



Unintended Consequences

by R. Jason Lenz, PhD, Creek Run Environmental Engineering

I have been doing this a long time — back when the Indiana Department of Environmental Management (IDEM) was just getting started in 1988, and back when 1.6 million underground storage tanks (USTs) were in the ground in the United States.

Fifty thousand of them were estimated to be in Indiana (Lenz, 2014). Almost all of them were bare, unprotected steel tanks. In 2017, I wrote an article that highlighted the progress since the passage of the federal Superfund Amendments and Reauthorization Act in 1986. The Superfund legislation is the first mention

of USTs in any federal regulation and led to IDEM being established. IDEM works in conjunction with the Excess Liability Trust Fund (ELTF) and the Financial Assurance Board (FAB), which manages the ELTF. The Superfund amendments, also called SARA Title III, were passed by Republican President Ronald Reagan

in direct response to Love Canal in New York and a 60-minute documentary about petroleum vapors, the result of leaking USTs, in buildings in New York City (SARA, 1986). My 2017 article discussed the progress that the federal regulation and IDEM had made in the United States and in Indiana for the safe removal and,

in some cases, replacement of bare steel, leaking USTs with much safer and fewer fiberglass USTs (Lenz, 2017).

Much of the work that I have done, but not all, as an environmental consultant has involved petroleum releases from USTs in the state of Indiana. I have been a member of the Indiana Food & Fuel Association long before it was called Indiana Food & Fuel. I am a longtime President's Council member and am fortunate to call at least seven past presidents of the organization loyal clients. I have been fortunate to work with IDEM and the dedicated current and former personnel. To a person, they are committed to the mission of protecting human health and the environment. Working with IDEM over the last 30 years has meant that I have also helped clients seek reimbursement from the ELTF for cost incurred for reimbursable expenses from active petroleum remediation at approved sites following a petroleum release. This, believe it or not, is still a relatively new phenomenon. I had to convince clients 20 years ago to actively clean up their sites and seek reimbursement for eligible costs. I heard many times that they did not want to pursue ELTF for fear that if and/or when they really needed it, the money would be gone. Many of the clients that I dealt with were convinced the fund would not remain solvent. ELTF reimbursement is a form of monetary incentive designed not only to encourage economic growth, but to provide a safe environment (Oates, 1992). The fund did have an uphill climb. In 2006, the fund went into priority mode, and I and many of my clients received IOU notices from IDEM; they essentially approved your claim and acknowledged they owed you the money, but they could not pay you until later. But after a diesel tax was approved for funding along with the already existing gasoline tax, suddenly the fund balance appeared to skyrocket.

Over the next decade, the fund escalated and at many times had a fund balance of more than \$100 million, allowing it to have the highest reimbursement ceiling in comparison to other states at \$2 million. It was raised in 2016 to \$2.5 million, a decision that is still unclear to me. The lowest deductible amount is in Nebraska at \$900,000. The deductible prior to

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2016 was \$35,000; today it is \$15,000. Surrounding states are much higher, including Ohio — which has a deductible of \$50,000. This means that today a UST owner has only to pay the \$15,000 out of pocket before they can have all other approved costs reimbursed, up to \$2.5 million. As of September 15, 2020, the fund balance was \$95,104,637 (Louks, email correspondence, October 2020).

So where does that leave us all, and where are we headed? IDEM, at the urging of outside and out-of-state experts, began to apply all petroleum releases to a risk-based approach, meaning that all petroleum impacts were not necessarily equal, and cleaning up sites to a very specific and sometimes unattainable level (or so it seemed) was not the best approach. The risk-based approach is tried and true and has been adopted by most states. In the mid-1990s, IDEM put together a task force to investigate. I was on that task force. The approach was met with obstacles, including within IDEM. The senior deputy commissioner told me that in the end IDEM would never adopt a risk-based

approach, because the majority of IDEM project managers had no intention of ever leaving (or at least they did not want to leave) petroleum impacts in the ground. Though reviewed and discussed, the idea of a risk-based approach to petroleum releases was met with resistance and never was adopted in its entirety and/or accepted in Indiana by tank owners and IDEM. Environmental consultants were left to pick up the pieces. At this time, active petroleum remediation seemed to escalate. Money was spent, even though it was still very difficult to reach closure levels. No further action (NFA) letters for some consultants were few and far between. For whatever reason, tank owners, IDEM and consultants could not, or would not, arrive at a consensus of what is clean. What is clean, in and of itself, is a very subjective approach (Pojman, 2000). If it is what you think, how can someone else be critical? Tank owners, IDEM and consultants continued to reach for a subjective answer for what is clean. ELTF was solvent, IDEM let the tank owners pursue remediation efforts in an almost hands-off approach



and environmental consultants took advantage. Many tank owners signed over their ELTF rights and let the consultant make decisions for them, and in some cases, since they were not paying them, gave invoices little or no attention (Lenz, 2011). I will interject here and say that this is not the case for all tank owners, and it is also not the case for all consultants. Both consultants and tank owners working together with IDEM can obtain closure. My company, Creek Run, has achieved 237 NFAs and/or site closures. The first was in Blackford County in 1998. No. 100 was in 2014 in Porter County, No. 200 was in 2018 in White County and No. 237 was last month in Wayne County. It can be done on time and on budget. It takes a commitment and a plan.

Where do we go now? IDEM has adopted the risk-based approach. They appear to be all in over the last 24 months. Denying claims and costs that they deem excessive, they are making management decisions that affect the financial bottom lines of the fund, tank owners and environmental consultants. This new fiduciary response by IDEM will benefit all stakeholders in the end. These actions are necessary and force all stakeholders to play a pivotal role. However, we need management over the fund. The FAB has not met in more than two years. A state requirement directs the Board to meet once every 12 months. The Board is down one member, and a replacement has not been appointed. Management of the fund is crucial at this juncture. All stakeholders seem to be in a state of flux. IDEM and a deputy commissioner are being sued because someone disagrees with the risk-based approach, or at least they disagree with how the risk-based approach is being implemented (Braun, 2013).

There will be some unintended consequences to risk-based corrective action. Petroleum impacts will be left in the ground, in some cases as free product. Tank owners will have to accept those risks, these unintended consequences and the potential cost that will go with them — property values, paying your consultant for denied costs, and risks to third parties. ELTF rights will not be as easily transferable. Few consultants will



want to accept the associated risk of IDEM not paying for a task that the consultant believes is mission essential. They want to be reimbursed — I want to be reimbursed. Who will pay for those “gray” costs, where cost is deemed essential by the consultant, but payment is denied by ELTF? This unintended consequence should force consultants to be very conservative before accepting a site as a direct-pay ELTF site. A consultant acting on the best interest of their client to protect human health and the environment and to achieve the most cost-effective closure approach should expect to be reimbursed in a timely manner. The manner of who pays and when needs be discussed, and the remedy, as I see it, is no longer for a tank owner to sign over their ELTF rights. A remedy between all stakeholders needs to be addressed. A proactive, involved and committed FAB should/would be the solution that is needed to manage these unintended consequences. The sooner this happens, the better. I urge FAB to remove the ability of stakeholders to sign over their ELTF rights to someone who is both managing the project and doing the work.

There are 13,342 USTs in the state of Indiana that registered at 4,096 locations, and 1,513 of these 4,096 locations have an active incident number (Louks, email correspondence, October 2020). Who will decide how these 1,513 sites are cleaned up, and who decides what the payment will be and to whom? These “gray” areas will have to be discussed and conclusions made that all stakeholders can abide by. IDEM is trying now to be prudent and play a more prominent, active role than what they have in the past and have adopted a more risk-based approach. Tank owners, or at least most of them, want to be involved,

and they need to stay involved and seek alternative funding when necessary. Moving forward it is doubtful that all costs will continue to be covered by ELTF. And all environmental consultants are not greedy; they simply have a job to do and want to be reimbursed in a timely manner, for their experience and education, at a competitive rate. I trust and implore that all stakeholders can work toward finding solutions to these unintended consequences hidden in the “gray” areas. 

Dr. Lenz founded Creek Run Environmental Engineering in 1993. His company has achieved closure, NFA status, at 237 petroleum facilities.

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