM evaluate the effectiveness of proposed EROs. Local governments should be contacted for information including:

- Current and future local water resource planning
- Procedures for granting exceptions and variances to the ERO
- Local point of contact for ERO monitoring and compliance
- Notification provisions for EROs

IDEM will notify local government units and water utilities in writing of any formal proposal to utilize an ERO at a particular site; and will request input on the items listed above if the information has not already been provided in the work plan.

## **2.7 Investigation**

Depending on the type(s) of program assistance sought, different levels of site investigation can be conducted. Where the assistance requested involves only a Comfort Letter request, a Phase I Environmental Site Assessment compliant with the AAI rule (*40 CFR Pt. 312*) (*ASTM E1527-05 standard or equivalent*) alone is sufficient to enable the program to issue a letter. However, Phase II site investigative activities may be needed or desired by the applicant in order to make a better informed decision about a property transaction. In addition, Phase II investigation provides additional information for the program to review, which may result in a recommendation that fewer or no land use restrictions are necessary as a condition of closure. Absent such Phase II information, the program may take a more conservative approach to land use restrictions. For an SSL/NFA site or site receiving program financial assistance, a Phase II site investigation is required to determine the full nature and extent of the contamination in soil, ground water, and soil vapor/indoor air (*when applicable*), and to evaluate actual or potential exposure to human and ecological receptors using the conceptual site model (CSM). Delineation of the contaminant source and extents are usually accomplished using the step-out procedures described in the *Remediation Closure Guide (Waste-0046-R1)* ([www.IN.gov/idem/4694.htm](http://www.IN.gov/idem/4694.htm)).

The program follows the reporting requirements discussed in Section 3.11 (*CSM Documentation*) of the *Remediation Closure Guide* to document investigation related activities. Any presampling activities and optional screening data results should be incorporated into the investigation report(s).

## **2.8 Remedy Decision**

The IBP does not follow a formal remedy decision process.

## **2.9 Remedial Action**

The IBP may recommend that the applicant conduct remedial action if the site does not meet appropriate risk-based levels based on the anticipated land use or may require land use restrictions to be recorded in an ERC ([www.IN.gov/idem/5959.htm](http://www.IN.gov/idem/5959.htm)). While the program cannot obligate that remediation take place, the program may decline to issue a letter until *Remediation Closure Guide (Waste-0046-R1)* ([www.IN.gov/idem/4694.htm](http://www.IN.gov/idem/4694.htm)) criteria have been fulfilled.

## **2.10 Closure**

Closure is achieved when an applicant is able to demonstrate that current levels of contaminants at the brownfield substantially meet remediation objectives, as established by IDEM under the *Remediation Closure Guide (Waste-0046-R1)* ([www.IN.gov/idem/4694.htm](http://www.IN.gov/idem/4694.htm)). Documentation incorporating *Remediation Closure Guide* closure determinations typically is limited to SSLs or NFA letters (*usually for petroleum only*). An environmental restrictive covenant (ERC) may be required for a site at which environmental conditions do not meet residential screening levels in the *Remediation Closure Guide*, or site-specific residential risk-based levels, regardless of current use or proposed future use.

### **No Further Action Letter**

In addition to SSLs, the IBP may, at its option, alternatively provide an NFA letter, typically for petroleum-contaminated sites only, when environmental conditions at a site meet the remediation objectives in accordance with the *Remediation Closure Guide (Waste-0046-R1)* ([www.IN.gov/idem/4694.htm](http://www.IN.gov/idem/4694.htm)).

An NFA letter does not address the potential liability of the party receiving the letter. An NFA letter states that based on a technical analysis of information pertaining to site conditions submitted to or otherwise available to IDEM, IDEM concludes that current site conditions do not present a threat to human health or the environment and that IDEM does not plan to take or require a response action at the brownfield site. An NFA letter:

- Incorporates Indiana's *Remediation Closure Guide* investigation methodology and remediation objectives in the decision making process
- Can be issued to owners who owned the site at the time of the release
- Are tied to the land/site conditions, not a stakeholder

### **Environmental Restrictive Covenant**

Indiana Code (IC) 13-14-2-6(5) authorizes IDEM to use and enforce an environmental restrictive covenant (ERC), as defined in IC 13-11-2-193.5<sup>2</sup>. An ERC is a legally enforceable agreement (*and a type of institutional control*) placed by the site owner on the property deed containing land use restrictions designed to eliminate contaminant exposure pathways.<sup>3</sup>

An ERC is typically needed for any site that does not meet *Remediation Closure Guide (Waste-0046-R1)* ([www.IN.gov/idem/4694.htm](http://www.IN.gov/idem/4694.htm)) residential screening levels or site-specific risk based residential levels. ERCs are modifiable with IDEM's written agreement and may be terminated under certain conditions. Land use restrictions can be changed in the future due to new or previously unknown conditions, a change in land use, or data evidencing environmental site conditions have changed no longer necessitating a particular restriction.

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#### <sup>2</sup> IC 13-11-2-193.5 "Restrictive covenant"

"Restrictive covenant", for purposes of IC 13-14-2-6, means, with respect to land, any deed restriction, restrictive covenant, environmental covenant, environmental notice, or other restriction or obligation that:

- Limits the use of the land or the activities that may be performed on or at the land or requires the maintenance of any engineering control on the land designed to protect human health or the environment
- Is intended to run with the land and be binding on successors
- Is recorded with the county recorder's office in the county in which the land is located
- Explains how it can be modified or terminated.

<sup>3</sup> An institutional control is a legal or administrative tool or action taken to reduce the potential for exposure to hazardous substances. Institutional controls may include, but are not limited to, use restrictions, environmental monitoring requirements, and site access and security measures.

## ***2.11 Conditions Subsequent***

### **Monitoring/Operations and Maintenance**

Active engineering controls associated with a remedy and providing long-term protectiveness at a site may require ongoing operation and maintenance under the terms of a settlement or an ERC. Similarly, land use restrictions contained in an institutional control such as an ERC must be complied with on an ongoing basis. Failure to comply with such restrictions may result in enforcement action by IDEM.

## ***2.12 When Issues Arise***

Participation in the IBP is voluntary, and environmental investigations and cleanups are performed cooperatively between the applicant and the program. Most disagreements regarding the technical aspects of a project can be resolved through discussions between the project manager and the project stakeholders. However, in instances where the program identifies a likely immediate risk to human health and/or the environment, sites may be referred to another IDEM program for remediation or enforcement. The program's professional services contracts typically contain a dispute resolution provision that also directs the parties to cooperatively and expeditiously reach a solution to any dispute. In addition, a request for review may be filed with the Indiana Department of Administration in certain circumstances to resolve a contract dispute.

## ***2.13 Forms and Checklists***

Sample copies of many forms, templates, and checklists discussed in this RPG may be found at the end of each chapter of this guide. **The sample forms, templates, and checklists in this guide are images only, may not be current, and cannot be completed electronically.**

Current state forms that can be completed electronically are posted on the IDEM Forms website ([www.IN.gov/idem/5157.htm](http://www.IN.gov/idem/5157.htm)) as PDF fillable forms, Microsoft Word documents or Excel documents. Links to the locations of those forms and checklists, and links to many other documents and websites have been provided where the document is discussed in this RPG.

- Sample 2.1 Indiana Brownfields Program Checklist
- Sample 2.2 Procedures to Request a Determination of Petroleum Site Eligibility Required for U.S. EPA Brownfield Grants

**Sample 2.1 Indiana Brownfields Program Checklist**

<b>Indiana Brownfields Program CHECKLIST</b>			
<b>Comfort Letter</b>		Yes	No
<b>Comfort Letter: BFPP Exemption</b>	Is the site a brownfield?	<input type="checkbox"/>	<input type="checkbox"/>
	Is site suspected to be contaminated or contaminated with a hazardous substance and/or petroleum?	<input type="checkbox"/>	<input type="checkbox"/>
	Has the site cleared an IDEM enforcement check?	<input type="checkbox"/>	<input type="checkbox"/>
	Is a Phase I Environmental Site Assessment included and is it written for the stakeholder requesting the Comfort Letter (Prospective Purchaser or Prospective Tenant)?	<input type="checkbox"/>	<input type="checkbox"/>
	Is the Phase I Environmental Site Assessment completed in accordance with <u>ASTM E1527-05</u> or <u>40 CFR Part 312</u> ?	<input type="checkbox"/>	<input type="checkbox"/>
	Were the Phase I Environmental Site Assessment activities (and report) completed within 180 days <b>prior to</b> acquisition? <ul style="list-style-type: none"> <li>▪ If no, have the required Phase I Environmental Site Assessment update activities been completed within 180 days of <b>prior to</b> acquisition?</li> </ul>	<input type="checkbox"/>	<input type="checkbox"/>
	Is the Phase I Environmental Site Assessment signed by qualified Environmental Professionals and the report contains proper certification statement?	<input type="checkbox"/>	<input type="checkbox"/>
	Did the Applicant requesting Comfort Letter answer the User specific questions for the Phase I Environmental Site Assessment?	<input type="checkbox"/>	<input type="checkbox"/>
	Is there any basis for the Applicant to be potentially liable, for example, is the Applicant a Potentially Responsible Party/Responsible Party or affiliated with any Potentially Responsible Party/Responsible Party that caused or contributed to the contamination? <ul style="list-style-type: none"> <li>• Direct or indirect familial relationship?</li> <li>• Any contractual, corporate, or financial relationship (other than property transfer instrument)?</li> <li>• Reorganization of a business entity that was potentially liable?</li> </ul>	<input type="checkbox"/>	<input type="checkbox"/>
	If Comfort Letter request is post acquisition: <ul style="list-style-type: none"> <li>• Did the Applicant acquire after January 11, 2002 (or June 30, 2009 for petroleum-contaminated sites)?</li> <li>• Has the Applicant satisfied continuing obligations since acquisition?  <ul style="list-style-type: none"> <li>• Provided all legally required notices with regard to discovery, release of hazardous substances?</li> </ul> </li> </ul>	<input type="checkbox"/>	<input type="checkbox"/>

SAMPLE

	<ul style="list-style-type: none"> <li>• Taken reasonable steps to stop continuing releases, prevent any threatened future release, prevent or limit exposure to any previously released hazardous substances?</li> <li>• Provided full cooperation, assistance and access to persons conducting response actions?</li> <li>• In compliance with any land use restrictions already established and not impeding the effectiveness or integrity of any institutional control employed at the Site in connection with a response action?</li> <li>• Complied with any request for information or administrative subpoena issued by U.S. EPA?</li> </ul>		
<b>Comfort Letter: Governmental Entity</b>	Is the Applicant a governmental entity exempt from liability under IC 13-25-4-8(e), IC 13-11-2-150(c), or IC 13-11-2-151(b)?	<input type="checkbox"/>	<input type="checkbox"/>
<b>Comfort Letter: Lender/Fiduciary Liability</b>	Is the Applicant a creditor, lender, or fiduciary exempt from liability under IC 13-23-13-14, IC 13-24-1-10, or IC 13-25-4-8(c)? Current/ prospective lender who not participate in the active management of the site?	<input type="checkbox"/>	<input type="checkbox"/>
<b>Comfort Letter: UST Owner/Operator</b>	Is the Applicant the sole or joint owner of an underground storage tank pursuant to IC 13-11-2-10(a) because the tank was used after November 8, 1984 and the Applicant was not the person who owned the tank immediately before the discontinuation of the tank's use? Or, does the Applicant meet an exception to the owner definition?	<input type="checkbox"/>	<input type="checkbox"/>
<b>Comfort Letter: Contaminated Aquifer</b>	Does the Applicant satisfy the conditions of IDEM Nonrule Policy Document, "Property Containing Contaminated Aquifers" (20 IR 1674, January 30, 1997), or IDEM Nonrule Policy Document Waste-0038 "Property Containing Contaminated Aquifers/Underground Storage Tanks" (23 IR 2141, April 20, 2000)?	<input type="checkbox"/>	<input type="checkbox"/>
<b>SITE STATUS LETTER</b>			
<b>Site Status Letter</b>	Is the site a brownfield?	<input type="checkbox"/>	<input type="checkbox"/>
	Has the site cleared an IDEM enforcement check?	<input type="checkbox"/>	<input type="checkbox"/>
	Did the Applicant cause, contribute to, or knowingly exacerbate the release or threat of release of the hazardous substance or petroleum through an act or omission?	<input type="checkbox"/>	<input type="checkbox"/>
	Is there any basis for the Applicant to be potentially liable, for example, is the Applicant a Potentially Responsible Party/Responsible Party or affiliated with any Potentially Responsible Party/Responsible Party that caused or contributed to the contamination? <ul style="list-style-type: none"> <li>• Direct or indirect familial relationship?</li> </ul>	<input type="checkbox"/>	<input type="checkbox"/>

	<ul style="list-style-type: none"> <li>Any contractual, corporate, or financial relationship (other than property transfer instrument)?</li> <li>Reorganization of a business entity that was potentially liable?</li> </ul>		
	Has the site has been delineated to appropriate screening levels?	<input type="checkbox"/>	<input type="checkbox"/>
	Do environmental conditions substantially meet current RCG remediation objectives?	<input type="checkbox"/>	<input type="checkbox"/>
<b>ENVIRONMENTAL RESTRICTION COVENANTS</b>			
<b>ERC</b>	Has a remedial survey monitoring and site level description of the property been provided for each parcel requiring an ERC?	<input type="checkbox"/>	<input type="checkbox"/>
	Have the following maps been submitted? <ul style="list-style-type: none"> <li>One black &amp; white map (non-aerial) showing property lines</li> <li>One black &amp; white map (non-aerial) showing all soil borings and monitoring wells. Borings and wells over applicable cleanup goals should be noted. Contaminant concentration labels are optional.</li> </ul>	<input type="checkbox"/>	<input type="checkbox"/>
	Have the following tables been submitted? <ul style="list-style-type: none"> <li>One table for soil samples over applicable residential and industrial cleanup goals</li> <li>One table for ground water samples over applicable residential and industrial cleanup goals</li> </ul>	<input type="checkbox"/>	<input type="checkbox"/>

**Sample 2.2 Procedures to Request a Determination of Petroleum Site Eligibility Required for U. S. EPA Brownfield Grants**



***Procedures to Request a Determination of Petroleum Site Eligibility Required for U. S. EPA Brownfield Grants***

When requesting a petroleum eligibility determination from the Indiana Department of Environmental Management (IDEM), please provide written responses to the items listed below. If you are unable to provide the information related to any of the items, please state why that information is unavailable. Requests should be sent to Michele Oertel, the Indiana Brownfields Program EPA/Community Liaison and Outreach Coordinator by email at: [moertel@ifa.in.gov](mailto:moertel@ifa.in.gov). Subsequent to its review of the request, IDEM will provide a written response determining eligibility for use of federal grant funds on the site. Further information regarding petroleum eligibility determinations may be found in the US EPA's *Guideline for Brownfield Assessment, Revolving Loan Fund, and Cleanup Grants*. The guidelines for all three types of grants are available on the web at: <http://www.epa.gov/brownfields/application>.

**SAMPLE**

The following information must be provided in order for the IDEM to make a petroleum eligibility determination:

1. **Site Description**. Please provide information regarding the following: a) the name of the site; b) the address of the site; c) whether this site is contaminated by petroleum or hazardous substances; d) the operational history and current uses(s) of the site; and e) environmental concerns, if known, at the site.
2. **Previous Assessments**. Please explain the phase of assessment, if any, that has been completed to date. Provide dates of the assessment(s).
3. **Areas of Concern**. Please identify how the site became contaminated, if known, and, to the extent possible, describe the nature and extent of the contamination.
4. **Current and Immediate Past Owners**. Identify the current and immediate past owner of the site.
5. **Acquisition of Site**. Please identify when and by what method the current owner

acquired the property (for example, purchase, tax foreclosure, donation, eminent domain).

6. **No Responsible Party for the Site.** Please identify whether the current and immediate past owner dispensed or disposed of petroleum or petroleum product, or exacerbated the existing petroleum-contamination at the site, and whether the current and immediate past owner took reasonable steps with regard to the contamination at the site.

7. **Assessed or Cleaned Up by a Person Not Potentially Liable.** Please identify whether you (the applicant) dispensed or disposed of petroleum or petroleum product, or exacerbated the existing petroleum contamination at the site, and whether you took reasonable steps with regard to the contamination at the site.

8. **Relatively Low Risk.** Please identify whether the site is of “relative low risk” compared to other petroleum or petroleum product-only contaminated sites in the state in which the site is located, including whether the site is receiving oil from a Leaking Underground Storage Tank (LUST) or a Tank Farm (TF).

9. **Judgments, Orders, or Third Party Suits.** Please provide information that no Responsible Party is identified for the site through either:

- a. A judgment rendered in a court of law or an administrative order that would require any person to assess, investigate, or clean up the site; or
- b. An enforcement action by federal or state authorities against any party that would require any person to assess, investigate, or clean up the site; or
- c. A citizen suit, contribution action or other third party claim brought against the current or immediate past owner, that would, if successful, require the assessment, investigation, or cleanup of the site.

10. **Subject to RCRA.** Please identify whether the site is subject to any order under section 9003(h) of the Solid Waste Disposal Act (RCRA Corrective Action).

11. **Financial Viability of Responsible Parties.** For any current or immediate past owners identified as responsible for the contamination at the site, provide information regarding whether they have the financial capability to satisfy their obligations under federal or state law to assess, investigate, or clean up the site.

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Questions pertaining to this document can be directed to Cindy Klem, Indiana Brownfields Program Counsel, at [cklem@ifa.in.gov](mailto:cklem@ifa.in.gov) or (317) 234-6018.