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Insights

Indiana's Excess Liability Trust Fund Receives a Statutory Update

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Indiana's Excess Liability Trust Fund (ELTF) reimburses property owners for costs associated with cleaning up petroleum releases from eligible underground storage tanks (UST). Funded by fees, penalties, and other sources of revenue over the last few decades, the ELTF now finds itself with a fund balance of approximately $103 million. It is against this backdrop that the 2016 Indiana General Assembly amended the ELTF, via Public Law 96-2016, with changes in effect as of July 1, 2016 (the "Amendments").

This Client Alert examines the noteworthy additions, revisions, and deletions to the ELTF, and will provide insight and practical application for how the upcoming changes can impact your business. This Alert includes:

- Discussion of three new key definitions.
- An evaluation of revenue source changes for the ELTF as well as the implementation of an independent actuarial study.
- An examination of substantive language changes and how they will impact owners and operators of USTs in Indiana, including, among others, changes in annual claims limits, changes in deductible amounts set by the ELTF, and removal of the ability of the Department of Revenue to place liens on property with underground storage tanks.

ADDED DEFINITIONS

The Amendments add three new definitions to the ELTF statutory scheme which clarify - and, with any luck, simplify - when monies may be released from the ELTF and to whom they may be released. The first is a definition of "eligible party," the second defines an "eligible release," and the third adds a definition of an "ELTF indemnity claim."

First off, the new definition of "eligible party" under Ind. Code § 13-11-2-62.5 makes it clear that five categories of parties may recover costs from the ELTF. These include:

1. "An owner, as defined in IC 13-11-2-150."

2. "An operator, as defined in IC 13-11-2-148(d) and IC 13-11-2-148(e)."

3. "A former owner or operator."

4. "A transferee of property upon which a UST is located."

5. "A transferee of property upon which a UST was located but from which the UST has been removed."

An "eligible party" who is an "operator" as defined by Ind. Code § 13-11-2-148(e) is a broad category of potential parties and includes secured creditors, lenders, parties who deliver fuel to USTs, and political subdivisions. *See* Ind. Code § 13-11-2-148(e)(1)-(4).

The second new definition of an "eligible release" is of equal importance in clarifying what releases qualify for reimbursement from the ELTF. *See* Ind. Code § 13-11-2-62.7. Here, the new definition imposes only four prerequisites:

1. The release is from a UST that was registered with IDEM before the date of the ELTF claim.

2. The release is reported no later than thirty days after the date the claimant discovered the release.

3. An initial site characterization of the facility is submitted to IDEM.

4. The release is from the tank or dispensing components, NOT including the nozzle or hose connecting the nozzle to the pump.

As to the third requisite, the Amendments do not specify when an "initial site characterization" must be submitted, only that one must be submitted. Forthcoming implementing regulations will no doubt clarify this time frame.

Finally, the new definition of an "ELTF indemnity claim" provides that this term "means any ELTF claim for the indemnification of a third party." Ind. Code § 13-11-2-63.7. The addition of this definition is important because the Amendments go on to provide a procedure to have "ELTF indemnity claims" paid from the fund. *See* Ind. Code § 13-23-9-3.

THE ELTF'S SOURCES OF REVENUE

Fees and penalties are no longer the key methods used to finance the ELTF. These fees and penalties (along with other sources) now go to the Underground Petroleum Storage Tank Trust Fund - a fund which is to be used (in part) to finance corrective actions that are ineligible to receive funds from the ELTF. Instead of relying on fees and penalties, there are now five sources of funding for the ELTF:

1. Appropriations from the General Assembly;

2. Gifts and donations intended for deposit in the fund;

3. Inspection fees paid under Ind. Code § 16-44-2;

4. Bond revenue under Ind. Code § 4-4-11.2-7; and

5. Any other money authorized to be deposited in or appropriated to the trust fund.

ACTUARIAL STUDY

What used to call for simply an "audit" of the ELTF now calls for an independent actuarial study to be conducted every five years, to examine "the future obligations and fiscal sustainability of the ELTF."

DEPARTMENT OF REVENUE LIENS

The Department of Revenue (DoR), prior to July, 2016, was able to place a lien on property that had unpaid UST fees. After the repeal of Ind. Code § 13-23-7-10, the DoR may no longer place such liens.

PRIORITY OF CLAIMS PAYMENTS, IF ELTF BALANCE IS LIMITED

If the ELTF drops below $25 million the administrator is to pay claims based upon a priority system. If the ELTF balance is insufficient to pay claims and necessary personnel and administrative expenses, then the administrator is to cease paying all claims.

Pursuant to amended Ind. Code § 13-23-11-7, the Underground Storage Tank Financial Assurances Board is to establish the standards for paying ELTF claims. These rules are currently under development and no date for adoption is readily available.

INCREASE IN PAYMENT CAPS FOR ELIGIBLE RELEASES

The amount that may now be paid out of the fund for eligible releases has increased. The ELTF administrator may now pay:

1. Up to $2.5 million from the ELTF per eligible release; and

2. Up to $10 million from the ELTF per fiscal year, to any one person or entity. (If you are an eligible party and you've submitted more than $10 million in claims in one year then you're out for the remainder of the year).

Pre-July, 2016, the limits were: $3 million annually for owners with 100 or more USTs, and $2 million for owners with less than 100 USTs.[1] Increasing the ELTF payment caps greatly helps UST owners, especially in situations where there has been a large and costly release, or multiple releases within a one year timeframe. What used to limit owners with less than 100 USTs to just $2 million annually for any claims, now allows these same owners to recoup up to $2.5 million, per release - and up to $10 million per year.

Larger cost recovery can now occur in a matter of years - instead of decades, in some cases. For example, a multi-million dollar release that used to take several years to pay off due to the $2 or $3 million dollar annual limit, may now take just a year or two, as the owner may now request up to $10 million per year to recover cleanup and remediation costs.

NEW DEDUCTIBLE ARRANGEMENT

The pre-2016 deductible scheme included several factors for determining the UST owner's deductible. For instance, ELTF payments were reduced by $35,000 if the UST was not in compliance with rules adopted by the board concerning technical and safety requirements before the tank was required to be in compliance, but were in compliance at the time a release was discovered. The deductible was $30,000 if the UST was compliant, was not double walled, but had piping to a secondary containment. The deductible was $20,000 if the UST was in compliance, was double walled, and also had piping to a secondary containment.

The new legislation has simplified and streamlined the ELTF payment procedure by jettisoning this approach and adopting a 3-step deductible calculation:

1. Flat deductible of $15,000,

2. Any annual registration fees due, per each on-site UST, that were due in 1991 or later, and

3. Additional $1,000 per UST that did not have registration completed as required by Ind. Code § 13-23-12-1.

Changes in the deductible requirements under the ELTF should assist tank owners in their ability to more accurately predict reductions in ELTF payouts. Instead of focusing on tank wall characteristics and overflow containment systems - important elements under the old regime - a tank owner now needs only to ensure their release is eligible, and, if so, the deductible amount is a straightforward $15,000.

However, care still must be taken to ensure tank registration requirements are met. Under the new deductible scheme, all tanks on-site must be properly registered before a release occurs. If they are not and a release occurs, all tanks must then have past due annual registration fees paid and, for each delinquent tank, there is an additional $1,000 fee. In the case of multiple unregistered tanks at one site, the fees and penalties could climb quickly. If a small petroleum release were to occur, these penalties and past-due fees could quickly wipe out much of the reimbursement money owed under the ELTF.[2]