OFFICE OF THE STATE BUILDING COMMISSIONER
WRITTEN INTERPRETATION OF A BUILDING LAW

Title:	Service Disconnecting Means
Identification Number:	OSBC-05-01
Date Originally Issued:	May 11, 2004
Effective Date:	February 1, 2005
Brief Description of Subject Matter:	Location of service disconnecting means
Indiana Building Code(s) Affected:	Indiana Residential Code, 2001 Edition (675 IAC 14-4.2) Indiana Electrical Code, 2002 Edition (675 IAC 17-1.6)

The Office of the State Building Commissioner, pursuant to the authority granted under Indiana Code 22-15-2-6(5) and Indiana Code 22-13-5, has developed this written interpretation of a building law. Pursuant to Indiana Code 22-13-5-4, **this written interpretation of a building law is binding upon all counties and municipalities.**

This written interpretation will continue to bind all counties and municipalities until the earlier of the following:

(1) The general assembly enacts a statute that substantively changes the building law interpreted or voids the written interpretation.

(2) The Fire Prevention and Building Safety Commission adopts a rule under IC 4-22-2 to state a different interpretation of the building law.

(3) The written interpretation is found to be an erroneous interpretation of the building law in a judicial proceeding.

(4) The Office of the State Building Commissioner publishes a different written interpretation of the building law.

Background

Indiana Residential Code (675 IAC 14-4.2) Section E3501.6.2 and Indiana Electrical Code (675 IAC 17-1.6) Section 230.70(A)(1) require the service disconnecting means to be "at a readily accessible location either outside of a building or inside nearest the point of entrance of the service conductors".

Interpretation

The referenced code sections clearly allow placement of the disconnect means at a readily accessible location outside of a building on the load side of the meter, resulting in the service conductors not entering the building. The same sections allow the disconnect means to be placed inside of a building far enough to reach a readily accessible location, but no further. This allows the service-entrance conductors to enter the building but minimizes their length.

The intent of these code sections is to allow service-entrance conductors to extend to service equipment which is in basements or beyond construction which would prevent ready access to the equipment. The length of the service-entrance conductors is intended to be minimized, but not eliminated.

INDIANA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT
COMMISSIONER'S BULLETIN #15

List of hazardous waste sites scored
using the Indiana Scoring Model (ISM)

Jan-05

http://www.in.gov/idem/land/statecleanup/club.html

	County/City Site Name (Type of Facility) Address	*score based on* *potential impact* Score Rescore	Score Date Rescore Date	Contaminant Type	Environment Affected	Status
1.	Adams/Berne National Oil Company (Bulk Plant) SR 218 & CR 150W	20.97 -/-	May-92	Fuel	Soil Surface water	Investigation in progress Conducting removal action
2.	Delaware/Albany					

	Muncie Race Track (Dump) SR 67 & 700N	27.70 -/-	Feb-91	Metals Solvents PCBs	Soil Groundwater	Waste isolated Landfill capped Ongoing groundwater monitoring
3.	Delaware/Muncie Stout Storage Battery (Industrial) 2505 West 8th	26.22 11.21	Dec-90 May-99	Lead	Soil	Cleanup Complete Delisting evaluation proposed 2005
4.	Elkhart/Elkhart Lusher Avenue (Landfill) CR 18 & 21st Street	31.00 -/-	Feb-91	Solvents	Groundwater	Residential water filters installed
5.	Elkhart/Elkhart Sycamore Street Site (Dry Cleaner) 100 Sycamore	13.13 -/-	May-91	Solvents	Groundwater	Alternate water supplied Delisting evaluation proposed 2005
6.	Fayette/Connersville Connersville Landfill (Landfill) SR 121 & Eastern Avenue	44.60 -/-	Feb-91	Solvents Metals	Soil Surface water Groundwater	Immediate removal actions completed Additional investigation proposed
7.	Franklin/Laurel Laurel Dump Site #1 (Dump) Various Sites	20.89 -/-	Mar-92	Solvents Metals	Soil Surface water Groundwater	Surface/subsurface waste removed Pending additional USEPA investigation
8.	Gibson/Princeton Indiana Refining (Industrial) US 41 and 350 S	30.03 -/-	Dec-90	Fuel	Soil	Surface waste removed Delisting evaluation proposed 2005
9.	Grant/Marion Grant County Landfill (Landfill) 750 E & SR 18	15.48 -/-	Apr-91	Metals	Soil Groundwater	Ongoing investigation Sampling event planned for 2005
10.	Hancock/Fortville Meridian Road Landfill (Landfill) CR 1000 N and Meridian	40.16 -/-	Dec-90	Solvents Metals	Soil Groundwater	Investigation complete Cleanup in progress
11.	Hendricks/Clayton Clayton Wells (Commercial) Kentucky Street	27.00 -/-	Dec-90	Solvents	Groundwater	Filters supplied Periodic monitoring
12.	Huntington/Huntington Huntington Terminals (Pipeline) Meridian & Erie Stone	28.90 -/-	Dec-90	Fuel	Groundwater	Alternate water supplied Steering committee formed by Responsible Parties
13.	Jackson/Reddington Texas Eastern	26.26	Dec-90	Fuel	Soil	Cleanup in progress under Agreed Order

(Petroleum pipeline) Southwest of Reddington	-/-			Groundwater	
14. Jackson/Medora					
United Plastics	39.00	Jan-91	Solvents	Soil	Waste removal in progress
(Manufacturing)	-/-		Metals	Groundwater	Entered Voluntary Remediation Program
SR235 & 2nd Street					
15. Kosciusko/Warsaw					
Warsaw Chemical	47.45	Jan-91	Solvents	Soil	Cleanup in progress under USEPA Agreed
(Chem-Manufacturing)	-/-			Groundwater	Order on Consent
Argonne & Durban Street					Pending Agreed Order with State
16. Lake/Hammond					
Calumet Containers	16.07	Dec-90	Solvents	Soil	Ongoing removal by USEPA
(Industrial)	-/-				Ongoing investigation by State
3631 Stateline Road					
17. Lake/East Chicago					
Energy Cooperative Incorporated	19.87	Dec-90	Fuel	Soil	Cleanup in progress under Agreed Order
(Industrial)	-/-		Lead	Surface water	Consent Decree negotiations underway
3500 Indianapolis Blvd				Groundwater	
18. Lake/Hammond					
BP	18.59	Mar-91	Fuel	Soil	Cleanup under RCRA Corrective Action
(Refinery)	-/-		Acid/bases	Groundwater	
Lake Avenue & 129th Street			Lead		
19. Lake/Cedar Lake					
Schreiber Oil Company	13.48	Dec-90	Fuel	Soil	Surface waste removed
(Petroleum Storage)	-/-				Delisting evaluation proposed 2005
10601 W 133rd Street					
20. Lake/Hammond					
William Powers	18.88	Mar-91	Cyanide	Soil	Delisting evaluation proposed 2005
(Industrial)	-/-		Sulfide	Surface water	
119th & Stateline					
21. Lawrence/Oolitic					
Oolitic Dump	48.87	Jan-91	Fuel	Soil	Cleanup in progress under Leaking
(Dump)	-/-			Groundwater	Underground Storage Tank Program
Hoosier & 4th Street					Delisting evaluation proposed 2005
22. Madison/Anderson					
Prime Battery	29.52	Dec-91	Lead	Soil	USEPA Removal action completed
(Manufacturing)	-/-			Groundwater	Delisting evaluation proposed 2005
230 Jackson					
23. Marion/Indianapolis					
American Lead	21.78	Jun-99	Lead	Soil	Investigation Completed
(Industrial)	-/-				USEPA Removal action proposed
2102 Hillside Avenue					
24. Marion/Indianapolis					
Avanti Corporation	40.05	May-93	Lead	Soil	USEPA removal completed
(Industrial)	23.09	Oct-98		Groundwater	Long-term operation and maintenance

South Harris Street				Surface Water	ongoing
25. Marion/Indianapolis					
Marathon Rock Island	15.22	Jan-91	Gasoline	Soil	Voluntary waste cleanup in progress
(Industrial)	-/-		Metals	Surface water	Ongoing investigation
500 W 86th Street				Groundwater	Ongoing negotiations for Agreed Order
26. Marion/Speedway					
Marathon Terminal	21.04	Apr-91	Fuel	Soil	Cleanup in progress
(Industrial)	-/-			Surface water	Multiple recovery wells
1304 Olin Avenue				Groundwater	Soil vapor extraction system in place
					Ongoing investigation
27. Marshall/Bourbon					
Bourbon & Quad Streets Contamination	25.86	May-92	Solvents	Soil	Cleanup in progress under Leaking
(Commercial)	-/-		Fuel	Groundwater	Underground Storage Tank Program
211 W Center Street					
28. Montgomery/Crawfordsville					
Crawfordsville Scrap & Salvage	29.67	Oct-93	PCBs	Soil	Entered Voluntary Remediation Program
(Dump/Scrap)	-/-		Lead	Sediments	
419 N Green Street					
29. Montgomery/Crawfordsville					
P.R. Mallory	22.23	Sep-91	PCBs	Soil	Some surface waste removed by USEPA
(Electrical)	-/-			Sediments	Pending further investigation
SR 32 East					
30. Montgomery/Crawfordsville					
Shelly Ditch	24.04	Aug-99	PCBs	Soil	Waste study in progress under Superfund
(Industrial)	-/-			Sediments	Ongoing removal action
1204 Darlington Avenue					USEPA lead
31. Morgan/Monrovia					
Davenport Dump	28.20	Dec-90	Solvents	Surface water	USEPA removal action completed
(Dump)	23.20	Jul-00			Delisting evaluation proposed 2005
6965 Beech Grove Road					
32. Porter/Wheeler					
Wheeler Landfill	31.19	Jan-92	Solvents	Groundwater	Long-term monitoring under RCRA permit
(Landfill)	-/-		Caustics		
SR 130 & Jones Road					
33. Randolph/Union City					
A.O. Smith (Westinghouse)	44.67	Feb-92	PCBs	Soil	Cleanup in progress under Superfund
(Industrial)	-/-			Groundwater	Surface waste removed by USEPA
Frank Miller Road					
34. Randolph/Union City					
Little Mississenewa River	31.37	Jul-99	PCBs	Soil	Cleanup in progress under Superfund
(River)	-/-			Sediments	
Frank Miller Road at Little Mississenewa					
35. Randolph/Union City					

UTA	33.70	Sep-99	PCBs	Soil	Cleanup in progress under TSCA
(Industrial)	-/-			Groundwater	
1425 W Oak					
36. St. Joseph/Granger					
Amoco/Granger	54.76	Dec-90	Fuel	Soil	Cleanup in progress
(Industrial)	26.02	Jan-96	Solvents	Groundwater	Agreed Order signed
Adams Road					
37. St. Joseph/South Bend					
Allied Signal Corporation	41.75	May-92	Solvents	Soil	Entered Voluntary Remediation Program
(Industrial)	-/-		Fuel	Groundwater	
717 N Bendix Drive					
38. St. Joseph/South Bend					
ARCO	46.74	Jul-99	Fuel	Soil	Remedial investigation in progress
(Industrial)	-/-			Groundwater	
20630 West Ireland					
39. St. Joseph/South Bend					
Avanti	27.60	Mar-90	Solvents	Soil	Drum removal complete
(Industrial)	28.28	Mar-92		Groundwater	Remedial investigation in progress
765 S Lafayette Road					
40. St. Joseph/South Bend					
Chippewa Avenue Well Field	50.38	Aug-99	Solvents	Groundwater	Remedial investigation in progress
(Industrial)	-/-				Cleanup in progress
600 W Chippewa					
41. St. Joseph/South Bend					
Hollywoood Park	12.8	Aug-02	Solvents	Groundwater	Groundwater investigation in progress
(Residential)					Impacted residents connected to municipal water
23768 US 20					
42. St. Joseph/South Bend					
Toro-Wheelhorse	29.89	Mar-93	Solvents	Soil	Cleanup Complete
(Industrial)	-/-		Metals	Groundwater	Issued Covenant Not to Sue under the Voluntary Remediation Program
515 W Ireland Road					
43. Shelby/Shelbyville					
Knauf Fiberglass	43.86	Mar-91	Solvents	Groundwater	Cleanup Complete
(Industrial)	17.85	Mar-94		Surface water	No further action
240 Elizabeth					Delisting evaluation proposed 2005
44. Shelby/Shelbyville					
IGC/PSI	19.06	Mar-91	Fuel by-products	Soil	Ongoing investigation
(Industrial)	-/-		Cyanide	Groundwater	
Noble Street					
45. Shelby/Shelbyville					
TRW Incorporated	42.83	Dec-90	Solvents	Soil	Risk assessment in progress
(Industrial)	9.17	Mar-94		Groundwater	Cleanup in progress
630 Noble/513 Hendricks					
46. Spencer/Troy					
Freeman Kline Site/Troy Refinery	31.17	Jun-97	Petroleum	Soil	Immediate removal completed

(Refinery) SR 70 East	-/-			Surface water	Investigation in progress
47. Sullivan/Dugger Dugger Electric (Commercial) First and Main Streets	25.82 -/-	Feb-91	Petroleum PCBs	Groundwater	Monitoring
48. Tippecanoe/Lafayette ALCOA (Industrial) 3131 E Main	19.44 -/-	Dec-90	PCBs	Soil Sediments	Ongoing investigation by SI
49. Tippecanoe/Otterbein David John Property (Drum Recycling) Vandalia Street	43.8	Aug-01	Solvents	Soil Groundwater	Ongoing Investigation
50. Tippecanoe/Lafayette Indiana Gas (Industrial) 600 N 4th Street	44.35 39.65	Dec-91 Jul-99	Fuel by-products Cyanide	Soil Groundwater	Cleanup complete Long term monitoring Delisting evaluation proposed 2005
51. Tippecanoe/Lafayette TRW/Ross Gear (Industrial) 800 Heath Street	58.54 42.60	Dec-90 Jan-96	Solvents	Soil Groundwater	Cleanup complete under Agreed Order Delisting evaluation proposed 2005
52. Vigo/Terre Haute J.I. Case (Industrial) 4901 N 13th Street	31.77 -/-	Dec-90	Solvents	Groundwater	Agreed Order signed Pilot groundwater cleanup project in place
53. Wayne/Richmond Dana/Springwood Park (Industrial) Williamsburg Pike	43.17 -/-	Jan-91	Solvents	Groundwater	Cleanup in progress under Voluntary Remediation and Solid Waste programs
54. Wells/Petroleum Merrill Meyers Property (Farm Equipment) SR 1 & CR 900	25.26 -/-	Feb-92	PCBs	Soil	Pending USEPA Removal Action Delisting evaluation proposed 2005
55. White/Monon Monon Well Field (Commercial) Main Street	28.40 13.91	Dec-90 Sep-03	Solvents	Soil Groundwater	Consent Order signed Wellfield relocated Delisting evaluation proposed 2005

One (1) site was delisted from the Commissioner's Bulletin in 2004
No sites were added to the Commissioner's Bulletin in 2004

NATURAL RESOURCES COMMISSION
Information Bulletin #2 (Third Amendment)
January 1, 2005

SUBJECT: Roster of Indiana Animals and Plants that are Extirpated, Endangered, Threatened, or Rare. The list outlined here supersedes both Information Bulletin #2, *Roster of Indiana Animals and Plants which are Extirpated, Endangered, Threatened, Rare, or of Special Concern* (15 IR 848) and Information Bulletin #2, *Roster of Indiana Animals and Plants which are Extirpated, Endangered, Threatened, or Rare* (15 IR 1312).

I. INTRODUCTION

Following is a roster of animals, plants, and insects considered in Indiana by the department of natural resources to be extirpated, endangered, threatened or rare. The roster is intended to help identify these animals and plants; and the hope is that a better understanding of the fragility of these species will promote intelligent land use decisions. This roster may also be cross referenced in rules and other documents directed to land use management.

Inclusion of an animal or plant on the roster is determined based on the best current information available. Adjustments to the listing will be required, as additional data becomes available to the department and as the conditions of species change. For this reason, adjustments will be needed periodically to this roster; and those adjustments will be set forth in later editions of the roster.

Additional information concerning particular species included on the roster may be obtained from the department of natural resources. For more information, or to suggest additions, deletions or modifications to the listing, contact the following:

Environmental Unit Supervisor
Indiana Department of Natural Resources
Division of Fish and Wildlife
402 West Washington Street, Room W273
Indianapolis, Indiana 46204
Telephone: (317) 232-4070

II. INDIANA CLASSIFICATIONS

This section sets forth the classifications used in Indiana for animals, other than insects, and for plants included on this roster. The somewhat modified classifications used for insects are set forth in section III (G).

"Extirpated" means an animal that has been absent from the state as a naturally occurring breeding population for over ten years, but exists elsewhere as a wild population. Extirpated plant species are those believed to be originally native to Indiana but without any currently known populations within the state.

"Endangered" means any animal species or subspecies whose prospects for survival or recruitment within the state are in immediate jeopardy and are in danger of disappearing from the state. This includes all species classified as endangered by the federal government that occur in Indiana.

"Threatened" means an animal species or subspecies that is likely to become endangered within the foreseeable future, including all species or subspecies classified as threatened by the federal government that occur in Indiana. (312 IAC 9-1-14). Endangered and threatened species receive the same protection under state law.

"Rare" means an animal species where some problems of limited abundance or distribution in Indiana are known or suspected and should be closely monitored. Plants known to occur currently on eleven to 20 sites are considered rare.

III. ANIMALS

A. MAMMALS

1. Extirpated

Rattus rattus "black rat"
Erethizon dorsatum "porcupine"
Canis rufus "red wolf"
Canis lupus "gray wolf"
Ursus americanus "black bear"
Martes pennanti "fisher"
Gulo gulo "wolverine"
Spilogale putorius "eastern spotted skunk"
Felis concolor "mountain lion"
Felis lynx "lynx"
Cervus elaphus "elk"
Bison bison "bison"

2. Endangered or Threatened

Felis rufus "bobcat"
Myotis sodalis "Indiana bat"

Myotis grisescens "gray bat"
Myotis austroriparius "southeastern bat"
Nycticeius humeralis "evening bat"
Taxidea taxus "badger"
Neotoma floridana "eastern wood rat"
*Sylvilagus aquaticu*s "Swamp rabbit"
Spermophilus franklinii "Franklin's ground squirrel"
Lutra canadensis "river otter"

3. Rare

Condylura cristata "star-nosed mole"
Plecotus rafinesquii "Rafinesque's big-eared bat"
Geomys bursarius "plains pocket gopher"
Reithrodontomys megalotis "western harvest mouse"
Mustela nivalis "least weasel"

B. BIRDS

1. Extirpated

Gavia immer "common loon"
Phalacrocorax auritus "double-crested cormorant"
Tympanuchus cupido "greater prairie-chicken"
Phalaropus tricolor "Wilson's phalarope"
Sterna hirundo "common tern"
Sterna forsteri "Forster's tern"
Corvus corax "common raven"
Euphagus cyanocephalus "Brewer's blackbird"

2. Endangered or Threatened

Botaurus lentiginosus "American bittern"
Ixobrychus exilis "least bittern"
Nycticorax nycticorax "black-crowned night-heron"
Nyctanassa violacea "yellow-crowned night-heron"
Sygnus buccinator "trumpeter swan"
Pandion haliaetus "osprey"
Haliaeetus leucocephalus "bald eagle"
Circus cyaneus "northern harrier"
Falco peregrinus "peregrine falcon"
Laterallus jamaicensis "black rail"
Rallus elegans "king rail"
Rallus limicola "Virginia rail"
Gallinula chloropus "common moorhen"
Grus americana "whooping crane"
Charadrius melodus "piping plover"
Bartramia longicauda "upland sandpiper"
Sterna antillarum "least tern"
Chlidonias niger "black tern"
Tyto alba "barn owl"
Asio flammeus "short-eared owl"
Cisothorus platensis "sedge wren"
Cisothorus palustris "marsh wren"
Lanius ludovicianus "loggerhead shrike"
Vermivora chrysoptera "golden-winged warbler"
Dendroica kirtlandii "Kirtland's warbler"
Ammodramus henslowii "Henslow's sparrow"
Xanthocephalus xanthocephalus "yellow-headed blackbird"

3. Rare

Coragyps atratus "black vulture"
Accipiter striatus "sharp-shinned hawk"

Accipiter cooperii "Cooper's hawk"
Buteo lineatus "red-shouldered hawk"
Buteo platypterus "broad-winged hawk"
Empidonax minimus "least flycatcher"
Certhia americana "brown creeper"
Mniotilta varia "black-and-white warbler"
Helmitheros vermivorus "worm-eating warbler"
Wilsonia citrina "hooded warbler"
Wilsonia canadensis "Canada warbler"
Sturnell a neglecta "western meadowlark"

C. REPTILES

1. Extirpated
   Farancie abacura reinwardti "mud snake"
2. Endangered or Threatened
   Aneides aeneus "green salamander"
   Nerodia erythrogaster "copperbelly water snake"
   Thamnophis butleri "Butler's garter snake"
   Clonophis kirtlandii "Kirtland's snake"
   Cemophora coccinea "scarlet snake"
   Liochlorophis vernalis "smooth green snake"
   Tantilla coronata "Southeastern crowned snake"
   Agkistrodon piscivorus "cottonmouth"
   Sistrurus catenatus "massasauga"
   Crotalus horridus "timber rattlesnake"
   Kinosternon subrubrum "eastern mud turtle"
   Clemmys guttata "spotted turtle"
   Pseudemys concinna "hieroglyphic river cooter"
   Macrochelys temmincki "alligator snapping turtle"
   Emydoidea blandingii "Blanding's turtle"
   Terrapene ornata "ornate box turtle"
3. Rare
   Thamnophis proximus "western ribbon snake"
   Opheodrys aestivus "rough green snake"
   Graptemys pseudogeographic "false map turtle"

D. AMPHIBIANS

1. Extirpated
   No Species Listed.
2. Endangered
   Cryptobranchus alleganiensis "hellbender"
   Pseudotriton ruber "red Salamander"
   Aneides aeneus "green salamander"
3. Threatened
   Hemidactylium scutatum "four-toed salamander"
   Rana areolata "crawfish frog"
   Rana areolata circulosa "northern crawfish frog"
4. Rare
   Necturus maculosus "common mudpuppy"
   Ambystoma laterale "blue-spotted salamander"
   Rana pipiens "northern leopard frog"
   Rana blairi "plains leopard frog"

E. FISH

1. Extirpated
   Esox masquinongy ohioensis "Ohio muskellunge"
   Ammocrypta asprella "crystal darter"
   Percina uranidea "stargazing darter"

2. Endangered
Acipenser fulvescens "lake sturgeon"
Clinostomus elongatus "redside dace"
Notropis ariommus "popeye shiner"
Amblyopsis spelaea "northern cavefish"
Typhlichthys subterraneus "southern cavefish"
Etheostoma camurum "bluebreast darter"
Etheostoma maculatum "spotted darter"
Etheostoma squamiceps "spottail darter"
Etheostoma tippecanoe "Tippecanoe darter"
Etheostoma variatum "variegate darter"
Percina evides "gilt darter"
Etheostoma histrio "harlequin darter"
3. Threatened
No Species Listed.
4. Rare
Coregonus artedii "cisco"
Cycleptus elongatus "blue sucker"
Moxostoma carinatum "river redhorse"
Moxostoma valenciennesi "greater redhorse"
Fundulus catenatus "northern studfish"
Ammocrypta pellucida "eastern sand darter"

F. MOLLUSKS AND CRUSTACEANS
1. Extirpated
No Species Listed.
2. Endangered or Threatened
Quadrula cylindrica "rabbitsfoot"
Plethobasus cyphyus "sheepnose"
Pleurobema clava "clubshell"
Pleurobema pyramidatum "pyramid pigtoe"
Cyprogenia stegaria "fanshell"
Epioblasma triquetra "snuffbox"
Plethobasus cooperianus "orangefoot pimpleback"
Lampsilis abrupta "pink mucket"
Potamilus capax "fat pocketbook"
Pleurobema plenum "rough pigtoe"
Epioblasma torulosa torulosa "tuberculed blossom"
Epioblasma obliquata perobliqua "white catspaw"
Epioblasma torulosa rangiana "northern riffleshell"
Fusconaia subrutunda "long solid"
Plethobasus cicatricosus "white wartyback"
Orconectes indianensis "Indiana crayfish"
3. Rare
Simpsonaias ambigua "salamander mussel"
Pleurobema cordatum "Ohio pigtoe"
Lampsilis fasciola "wavy-rayed lampmussel"
Venustaconcha ellipsiformis "ellipse"
Villosa fabalis "rayed bean"
Villosa lienosa "little spectacle case"
Campleloma decisum "pointed campeloma"
Lymnaea stagnalis "swamp lymnaea"
Toxolasma lividus "purple lilliput"
Obovaria subrotunda "round hickorynut"

G. INSECTS
1. Extirpated: An insect is considered state extirpated if any of the following three conditions occur: (a) A species is declared

extirpated by a specialist for the species, family, or order to which the insect belongs. (b) A species has not been located in Indiana as a naturally occurring breeding population for more than 15 years, but the species exists outside Indiana as a wild population. (c) A species appears on a federal list as being extirpated in Indiana. Applying this standard, the following species are believed extirpated in Indiana:

Ephemeroptera (Mayflies)
Pentagenia robusta "robust pentagenian burrowing mayfly"
Odonata (Dragonflies; Damselflies)
Somatochlora hineana "Hine's emerald"
Neuroptera (Lacewings; Antlions; Owlflies; Snakeflies)
Polystoechotes punctatus "a giant lacewing"
Coleoptera (Beetles)
Nicrophorus americanus "American burying beetle"
Lepidoptera (Butterflies; Skippers)
Enodia creola "Creole pearly-eye"
Lycaena epixanthe "bog copper"
Oarisma powesheik "Powesheik skipperling"
Lepidoptera (Moths)
Papaipena eryngii "rattlesnake-master borer moth"

2. Endangered: An insect species is considered state endangered if its prospects for survival or recruitment within Indiana are in immediate jeopardy, and is in danger of disappearing from the state, where any of the following three conditions occur: (a) A species which may occur in Indiana is classified as endangered by the federal government. (b) A species is biologically dependent on a threatened or endangered plant species. (c) A species is known from fewer than five sites in Indiana.

An insect is also considered endangered if the insect is listed as extirpated but is later rediscovered in Indiana, whether the population is endemic or believed to be recently adventive. The discovery of any life stage of an extirpated or endangered species is fiduciary evidence that a population exists.

An endangered species of insect does not include any of the following: (a) A species that is not known as a population in Indiana but which ranges into the state from Michigan, Ohio, Illinois, or Kentucky. (b) A nonregulated adventive species. (c) A species regulated under IC 14-24 and 312 IAC 18-3 (including a species used for biological control).

Applying this standard, the following insect species are listed as endangered:

Collembola (Springtails)
Arrhopalites ater "black medusa springtail"
Arrhopalites benitus "a springtail"
Arrhopalites bimus "springtail"
Folsomides americanus "small springtail"
Hypogastrura helena "Helen's springtail"
Hypogastrura lucifuga "Wyandotte Cave sprintail"
Isotoma christianseni "Christiansen's springtail"
Micranurida harti "Hart's springtail"
Pseudosinella collina "hilly springtail"
Sinella avita "ancestral springtail"
Sinella barri "Barr's Cave springtail"
Tomocerus missus "cave springtail"
Thysanura (Silverfish)
Campodea plusiochaeta "a dipluran"
Ephemeroptera (Mayflies)
Epeorus namatus "a mayfly"
Homoeoneuria ammophila "a sand-filtering mayfly"
Pseudiron centralis "a mayfly"
Raptoheptagenia cruentata "a flatheaded mayfly"
Siphloplecton interlineatum "a sand minnow mayfly"
Spinadis wallacei "Wallace's deepwater mayfly"
Odonata (Dragonflies; Damselflies)
Aeshna canadensis "Canada darner"
Aeshna clepsydra "mottled darner"
Arigomphus cornutus "horned clubtail"

Arigomphus furcifer "lilypad clubtail"
Arigomphus lentulus "stillwater clubtail"
Calopteryx aequabilis "river jewelwing"
Calopteryx angustipennis "Appalachian jewelwing"
Celithemis monomelaena "black spotted skimmer"
Celithemis verna "double-ringed pennant"
Cordulegaster bilineata "brown spiketail"
Cordulegaster diastatops "Delta-spotted spiketail"
Cordulegaster erronea "tiger spiketail"
Dorocordulia libera "racket-tailed emerald"
Epitheca canis "beaverpond baskettail"
Gomphus hybridus "cocoa clubtail"
Ischnura prognata "furtive forktail"
Macromia wabashensis "Wabash River cruiser"
Nannothemis bella "dwarf skimmer"
Nehalennia gracilis "sphagnum sprite"
Neurocordulia molesta "smoky shadowdragon"
Somatochlora ensigera "lemon-faced emerald"
Stylogomphus albistylus "least clubtail"
Stylurus laurae "Laura's clubtail"
Stylurus notatus "elusive clubtail dragonfly"
Stylurus scudderi "zebra clubtail"
Sympetrum danae "black meadowhawk"
Tetragoneuria spinigera "spiny baskettail"

Orthoptera (Grasshoppers; Crickets)
Ceuthophilus brevipes "spotted cave cricket"

Homoptera (Cicadas; Hoppers; Scales; Aphids)
Flexamia robertsonii "Robertson's flightless planthopper
Lepyronia gibbosa "hill-prairie spittlebug"
Mesamia stramineus "helianthus leafhopper"
Polyamia dilata "the short-winged panic grass leafhopper"
Prairiana kansana "the Kansas prairie leafhopper"
Texananus areolatus "the ivory Texan leafhopper"

Coleoptera (Beetles)
Aleochara lucifuga "a beetle"
Atheta annexa "a beetle"
Atheta lucifuga "light shunning rove beetle"
Batrisodes krekeleri "cave beetle"
Catops gratiosa "a beetle"
Cicindela marginipennis "cobblestone tiger beetle"
Lissobiops serpentinus "a rove beetle"
Pseudanophthalmus barri "cave beetle"
Pseudanophthalmus chthonius "cave beetle"
Pseudanophthalmus Emersoni "cave beetle"
Pseudanophthalmus eremita "cave beetle"
Pseudanophthalmus jeanneli "cave beetle"
Pseudanophthalmus Leonae "cave beetle"
Pseudanophthalmus Shilohensis "cave beetle"
Pseudanophthalmus shilohensis boonensis "cave beetle"
Pseudanophthalmus shilohensis mayfieldensis "cave beetle"
Pseudanophthalmus tenuis blatchleyi "cave beetle"
Pseudanophthalmus tenuis morrisoni "cave beetle"
Pseudanophthalmus youngi "cave beetle"
Pseudanophthalmus youngi donaldsoni "cave beetle
Ptomaphagus cavernicola "cavernicolouis fungus beetle"

Mecoptera (Scorpionflies)
Merope tuber "earwig scorpionfly"
Trichoptera (Caddisflies)
Goera stylata "a northern casemaker caddisfly"
Homoplectra doringa "a homoplectran caddisfly"
Pycnopsyche rossi "a northern casemaker caddisfly"
Setodes oligius "a caddisfly"
Lepidoptera (Butterflies; Skippers)
Boloria selene nebraskensis "the Nebraska silver bordered frittillary"
Callophrys irus "frosted elfin"
Callophrys polios "hoary elfin"
Erynnis persius persius "Persius dusky wing"
Glaucopsyche lygdamus couperi "silvery blue"
Hesperia ottoe "Ottoe skipper"
Lycaeides melissa samuelis "Karner blue"
Lycaena xanthoides "great copper"
Neonympha mitchellii mitchellii "Mitchell's satyr"
Pieris oleracea "eastern veined white"
Satyrodes appalachia appalachia "Appalachian eyed brown"
Speyeria diana "Diana fritillary"
Speyeria idalia "regal fritillary"
Lepidoptera (Moths)
Aethes patricia
Catocala abreviatella "the abbreviated leadplant underwing moth"
Catocala amestris "the leadplant underwing moth"
Catocala antinympha "the sweet fern underwing"
Catocala marmorata "marbled underwing moth"
Cochylis ringsi
Exyra rolandiana "Pitcher window moth"
Macrochilo bivitatta "two-striped cord grass moth"
Melanchra assimilis "the shadowy arches"
Mesapamea stipata "the four-lined cordgrass borer"
Metarranthis apiciaria "barrens metarranthis moth"
Nephopterix dammersi "leadplant leafwebber moth"
Oligia obtusa "a noctuid moth"
Papaipema appassionata "the pitcher plant borer moth"
Phytometra ernestiana "Ernestine's moth"
Schinia indiana "phlox moth"
Schinia lucens "leadplant flower moth"
Diptera (Flies)
Mydas brunneus "the golden mydas fly"

3. Threatened: A state threatened species is one which is likely to become endangered within the foreseeable future, where any of the following three conditions occur: (a) A species which occurs in Indiana is classified as threatened by the federal government. (b) A species is biologically dependent upon a rare or threatened plant species. (c) A species is known from six to ten sites in Indiana.

The discovery of a single life stage in situ is fiduciary evidence that a population exists. A threatened species does not include accidentals, adventive nonregulated species, nor any species subject to IC 14-24 and 312 IAC 18-3 (including a species used for biological control).

Applying this standard, the following insect species are listed as threatened:

Collembola (Springtails)
Arrhopalites lewisi "Lewis' cave springtail"
Entomobrya socia "social springtail"
Onychiurus casus "fallen springtail"
Pseudosinella fonsa "Fountain Cave springtail"
Sinella cavernarum "a springtail"
Ephemeroptera (Mayflies)

Pentagenia vittigera "a pentagenian burrowing mayfly"
Tortopus primus "a mayfly"
Odonata (Dragonflies; Damselflies)
Aeshna mutata "spatterdock darner"
Aeshna tuberculifera "black-tipped darner"
Anax longipes "comet darner"
Enallagma boreale "boreal bluet"
Enallagma cyathigerum "northern bluet"
Erpetogomphus designatus "eastern ringtail"
Gomphus crassus "handsome clubtail"
Gomphus lineatifrons "splendid clubtail"
Gomphus quadricolor "rapids clubtail"
Gomphus spicatus "dusky clubtail"
Gomphus ventricosus "skillet clubtail"
Gomphus viridifrons "green-faced clubtail"
Ischnura kellicotti "lilypad forktail"
Leucorrhinia frigida "frosted whiteface"
Macromia pacifica "gilded river cruiser"
Neurocordulia obsoleta "umber shadowdragon"
Neurocordulia yamaskanensis "stygian shadowfly"
Stylurus amnicola "riverine clubtail"
Orthoptera (Grasshoppers; Crickets)
Eritettix simplex "the velvet-stripe grasshopper"
Paroxya atlantica "a grasshopper"
Paroxya hoosieri "Hoosier locust"
Phoetaliotes nebrascensis "large-headed grasshopper"
Pseudopomala brachyptera "bunch grass locust"
Stethophyma lineatum "striped sedge grasshopper"
Trimerotropis maritima "the dune locust"
Homoptera (Cicadas; Hoppers; Scales; Aphids)
Dorydiella kansana
Flexamia reflexus "Indiangrass flexamia"
Lepyronia angulifera "angular spittlebug"
Paraphilaenus paralellus "a spittle bug"
Paraphlepsius maculosus "peppered paraphlepsius leafhopper"
Polyamia herbida "the prairie panic grass leafhopper"
Neuroptera (Lacewings; Antlions: Owlflies; Snakeflies)
Climacia sp 1 "a spongilla fly"
Lomamyia banksi "a beaded lacewing"
Lomamyia flavicornis "a beaded lacewing"
Nallachius americanus "a pleasing lacewing"
Sisyra sp 1 "Indiana spongilla fly"
Coleoptera (Beetles)
Dryobius sexnotatus "six-banded longhorn beetle"
Necrophilus pettiti "a carrion beetle"
Pseudanophthalmus tenuis "cave beetle"
Pseudanophthalmus tenuis stricticollis "Marengo Cave ground beetle"
Quedius spelaeus "spelean rove beetle"
Mecoptera (Scorpionflies)
Boreus sp 1 "Virginia snow scorpionfly"
Trichoptera (Caddisflies)
Agapetus gelbae "an agapetus caddisfly"
Agapetus illini "an agapetus caddisfly"
Diplectrona metaqui "a diplectronan caddisfly"
Lepidoptera (Butterflies; Skippers)

Amblyscirtes belli "Bell's roadside-skipper"
Atrytonopsis hianna "dusted skipper"
Boloria selene myrina "slver-bordered fritillary"
Calephelis muticum "swamp metalmark"
Celastrina neglectamajor "Appalachian blue"
Celastrina nigra "sooty zzure"
Chlosyne harrisii "Harris's checkerspot"
Erynnis lucilius "columbine duskywing"
Erynnis martialis "mottled duskywing"
Euchloe olympia "Olympia marble"
Euphyes bimacula "two-spotted skipper"
Euphyes dukesi "scarce swamp skipper"
Hesperia metea "cobweb skipper"
Hesperia sassacus "Indian skipper"
Poanes viator viator "big broad-winged skipper"
Problema byssus "bunchgrass skipper"
Satyrodes eurydice fumosa "smoky-eyed brown"
Speyeria aphrodite "Aphrodite fritillary"

Lepidoptera (Moths)

Agrotis stigmosa
Apamea apamiformis "a noctuid moth"
Apamea burgessi "a noctuid moth"
Apamea lignicolora "the wood-colored apamea"
Apamea lutosa "opalescent apamea"
Apamea relicina "a noctuid moth"
Apamea verbascoides "the boreal apamea"
Archanara laeta
Bellura densa "a noctuid moth"
Capis curvata "a noctuid moth"
Catocala insolabilis "the unconsolable underwing"
Chortodes enervata "the many-lines cordgrass moth"
Chortodes inquinata "tufted sedge moth"
Crambus murellus "prairie sedge moth"
Cryptocala acadiensis "catocaline dart"
Eosphoropteryx thyatyroides "pinkpatched looper moth
Ethmia fuscidepella "a moth"
Eucoptocnemis fimbriaris "a noctuid moth"
Eucoptocnemis tripars "pearly dune moth"
Euxoa aurulenta "dune cutworm"
Fagitana littera "the marsh fern moth"
Faronta rubripennis "the pine streak"
Hadena ectypa "the starry campion moth"
Hemileuca sp 3 "midwestern fen buckmoth"
Hemipachnobia monochromatea "the purple sundew moth"
Leucania multilinea
Leucania scirpicola
Loxagrotis acclivis "a noctuid moth"
Loxagrotis grotei "Grote's black-tipped quaker"
Lytrosis permagnaria "a lytrosis moth"
Macrochilo louisiana
Meropleon ambifuscum "Newman's brocade"
Oligia bridghami "a noctuid moth"
Oncocnemis riparia "the dune oncocnemis moth"
Pangrapta decoralis "the multicolored huckleberry moth"
Papaipema astuta "the stoneroot borer moth"

Papaipema beeriana "Beer's blazing star borer moth"
Papaipema cerina "golden borer moth"
Papaipema leucostigma "columbine borer"
Papaipema lysimachiae "The St. John's wort borer moth"
Papaipema maritima "the giant sunflower borer moth"
Papaipema polymniae "the cup plant borer moth"
Papaipema sciata "the Culver's root borer"
Papaipema silphii "silphium borer moth"
Papaipema speciosissima "the royal fern borer moth"
Phalaenostola hanhami "Hanham's rare sedge moth"
Platyperigea meralis "the rare sand quaker"
Rhodoecia aurantiago "aureolaria seed borer"
Schinia gloriosa "the glorious blazing star flower moth"
Sitochroa dasconalis "pearly indigo borer"
Spartiniphaga includens "the included cordgrass borer"
Spartiniphaga panatela "northern cordgrass norer"
Tampa dimediatella "red-striped panic grass moth"
Tricholita notata "marked noctuid"

Diptera (Flies)

Mydas tibialis "golden legged mydas fly"

4. Rare: A state rare insect species is a species where problems of limited abundance or distribution in Indiana are known or reasonably suspected including the following: (a) A species that is known to be rare in Michigan, Ohio, Illinois, or Kentucky. (b) A species that is biologically dependent upon a rare plant species.

A rare species references an established population. A rare species does not include accidentals, adventive nonregulated species, or other species regulated under IC 14-24 and 312 IAC 18-3 (including species used for biological control).

Applying this standard, the following species are listed as rare:

Collembola (Springtails)

Sinella alata "springtail"

Odonata (Dragonflies; Damselflies)

Archilestes grandis "great spreadwing"
Chromagrion conditum "aurora damsel"
Cordulegaster maculata "twin-spotted spiketail"
Cordulegaster obliqua "arrowhead spiketail"
Enallagma divagans "turquoise bluet"
Gomphus externus "Plains clubtail"
Hagenius brevistylus "dragonhunter"
Hetaerina titia "smoky rubyspot"
Ladona julia "halk-fronted skimmer"
Macromia illinoiensis georgina "Georgia River cruiser"
Nehalennia irene "sedge sprite"
Ophiogomphus rupinsulensis "rusty snaketail"
Somatochlora linearis "mocha emerald"
Somatochlora tenebrosa "clamp-tipped emerald"
Sympetrum semicinctum "band-winged meadowhawk"
Tachopteryx thoreyi "gray petaltail"

Orthoptera (Grasshoppers; Crickets)

Chloealtis conspersa "sprinkled locust"
Conocephalus saltans "prairie meadow katydid"
Hesperotettix viridis pratensis "a grasshopper"
Melanoplus fasciatus "huckleberry spur-throat grasshopper"
Melanoplus gracilis "graceful spur-throated grasshopper"
Melanoplus keeleri luridus "Keeler's spur-throated grasshopper"
Melanoplus tepidus "the fearful barrens locust"
Melanoplus viridipes viridipes "green-legged spur-throated grasshopper"
Neoconocephalus nebrascensis "a katydid"

Orphulella pelidna "green desert grasshopper"
Pardalophora phoenicoptera "orange-winged grasshopper"
Psinidia fenestralis "sand locust"
Homoptera (Cicadas; Hoppers; Scales; Aphids)
Bruchomorpha dorsata
Bruchomorpha extensa "the long-nosed elephant hopper"
Chlorotettix fallax "a leafhopper"
Chlorotettix vacuna "the vacant chlorotettix"
Flexamia pyrops "the long-nose three-awn leafhopper"
Mesamia nigridorsum "a leafhopper"
Polyamia obtectus
Prosapia ignipectus "red-legged spittle bug"
Coleoptera (Beetles)
Cicindela patruela "a tiger beetle"
Dynastes tityus "unicorn beetle"
Ochthebius putnamensis "Indiana ochthebius minute moss beetle"
Stenelmis douglasensis "Douglas Stenelmis riffle beetle"
Trichoptera (Caddisflies)
Nectopsyche pavida "a longhorned casemaker caddisfly"
Lepidoptera (Butterflies; Skippers)
Achalarus lyciades "the hoary edge skipper"
Amblyscirtes aesculapius "lace-winged roadside–skipper"
Amblyscirtes hegon "salt-and-pepper skipper"
Amblyscirtes vialis "common roadside-skipper"
Artogeia virginiensis "West Virginia white"
Autochton cellus "gold-banded skipper"
Calephelis borealis "northern metalmark"
Callophrys gryneus gryneus "olive hairstreak"
Calycopis cecrops "red-banded hairstreak"
Cyllopsis gemma "gemmed satyr"
Enodia anthedon "northern pearly-eye"
Euphydryas phaeton "Baltimore"
Euphyes dion "sedge skipper"
Fixsenia favonius "northern hairstreak"
Hermeuptychia sosybius "Carolina satyr"
Hesperia leonardus "Leonard's skipper"
Lycaena dorcas dorcas "dorcas copper"
Lycaena helloides "purplish copper"
Parrhasius m-album "white-M hairstreak"
Polygonia progne "gray comma"
Satyrodes eurydice "eyed brown"
Thorybes pylades "northern cloudywing"
Lepidoptera (Moths)
Agrotis vetusta "a moth"
Anepia capsularis "the starry campion capsule moth"
Anomogyna janualis "the red blueberry dart"
Apamea nigrior "nlack-dashed apamea"
Bagisara rectifascia "the rare mallow moth"
Catocala flebilis "the black-dashed underwing moth"
Catocala gracilis "graceful underwing"
Catocala praeclara "praeclara underwing"
Catocala sordida "the huckleberry underwing"
Chrysanympha formosa "the huckleberry looper moth"
Coenochroa bipunctella "sand dune panic grass moth"
Coenochroa illibella "dune panic grass moth"

Coenophila opacifrons "plain-faced blueberry dart"
Crambus girardellus "orange-striped sedge moth"
Cycnia inopinatus "the unexpected milkweed moth"
Dasychira cinnamomea "a moth"
Dasychira dorsipennata "pitch pine tussock moth"
Eubaphe meridiana "a moth"
Eucosma bilineana
Eucosma bipunctella "a moth"
Eucosma fulminana
Eucosma giganteana
Euxoa albipennis "white-striped dart"
Gabara subnivosella "a noctuid moth"
Grammia anna
Grammia figurata "the figured grammia"
Grammia oithona "Oithona's grammia"
Grammia phyllira "the sand barrens grammia"
Grammia virguncula
Hemaris gracilis "the blueberry clearwing sphinx"
Hemileuca nevadensis "Nevada buck moth"
Herpetogramma thestealis
Himella intractata "intractable quaker moth"
Holomelina opella "the smokey holomelina"
Homohadena infixa "broad-lined sallow"
Homophoberia cristata "a noctuid moth"
Iodopepla u-album "a noctuid moth"
Lacinipolia olivacea "olive arches"
Lemmeria digitalis "a noctuid moth"
Lesmone detrahens "a moth"
Leucania inermis "a moth"
Macrochilo absorptalis "a moth"
Macrochilo hypocritalis "a noctuid moth"
Melanomma auricinctaria "huckleberry eye-spot moth"
Melipotis jucunda "a noctuid moth"
Meropleon diversicolor "a noctuid moth"
Monoleuca semifascia "the zig-zag monoleuca"
Odontosia elegans "elegant prominent"
Paectes abrostolella "the barrens paectes moth"
Pagara simplex "a moth"
Panthea furcilla
Papaipema harrisi "heracleum stem borer moth"
Papaipema limpida "the ironweed borer moth"
Papaipema marginidens "the brick red borer moth"
Papaipema rigida "a borer moth"
Papaipema rutila "the mayapple borer moth"
Parasa indetermina "a moth"
Peoria gemmatella "gemmed cordgrass borer"
Pygarctia spraugei "sprague's pygartic"
Pyrausta laticlavia "the southern purplemMint moth"
Pyreferra ceromatica "annointed sallow moth"
Schinia septentrionalis "a noctuid moth"
Semiothisa eremiata "the goat's rue looper"
Spartiniphaga inops "spartina borer moth"
Sphinx luscitiosa "the luscious willow sphinx"
Spilosoma latipennis "the red-legged tussock moth"
Trichosilia manifesta "a noctuid moth"

Ufeus plicatus "folded satyr"
Xestia youngii "Young blueberry dart"

IV. VASCULAR PLANTS

1. Extirpated

Adlumia fungosa "climbing fumatory"
Anemone caroliniana "Carolina anemone"
Arethusa bulbosa "swamp-pink"
Asclepias meadii "Mead's milkweed"
Astragalus tennesseensis "Tennessee milk-vetch"
Aureolaria grandiflora var. pulchra "large-flower false-foxglove"
Botrychium multifidum var. intermedium "leathery grape –fern"
Callirhoe triangulata "clustered poppy-mallow"
Circaea alpina "small enchanter's nightshade"
Conyza canadensis var. pusilla "fleabane"
Corallorhiza trifida var. verna "early coralroot"
Cuscuta cuspidata "cusp dodder"
Dryopteris clintoniana "Clinton woodfern"
Echinodorus berteroi "burhead"
Epilobium ciliatum "hairy willow-herb"
Eriophorum spissum "dense cotton-grass"
Glyceria grandis "American manna-grass"
Gnaphalium macounii "winged cudweed"
Gymnopogon amgiguus "broadleaf beardgrass"
Hemicarpha drummondii "Drummond hemicarpha"
Hippuris vulgaris "common mare's-tail"
Hypericum frondosum "golden St. John's-wort"
Lactuca ludoviciana "western lettuce"
Lechea stricta "upright pinweed"
Lemna perpusilla "minute duckweed"
Lespedeza stuevei "tall bush-clover"
Linnaea borealis "twinflower"
Lonicera canadensis "American fly-honeysuckle"
Oenothera triloba "stemless evening-primrose"
Oryzopsis pungens "slender mountain-ricegrass"
Panicum longifolium "long-leaved panic-grass"
Panicum mattamuskeetense "a panic-grass"
Penstemon tubaeflorus "tube penstemon"
Platanthera hookeri "Hooker orchis"
Platanthera orbiculata "large roundleaf orchid"
Poa cuspidata "bluegrass"
Populus balsamifera "balsam poplar"
Proboscidea louisianica "Louisiana unicorn-plant"
Psilocarya nitens "short-beaked bald-rush"
Psoralea tenuiflora "few-flowered scurf-pea"
Pteridium aquilinum var. pseudocaudatum "bracken fern"
Pyrola secunda "One-sided wintergreen"
Pyrola virens "greenish-flowered wintergreen"
Rubus alumnus "a bramble"
Rubus deamii "Deam dewberry"
Rubus depavitus "a bramble"
Rubus impar "a bramble"
Safatia campanulata "slender marsh pink"
Scutellaria parvula var. parvula "small skullcap"
Shepherdia canadensis "Canada buffalo-berry"
Sorbus decora "northern mountain-ash"

Stipa comata "sewing needlegrass"
Trautvetteria caroliniensis "Carolina tassel-rue"
Utricularia resupinata "northeastern bladderwort"
Veronica americana "American speedwell"
Viola hirsutula "southern wood violet"

2. Endangered

Aconitum uncinatum "blue monkshood"
Amelanchier humilis "running serviceberry"
Arabis drummondii "Drummond rockcress"
Arabis missouriensis var. deamii "Missouri rockcress"
Arabis patens "spreading rockcress"
Aralia hispida "bristly sarsaparilla"
Arenaria patula "Pitcher's stitchwort"
Armoracia aquatica "lake cress"
Asclepias viridis "green milkweed"
Asplenium bradleyi "Bradley's spleenwort"
Asplenium montanum "mountain spleenwort"
Asplenium resiliens "black-stem spleenwort"
Aster schreberi "Schreber aster"
Berberis canadensis "American barberry"
Besseya bullii "kitten tails"
Betula populifolia "gray birch"
Botrychium simplex "least grape-fern"
Buchnera americana "bluehearts"
Bumelia lycioides "buckthorn"
Calla palustris "wild calla"
Camassia angusta "wild hyacinth"
Carex alopecoidea "foxtail sedge"
Carex arctata "black sedge"
Carex atherodes "awned sedge"
Carex atlantica ssp *capillacea* "Howe sedge"
Carex brunnescens "brownish sedge"
Carex chordorrhiza "creeping sedge"
Carex cumulata "clustered sedge"
Carex disperma "softleaf sedge"
Carex echinata "little prickly sedge"
Carex gravida "heavy sedge"
Carex leptonervia "finely-nerved sedge"
Carex limosa "mud sedge"
Carex livida "livid sedge"
Carex oklahomensis "Oklahoma sedge"
Carex pseudocyperus "cyperus-like sedge"
Carex retrorsa "retrorse sedge"
Carex scabrata "rought sedge"
Carex sparganioides var. cephaloidea "thinleaf sedge"
Carex timida "timid sedge"
Carya pallida "sand hickory"
Carya texana "black hickory"
Ceanothus herbaceus "prairie redroot"
Chamaelirium luteum "devil's-bit"
Cimicifuga rubifolia "Appalachian bugbane"
Cirsium hillii "Hill's thistle"
Clintonia borealis "Clinton lily"
Conioselinum chinense "hemlock parsley"
Cornus amomum ssp *amomum* "silky dogwood"

Cornus canadensis "bunchberry"
Crataegus arborea "a hawthorn"
Crataegus biltmoreana "Biltmore hawthorn"
Crataegus chrysocarpa "fineberry hawthorn"
Crataegus grandis "grand hawthorn"
Crataegus kelloggii "Kellogg hawthorn"
Crataegus prona "Illinois hawthorn"
Crotonopsis elliptica "elliptical rushfoil"
Cyperus acuminatus "short-point flatsedge"
Cyperus dentatus "toothed sedge"
Cyperus houghtonii "Houghton's nutsedge"
Dentaria multifida "divided toothwort"
Dicliptera brachiata "wild mudwort"
Didiplis diandra "water-purslane"
Dryopteris celsa "log fern"
Echinodorus cordifolius "creeping bur-head"
Echinodorus parvulus "little bur-head"
Eleocharis equisetoides "horst-tail spikerush"
Eleocharis microcarpa "small-fruited spike-rush"
Epilobium angustifolium "fireweed"
Equisetum variegatum "variegated horsetail"
Eriocaulon aquaticum "pipewort"
Euphorbia obtusata "bluntleaf spurge"
Euphorbia serpens "matted broomspurge"
Fimbristylis annua "annual fimbry"
Fimbristylis puberula "Carolina fimbry"
Fragaria vesca var. americana "woodland strawberry"
Gentiana villosa "striped gentian"
Geranium bicknellii "Bicknell northern crane's-bill"
Geum rivale "purple avens"
Gleditsia aquatica "water-locust"
Glyceria acutiflora "sharp-scaled manna-grass"
Glyceria borealis "small floating manna-grass"
Helianthus angustifolius "swamp sunflower"
Hibiscus moscheutos ssp *lasiocarpos* "hairy-fruited hibiscus"
Hydrocotyle americana "American water-pennywort"
Hymenopappus scabiosaeus "Carolina woollywhite"
Hypericum adpressum "creeping St. John's-wort"
Hypericum gymnanthum "Clasping-leaved St. John's-wort"
Iliamna remota "Kankakee globe-mallow"
Isoetes engelmannii "Appalachian quillwort"
Itea virginica "Virginia willow"
Juncus articulatus "jointed rush"
Juncus militaris "bayonet rush"
Juncus pelocarpus "brown-fruited rush"
Juncus secundus "secund rush"
Lathyrus maritimus var. glaber "Beach peavine"
Lathyrus ochroleucus "pale vetchling peavine"
Leavenworthia uniflora "Michaux lavenworthia"
Lechea racemulosa "Illinois pinweed"
Lemna minima "least duckweed"
Lemna valdiviana "pale duckweed"
Leptochloa panicoides "Amazon sprangle-top"
Lesquerella globosa "Lesquereux's mustard"
Ligusticum canadense "nondo lovage"

Limnobium spongia "American frog's-bit"
Linum intercursum "sandplain flax"
Lithospermum incisum "narrow-leaved puccoon"
Ludwigia sphaerocarpa "globe-fruited false-loosestrife"
Luzula acuminata "hairy woodrush"
Lycopodiella inundata "northern bog clubmoss"
Lycopodiella subappressa "northern appressed bog clubmoss"
Lycopodium dendroideum "treelike clubmoss"
Lycopus amplectens "sessile-leaved bugleweed"
Lygodium palmatum "climbing fern"
Magnolia acuminata "cucumber magnolia"
Magnolia tripetala "umbrella magnolia"
Malaxis unifolia "green adder's-mouth"
Mecardonia acuminata "purple mecardonia"
Melanthium virginicum "Virginia bunchflower"
Melothria pendula "creeping cucumber"
Mikania scandens "climbing hempweed"
Monarda bradburiana "eastern bee-balm"
Muhlenbergia capillaris "long-awn hairgrass"
Muhlenbergia cuspidata "plains muhlenbergia"
Myriophyllum pinnatum "cutleaf water-milfoil"
Myriophyllum tenellum "slender water-milfoil"
Onosmodium hispidissimum "shaggy false-gromwell"
Orobanche fasciculata "clustered broomrape"
Orobanche ludoviciana "Louisiana broomrape"
Oryzopsis asperifolia "white-grained mountain-ricegrass"
Pachysandra procumbens "Allegheny spurge"
Panicum annulum "a panic-grass"
Panicum bicknellii "a panic-grass"
Panicum commonsianum var. addisonii "Commons' panic-grass"
Panicum lucidum "shining panic-grass"
Panicum scoparium "broom panic-grass"
Panicum subvillosum "a panic-grass"
Panicum yadkinense "a panic-grass"
Penstemon canescens "gray beard tongue"
Perideridia americana "eastern eulophus"
Phacelia ranunculacea "Blue scorpion-weed"
Phlox bifida ssp *stellaria* "cleft phlox"
Phlox ovata "mountain phlox"
Plantago cordata "heart-leaved plantain"
Platanthera ciliaris "Yellow-fringe orchis"
Platanthera dilatata "leafy white orchis"
Platanthera flava var. flava "southern rein orchid"
Platanthera leucophaea "prairie white-fringed orchid"
Polygala incarnata "pink milkwort"
Polygala paucifolia "gay-wing milkwort"
Polygonum cilinode "fringed black bindweed"
Polygonum hydropiperoides var. setaceum "swamp smartweed"
Polytaenia nuttallii "prairie parsley"
Potamogeton bicupulatus "snail-seed pondweed"
Potamogeton epihydrus "nuttall pondweed"
Potamogeton oakesianus "Oakes pondweed"
Potamogeton pulcher "spotted pondweed"
Potamogeton vaseyi "Vasey's pondweed"
Pyrola asarifolia "pink wintergreen"

Quercus prinoides "dwarf chinquapin oak"
Ranunculus harveyi "Harvey's buttercup"
Ranunculus laxicaulis "Mississippi buttercup"
Ranunculus pusillus "pursh buttercup"
Rhynchospora recognita "globe beaked-rush"
Rubus centralis "Illinois blackberry"
Rubus enslenii "southern dewberry"
Rubus setosus "small bristleberry"
Rudbeckia fulgida var. umbrosa "coneflower"
Sanguisorba canadensis "Canada burnet"
Satureja glabella var. angustifolia "calamint"
Saxifraga forbesii "Forbes saxifrage"
Scheuchzeria palustris ssp *americana* "American scheuchzeria"
Schizachne purpurascens "purple oat"
Scirpus expansus "bulrush"
Scirpus hallii "Hall's bulrush"
Scirpus smithii "Smith's bulrush"
Scirpus torreyi "Torrey's bulrush"
Scutellaria saxatilis "rock skullcap"
Setaria geniculata "bristly foxtail"
Sida hermaphrodita "Virginia mallow"
Silene ovata "ovate catchfly"
Sisyrinchium montanum "Strict blue-eyed-grass"
Solidago buckleyi "Buckley's goldenrod"
Solidago shortii "Short's goldenrod"
Solidago squarrosa "stout-ragged goldenrod"
Spigelia marilandica "woodland pinkroot"
Spiranthes magnicamporum "Great Plains ladies'-tresses"
Stachys clingmanii "Clingman hedge-nettle"
Styrax grandifolius "large-leaf snowbell"
Taxus canadensis "American yew"
Thuja occidentalis "northern white cedar"
Trichomanes boschianum "filmy fern"
Trifolium reflexum var. glabrum "buffalo clover"
Trifolium stoloniferum "running buffalo clover"
Trillium cernuum var. macranthum "nodding trillium"
Utricularia geminiscapa "hidden-fruited bladderwort"
Utricularia radiata "small swollen bladderwort"
Uvularia perfoliata "bellwort"
Vaccinium myrtilloides "velvetleaf blueberry"
Valeriana edulis "hairy valerian"
Valeriana uliginosa "marsh valerian"
Valerianella chenopodiifolia "goose-foot corn-salad"
Verbesina virginica "white crownbeard"
Vigurnum cassinoides "northern wild-raisin"
Viburnum opulus var. americanum "highbush-cranberry"
Viola egglestonii "Eggleston's violet"
Vitis rupestris "sand grape"
Wolffiella gladiata "sword bogmat"

3. Threatened

Agalinis auriculata "earleaf foxglove"
Agalinis skinneriana "pale false foxglove"
Androsace occidentalis "western rockjasmine"
Azolla caroliniana "Carolina mosquito-fern"
Bacopa rotundifolia "roundleaf water-hyssop"

Bidens beckii "Beck water-marigold"
Calamagrostis porteri ssp *insperata* "reed bent grass"
Calycocarpum lyonii "cup-seed"
Carex atlantica ssp atlantica "Atlantic sedge"
Carex bebbii "Bebb's sedge"
Carex bushii "Bush's sedge"
Carex conoidea "prairie gray sedge"
Carex crawei "crawe sedge"
Carex decomposita "cypress-knee sedge"
Carex flava "yellow sedge"
Carex garberi "elk sedge"
Carex gigantea "large sedge"
Carex richardsonii "Richardson sedge"
Carex straminea "straw sedge"
Chaerophyllum procumbens var. shortii "wild chervil"
Chimaphila umbellata ssp *cisatlantica* "pipsissewa"
Chrysopsis villosa "hairy golden-aster"
Chrysosplenium americanum "American golden-saxifrage"
Cirsium pitcheri "dune thistle"
Cladrastis lutea "yellowwood"
Coeloglossum viride var. virescens "long-bract green orchis"
Corydalis sempervirens "pale corydalis"
Crataegus pedicellata "scarlet hawthorn"
Crataegus viridis "green hawthorn"
Eleocharis geniculata "capitate spike-rush"
Eleocharis melanocarpa "black-fruited spike-rush"
Eriophorum gracile "slender cotton-grass"
Erysimum capitatum "prairie-rocket wallflower"
Eupatorium album "white thoroughwort"
Eupatorium incarnatum "pink thoroughwort"
Festuca paradoxa "cluster fescue"
Fuirena pumila "dwarf umbrella-sedge"
Gaura filipes "slender-stalked gaura"
Gentiana puberulenta "downy gentian"
Geranium robertianum "herb-Robert"
Heliotropium tenellum "slender heliotrope"
Hottonia inflata "featherfoil"
Hudsonia tomentosa "sand-heather"
Hypericum denticulatum "coppery St. John's-wort"
Hypericum pyramidatum "great St. John's-wort"
Isoetes melanopoda "blackfoot quillwort"
Juncus scirpoides "scirpus-like rush"
Krigia oppositifolia "dwarf dandelion"
Lathyrus venosus "smooth veiny pea"
Liatris pycnostachya "cattail gay-feather"
Ludwigia glandulosa "cylindric-fruited seedbox"
Melica nitens "three-flower melic grass"
Myosotis laxa "smaller forget-me-not"
Najas gracillima "thread-like naiad"
Panicum leibergii "Leiberg's witchgrass"
Panicum verrucosum "warty panic-grass"
Platanthera hyperborea "leafy northern green orchis"
Polygonum careyi "Carey's smartweed"
Polygonum hydropiperoides var. opelousanum "northeastern smartweed"
Potamogeton friesii "Fries' pondweed"

Potamogeton praelongus "white-stem pondweed"
Potamogeton strictifolius "straight-leaf pondweed"
Potentilla anserina "Silverweed"
Psilocarya scirpoides "Long-beaded baldrush"
Rhexia mariana var. mariana "Maryland meadow beauty"
Rhynchospora corniculata var. interior "short-bristle horned-rush"
Rubus odoratus "purple flowering raspberry"
Salix cordata "heartleaf willow"
Salix serissima "autumn willow"
Satureja vulgaris var. neogaea
Scleria reticularis "reticulated nutrush"
Selaginella rupestris "ledge spike-moss"
Silene regia "royal catchfly"
Solidago simplex var. gillmanii "sticky goldenrod"
Sparganium androcladum "branching bur-reed"
Spiranthes ochroleuca "yellow nodding ladies'-tresses"
Spiranthes romanzoffiana "hooded ladies'-tresses"
Stenanthium gramineum "eastern featherbells"
Strophostyles leiosperma "slick-seed wild-bean"
Sullivantia sullivantii "sullivantia"
Talinum rugospermum "prairie fame-flower"
Taxodium distichum "bald cypress"
Thalictrum pubescens "tall meadowrue"
Utricularia cornuta "horned bladderwort"
Utricularia minor "lesser bladderwort"
Utricularia subulata "zigzag bladderwort"
Vaccinium oxycoccos "small cranberry"
Viola pedatifida "prairie violet"
Viola primulifolia "primrose-leaf violet"
Xyris difformis "Carolina yellow-eyed grass"

4. Rare

Acalypha deamii "Mercury"
Actaea rubra "Red Baneberry"
Andromeda glaucophylla "bog rosemary"
Arctostaphylos uva-ursi "bearberry"
Arenaria stricta "Michaux's stitchwort"
Aristida intermedia "slim-spike three-awn grass"
Aristida tuberculosa "seabeach needlegrass"
Asplenium ruta-muraria "wallrue spleenwort"
Aster borealis "rushlike aster"
Aster furcatus "forked aster"
Aster oblongifolius "aromatic aster"
Aster sericeus "western silvery aster"
Baptisia australis "wild false indigo"
Botrychium matricariifolium "chamomile grape-fern"
Carex aurea "golden-fruited sedge"
Carex debilis var. rudgei "white-edge sedge"
Carex eburnea "ebony sedge"
Carex folliculata "long sedge"
Carex lupuliformis "false hop sedge"
Carex pedunculata "longstalk sedge"
Carex seorsa "weak stellate sedge"
Carex socialis "social sedge"
Catalpa speciosa "northern catalpa"
Ceratophyllum echinatum "prickly hornwort"

Cheilanthes lanosa "hairy lipfern"
Cirsium carolinianum "Carolina thistle"
Clematis pitcheri "pitcher leather-flower"
Cornus rugosa "roundleaf dogwood"
Crataegus intricata "a hawthorn"
Crataegus succulenta "fleshy hawthorn"
Cyperus pseudovegetus "green flatsedge"
Cypripedium calceolus var. parviflorum "small yellow lady's-slipper"
Deschampsia cespitosa "tufted hairgrass"
Diervilla lonicera "northern bush-honeysuckle"
Dodecatheon frenchii "French's shootingstar"
Drosera intermedia "spoon-leaved sundew"
Eleocharis robbinsii "Robbins spikerush"
Eleocharis wolfii "Wolf spikerush"
Eriophorum angustifolium "narrow-leaved cotton-grass"
Eriophorum viridicarinatum "green-keeled cotton-grass"
Euphorbia polygonifolia "seaside spurge"
Gentiana alba "yellow gentian"
Gonolobus obliquus "angle pod"
Hexalectris spicata "crested coralroot"
Houstonia nigricans "narrowleaf summer bluets"
Hypericum dolabriforme "straggling St. John's –wort"
Iresine rhizomatosa "eastern bloodleaf"
Juncus balticus var. littoralis "Baltic rush"
Juniperus communis "ground juniper"
Lilium canadense "Canada lily"
Linum sulcatum "grooved yellow flax"
Lycopodium hickeyi "Hickey's clubmoss"
Lycopodium obscurum "tree clubmoss"
Lycopodium tristachyum "deep-root clubmoss"
Matteuccia struthiopteris "ostrich fern"
Melampyrum lineare "American cow-wheat"
Milium effusum "tall millet-grass"
Myriophyllum verticillatum "whorled water-milfoil"
Napaea dioica "glade mallow"
Nothoscordum bivalve "crow-poison"
Oenothera perennis "small sundrops"
Ophioglossum engelmannii "limestone adder's-tongue"
Orqzopsis racemosa "black-fruit mountain-ricegrass"
Oxydendrum arboreum "sourwood"
Panicum boreale "northern witchgrass"
Panicum columbianum "hemlock panic-grass"
Panicum wilcoxianum "blood witchgrass"
Passiflora incarnata "purple passion-flower"
Penstemon deamii "Deam beard tongue"
Phlox amplifolia "large-leaved phlox"
Pinus banksiana "jack pine"
Pinus strobus "eastern white pine"
Platanthera psycodes "small purple-fringe orchis"
Poa alsodes "grove meadow grass"
Poa wolfii "Wolf bluegrass"
Polygonella articulata "eastern jointweed"
Polypodium polypodioides "resurrection fern"
Potamogeton richardsonii "redheadgrass"
Potamogeton robbinsii "flatleaf pondweed"

Prenanthes aspera "rough rattlesnake-root"
Prunus pensylvanica "fire cherry"
Pyrola rotundifolia var. americana "American wintergreen"
Rhus aromatica var. arenaria "beach sumac"
Rhynchospora macrostachya "tall beaked-rush"
Sagittaria australis "longbeak arrowhead"
Sanicula smallii "Small's snakeroot"
Scirpus purshianus "weakstalk bulrush"
Scirpus subterminalis "water bulrush"
Sedum telephioides "Allegheny stonecrop"
Senna obtusifolia "blunt-leaf senna"
Solidago ptarmicoides "prairie goldenrod"
Spiranthes lucida "shining ladies'-tresses"
Stipa avenacea "blackseed needlegrass"
Tofieldia glutinosa "false asphodel"
Trachelospermum difforme "climbing dogbane"
Trichostema dichotomum "forked bluecurl"
Triglochin palustris "marsh arrow-grass"
Utricularia purpurea "purple bladderwort"
Viburnum molle "softleaf arrow-wood"
Vitis palmata "catbird grape"
Vittaria appalachiana "Appalachian vittaria"
Waldsteinia fragarioides "barren strawberry"
Wisteria macrostachya "Kentucky wisteria"
Woodwardia areolata "netted chainfern"
Zannichellia palustris "horned pondweed"
Zigadenus elegans var. glaucus "white camas"
Zizia aptera "golden alexanders"

NATURAL RESOURCES COMMISSION
Information Bulletin #36 (Third Amendment)
Effective January 1, 2005

Subject: Procedural Guidelines for the Interpretations of the Conservancy District Article (IC 14-33).

1. History

The development of conservancy districts is an increasingly active option for addressing a variety of land use issues at the local level. Freeholders within contiguous geographic areas may use a conservancy district to achieve a dependable drinking water supply, to provide for sewage collection and treatment, to improve flood control, to reduce soil erosion, or to achieve any of numerous other water-resource community goals, either singly or in combination. IC 14-33-1-1.

The determination whether to approve the establishment of a conservancy district and the primary responsibility for the oversight of an existing conservancy district rest with a circuit court where the district is located. IC 14-33-2-26. Management of the district itself is under the control of a board of directors, selected initially by the county commissioners and subsequently by the freeholders of the district. IC 14-33-5-11.

Important roles are also served by the natural resources commission at six crucial stages in the formation, management, and dissolution of conservancy districts. At two of the stages, hearings for public input are required. At the other four, hearings may be requested. These stages also provide the primary forums for the receipt and evaluation of scientific and technical data upon which the court adjudicates and the board manages. In the receipt and evaluation of technical data, the commission brings together reports and analyses of the department of natural resources, acting primarily through the division of water, and other state and local agencies. Most common among these are the department of environmental management, state department of health, and utility regulatory commission.

In 1996, a comprehensive commission policy was established for procedural functions relating to the formation and development of conservancy districts. [Information Bulletin #12, 19 IR 2801, superseded]. Four developments were identified by the commission in support of the policy:

First, the absence of a policy led to public uncertainty and discomfort, particularly among persons who oppose the formation

of a conservancy district or who oppose the development of a project within an existing conservancy district. Concerns had been expressed that the conservancy district process should be re-evaluated to assure all citizens within the boundaries of a proposed or existing district would have meaningful access to the hearing processes.

Second, the complexity of the economic and environmental issues supported the need for a consistent policy. Not the least of these issues were the regulatory functions of the state agencies and their coordination with local governmental entities bearing upon the functions of conservancy districts.

Third, the natural resources commission and the department of natural resources had experienced a statutory evolution regarding hearing processes that had not yet been accommodated for conservancy district hearings. Most noteworthy was the development of the administrative orders and procedures act (IC 4-21.5) and the "sunset review" process for these agencies that resulted in 1990 and 1991 legislation.

The fourth development was the recodification of natural resources laws set forth in P.L. 1-1995. The recodification resolved a statutory ambiguity relative to adding territory to conservancy districts. Compare IC 13-3-3-6(a) as recodified at IC 14-33-4-2(b). In part to address the ambiguity, the commission implemented Information Bulletin #6, published at 17 IR 1836 (April 1, 1994). With the recodification, Information Bulletin #6 was reconsidered and amended.

In response to these developments, Information Bulletin #12 provided guidelines for implementation of conservancy districts processes, where those processes were within the jurisdiction of the natural resources commission. A flexible guidance was designed to help the commission fully and fairly review pertinent issues. Responsibilities were identified and delegated to the commission's division of hearings, and to the department of natural resources, so as to foster better coordination among these and other pertinent agencies.

The primary purposes of Information Bulletin #36 are as follows: (1) refinement of the purposes previously addressed in Information Bulletin #12; (2) integration of the "contiguousness" analysis contained in Information Bulletin #6; (3) clarification of agency treatment of initiatives to add a purpose to an existing district; (4) inclusion of standards for determining whether a district qualifies for the purpose of flood prevention and control; and, (5) consideration of conservancy district elections.

The six crucial stages in which the commission serves are considered separately. These stages are as follows:

(1) consideration of technical issues prior to formation of a district;

(2) development of a district plan;

(3) development of a unit of work;

(4) addition of territory to an existing district;

(5) addition of a purpose to an existing district; and,

(6) dissolution of a district.

The natural resources commission on September 16, 2003 approved amendments to this information bulletin, for additions to conservancy districts in Hendricks County. These amendments were published in the Indiana Register and became effective on November 1, 2003. In 2004, the Indiana general assembly amended IC 14-33-4-2 by deleting the extraordinary requirements for Hendricks County. The legislation became effective July 1, 2004, and the information bulletin has been amended, consistently with the legislation, to remove these 2003 amendments.

2. Consideration of Technical Issues Prior to Formation of a District

A. Petition Referral

As provided in IC 14-33-2-17(b), after a court determines a petition to create a district is in proper form and bears the needed signatures, the petition is referred to the natural resources commission for a technical review. The issues for review are set forth in subsection (c) and include whether:

(1) the proposed district appears to be necessary;

(2) the proposed district holds promise of economic and engineering feasibility;

(3) the proposed district seems to offer benefits in excess of costs and damages (or, for water supply, sewage disposal, or water storage, whether the public health will be served);

(4) the proposed district proposes to cover and serve a proper area; and,

(5) the proposed district could be established in a manner compatible with similar governmental entities.

At least one public hearing is mandatory. An interested person has "the right to be heard. At the request of an interested person, the commission shall hold hearings at the county seat of a county containing land in the proposed district." IC 14-33-2-19(a). Notice of the hearing must be published in a "newspaper of general circulation in each county containing land in the proposed district." IC 14-33-2-19(b). The commission is also required to incorporate technical assistance from any state and local agency that might have jurisdiction over the subject-matter of the proposed district.

The information received at public hearing and from the agencies is incorporated in a factfinding report to the commission from its hearing officer. The factfinding report of the commission on the proposed district is prima facie evidence of the facts in all subsequent proceedings. IC 14-33-2-23. After receipt of the report from the commission, the court sets another hearing at which an opportunity for additional evidence is provided. IC 14-33-2-25.

Of the six stages under consideration, the initial stage has traditionally been the one most likely to evoke controversy. The petitioner is always represented by an attorney. Where there is a formal remonstrance to a proposed district, the remonstrants are likely to have legal representation. Attorneys participating in the process at this stage, most notably those representing remonstrants, have sometimes urged the full application of the administrative orders and procedures act. Key elements of that act are that all testimony must be given under oath, there is an opportunity for the cross-examination of witnesses, and there is a prohibition on substantive ex parte communications between a party and the administrative law judge (or, if applied to conservancy districts, the hearing officer).

The administrative orders and procedures act does not appear to have direct application to the commission's role prior to formation of a district. Most notably, the act applies generally to agency "orders". The commission issues not an order but a factfinding report that the circuit court then utilizes as prima facie evidence. The court itself issues the order whether or not to create a conservancy district and does so only following a judicial hearing held after receipt of the commission's factfinding report. In addition, the application of the relatively formal processes of the administrative orders and procedures act appear unwieldy in relation to the informal public hearings before the commission's hearing officer; often these public hearings are attended by hundreds of participating citizens. Application of the administrative orders and procedures act may have a chilling effect upon public comment and inquiry at this preliminary stage. Finally, before the hearing date the hearing officer typically is only vaguely informed, if informed at all, of the identity of any remonstrants. The concept of party status is not generally well-defined at this stage, casting uncertainty on application of the prohibition against substantive ex parte communications.

On the other hand, fairness requires the full participation by remonstrants and by citizens seeking additional information, as well as by the petitioners, in this stage of the process. The development of a complete factfinding report is also supported by full participation by all citizens, particularly the freeholders to a proposed district. The process should be conducted in a manner which both is and has the appearance of being impartial. To these ends, the following guidelines are established:

(1) Referrals by a court for the technical review anticipated by IC 14-33-2-17(b) are directed to the following address:

Division of Hearings
Natural Resources Commission
Indiana Government Center South
402 West Washington Street, Room W272
Indianapolis, IN 46204-2739

(2) As soon as practicable after the receipt of the referral, the director of the division of hearings appoints a hearing officer. The hearing officer conducts actions appropriate to the preparation and submission to the commission of a recommended factfinding report. Included among these actions are the following:

(A) The hearing officer promptly provides a copy of the referral to the division of water of the department of natural resources, the department of environmental management, the state department of health, the utility regulatory commission, and any other agency determined by the hearing officer to have jurisdiction over the subject-matter of the referral. Accompanied by the referral is an invitation for comment as well as the address and telephone number of a contact person within the division of water. The address for the contact person is as follows:

Division of Water–Project Development
Department of Natural Resources
Indiana Government Center South
402 West Washington Street, Room W264
Indianapolis, IN 46204-2641

(B) The hearing officer confers with the court or the clerk of the court to determine, if in addition to the petitioners, a remonstrant or other party has entered an appearance as a party to the civil proceeding.

(C) The hearing officer forwards a copy of this nonrule policy document to each of the parties. Also included are the name, address, and telephone number of the contact person within the division of water who will coordinate technical reviews.

(D) If parties other than the petitioners have entered an appearance, the hearing officer promptly sets an informal conference of the parties. An invitation to participate is also made to division of water. During the informal conference, the hearing officer will attempt to develop a consensus for the conduct of the public hearing. If a consensus cannot be developed, the hearing officer determines the conduct of the hearing in accordance with the following principles:

1. A hearing is held in the county seat of a county containing land in the proposed district.

2. The process is conducted in the most informal manner practicable that also supports fairness and meaningful public participation.

3. If issues in dispute are identified during the informal conference which require expert testimony, or for which the hearing officer otherwise determines testimony should be under oath, a second hearing may be conducted. An opportunity for cross-examination shall be provided, the hearing recorded by a court stenographer or reporter approved by the commission, and the trial rules of discovery applied. The hearing officer provides written notice

to the parties of any second hearing and also announces the time, date, and location of the second hearing during the initial public hearing. Unless otherwise agreed by the parties, the hearing officer makes every reasonable effort to conduct the second hearing so that a delay is not required in the submission of a recommended factfinding report to the commission.

(E) The hearing officer drafts and tenders to the commission a recommended factfinding report. A copy of the report is forwarded to each party, to the division of water, to any agency that commented upon the proposed conservancy district, and to any other person requesting a copy. The hearing officer encloses with the report a notice of the time, date, and location when the commission is scheduled to act upon the recommended factfinding report.

(F) Following action by the commission, the hearing officer causes a copy of the factfinding report of the commission to be filed with the court and served upon the division of water, the parties, and any other person requesting a copy.

B. 'Contiguousness' of District Boundaries

As part of the factfinding report, the commission is required to determine and communicate to the court whether a proposed district would "cover and serve a proper area." IC 14-33-2-17(c)(5). Also, as provided in IC 14-33-2-22, the factfinding report must include "findings on the territorial limits of the proposed district."

Factors for determining appropriate district boundaries are set forth in IC 14-33-3-1. Among these factors is a requirement that "each part of the district is contiguous to another part." The statutory requirement of contiguousness forms an important element to the geographic requirements of the conservancy district chapter.

If lengthy but narrow boundaries are created to incorporate outlying areas into a district, problems could be posed to adjacent areas, particularly if residents of these areas are not allowed to enter the district. The establishment of a district with exclusive boundaries may hinder attempts by the residents to form a new district. These problems may be acute where a purpose of the district is to provide water supply or sewage disposal.

To establish a consistent and viable framework for determining what is "contiguous" within IC 14-33-3-1, the commission will apply the following:

As used in IC 14-33-3-1, "contiguous" will ordinarily be applied to require that each part of the district adjoin every other part. The requirement is not met where a district boundary is excessively long and narrow. What is excessively long and narrow will be evaluated on an individual basis and will more likely be a major concern for districts that would provide sewage disposal or water supply than for districts which would provide other services. Where the district would provide flood prevention and control, contiguousness will be applied to encourage a coordinated effort within a particular watershed.

An easement or other written license granted by the fee title holder to the district or proposed district may establish contiguousness. Where the district is to provide sewage treatment or water supply, freeholders must typically be provided an opportunity to connect to an adjacent line or to enter the district. As used in this paragraph, an "adjacent line" is one that is either (1) used to carry sewage and located within 300 feet of the freeholder's building; or (2) used to carry water supply and located on an easement or license that adjoins the freeholder's property. A petitioner must provide the division of water a copy of an easement or other written license that is used to establish contiguousness.

C. Review Standards for Purpose of Flood Prevention and Control

One purpose for which a conservancy district can be established is flood prevention and control. IC 14-33-1-1(a)(1). In order to receive a favorable determination by the commission under IC 14-33-2-17 for the purpose of flood prevention and control, the petitioners must show the district would accomplish at least one of the following functions:

(1) The removal of obstructions and accumulated debris from a waterway channel.
(2) The cleaning or straightening of a channel.
(3) The development of a new and enlarged channel.
(4) The construction or repair of dikes, levees, or other flood protective works.
(5) The construction of waterway bank protection.
(6) The establishment of a floodway.

All works for the purpose of flood prevention and control must be coordinated in design, construction, and operation according to sound and accepted engineering practice so as to effect the best flood control obtainable that complies with IC 14-28-1-29.

3. Development of a District Plan

Following the creation of a conservancy district by the circuit court, the district is required to establish a "district plan." As provided in IC 14-33-6-2, a "district plan consists of an engineering report that sets forth the general, comprehensive plan for the accomplishment of each purpose for which the district was established." The district plan includes physical and technical descriptions, maps, preliminary drawings, cost estimates based upon preliminary engineering surveys and studies, copies of agreements with other governmental entities, and works of improvement.

The board of directors is required to submit a district plan to the commission for its approval within 120 days after the appointment of the board members, unless a time extension is obtained from the commission. IC 14-13-6-3. "The commission may reject a plan or any part of a plan." IC 14-13-6-4(d). "After receiving the approval of the commission, the board shall file the district

plan with the court." IC 14-13-6-5(a). Following the filing by the board of directors, the court sets the district plan for a hearing. IC 14-13-6-5(b).

The conservancy district statutory article does not address review of the "approval" process at the state agency level, but administrative reviews are addressed generally in IC 4-21.5 ("administrative orders and procedures act" or "AOPA"). Licenses are governed by AOPA, and included within the definition of "license" is any "approval" required by law. IC 4-21.5-1-8. The term "license" is also defined in the statutory chapter governing the relationship of the natural resources commission and the department of natural resources to include an "approval" that may be issued by the department under Indiana law. IC 14-11-3-1(a).

Significant to the inclusion of "approval" within the definition of license contained in IC 14-11-3-1(a) is that "[n]otwithstanding any other law, the director shall issue all licenses." IC 14-11-3-1(b). A designee may act for the director in license issuance, but the designee must be a "full-time employee of the department" of natural resources. IC 14-11-3-1(c). The commission then acts as the "ultimate authority" for license determinations by the director or his designee. IC 14-10-2-3. "Ultimate authority" is defined in AOPA to mean the entity "in whom the final authority for an agency is vested by law." IC 4-21.5-1-15.

With this background, the following guidelines are established:

(1) The board of directors of a district submits any proposal for or pertaining to a district plan to the department's division of water.

(2) The division of water assists the board in identifying licenses likely to be required to implement the district plan. The division of water also coordinates with the department of environmental management and the state department of health concerning any comments pertaining to the development of a district plan.

(3) The division of water reviews and evaluates comments and alternative proposals to the district plan that may be submitted by other interested persons. The division of water shall consider only technical, engineering, and scientific issues necessary to the development of the district plan. The division may use facilitation or mediation to help resolve any conflict.

(4) The director of the division of water approves or disapproves the district plan. Notice of the agency action and the opportunity to seek administrative review under AOPA is provided to the board of directors and to any other person requesting a copy of the notice. The director of the division of water also acts upon any request to extend the time to file a district plan, and the same notification process applies. The division director shall encourage the board to file completed applications for any necessary license as soon as practicable after approval of a district plan.

(5) The commission's division of hearings conducts any administrative review sought under part (4). The commission is the ultimate authority for the department of natural resources under AOPA. Following the completion of administrative review, the division of hearings notifies the parties of the completion and that review of the commission order is subject to further action by the circuit court pursuant to IC 14-13-6-5(b).

4. Development of a Unit of Work

To implement a district plan, the board of directors of a conservancy district "shall order the preparation of the detailed construction drawings, specifications, and refined cost estimates.... The implementation may involve all or part of the works of improvement if the part constitutes a unit that:

(1) can be constructed and operated as a feasible unit alone; and

(2) can be operated economically in conjunction with other proposed works set forth in the district plan." IC 14-33-6-8(a).

"When the drawings, specifications, and cost estimates have been prepared to the satisfaction of the board [of directors], the board shall by resolution tentatively adopt and submit the drawings, specifications, and cost estimates to the commission for approval." IC 14-33-6-8(b). "Upon the receipt of the written approval," the board provides a "hearing on the drawings, specifications, and cost estimates at which any interested person must be heard." IC 14-33-6-9.

The process of the development of a unit of work is similar to that for the preparation of a district plan. An important distinction is no judicial hearing follows the commission approval. Within the context of the review process, the legislature may have envisioned the hearing by the board, following commission approval of the unit of work, serves as an informational rather than judicial or quasi-judicial process.

With this background, the following guidelines are established:

(1) The board of directors of a district submits to the division of water of the department of natural resources any proposals for or pertaining to a unit work.

(2) The division of water assists the board in identifying licenses likely to be required to implement the district plan. The division of water also coordinates with the department of environmental management and the state department of health concerning any comments pertaining to the development of a unit of work.

(3) The division of water reviews and gives due consideration to comments and alternative proposals to the unit of work which may be submitted by other interested persons. In performing this function, the division is limited to consideration of the design and construction of structures needed to implement the district plan. The division may use facilitation or mediation to help resolve any conflict.

(4) The director of the division of water approves or disapproves the unit of work. Notice of the agency action and the

opportunity to seek administrative review pursuant to the administrative orders and procedures act is provided to the board of directors and to any other person requesting a copy of the notice. The director of the division of water also acts upon any request to extend the time by which to file a unit of work, and the same notification process applies. The division director shall encourage the board of a conservancy district to file completed applications for any necessary license as soon as practicable after approval of a unit of work.

(5) The commission's division of hearings conducts any administrative review sought under part (4). The commission is the ultimate authority for the department of natural resources. Following the completion of administrative review under AOPA, the division of hearings notifies the parties of the final agency action by the commission and outlines the process for obtaining judicial review. Also included in the notice is reference to the informal hearing before the board of directors pursuant to IC 14-33-6-9.

5. Addition of Territory to an Existing District

Ordinarily, territory may be added to an existing district according to either of two procedures. The procedures in these two circumstances follow distinct paths and are here viewed separately:

A. Additions Initiated with the Circuit Court

Pursuant to IC 14-33-4-2(b)(1), territory may be added according to the same procedure as is provided for the establishment of a district. A petition to add territory under this subdivision will be supported by the following guidance.

After a court determines a petition to add territory to a district is in proper form and bears the needed signatures, the petition is referred to the natural resources commission for a technical review. The issues for review include whether:

1. the proposed addition appears to be necessary;
2. the proposed addition holds promise of economic and engineering feasibility;
3. the proposed addition seems to offer benefits in excess of costs and damages (or, for water supply, sewage disposal, or water storage, whether the public health will be served);
4. the proposed addition proposes to cover and serve a proper area; and,
5. the proposed addition could be implemented in a manner compatible with similar governmental entities, most notably the existing conservancy district.

At least one public hearing is mandatory. The hearing officer will be selected and conduct the hearing essentially as provided to consider the establishment of a new district. An interested person has the right to be heard. The hearing will be held at the county seat of a county containing land in the proposed district. Notice of the hearing will be published in a newspaper of general circulation in each county containing land in the district and the proposed addition. The commission hearing officer will incorporate technical assistance from a state agency having jurisdiction over the subject matter of the district and the proposed addition.

Where territory is sought to be added to an existing district, the impact upon the district is often inconsequential. An addition may be relatively minor and involve only a small area with little or no measurable affect to the freeholders within the existing district. The hearing officer will consider and, following the completion of the public hearing or hearings, report to the director of the division of water as to the likely consequence to the district of the proposed addition. The director of the division of water is delegated authority to determine when the proposed addition of territory is de minimis and when its review by the commission is unlikely to be productive. When the division director makes such a determination, the hearing officer's report is forwarded directly to the court as the commission's factfinding report. This report is to be submitted within 30 days of receipt by the division of water of a completed petition to add territory to a district.

B. Additions Initiated with the Board of Directors

As provided in IC 14-33-4-2(b)(2), an addition of territory to an existing district may also be initiated by a board resolution. The resolution follows a petition by the majority of freeholders or the municipality in the area proposed to be added. The resolution and petition are filed with the court, and the court sets the matter for hearing. Notice of the hearing is sent to the natural resources commission and to the freeholders in the district and in the area proposed to be served by the additional territory. The notice to the commission should be forwarded to the division of hearings.

Upon receipt of the notice, the division of hearings will notify the division of water of the department of natural resources and other state agencies which appear to have jurisdiction over the subject of the addition. A conservancy district board wishing to apply IC 14-33-4-2(b)(2) is urged to communicate its wish to the division of hearings as soon as practicable so that expeditious technical discussions may be pursued with the appropriate state agencies. The recommendation is that this communication occurs at least 60 days prior to the setting of a hearing under IC 14-33-4-2(d). Adequate review is essential to a favorable comment by the commission to the court. The division director of the division of water is delegated authority by the commission to report favorably, to make recommendations to modify or condition the addition of territory, or to object to the addition of territory. See particularly IC 14-33-4-2(e).

6. Addition of a Purpose to an Existing District

A purpose may be added to an existing district in either of two ways. The same procedure may be used as is provided for the establishment of a district. IC 14-33-1-4(1). If this subdivision is applied, reference should be made to the process for the addition

of territory pursuant to part 5A of this nonrule policy document.

In the alternative, IC 14-33-1-4(2) provides that the conservancy district board may add a purpose based upon a petition signed by at least 10% of the freeholders of the district. If the resolution is passed, the resolution and petition are filed with the county court and the court sets the matter for hearing. The court forwards to the commission the notice of hearing along with a copy of the resolution "at least 30 days before the date of hearing." IC 14-33-1-5.

Upon receipt of the notice, the division of hearings will notify the department's division of water and other state agencies that appear to have jurisdiction over the subject of the addition. A conservancy district board wishing to apply IC 14-33-1-4(2) is urged to communicate its wish to the division of hearings as soon as practicable so that expeditious technical discussions may be pursued with the appropriate state agencies. The recommendation is this communication occur at least 60 days before setting a hearing under IC 14-33-1-5(b). Adequate review is essential to a favorable comment by the commission to the court. The division director of the division of water is delegated authority by the commission to report favorably, to make recommendations to modify or condition the addition of purpose, or to object to the addition of purpose. See particularly IC 14-33-1-5(e).

7. Dissolution of a District

A conservancy district may be dissolved either because the district is "no longer of benefit" (IC 14-33-15) or because "construction of works of improvement has not begun within six (6) years after the district plan." (IC 14-33-16). Where works of improvement are not begun, there is no statutory participation by the natural resources commission; no procedural issue is presented. A district dissolved due to loss of benefit applies "the same procedure used to establish a district. The petition must set forth the change of circumstances that causes the district to lose the district's benefit." IC 14-13-15-1.

Because the process is essentially the same for the dissolution as for the establishment of a conservancy district, the same analysis applies to the development of an appropriate process. With this background, the following guidelines are established:

(1) Referrals by a court for the technical review anticipated by IC 14-33-15-1 are directed to the division of hearings.

(2) As soon as practicable after the receipt of the referral, the director of the division of hearings appoints a hearing officer. The hearing officer conducts actions appropriate to the preparation and submission to the commission of a recommended factfinding report. Included among these actions are the following:

(A) The hearing officer promptly provides a copy of the referral to the division of water of the department of natural resources, the department of environmental management, the state department of health, the utility regulatory commission, and any other agency determined by the hearing officer to have jurisdiction over the subject-matter of the referral. Accompanied by the referral is an invitation for comment as well as the address and telephone number of a contact person within the division of water.

(B) The hearing officer confers with the court or the clerk of the court to determine, if in addition to the petitioners, a remonstrant or other party has entered an appearance as a party to the civil proceeding.

(C) The hearing officer forwards a copy of this nonrule policy document to each of the parties. Also included are the name, address, and telephone number of the contact person within the division of water.

(D) If parties other than the petitioners have entered an appearance, the hearing officer promptly sets an informal conference of the parties. An invitation to participate is also made to division of water.

During the informal conference, the hearing officer will attempt to develop a consensus for the conduct of the public hearing. If a consensus cannot be developed, the hearing officer determines the conduct of the hearing in accordance with the following principles:

(1) A hearing is held the county seat of a county containing land in the district.

(2) The process is conducted in the most informal manner practicable which also support fairness and meaningful public participation.

(3) If issues in dispute are identified requiring expert testimony, or for which the hearing officer otherwise determines testimony should be under oath, a second hearing may be conducted. An opportunity for cross-examination shall be provided, the hearing recorded by a court stenographer or reporter approved by the commission, and the trial rules of discovery applied. The hearing officer announces the time, date, and location of the second hearing during the initial public hearing. Unless otherwise agreed by the parties, the hearing officer makes every reasonable effort to conduct the second hearing so that a delay is not required in the submission of a recommended factfinding report to the commission.

(4) The hearing officer determines whether either of the following matters are in issue: (a) whether the board has failed, within two years of establishment of the conservancy district, to produce satisfactory evidence of progress in the preparation of the district plan; or, (b) whether federal or state money, or both, contemplated in the petition for the establishment of the district, appears to be unavailable. See IC 14-33-15-2.

(E) The hearing officer drafts and tenders to the commission a recommended factfinding report. A copy of the report is forwarded to each party, to the division of water, to any agency that commented upon the conservancy district, and to any other person requesting a copy. The hearing officer encloses with the report a notice of the time, date, and location when

the commission is scheduled to act upon the recommended factfinding report.

(F) Following action by the commission, the hearing officer causes a copy of the factfinding report of the commission to be served upon the division of water, the parties, and any other person requesting a copy.

8. Election of Board of Directors and Notice to Commission

Neither the natural resources commission nor the department of natural resources have jurisdiction over board elections. The board of commissioners of the county appoints the board of directors for the new district within twenty (20) days after a court order establishing a district. IC 14-33-5-1. A person adversely affected by an action committed or omitted by the board may petition the court having jurisdiction over the district to enjoin or mandate the board. IC. 14-33-5-24.

The board chair is required by IC 14-33-5-17 to promptly notify the commission when board members are elected or appointed. The department's division of water maintains a database of conservancy districts and board members. By this Information Bulletin, the commission identifies the following address for the notice required by IC 14-33-5-17:

Division of Water–Project Development
Department of Natural Resources
Indiana Government Center South
402 West Washington Street, Room W264
Indianapolis, IN 46204-2641

Service at this address will also help assure the division of water's database is current. For more information see http://www.in.gov/dnr/water/publications/pdf/con_dist_dir.pdf.

9. Application and Modification

This information bulletin is intended to be liberally construed in order to support efficient administration by the natural resources commission, acting in cooperation with other agencies, of its conservancy district responsibilities. Modifications to the document may be needed based upon experience or legislative changes. Suggestions for modification of the document are welcomed from the public and should be forwarded to the division of hearings at the address set forth previously. Send any suggestions to the address for the division of hearings shown above or by email to slucas@nrc.IN.us.

INDIANA STATE RECOUNT COMMISSION
Guidelines for Conduct of an Election Recount and Contest
As Amended, December 10, 2004
Guideline #2-2004
Chapter 1. Definitions

Sec. 1. (a) "Candidate" refers to a candidate for nomination or election to an office for which a recount or contest petition has been filed.

(b) If a candidate who is entitled to file a recount or contest petition does not do so in accordance with IC 3-12-11, a state chairman or county chairman who files a recount petition under IC 3-12-11, has the rights and responsibilities of a "candidate" under these guidelines.

Sec. 2. "Chad" means the part of a ballot card that indicates a vote on the card when punched out by the voter.

Sec. 3. "Commission" refers to the state recount commission established by IC 3-12-10-1.

Sec. 4. "Cross-petitioner" includes a candidate who was opposed in the primary or election by the petitioner, whether or not the candidate chose to file a cross-petition with the commission under IC 3-12.

Sec. 5. "Disputed ballot" refers to a ballot challenged by a party to a recount or to a ballot that the state board of accounts determines does not conform with these guidelines or IC 3-12.

Sec. 6. "No votes" refers to ballots subjected to the recount which:

(1) do not indicate a vote cast for any candidate subject to the recount; and

(2) are otherwise classified as either "valid" or "invalid" under these guidelines or IC 3-12.

Sec. 7. "Precinct tally sheet" refers to the written record used by the state board of accounts to record the precinct vote tally and other evidence concerning the voting process in a precinct.

Sec. 8. "Recount" means the determination by the state recount commission of the number of valid votes received by each candidate for the office subject to a recount.

Sec. 9. "Tally" means the counting by the state board of accounts of votes cast for each candidate in each of the following categories: undisputed valid, undisputed invalid, or disputed.

Sec. 10. All other terms used in these guidelines have the meaning set forth in IC 3-5.

Chapter 2. Conduct of Election Recounts and Contests Generally

Sec. 1. The state recount commission shall conduct all recounts and contests under identical procedures to the extent reasonably

possible.

Sec. 2. The commission makes the final decision as to whether a disputed ballot will be counted.

Sec. 3. (a) All tallying shall be physically performed by the state board of accounts in accordance with these guidelines.

(b) The state board of accounts staff manual for recounts (*Agency Guidelines for Conduct of Recount for the State Recount Commission,* May 2004 edition) is approved for use in recounts conducted by the commission. If any conflict exists between this manual and these guidelines, the guidelines control to the extent of that conflict.

(c) The commission shall conduct the recount at times and locations designated by it, but all tallying of votes shall be conducted within the county where the votes were cast unless the parties consent to a change of location.

Sec. 4. The commission shall appoint a director who is responsible for supervising the conduct of the tally by the state board of accounts. The state board of accounts shall prepare for the director a report on the tally by the state board of accounts. The director shall present the report to the commission to enable the commission to make final decisions in a fair and prompt manner.

Sec. 5. (a) The commission may order with consent of all parties to a recount, that a prerecount inspection of impounded election material be conducted by the attorneys representing the parties. This inspection:

(1) must be conducted under the supervision of the state board of accounts and the Indiana state police at all times; and

(2) is designed to enable the parties to narrow the issues and material subject to dispute in the recount so that the recount may be conducted efficiently.

The director shall attend this inspection and is authorized to resolve any dispute regarding its scope and procedures.

(b) When the recount begins, all tallying must be conducted by audit teams composed of at least two staff members of the state board of accounts. The director may assign additional staff members to the audit teams to conduct the recount. Where possible, team assignments should be rotated daily so that the same auditors do not work as a team on consecutive days.

(c) Except as provided in subsection (d), the audit team shall inspect and tally all ballots in accordance with these guidelines. The audit team may classify a ballot as invalid only for reasons set forth in these guidelines or IC 3-12 and if no party to the recount disputes that determination. The audit team shall also inspect all poll lists, voter affidavits, absentee envelopes, and other documents relevant to the recount, as determined by the director.

(d) If a recount is conducted concerning a primary election, the ballots cast in the primary conducted for the candidates of the other major party, and the ballots cast solely for school board candidates or on public questions are not to be recounted, but shall be documented solely for the purpose of reconciling the number of voters who cast ballots in person or by absentee ballot at the precinct (according to the poll list) with the number of ballots cast in the precinct according to the canvass.

Sec. 6. (a) The state board of accounts shall designate one of its staff to act as a supervisor for each group of audit teams.

(b) Each supervisor should be present at the tallying location while the tally is being conducted, assist the director in managing the tallying process, and keep the director advised of the progress of the tallying.

(c) The supervisor shall inspect all absentee ballot envelopes not distributed to the precinct election boards or to central count absentee ballot counters and shall permit observers to inspect the envelopes. The supervisor may not open the envelope.

Sec. 7. At least one state police officer must be present at each counting location during the tallying. The state police are responsible for the safety and integrity of all election materials during and after the recount, until further order of the commission.

Sec. 8. Each candidate in a race being tallied may observe each audit team as it conducts the tally. Each candidate may also designate one observer per audit team and not more than two managers for the candidate's observers in each county. The audit team shall allow each candidate or his/her manager or observer a reasonable opportunity to view each ballot, document, voting machine or other materials reviewed by the audit team. An audit team does not have to delay the tallying process because of the absence of a candidate or candidate's manager or observer.

Sec. 9. During the tallying of ballots in each precinct, one member of the audit team shall be responsible for inspecting each ballot and determining the tally category for that ballot. The other member of the audit team shall keep all necessary records. The members of the audit team may consult with one another or the director.

Sec. 10. The candidates, and their managers and observers, may not argue or interfere with the audit team but may request that a ballot be identified by the audit team as a disputed ballot. The candidate, manager or observer need not state the reason for the challenge. Unless a ballot is challenged by a candidate, manager, or observer before the audit team signs the precinct tally sheet, the audit team's decision as to the classification of that ballot is final. The commission shall review disputed ballots upon completion of the tally by the state board of accounts.

Sec. 11. The audit team shall mark any disputed ballot as an exhibit. The mark must contain at least the following information: county, township or ward, precinct, exhibit number and the name of the candidate challenging the ballot, or whether the ballot is disputed by the state board of accounts.

Sec. 12. The director shall attempt to resolve procedural problems (other than ballot validity issues) not resolved by these guidelines. The director shall keep the commission advised of the progress of the tallying, procedural problems he/she resolves and any disagreement with his/her actions. If an issue arises during the tallying process, the commission may meet to resolve such an issue at the request of a candidate.

Sec. 13. Each audit team shall tally only one precinct at a time, and election materials for each precinct shall be kept separate by precinct.

Sec. 14. The audit team shall record information relevant to seals on the voting machines and ballot boxes or other containers of election materials on the precinct tally sheet.

Sec. 15. (a) The audit team shall then open the container of election materials and record the following information, if available, on the precinct tally sheet:

(1) the total number of votes recorded on the precinct certificate;

(2) the number of voters' signatures on the poll list;

(3) the number of absentee ballots delivered to the precinct;

(4) the number of absentee voters listed on the poll list;

(5) the number of absentee ballots not counted;

(6) the number of absentee voter applications; and

(7) the number of votes for each candidate in the relevant race as reported by the precinct election board or the county election board.

(b) Any discrepancies between the numbers recorded by election officials and the numbers recorded by the audit team should also be recorded on the precinct tally sheet.

Sec. 16. The audit team may not independently examine the absentee voter applications and affidavits on absentee ballot envelopes but shall permit each candidate, manager, or observer to inspect them and to challenge ballots cast pursuant to any of them.

Sec. 17. The audit team may not remove from its envelope any absentee ballots or provisional ballots not removed from their ballot envelopes by the precinct election board or the central count absentee ballot counters.

Sec. 18. The audit team shall:

(1) tally the total number of undisputed valid ballots cast for each candidate in each relevant race;

(2) tally the number of undisputed invalid ballots for each candidate rejected by the audit team;

(3) tally the number of disputed ballots for each candidate;

(4) tally the number of no votes in the precinct;

(5) sign and date the precinct tally sheet;

(6) place all precinct materials in the precinct container; and

(7) return the container and the completed precinct tally sheet to the state board of accounts supervisor or director.

Sec. 19. The director or supervisor shall make copies of each precinct tally sheet available to each candidate's representatives and the media as soon as possible.

Sec. 20. (a) Upon completion of the tallying by the state board of accounts, the commission shall convene to review the report of the director and to receive from the candidates evidence relevant to whether disputed votes should be counted.

(b) The commission shall proceed to conduct the count required under IC 3-12-11-17.7(a) in the following manner:

(1) If the tallying by the state board of accounts indicates that there are not disputed ballots in one or more precincts, the director shall present a report of the votes cast for each candidate in the indicated precincts. The commission shall order the votes counted for the designated candidates and shall order any undisputed invalid ballots or no votes in the precinct to not be counted.

(2) After the disposition of all precincts with no disputed ballots, the commission shall proceed to count all ballots in precincts with one or more disputed ballots.

(3) If the recount is to be conducted in more than one county, the commission may begin with any county agreed upon by the parties. If no agreement exists between the parties, the recount shall begin in the county designated by the commission and proceed to subsequent counties in accordance with an order adopted by the commission. The commission shall conduct the recount in precincts within one county in alphanumeric order, according to the precinct name, unless all parties to the recount join in requesting that the count be conducted in an alternative manner.

(4) The commission shall begin by recognizing the director to present the state board of accounts report regarding the votes cast within all precincts other than the precincts described in (1). The director shall state the number of:

(A) undisputed valid votes cast for each candidate in each precinct;

(B) undisputed invalid votes cast for each candidate; and

(C) no votes cast in each precinct.

(5) The commission shall then order:

(A) the votes described in 4(a) to be counted for the designated candidates; and

(B) the votes described in 4(b) or 4(c) not counted.

(6) If, following the designation of a ballot as disputed, the party who disputed the ballot determines that the ballot should be designated as either an undisputed valid vote cast for a specific candidate, or as an undisputed invalid vote, the party may file a written statement to that effect with the director. The statement must:

(A) identify the ballot according to the "Exhibit No." on the state board of accounts exhibit list of disputed ballots;

(B) state whether the ballot should be categorized as an undisputed valid vote for a specified candidate, or as an undisputed invalid vote; and

(C) be signed by the party to the recount who disputed the ballot.

(7) After the commission acts under (5) to order that ballots be counted or not counted, the director shall report to the commission whether a statement described by (6) has been filed with the director regarding any disputed ballot. If so, the commission shall proceed to order the ballot to be counted for a specified candidate, or not counted, in accordance with the statement.

(8) The commission shall then recognize the petitioner to present ballots disputed by the petitioner or state board of accounts to the commission that the petitioner contends should be counted as votes for the petitioner. The petitioner shall present each ballot in the order that the ballot is designated as an exhibit number in the exhibit list of disputed ballots and for the first such precinct according to the precinct order listed in (3). However, the commission may consent to the consideration of more than one ballot in the precinct at the same time if requested by the petitioner, and the commission determines that the issues regarding the disputed ballots are essentially identical so that there is no need for a determination regarding each ballot in this group.

(9) After the presentation of a ballot (or when permitted, a group of ballots) under (8), the commission shall determine based on all relevant evidence whether or not the ballot(s) shall be counted as a vote (or votes) for the petitioner, a vote (or votes) for the cross-petitioner, or whether the ballots shall not be counted for any candidate.

(10) After the completion of the petitioner's case-in-chief in all of the precincts included in the recount, the commission shall then recognize the cross-petitioner to present ballots disputed by the cross-petitioner or state board of accounts to the commission that the cross-petitioner contends should be counted as votes for the cross-petitioner. The cross-petitioner shall present each ballot in the order that the ballot is designated as an exhibit number in the exhibit list of disputed ballots and for the first such precinct according to the precinct order listed in (3). However, the commission may consent to the consideration of more than one ballot in the precinct at the same time if requested by the cross-petitioner, and the commission determines that the issues regarding the disputed ballots are essentially identical so that there is no need for a determination regarding each ballot in this group.

(11) After the presentation of a ballot (or when permitted, a group of ballots) under (11), the commission shall determine based on all relevant evidence whether or not the ballot(s) in the precinct shall be counted as a vote (or votes) for the petitioner, a vote (or votes) for the cross-petitioner, or whether the ballots shall not be counted for any candidate.

(12) After completion of the cross-petitioner's case-in-chief in all of the precincts included in the recount, the commission shall then recognize the director to report whether any disputed ballots in any precinct have not been presented by either the petitioner or cross-petitioner to the commission. If the director identifies any ballots that remain disputed, the director shall present these ballots to the commission for determination.

Sec. 21. (a) Except as provided in subsection (b), (c), or (d), a member of the commission (or an individual acting on behalf of the commission) shall not initiate, permit, or consider ex parte communications, or consider other communications made to the member or individual outside the presence of the parties, concerning a pending or impending proceeding.

(b) Where circumstances require, ex parte communications for scheduling, administrative purposes, or emergencies that do not deal with substantive matters or issues on the merits are authorized if the member or individual reasonably believes that no party will gain a procedural or tactical advantage as a result of the ex parte communication and promptly notifies the commission and all other parties of the substance of the ex parte communication and allows an opportunity to respond.

(c) A member or individual may consult with commission staff and others whose function it is to aid the member or individual in carrying out the member or individual's responsibilities.

(d) A member or individual may, with the consent of the parties, confer separately with the parties and their lawyers to mediate or settle matters pending before the commission.

Sec. 22. All testimony presented to the commission by an individual shall be sworn to (or affirmed) by that individual.

Sec. 23. The commission may accept evidence in a proceeding even if the evidence would not be admissible in a judicial proceeding under the rules of evidence. In accepting the evidence described by this section, the commission shall ensure that the commission's proceedings are conducted with the decorum required to protect the rights of the parties to the proceeding and other individuals.

Sec. 24. Unless otherwise ordered by the commission, if the commission requests or requires that written briefs be submitted in a proceeding before the commission, the briefs must be filed with the election division no later than forty-eight (48) hours before the commission is scheduled to meet to consider the matter.

Sec. 25. After the commission has completed its count under Section 20, the commission shall adjust accordingly the tallies certified by the state board of accounts, resolve any other issues raised in the recount, or contest and certify the results to the election division pursuant to IC 3-12-11-15.

Chapter 3. Tallying Votes in a Ballot Card Voting System Precinct

Sec. 1. This chapter applies only to tallying votes in a precinct that uses ballot cards for registering votes.

Sec. 2. The director shall obtain the use of one or, if possible, two automatic tabulating machines in each county. The director may seek the assistance of county election officials in preparing the machines for use in the tallying.

Sec. 3. The state board of accounts shall prepare a test deck of sample ballot cards, and the candidates may jointly prepare test decks. At the beginning and end of each day of tallying, the counting machine shall be tested by running decks prepared by the candidates. Candidates and their managers or observers may observe all testing and operation of automatic tabulating machines.

Sec. 4. The audit team shall examine the precinct header card to determine whether it is the correct card for the precinct. Candidates, managers, or observers may inspect the precinct header card and have it marked as an exhibit for review by the commission.

Sec. 5. (a) The audit team shall manually inspect each ballot card in the container of election materials to determine whether it should be counted.

(b) A ballot marked "REJECTED", "VOID", "SPOILED", or "CANCELLED" or with any other similar notation regarding the reliability of the ballot permitted under the state law must be disputed by the audit team. The audit team shall record any available information concerning the reasons the marking appears on a ballot.

Sec. 6. The audit team shall divide all ballots into three groups:

(1) Ballot cards to be counted that are undisputed.

(2) Ballot cards that are disputed.

(3) Ballot cards not to be counted that are undisputed, including no votes.

Sec. 7. (a) All undamaged ballots to be counted shall then be counted on two separate automatic tabulating machines, if available; otherwise, the ballots shall be counted twice on one machine. The audit team shall compare the totals for each candidate from each machine run and shall record the totals.

(b) If the totals are identical on both machines, or on both runs on the same machine, no further counting will be necessary.

(c) If the totals are not identical, the audit team shall manually count the ballots at least twice, so that the audit team and supervisor are satisfied that the manual count is accurate.

Sec. 8. The director may order any appropriate test or a hand count in any precinct he/she believes there is a substantial question concerning the accuracy of the tabulating machine count.

Sec. 9. Notwithstanding sections 7 and 8 of this chapter if a petition or cross petition for a recount request that the ballot cards in a specific precinct be counted manually, the audit teams shall count the cards accordingly and may not use automatic tabulating machines except in a test unless the petitioner or cross-petitioner withdraws the request after the state board of accounts conducts a test of the automatic tabulating machine to ascertain its accuracy. A written withdrawal of such a request is effective upon delivery to the director, supervisor, or commission.

Chapter 4. Tallying Votes in Paper Ballot Precincts

Sec. 1. This chapter applies only to tallying votes in a precinct that uses paper ballots for registering votes.

Sec. 2. The audit team shall divide the paper ballots into three groups:

(1) Paper ballots to be counted that are undisputed.

(2) Paper ballots that are disputed.

(3) Paper ballots not to be counted that are undisputed, including no votes.

Sec. 3. (a) The audit team shall manually inspect each paper ballot in the container of election materials.

(b) A ballot marked "REJECTED" or "VOID" or "SPOILED" or "CANCELLED" or with any other similar notation regarding the reliability of the ballot permitted under the state law may not be counted by the audit team. The audit team shall record any available information concerning the reasons the marking appears on a ballot.

Chapter 5. Tallying Votes in an Electronic Voting System Precinct

Sec. 1. This chapter applies only to tallying votes in a precinct that uses the electronic voting system.

Sec. 2. (a) The audit team shall check the election night printout to ensure that the test of the electronic voting machine showed that the votes were recorded correctly, no over voting could occur, and the vote tallies for each office were equal to zero. The team shall note any discrepancies.

(b) The team shall check the election night results reported by the precinct election board with the printout for accuracy and shall note any discrepancies.

Sec. 3. If requested by a candidate or candidate's representative, the audit team shall cause a new printout to be made from the memory cartridges for a precinct. The new printout shall be compared with the old printout and election night results reported by the precinct election board. The audit team shall note any discrepancies.

Sec. 4. If a new printout is requested under Section 3 from more than one memory cartridge, the cartridges shall be read on one electronic voting system designated by the director, unless a party requests the use of the electronic voting system in which the cartridge was originally used.

Sec. 5. Unless otherwise requested by a party, a memory cartridge read on an electronic voting system is not required to also be read on the computer program maintained by the county election board for use in election night tabulations.

AS ADOPTED AND AMENDED BY THE STATE RECOUNT COMMISSION

DEPARTMENT OF STATE REVENUE

0420020329.LOF

LETTER OF FINDINGS NUMBER: 02-0329
SALES AND USE TAX
FOR TAX PERIODS: 1996-2000

NOTICE: Under IC 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUES

I. Sales and Use Tax: Imposition

Authority: IC 6-8.1-5-1(b), IC 6-2.5.2-1.

The taxpayer protests the assessment of sales tax.

STATEMENT OF FACTS

The taxpayer is a sole proprietor who operates a commercial printing business. After an audit, the Indiana Department of Revenue assessed additional sales and use tax, interest, and penalty. The taxpayer protested the assessment. A hearing was scheduled. The taxpayer did not appear for the hearing. Therefore, this Letter of Findings is based on the documentation in the file.

I. Sales and Use Tax: Imposition

DISCUSSION

An Indiana Department of Revenue Notice of Proposed Assessment is presumed to be accurate and taxpayers carry the burden of proving that a proposed liability is inaccurate. IC 6-8.1-5-1(b).

Indiana imposes a sales tax on retail transactions made in Indiana. The retail merchant has the duty of collecting the tax from the purchaser and remitting the tax to the state. IC 6-2.5-2-1. The taxpayer collected sales tax from its customers and failed to remit the tax to the state. The audit properly imposed the collected but unremitted sales tax on the taxpayer.

FINDING

The taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0420030108.LOF

LETTER OF FINDINGS NUMBER: 03-0108
Sales and Use Tax
For the Years 1998-2001

NOTICE: Under IC 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUES

I. Sales and Use Tax-Maintenance Agreements

Authority: IC 6-2.5-3-2, IC 6-2.5-2-1(a), IC 6-8.1-5-1(b), Indiana Sales Tax Information Bulletin #2 issued in 1991 and November, 2000, *Gross Income Tax Division v. National Bank and Trust Co.,* 79 N.E. 2d 651 (Ind. 1948).

The taxpayer protests the assessment of tax on certain maintenance agreements.

II. Sales and Use Tax-Software

Authority: IC 6-2.5-5-3(b), IC 6-2.5-5-4, 45 IAC 2.2-5-8, 45 IAC 2.2-5-10(c), *Indiana Department of Revenue v. Cave Stone*, 457 N.E. 2d 520, (Ind. 1983).

The taxpayer protests the assessment of tax on certain software.

III. Sales and Use Tax-Gerber Plotter, Software, and Replacement Parts

Authority: IC 6-2.5-5-3(b).

The taxpayer protests the assessment of tax on the Gerber plotter, software, and Replacement parts.

IV. Sales and Use Tax-Plotter Paper

Authority: IC 6-2.5-5-5.1(b),

The taxpayer protests the assessment of tax on plotter paper.

V. Sales and Use Tax-Forklift Parts

Authority: IC 6-2.5-5-3(b), 45 IAC 2.2-5-10(b)(2).

The taxpayer protests the assessment of tax on forklift parts.

VI. Sales and Use Tax-Sawsall Saw, Blade, and Cable Ties

Authority: IC 6-2.5-5-3.

The taxpayer protests the assessment of tax on the sawsall saw, blade, and cable ties.

STATEMENT OF FACTS

The taxpayer is a manufacturer of soft cloth purses and matching accessories for women. On November 19, 2001 the taxpayer filed a claim for refund of sales tax or use tax paid on certain manufacturing items. The Indiana Department of Revenue, hereinafter referred to as the "department," then conducted an audit encompassing the issues in the claim for refund. The audit denied portions of the claim for refund and assessed use tax on other purchases. The taxpayer protested certain findings in the audit. A hearing was held. This Letter of Findings results.

I. Sales and Use Tax-Maintenance Agreements

DISCUSSION

The taxpayer purchased several maintenance or extended warranty service agreements including equipment repair, software support, and telephone support. The department assessed use tax on each of these agreements. The taxpayer protested these assessments.

All tax assessments are presumed to be accurate and the taxpayer bears the burden of proving that any assessment is incorrect. IC 6-8.1-5-1 (b). All exemptions must be strictly construed against the party claiming the exemption. *Gross Income Tax Division v. National Bank and Trust Co.,* 79 N.E. 2d 651 (Ind. 1948).

Indiana imposes a sales tax on retail transactions made in Indiana. IC 6-2.5-2-1(a). A complimentary tax, the use tax, is imposed on tangible personal property stored, used, or consumed in Indiana when no sales tax was paid at the time of the purchase. IC 6-2.5-3-2 (a). The department's policy concerning the application of the sales tax and use tax to maintenance or extended warranty service agreements is found in Indiana Sales Tax Information Bulletin #2 issued in 1991 and November, 2000. Both editions have language similar to the following found in the November, 2000 issue concerning the application of sales or use tax to maintenance agreements:

> Optional warranties and maintenance agreements that only contain the intangible right to have property supplied and there is no certainty that property will be supplied are not subject to sales tax.

The taxpayer contends that the protested warranties are not subject to the sales tax or the use tax because replacement parts will only be provided if they are necessary. Therefore, there is only an intangible right to have tangible personal property. There is no guarantee that replacement parts will be provided. Although the agreements guarantee that additions and upgrades to the software will be supplied if produced, there is no guarantee that they will be produced. Since there is no guaranty that property will be supplied during the warranty period, the warranties are not subject to sales tax.

FINDING

The taxpayer's protest is sustained.

II. Sales and Use Tax-Software

DISCUSSION

The taxpayer also protests the assessment of use tax on certain software. This software programs cutting machines by translating the design into the machine language and putting the design information into the machine so that the machine can properly cut the taxpayer's product.

The taxpayer contends that this use of the software qualifies for the direct use in direct production manufacturing exemption pursuant to IC 6-2.5-5-3(b) as follows:

> Transactions involving manufacturing machinery, tools, or equipment are exempt from the state gross retail tax if the person acquiring that property acquires it for direct use in the direct production, manufacture, fabrication, assembly, extraction, mining, processing, refining, or finishing of other tangible personal property.

In *Indiana Department of Revenue v. Cave Stone*, 457 N.E. 2d 520, (Ind. 1983) the Indiana Supreme Court found that a piece of equipment qualifies for the manufacturing exemption if it is essential and integral to the production process. 45 IAC 2.2-5-10 (c) further describes manufacturing machinery and tools as exempt if they have an immediate effect on the property in production. IC 6-2.5-5-4 extends the exemption to tools used to build exempt machinery and equipment. This exemption is clarified at 45 IAC 2.2-5-8:

> (c) The state gross retail tax does not apply to purchases of manufacturing machinery, tools, and equipment to be directly used by the purchaser in the production process provided that such machinery, tools, and equipment are directly used in the production process; i.e., they have an immediate effect on the article being produced. Property has an immediate effect on the

article being produced if it is an essential and integral part of an integrated process which produces tangible personal property.

(d) Pre-production and post-production activities. Direct use in the production process: begins at the point of the first operation or activity constituting part of the integrated production process and ends at the point that the production has altered the item to its completed form, including packaging, if required.

The software in question does not have an immediate effect on the purses, suitcases, and other bags produced by the taxpayer. Rather, the software programs the cutting machines so the cutting machines cut the materials to the specifications. This software is used outside the production process and has an immediate effect upon the cutting machines rather than the bags produced by the taxpayer during the production process.

FINDING

The taxpayer's protest is denied.

III. Sales and Use Tax-Gerber Plotter, Software, and Replacement Parts

DISCUSSION

The taxpayer also protests the assessment of use tax on the Gerber plotter, software, and replacement parts contending that they qualify for the "direct use in direct production" exemption at IC 6-2.5-5-3(b). The Gerber plotter, software, and replacement parts are used to produce patterns. The production of patterns is not a part of the production process of cutting of fabric to be sewn into bags. The preparation of the patterns is not a part of the direct production process and does not have the required immediate effect upon the production process required for exemption from use tax.

FINDING

The taxpayer's protest is denied.

IV. Sales and Use Tax-Plotter Paper

DISCUSSION

The taxpayer also protests the assessment of use tax on the plotter paper. The taxpayer contends that the plotter paper qualifies for exemption pursuant to IC 6-2.5-5-5.1(b) as follows:

Transactions involving tangible personal property are exempt from the state gross retail tax if the person acquiring the property acquires it for direct consumption as a material to be consumed in the direct production of other tangible personal property in the person's business of manufacturing, processing, refining, repairing, mining, agriculture, horticulture, floriculture, or arboriculture.

The plotter paper is used in several areas of the taxpayer's facility. It is used as a pattern and for labeling for inventory control on stacks of material in the cutting process. It is also used for developing designs and planning the cutting of these designs in order to prevent waste of fabric. Any plotter paper used in the development and planning portion of the operation is outside the production process and is clearly subject to the use tax. The taxpayer did not offer any breakdown of the use of the plotter paper. If the plotter paper that is used in a taxable manner cannot be segregated from the plotter paper possibly used in an exempt manner, all the plotter paper must be considered subject to the use tax. The taxpayer has not sustained its burden of proving that some of the plotter paper is exempt from the use tax.

FINDING

The taxpayer's protest is denied.

V. Sales and Use Tax-Forklift Parts

DISCUSSION

The taxpayer uses three forklifts in its operations. One is used to unload raw materials from trucks and to place these items in the raw material warehouse. The two other forklifts are used to load and unload the work-in-process carts onto trucks for shipment to the purse assemblers. The department and the taxpayer agree that the two forklifts used to load and unload the work-in-process qualify for the direct use in direct production manufacturing exemption pursuant to IC 6-2.5-5-3(b).

45 IAC 2.2-5-10 (h) (2) further clarifies the exemption by allowing the exemption of "Replacement parts, used to replace worn, broken, inoperative or missing parts or accessories on exempt machinery and equipment..." Since two of the three forklifts qualify for exemption, 2/3 of the forklift replacement parts qualify for exemption. The taxpayer contends that the auditor miscalculated the amount of the exemption in the audit. A review of the audit and invoices submitted by the taxpayer indicates that the auditor assessed tax on 1/3 of the purchase price listed on the invoice of each forklift replacement part. Therefore, exemption was properly granted for 2/3 of the purchase price listed on each submitted invoice.

FINDING

The taxpayer's protest is denied.

VI. Sales and Use Tax-Sawsall Saw, Blade, and Cable Ties

DISCUSSION

The taxpayer also claims that the use of the sawsall saw, its blade, and cable ties qualifies these items for the manufacturing exemption from the sales tax pursuant to IC 6-2.5-5-3. The production of purses begins with the ripping of material into strips. The strips of material are then rolled onto cardboard tubes. The sawsall saw cuts the tubes into sections so that it can be sent to the sewers

to become purse straps, a component part of the final product. It is used in the production process in an integral fashion by actually changing the material so that it can be further processed into a component of the final product. Therefore, the use of the sawsall saw and its blade is exempt from the sales tax.

There was no explanation of the use of the cable ties given. Therefore, the taxpayer did not sustain its burden of proving that the use of the cable ties qualifies them for exemption from sales tax.

FINDING

The taxpayer's protest is sustained as to the sawsall saw and blade. The taxpayer's protest to the sales tax on the cable ties is denied.

DEPARTMENT OF STATE REVENUE

0220030248.LOF

LETTER OF FINDINGS: 03-0248
Indiana Corporate Income Tax
For the Tax Years 1997 to 2000

NOTICE: Under IC 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of the document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUE

I. Money Received In an Agency Capacity – Gross Income Tax.

Authority: IC 6-2.1-2-2(a)(1); IC 6-2.1-2-2(a)(2); Western Adjustment and Inspection Co. v. Gross Income Tax Division, 142 N.E.2d 630 (Ind. 1957); Policy Management Systems Corp. v Indiana Department of State Revenue, 720 N.E.2d 20 (Ind. Tax Ct. 1999); Monarch Steel Co. v. State Bd. Of Tax Comm'r, 699 N.E.2d 809 (Ind. Tax Ct. 1998); Trinity Episcopal Church v. State Bd. Of Tax Comm'r, 694 N.E.2d 816 (Ind. Tax. Ct. 1998); Universal Group Limited v. Indiana Department of State Revenue, 642 N.E.2d 553 (Ind. Tax Ct. 1994); Universal Group Ltd. v. Indiana Dept. of Revenue, 609 N.E.2d 48 (Ind. Tax Ct. 1993); 45 IAC 1.1-1-2; 45 IAC 1.1-1-2(b); 45 IAC 1.1-1-2(b)(2); 45 IAC 1.1-6-10.

Taxpayer – on behalf of taxpayer operating company – argues that it is not subject to Indiana gross income tax on money it received while purportedly acting in an agency capacity.

STATEMENT OF FACTS

Taxpayer is an out-of-state company which filed consolidated Indiana tax returns. One particular return included an operating company which was in the business of running an Indiana riverboat casino. The operating company is hereinafter referred to as "taxpayer operating company." Taxpayer operating company did not own the casino; it managed the day-to-day operations of the Indiana casino on behalf of the casino owner.

The Department of Revenue (Department) conducted an audit review of taxpayer's business records and tax returns. The Department concluded that taxpayer operating company had received money from the casino owner which was subject to gross income tax. Taxpayer disagreed with this conclusion arguing that the money was received from the casino company while taxpayer operating company was acting in an agency capacity and that, as a result, the money was not subject to gross income tax. Taxpayer (on behalf of itself and taxpayer operating company) submitted a protest to that effect. In addition to the agency/gross income tax argument, taxpayer stated that the initial audit inadvertently included a partnership distribution as subject to gross income tax at both the low rate and the high rate. An initial review of the high/low rate issue determined that the taxpayer was correct on this issue and that the partnership distribution was only subject to gross income tax at the high rate. Because the audit division has conceded this second issue, that portion of the taxpayer's protest will not be further addressed.

An administrative hearing was conducted during which taxpayer further explained the basis for its agency/gross income tax challenge. This Letter of Findings results.

I. Money Received In an Agency Capacity – Gross Income Tax.

Casino owner and taxpayer operating company entered into a "Project Development and Management Agreement" (Agreement) whereby taxpayer operating company arranged for the construction of the casino and agreed to subsequently provide for the day-to-day operation of the casino once construction was completed. Taxpayer operating company assisted in obtaining the casino license, but casino owner was the entity which actually held the casino's license.

Under the terms of the Agreement, taxpayer operating company had the responsibility to recruit and train the casino staff members, create and implement a casino marketing program, obtain the casino license on behalf of the owner, acquire the necessary start-up supplies and equipment, and develop start-up and operating budgets.

Under the terms of the Agreement, the casino owner designated taxpayer operating company as the casino owner's "exclusive

agent, to supervise, manage, direct and operate the [casino] during the Terms of this Agreement." Taxpayer operating company was granted "all the prerogatives normally accorded to management in the ordinary course of commerce, including... the collection of receivables, the incurring of trade debts, the approval and payment of checks, the advance of credit and the negotiating and signing of operational leases and contracts." In addition, the Agreement stipulated that "Unless this Agreement expressly provides for an item or service to be at [taxpayer operating company's] own expense, all costs and expenses incurred by [taxpayer holding company]... in the performance of [taxpayer operating company's] obligations under this Agreement shall be for and on behalf of [casino owner]." The Agreement specifically provides that, "All debts and liabilities incurred to third parties by [taxpayer operating company] on behalf of either the [casino] Owner or the Project are and shall remain the sole obligation of [casino] Owner."

In terms of the casino personnel, taxpayer operating company was granted "sole authority to hire, promote, discharge, and supervise all personnel." With the exception of the casino manager, department managers, credit manager, chief financial officer, all the casino employees were designated as employees of the casino owner. All of the costs related to the casino owner's employees were designated as an "Operating Expense of the Project and reimbursed to [taxpayer operating company] on a current basis."

After the Agreement was signed, casino owner began to pay taxpayer operating company money in the form of "management fees" in addition to money which taxpayer operating company characterized as reimbursement for expenses representing the payments advanced by taxpayer operating company to the casino owner's employees. Taxpayer operating company properly included the "management fees" in the gross income tax base as originally filed. However, what remains at issue is the amount of money which taxpayer operating company received from casino owner which was used to pay the casino employees. Taxpayer contends that this money is not subject to gross income tax because it was received while it was acting in an agency capacity. According to taxpayer operating company, "it was under the control of the [casino owner]," it did not "have any right, title or interest in the money or property received from the transaction," but that the money "passed through to third parties." In sum, taxpayer operating company "was merely the agent through which the funds passed to the third parties."

Indiana imposes a gross income tax upon the entire gross receipts of a taxpayer who is a resident or domiciliary of Indiana. IC 6-2.1-2-2(a)(1). For the taxpayer who is not a resident or domiciliary of Indiana, the tax is imposed on the gross receipts which are derived from business activities conducted within the state. IC 6-2.1-2-2(a)(2). However, 45 IAC 1.1-6-10 exempts that portion of a taxpayer's income which the taxpayer receives when acting in an agency capacity. 45 IAC 1.1-1-2 defines an "agent" as follows:

(a) "Agent" means a person or entity authorized by another to transact business on its behalf.

(b) A taxpayer will qualify as an agent if it meets both of the following requirements:

(1) The taxpayer must be under the control of another. An agency relationship is not established unless the taxpayer is under the control of another in transacting business on its behalf. The relationship must be intended by both parties and may be established by contract or implied from the conduct of the parties. The representation of one (1) party that it is the agent of another party without the manifestation of consent and control by the alleged principal is insufficient to establish an agency relationship.

(2) The taxpayer must not have any right, title, or interest in the money or property received from the transaction. The income must pass through, actually or substantively, to the principal or a third party, with the taxpayer being merely a conduit through which the funds pass between a third party and the principal.

In summary, when applying the above factors to a particular taxpayer, the critical factor is that of control. Notwithstanding the fact that the taxpayer acting for another has no right, title or interest in the money or property received, the taxpayer is not entitled to deduct that income from his gross receipts unless the taxpayer was acting as a true agent subject to the control of his principal.

The Indiana Tax Court in Policy Management Systems Corp. v Indiana Department of State Revenue, 720 N.E.2d 20 (Ind. Tax Ct. 1999) and Universal Group Limited v. Indiana Department of State Revenue, 642 N.E.2d 553 (Ind. Tax Ct. 1994) reviewed the relationship between the imposition of the state's gross income tax and agency principles, echoed the regulatory standards set out in 45 IAC 1.1-1-2 and 45 IAC 1.1-6-10, and held that an agency relationship required consent by the principal, acceptance and authority by the agent, and control of the agent by the principal.

The taxpayer has the burden of establishing that the reimbursements received from the building owner were not subject to the state's gross income tax. *See* Western Adjustment and Inspection Co. v. Gross Income Tax Division, 142 N.E.2d 630, 635 (Ind. 1957). When discussing tax exemptions, such as 45 IAC 1.1-6-10, the courts have held that the exemptions are strictly construed against the taxpayer and in favor of taxation. Monarch Steel Co. v. State Bd. Of Tax Comm'r, 699 N.E.2d 809, 811 (Ind. Tax Ct. 1998). Trinity Episcopal Church v. State Bd. Of Tax Comm'r, 694 N.E.2d 816, 818 (Ind. Tax. Ct. 1998).

Taxpayer is correct in pointing out that there are elements of an agent/principal relationship in the Agreement between itself and the casino owner. Taxpayer is also correct that this money was received from the casino owner to pay the salaries of employees who worked in the casino owner's own gambling facility and that the terms of that Agreement *required* the casino owner to reimburse taxpayer operating company for those expenses.

However, neither the terms of the parties' Agreement nor the parties' business practices indicate that the taxpayer operating company was acting as a "true agent" sufficient to warrant finding that the income was not subject to Indiana's gross income tax. In order for a putative agent to avoid the consequences of the gross income tax, the agent must have no control or authority over the

receipts at issue because the receipts must pass unimpeded through to the principal. Any apparent control which the agent exercises over the receipts is illusory because, at all times, the agent is simply acting on behalf of the principal. The agent eludes imposition of the gross income tax because the receipts never belong to the agent and because the principal controls the agent's substantive business activities. *See 45* IAC 1.1-1-2(b)(2).

There are two elements which are missing here. First, casino owner does not exercise the degree of authority over taxpayer operating company characteristic of an agent/principal business relationship; instead, taxpayer operating company retains operational control over the means and manner in which the casino is operated. Taxpayer operating company was given a substantial degree of independent authority in arranging for the construction of the casino, in determining how the casino would be operated, and setting up the casino's operating budget. Taxpayer operating company was given complete authority over the hiring and firing of personnel. As set out in the parties' agreement, "[Taxpayer operating company] shall have the sole authority to hire, promote, discharge, and supervise all personnel." Taxpayer operating company was expected to consult with the casino owner in hiring certain key personnel, but taxpayer operating company was given "the sole right to determine whom to hire." Although the terms of the Agreement specify that most of the casino personnel were the casino owner's employees, insofar as the employees were concerned, they worked for taxpayer operating company. Taxpayer operating company hired the employees and fired these employees. Presumably, if one of these employees was late for work, it was taxpayer operating company – and not the casino owner – which decided if that employee's next paycheck should be docked. Presumably if one of these employees exhibited a high standard of performance, it was up to taxpayer operating company – not the casino owner – to determine whether the employee was entitled to a bonus or a promotion. Insofar as the relationship between these parties, taxpayer operating company was more than simply a paymaster handing out paychecks to the casino owner's employees at the end of each month. In terms of the day-to-day operation of the casino, the casino employees worked for taxpayer operating company and worked under the direct control of the taxpayer operating company.

There are other aspects of this Agreement which demonstrate that casino owner did not have direct control over taxpayer operating company. For example in the matter of casino expenditures and budgets, the Agreement stipulated that taxpayer operating company was "entitled to increase these budgets to cover any expenditures or contingencies that were unanticipated by [taxpayer operating company] at the preparation of these budgets...." In addition, taxpayer operating company was authorized to "reallocate all or any portion of any amount budgeted with respect to any one item in any of the budgets to another item budgeted therein."

In the day-to-day operation of the casino's gambling business, taxpayer operating company was granted "the absolute discretion and authority to determine operating policies and procedures, standards of operation, credit polices, complimentary policies, win payment arrangements, standards of service and maintenance, food and beverage quality and service, pricing, and other standards affecting the [casino], or the operation thereof, to implement all such polices and procedures, and to perform any act on behalf of [casino owner] which [taxpayer operating company] deems necessary or desirable for the operation and maintenance of the [casino]...."

The gambling casino belonged to casino owner and casino owner retained ultimate authority to control the operation of that facility, but the taxpayer operating company retained substantially independent autonomy to run that facility. Although the two parties had a specific and well-defined contractual relationship, this is not the sort of relationship envisaged in the regulation which states that, "The taxpayer must be under the control of another. "An agency relationship is not established unless the taxpayer is under the control of another in transacting business on its behalf." 45 IAC 1.1-1-2(b). Despite the generalized intention of these two parties, taxpayer operating company is not a "true agent" of the casino owner sufficient to establish that this money was not subject to gross income tax because the casino owner – as principal – did not retain control over the manner in which taxpayer operating company operated the casino business. The parties' agreement establishes the relationship between taxpayer operating company and the casino owner; it does not permit the casino owner to dictate the manner in which taxpayer holding company fulfills its responsibilities under that agreement.

In addition, a second element is missing. Taxpayer operating company has not established that it was merely acting as a conduit for the money eventually paid over to the casino employees. 45 IAC 1.1-1-2(b)(2), in part, requires that, "The taxpayer must not have any right, title, or interest in the money or property received from the transaction. The income must pass through, actually or substantially, to the principal or a third party, with the taxpayer being merely a conduit through which the funds pass between a third party and the principal." Id. In order to establish that it was acting as a "merely a conduit," taxpayer operating company must establish that only the employees had a beneficial interest in the money. As the Tax Court stated in Universal Group Ltd. v. Indiana Dept. of Revenue, 609 N.E.2d 48 (Ind. Tax Ct. 1993), "[T]he taxpayer's beneficial interest is income is central to the receipt of gross income." Id. at 50. Taxpayer operating company had a beneficial interest in seeing that the casino employees it hired, supervised, and directed were paid for the work the employees performed in operating the casino. Because taxpayer operating company was charged with the responsibility for successfully operating the casino, it had a direct beneficial interest in the money it received from casino owner. Taxpayer operating company was not simply a disinterested paymaster distributing paychecks on behalf of the casino owner. Its own interests were inextricably bound with those of the employees, the casino owner, and the money it received from casino owner.

In order to qualify for the agency status it seeks, taxpayer operating company must demonstrate that the casino owner retained the right to dictate the manner in which taxpayer operating company ran the casino and that taxpayer operating company had no right

to or control over the money received from the casino owner. "A taxpayer will qualify as an agent if it meets *both* of the... requirements." 45 IAC 1.1-1-2(b) (*Emphasis added*). It is plain that casino owner did not retain the right to control the manner in which taxpayer operating company managed the casino business; furthermore, taxpayer holding company had a beneficial interest in the money received from the casino owner.

FINDING

Taxpayer's protest is respectfully denied.

DEPARTMENT OF STATE REVENUE

0420030320.LOF

LETTER OF FINDINGS NUMBER: 03-0320
Sales and Use Tax
For the Years 2000-2002

NOTICE: Under IC 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUE

I. Sales and Use Tax-Imposition of Use Tax

Authority: IC 6-8.1-5-1 (b), IC 6-2.5-3-2 (a).

The taxpayer protests the imposition of use tax on certain materials.

STATEMENT OF FACTS

The taxpayer is an Indiana corporation operating a chain of small convenience stores. After an audit, the Indiana Department of Revenue, hereinafter referred to as the "department," assessed additional use tax, interest, and penalty. The taxpayer protested a portion of the assessment. A hearing was scheduled on the taxpayer's protest. The taxpayer failed to appear or submit any documentation in support of its claim that the department improperly imposed use tax. Therefore this Letter of Findings is based on the documentation in the file.

I. Sales and Use Tax-Imposition of Use Tax

DISCUSSION

Indiana imposes an excise tax on tangible personal property stored, used, or consumed in Indiana when no sales tax was paid at the time of purchase. IC 6-2.5-3-2 (a). All tax assessments are presumed to be accurate. The taxpayer bears the burden of proving that any assessment is incorrect. IC 6-8.1-5-1 (b).

The taxpayer purchased equipment and materials to be used in its business. Most invoices for consumable supplies had sales tax paid at the time of purchase. Some invoices did not, however, indicate that sales tax had been paid at the time of purchase. The department assessed use tax on the taxpayer's use of these items. The taxpayer protested the assessments of use tax on materials used in particular maintenance and repair jobs in its convenience stores. The taxpayer contends that sales tax was paid at the time of the purchase of the materials. Therefore the taxpayer contends that it does not owe use tax on the use of the items. The taxpayer failed, however, to provide any documentation supporting its contention. Therefore, the taxpayer did not sustain its burden of proving that the use tax was improperly imposed.

FINDING

The taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0420030374.LOF

LETTER OF FINDINGS NUMBER: 03-0374
Withholding Tax and Sales Tax
Responsible Officer
For the Tax Period 1999-2001

NOTICE: Under IC 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUE

1. Sales and Use and Withholding Tax-Responsible Officer Liability

Authority: IC 6-3-4-8(f), IC 6-2.5-9-3, IC 6-8.1-5-1(b).

The taxpayer protests the assessment of responsible officer liability for unpaid corporate withholding taxes.

STATEMENT OF FACTS

The taxpayer was an incorporator, shareholder, and employee of a corporation that did not remit the proper amount of sales and withholding taxes to Indiana. The taxpayer was personally assessed for the taxes, penalties and interest. The taxpayer protested these assessments and a hearing was held. This Letter of Findings results.

1. Sales and Withholding Tax-Responsible Officer Liability

DISCUSSION

The proposed sales tax liability was issued under authority of IC 6-2.5-9-3 that provides as follows:

An individual who:

(1) is an individual retail merchant or is an employee, officer, or member of a corporate or partnership retail merchant; and

(2) has a duty to remit state gross retail or use taxes to the department;

holds those taxes in trust for the state and is personally liable for the payment of those taxes, plus any penalties and interest attributable to those taxes, to the state.

The proposed withholding taxes were assessed against the taxpayer pursuant to IC 6-3-4-8(f), which provides that "In the case of a corporate or partnership employer, every officer, employee, or member of such employer, who, as such officer, employee, or member is under a duty to deduct and remit such taxes shall be personally liable for such taxes, penalties, and interest."

Indiana Department of Revenue assessments are prima facie evidence that the taxes are owed by the taxpayer who has the burden of proving that assessment is incorrect. IC 6-8.1-5-1 (b).

The issue to be determined in this case is whether or not the taxpayer was a person who was responsible for remitting the corporate trust taxes to the Indiana Department of Revenue. Although given ample opportunity to do so, the taxpayer did not submit any documentation indicating that he was not a person with the responsibility to remit trust taxes to the state. Therefore, the taxpayer failed to sustain his burden of proving that the trust taxes were incorrectly assessed against him personally.

FINDING

The taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0120030464P.LOF

LETTER OF FINDINGS NUMBER: 03-0464P
Income Tax
For the Calendar Year 2002

NOTICE: Under IC 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superceded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUE

I. Tax Administration – Penalty

Authority: IC 6-8.1-10-2.1(d); 45 IAC 15-11-2;

The taxpayer protests the late penalty.

STATEMENT OF FACTS

The late penalty was assessed on the late payment of an annual income tax return for the calendar year 2002.

The taxpayer is an individual residing outside of Indiana.

I. Tax Administration – Penalty

DISCUSSION

The taxpayer argues the late penalty should be abated as the error was the result of a malfunction in the taxpayer's computer equipment.

The Department points out that the taxpayer is responsible for the proper operation of the taxpayer's computer equipment. As such, the taxpayer is liable for any errors resulting from the malfunction of the computer equipment.

45 IAC 15-11-2(b) states, "Negligence, on behalf of a taxpayer is defined as the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Negligence would result from a taxpayer's carelessness,

thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations. Ignorance of the listed tax laws, rules and/or regulations is treated as negligence. Further, failure to read and follow instructions provided by the department is treated as negligence. Negligence shall be determined on a case by case basis according to the facts and circumstances of each taxpayer."

The Department finds the taxpayer was inattentive of tax duties. Inattention is negligence and negligence is subject to penalty. As such, the Department finds the penalty proper and denies the penalty protest.

FINDING

The taxpayer's penalty protest is denied.

DEPARTMENT OF STATE REVENUE

0420020105.LOF

LETTER OF FINDINGS NUMBER: 04-0105
Sales Tax
Responsible Officer
For the Tax Period 1999-2000

NOTICE: Under IC 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUE

1. Sales Tax-Responsible Officer Liability

Authority: IC 6-2.5-9-3, IC 6-8.1-5-1(b), IC 6-2.5-2-1, IC 6-2.5-3-2, IC 6-2.5-3- 7, 45 IAC 2.2-8-12.

The taxpayer protests the assessment of responsible officer liability for unpaid corporate sales taxes.

II. Tax Administration- Ten Percent (10%) Negligence Penalty

Authority: IC 6-8.1-10-2.1, 45 IAC 15-11-2 (b).

The taxpayer protests the imposition of the ten percent (10%) negligence penalty

STATEMENT OF FACTS

The taxpayer was a fifty percent (50%) stockholder of a Subchapter S corporation that was audited for the tax period 1999-2000. As a result of the audit, the Indiana Department of Revenue assessed additional sales taxes, interest, and penalty against the corporation. The corporation did not pay the assessment. The department then assessed the corporate sales tax, interest, and penalty against the taxpayer as a responsible officer of that corporation. The taxpayer protested a portion of the assessment of sales tax and penalty. A telephone hearing was held and this Letter of Findings results.

1. Sales Tax-Responsible Officer Liability

DISCUSSION

Indiana Department of Revenue assessments are prima facie evidence that the taxes are owed by the taxpayer who has the burden of proving that the assessment is incorrect. IC 6-8-1-5-1(b).

The proposed sales tax liability was issued under authority of IC 6-2.5-9-3 that provides as follows:

An individual who:

(1) is an individual retail merchant or is an employee, officer, or member of a corporate or partnership retail merchant; and

(2) has a duty to remit state gross retail or use taxes to the department;

holds those taxes in trust for the state and is personally liable for the payment of those taxes, plus any penalties and interest attributable to those taxes, to the state.

The taxpayer admits that he was a person with the duty to remit sales tax to the state. The taxpayer contends, however, that the amount of the sales tax assessment against the corporation and then transferred to him is too high. The corporation sold cigarettes. Retail merchants are required to collect and remit sales tax on retail sales of tangible personal property. IC 6-2.5-2-1. Indiana imposes a complimentary use tax on tangible personal property stored, used, or consumed in Indiana if it was purchased in a retail transaction and no sales tax was paid at the time of purchase. IC 6-2.5-3-2. There are certain statutory exemptions from the use tax. Retail merchants have the burden of proving that a particular item's use qualifies it for exemption from the use tax. As an alternative, merchants can accept a properly completed form certifying that the use of the purchased item is exempt from the use tax. IC 6-2.5-3-7. The receipt of a properly completed exemption certificate transfers the burden of proving that the purchaser purchased the item for an exempt use from the retailer to the purchaser.

The corporation did not collect and remit sales tax on sales to several customers because the taxpayer believed that those

customers would use the cigarettes in a manner qualifying them for exemption from the Indiana use tax. At the time of the audit, the corporation could not produce evidence that the cigarettes were purchased for an exempt use. The corporation also did not have exemption certificates from the purchasers. The department gave the corporation the opportunity to obtain a properly executed "Special Sales/Use Tax Exemption Certificate," form AD-70, from each of the customers. The corporation submitted four certificates. One was not completed. Three were completely filled out including Registered Retail Merchant Nos. that properly identified the businesses. Of these three, one was signed by the company president, one was signed by a clerk, and one was signed by a manager. The corporation was only given credit in the audit for the certificate signed by the president. The law does not require that the certificate be signed by an officer, merely that it be filled out... "in the form prescribed by the department,".... This requirement is further clarified at 45 IAC 2.2-8-12 as follows:

> An exemption certificate issued by a purchaser shall not be valid unless it is executed in the prescribed and approved form and unless all information requested on such form is completed.

The law, regulations, and blank on the form do not indicate that the signatory must be an officer. Therefore, the three completed forms meet the department's guidelines to exempt the sales from assessment. Therefore the corporation's sales tax assessment must be corrected to reflect the two additional certificates. As a responsible officer, the taxpayer is only personally liable for the corporation's actual sales tax liability.

FINDING

The taxpayer's protest is sustained to the extent that tax was assessed on sales made to the customers who completed a "Special Sales/Use Tax Exemption Certificate" and the certificate was signed by the manager or clerk.

I. Tax Administration- Ten Per Cent (10%) Negligence Penalty

DISCUSSION

The taxpayer protests the imposition of the ten percent (10%) negligence penalty pursuant to IC 6-8.1-10-2.1. Indiana Regulation 45 IAC 15-11-2 (b) clarifies the standard for the imposition of the negligence penalty as follows:

> Negligence, on behalf of a taxpayer is defined as the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Negligence would result from a taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations. Ignorance of the listed tax laws, rules and/or regulations is treated as negligence. Further, failure to read and follow instructions provided by the department is treated as negligence. Negligence shall be determined on a case by case basis according to the facts and circumstances of each taxpayer.

The taxpayer did not fulfill his statutory duty to assure that the corporation collected and remitted the proper amount of sales tax to the state. This failure to follow the department's instructions in this matter constitutes negligence.

FINDING

The taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0420040106.LOF

LETTER OF FINDINGS NUMBER: 04-0106
Sales Tax
Responsible Officer
For the Tax Period 1999-2000

NOTICE: Under IC 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUE

I. Sales Tax-Responsible Officer Liability

Authority: IC 6-2.5-9-3, IC 6-8.1-5-1(b), IC 6-2.5-2-1, IC 6-2.5-3-2, IC 6-2.5-3-7, 45 IAC 2.2-8-12.

The taxpayer protests the assessment of responsible officer liability for unpaid corporate sales taxes.

II. Tax Administration- Ten Percent (10%) Negligence Penalty

Authority: IC 6-8.1-10-2.1, 45 IAC 15-11-2 (b).

The taxpayer protests the imposition of the ten percent (10%) negligence penalty.

STATEMENT OF FACTS

The taxpayer was a fifty percent (50%) stockholder of a Subchapter S corporation that was audited for the tax period 1999-2000. As a result of the audit, the Indiana Department of Revenue, hereinafter referred to as the "department," assessed additional sales

taxes, interest, and penalty against the corporation. The corporation did not pay the assessment. The department then assessed the corporate sales tax, interest, and penalty personally against the taxpayer as a responsible officer of that corporation. The taxpayer protested a portion of the assessment of sales tax and penalty. A telephone hearing was held and this Letter of Findings results.

I. Sales Tax-Responsible Officer Liability

DISCUSSION

Indiana Department of Revenue assessments are prima facie evidence that the taxes are owed by the taxpayer who has the burden of proving that the assessment is incorrect. IC 6-8-1-5-1(b).

The proposed sales tax liability was issued under authority of IC 6-2.5-9-3 that provides as follows:

An individual who:

(1) is an individual retail merchant or is an employee, officer, or member of a corporate or partnership retail merchant; and

(2) has a duty to remit state gross retail or use taxes to the department;

holds those taxes in trust for the state and is personally liable for the payment of those taxes, plus any penalties and interest attributable to those taxes, to the state.

The taxpayer admits that he was a person with the duty to remit sales tax to the state. The taxpayer contends, however, that the amount of the assessment is too high. The corporation sold cigarettes. Retail merchants are required to collect and remit sales tax on retail sales of tangible personal property. IC 6-2.5-2-1. Indiana imposes a complimentary use tax on tangible personal property stored, used, or consumed in Indiana if it was purchased in a retail transaction and no sales tax was paid at the time of purchase. IC 6-2.5-3-2. There are certain statutory exemptions from the use tax. Retail merchants have the burden of proving that a particular item's use qualifies it for exemption from the use tax or receiving a properly completed form certifying that use of the purchased item is exempt from the use tax. The receipt of a properly completed exemption certificate transfers the burden of proving that the purchaser purchased the item for an exempt use from the retailer to the purchaser. IC 6-2.5-3-7.

The corporation did not collect and remit sales tax on sales to several customers because the taxpayer believed that those customers would use the cigarettes in a manner qualifying them for exemption from the Indiana use tax. At the time of the audit, the corporation could not produce evidence that the cigarettes were purchased for an exempt use. The corporation also did not have exemption certificates from the purchasers. The department gave the corporation the opportunity to obtain a properly executed "Special Sales/Use Tax Exemption Certificate," form AD-70, from each of the customers. The corporation submitted four certificates. One was not completed. Three were completely filled out including Registered Retail Merchant Nos. that properly identified the businesses. Of these three, one was signed by the company president, one was signed by a clerk, and one was signed by a manager. The corporation was only given credit in the audit for the certificate signed by the president. The law requires that the certificate be that it be filled out... "in the form prescribed by the department,".... This requirement is further clarified at 45 IAC 2.2-8-12 as follows:

An exemption certificate issued by a purchaser shall not be valid unless it is executed in the prescribed and approved form and unless all information requested on such form is completed.

The law, regulations, and blank on the form do not require that the signatory be an officer. Therefore, the three completed forms meet the department's guidelines to exempt the sales from assessment. Therefore the corporation's sales tax assessment must be corrected to reflect the two additional certificates. As a responsible officer, the taxpayer is only liable for the actual sales tax liability.

FINDING

The taxpayer's protest is sustained to the extent that tax was assessed on sales made to the customers who completed a "Special Sales/Use Tax Exemption Certificate" and the certificate was signed by the manager or clerk.

I. Tax Administration- Ten Percent (10%) Negligence Penalty

DISCUSSION

The taxpayer protests the imposition of the ten percent (10%) negligence penalty pursuant to IC 6-8.1-10-2.1. Indiana Regulation 45 IAC 15-11-2 (b) clarifies the standard for the imposition of the negligence penalty as follows:

Negligence, on behalf of a taxpayer is defined as the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Negligence would result from a taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations. Ignorance of the listed tax laws, rules and/or regulations is treated as negligence. Further, failure to read and follow instructions provided by the department is treated as negligence. Negligence shall be determined on a case by case basis according to the facts and circumstances of each taxpayer.

The taxpayer did not fulfill his statutory duty to assure that the corporation collected and remitted the proper amount of sales tax to the state. This failure to follow the department's instructions in this matter constitutes negligence.

FINDING

The taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0220040118.LOF

LETTER OF FINDINGS: 04-0118
Indiana Corporate Income Tax
For 1999, 2000, and 2001

NOTICE: Under IC 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of the document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUES

I. Money Earned from Licensing Computer Software to Indiana Customers – Adjusted Gross Income Tax.

Authority: IC 6-3-2-2(a); Earman Oil Co. v. Burroughs Corp., 625 F.2d 1291 (5th Cir. 1980); RRX Indus., Inc. v. Lab-Con, Inc., 772 F.2d 543 (9th Cir. 1985); Colonial Life Ins. Co. v. Electronic Data Sys. Corp. 817 F.Supp. 235 (D. N.H. 1993); South Cent. Bell Tel. Co. v. Barthelemy, 643 So.2d 1240, 1246 (La. 1994); American Business Information Inc. v. Egr, 650 N.W.2d 251 (Neb. 2002); Black's Law Dictionary (7th ed. 1999).

Taxpayer maintains that the Department of Revenue (Department) erred when it determined that money it earned from licensing computer software to Indiana customers should have been included in the numerator of the sales factor.

II. Abatement of the Ten-Percent Negligence Penalty.

Authority: IC 6-8.1-10-2.1; IC 6-8.1-10-2.1(d); 45 IAC 15-11-2(b); 45 IAC 15-11-2(c).

Taxpayer asks that the Department abate the ten-percent negligence penalty.

STATEMENT OF FACTS

Taxpayer is an out-of-state company in the business of creating and licensing computer software. Taxpayer also performs certain data processing services at its out-of-state location.

The Department conducted an audit review of taxpayer's income tax returns and business records. As a result of that audit review, the Department concluded that taxpayer had not properly reported a portion of its income. The audit made adjustments resulting in the assessment of additional state income tax.

Taxpayer disagreed with a number of the audit adjustments and submitted a protest to that effect. An administrative hearing was conducted during which taxpayer further explained the basis for its protest. This Letter of Findings results.

DISCUSSION

I. Money Earned from Licensing Computer Software to Indiana Customers – Adjusted Gross Income Tax.

Taxpayer entered into agreements with Indiana customers which enabled the customers to make use of taxpayer's computer software. Taxpayer characterizes these as licensing agreements. The audit concluded otherwise finding that the taxpayer was engaged in the sale of tangible personal property and that the money attributable to the sales should have been included in the numerator of the sales factor. The audit arrived at this conclusion because taxpayer shipped the computer software to the Indiana customers by way of common carrier and because taxpayer – in its 10-K Report – stated that "revenue from licensing of software products is recognized upon shipment of the products... [the] shipped products would be tangible personal property and the income from tangible personal property shipped to Indiana customers would be included in the sales factor numerator." Taxpayer admits that it sent computer software to its Indiana customers by means of common carrier and that the Indiana customer received the software by way of a tangible object; taxpayer sent computer disks, the common carrier delivered the computer disks, and the Indiana customer received the computer disks. However, taxpayer maintains that computer disks are irrelevant in resolving the tax question and that the software could be transferred to the customer by way of a computer modem or some other non-corporeal means.

When an Indiana customer decides that it wants to make use of taxpayer's computer software, the customer signs a "License Agreement." This Agreement grants to the customer a "non-exclusive, non-transferable personal license to use the Software...." Taxpayer retains the "[t]itle and full ownership rights to the software...." The Indiana customer specifically "acknowledges and agrees that the Software is the property and contains the trade secrets of [taxpayer]." The Agreement limits the rights of the Indiana customer; the Indiana customer may only use the software on certain, designated computers. The Indiana customer is not permitted to make copies of the software except for its own internal use. The Indiana customer is required to "implement technical and procedural methods to prevent use of the Software other than as specifically authorized under [the Agreement]." Taxpayer points to the Agreement as supporting the proposition that the Indiana customer acquires only an insubstantial, intangible right to the software.

The issue is whether taxpayer is earning money from "tangible personal property" or from "intangible personal property." IC 6-3-2-2(a) states that, "With regard to corporations and non resident persons, 'adjusted gross income derived from sources within Indiana', for the purpose of this article, shall mean and include (1) income from real or *tangible personal property* located in this state; (2) income from doing business in this state... (5) income from stocks, bonds, notes, bank deposits, patents, copyrights... and other *intangible personal property* if the receipt form the intangible is attributable to Indiana under section 2.2 of this chapter."

(*Emphasis added*). Therefore, IC 6-3-2-2(a) distinguishes between tangible personal property and intangible personal property for purposes of apportioning income to Indiana.

The Department is unable to agree with taxpayer's assertion that, "Revenue from the licensing of software is not from the sale of tangible personal property." Tangible personal property is defined as "Corporeal personal property of any kind... that can be seen, weighed, measured, felt, or touch, or is in any way perceptible to the senses." Black's Law Dictionary 1234 (7th ed. 1999). Computer software is not an insubstantial intellectual concept, "but rather is knowledge recorded in a physical form which has physical existence, takes up space on the tape, disc, or hard drive, makes physical things happen, and can be perceived by the senses." South Cent. Bell Tel. Co. v. Barthelemy, 643 So.2d 1240, 1246 (La. 1994). *See also* American Business Information Inc. v. Egr, 650 N.W.2d 251 (Neb. 2002) (holding that for purposes of the Nebraska apportionment statute, computer software was tangible personal property). The fact that the software information can be recorded or transferred from one medium to another does not alter the nature of the software acquired by the Indiana customer. "[The software] still has corporeal qualities and is inextricably intertwined with a corporeal object. The software must be stored in physical form on some tangible object somewhere." South Cent. Bell Tel. at 1248. Therefore, regardless of whether the software is transferred by means of disks, magnetic tape, hard drive, or modem, the software is a tangible object prior to delivery and is a tangible object when utilized by the Indiana customer. In this sense, taxpayer's transfer of the computer software to an Indiana customer is no different than the transfer of books, audio recordings, DVD's, or computer games which embody intellectual property but which are commonly treated as tangible personal property. This principle is consistent with the position of other courts which have held computer software to be goods subject to U.C.C. Article 2 governing the sale of goods. RRX Indus., Inc. v. Lab-Con, Inc., 772 F.2d 543, 546-47 (9th Cir. 1985); Earman Oil Co. v. Burroughs Corp., 625 F.2d 1291, 1293 (5th Cir. 1980); Colonial Life Ins. Co. v. Electronic Data Sys. Corp. 817 F.Supp. 235, 239-39 (D. N.H. 1993).

In addition, the fact that the agreement between taxpayer and its Indiana customers is couched in terms of a "License Agreement" limiting the Indiana licensee's right to use the software is not dispositive. "[A] license to use... software, without transferring the software, would be of no use to [taxpayer], and the license to use the software is inseparable from the physical manifestation of the software in recorded form." South Cent. Bell Tel. 643 So.2d at 1249.

The audit was correct in determining that the software was tangible personal property and the money earned from the marketing of that software to Indiana customers should have been included in the numerator of the sales factor for purposes of determining taxpayer Indiana adjusted gross income.

FINDING

Taxpayer's protest is respectfully denied.

II. Abatement of the Ten-Percent Negligence Penalty.

Taxpayer asks that the Department waive the ten-percent negligence penalty on the ground that it filed its original tax returns based upon a reasonable interpretation of the statutes and that any omissions or errors were not due to willful neglect.

IC 6-8.1-10-2.1 requires that a ten-percent penalty be imposed if the tax deficiency results from the taxpayer's negligence. Departmental regulation 45 IAC 15-11-2(b) defines negligence as "the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer." Negligence is to "be determined on a case-by-case basis according to the facts and circumstances of each taxpayer." Id.

IC 6-8.1-10-2.1(d) allows the Department to waive the penalty upon a showing that the failure to pay the deficiency was based on "reasonable cause and not due to willful neglect." Departmental regulation 45 IAC 15-11-2(c) requires that in order to establish "reasonable cause," the taxpayer must demonstrate that it "exercised ordinary business care and prudence in carrying out or failing to carry out a duty giving rise to the penalty imposed...."

In regards to the 1999, 2000, and 2001 assessments, the Department agrees that taxpayer has demonstrated a reasonable basis for the positions originally taken.

FINDING

Taxpayer's protest is sustained.

DEPARTMENT OF STATE REVENUE

0420040144.LOF

LETTER OF FINDINGS NUMBER: 04-0144
Responsible Officer Liability—Duty to Remit Sales Tax
For Tax Year 2001

NOTICE: Under IC 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUES

I. Responsible Officer Liability—Duty to Remit Sales and Withholding Taxes

Authority: IC § 6-2.5-2-1; IC § 6-2.5-9-3; 45 IAC 2.2-2-2; 45 IAC 2.2-9-4; *Indiana Department of Revenue v. Safayan,* 654 N.E.2d 270, 273 (Ind. 1995)

Taxpayer protests the Department's determination of responsible officer liability for sales tax not paid during the assessment period.

STATEMENT OF FACTS

Taxpayer protests the Department's determination of responsible officer liability, based on the following facts. Taxpayer is only a minority shareholder in the business whose sales tax liability is at issue in this protest. The business, a golf course located in southern Indiana, is owned by husband and wife, Mr. and Mrs. B. Taxpayer, who is located in Indianapolis, visited the business approximately two years ago. He has never had access to the financial system. He was never a signatory or guarantor on any accounts or loans. He has never been authorized to execute checks or legal documents. Additional facts will be supplied as necessary.

I. Responsible Officer Liability—Duty to Remit Sales and Withholding Taxes

A gross retail (sales) tax is imposed on retail transactions made in Indiana. While this sales tax is levied on the purchaser of retail goods, it is the retail merchant who must "collect the tax as agent for the state." *See*, IC § 6-2.5-2-1 and 45 IAC 2.2-2-2

Individuals may be held personally responsible for failing to remit any sales tax. In determining who may acquire personal liability, IC § 6-2.5-9-3 is applicable:

An individual who:

(1) is an individual retail merchant or is an employee, officer, or member of a corporate or partnership retail merchant; and

(2) has a duty to remit state gross retail or use taxes (as described in IC § 6-2.5-3-2) to the department;

holds those taxes in trust for the state and is personally liable for the payment of those taxes, plus any penalties and interest attributable to those taxes to the state.

See also, 45 IAC 2.2-9-4.

In order to determine which persons are personally liable for the payment of these "trust" taxes, the Department must initially determine which parties had a duty to remit the taxes to the Department. *Indiana Department of Revenue v. Safayan*, 654 N.E.2d 270, 273 (Ind. 1995) is instructive:

The method of determining whether a given individual is a responsible person is the same under the gross retail and the withholding tax…. An individual is personally liable for unpaid sales and withholding taxes if she is an officer, employee, or member of the employer who has a duty to remit the taxes to the Department…. The statutory duty to remit trust taxes falls on any officer or employee who has the authority to see that the taxes are paid.

The Indiana Supreme Court in *Safayan* identified three relevant factors:

(1) the person's position within the power structure of the corporation;

(2) the authority of the officer or employee as established by the articles of incorporation, bylaws, or the person's employment contract; and

(3) whether the person actually exercised control over the finances of the business.

The Supreme Court also stated in *Safayan* that "where the individual was a high ranking officer, we presume that he or she had sufficient control over the company's finances to give rise to a duty to remit the trust taxes." Id. at 273. The Department further notes that *Safayan* specifically rejects the defense of failure by an officer to exercise oversight.

Taxpayer has provided documents, and the Department records corroborate those documents, showing that taxpayer was a passive investor in the business. As such, taxpayer had no active involvement in the management of the business.

The Department finds that taxpayer has provided sufficient evidence to overturn the Department's initial determination of responsible officer liability.

FINDING

Taxpayer's protest concerning the Department's determination of responsible officer liability for unpaid gross retail taxes is sustained.

DEPARTMENT OF STATE REVENUE

0420040145.LOF

LETTER OF FINDINGS NUMBER: 04-0145
Responsible Officer Liability—Duty to Remit Sales Tax
For Tax Year 2001

NOTICE: Under IC 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication.

It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUES

I. Responsible Officer Liability—Duty to Remit Sales and Withholding Taxes

Authority: IC § 6-2.5-2-1; IC § 6-2.5-9-3; 45 IAC 2.2-2-2; 45 IAC 2.2-9-4; *Indiana Department of Revenue v. Safayan,* 654 N.E.2d 270, 273 (Ind. 1995)

Taxpayer protests the Department's determination of responsible officer liability for sales tax not paid during the assessment period.

STATEMENT OF FACTS

Taxpayer protests the Department's determination of responsible officer liability, based on the following facts. Taxpayer is only a minority shareholder in the business whose sales tax liability is at issue in this protest. The business, a golf course located in southern Indiana, is owned by husband and wife, Mr. and Mrs. B. Taxpayer, who is located in Indianapolis, visited the business approximately two years ago. He has never had access to the financial system. He was never a signatory or guarantor on any accounts or loans. He has never been authorized to execute checks or legal documents. Additional facts will be supplied as necessary.

I. Responsible Officer Liability—Duty to Remit Sales and Withholding Taxes

A gross retail (sales) tax is imposed on retail transactions made in Indiana. While this sales tax is levied on the purchaser of retail goods, it is the retail merchant who must "collect the tax as agent for the state." *See*, IC § 6-2.5-2-1 and 45 IAC 2.2-2-2.

Individuals may be held personally responsible for failing to remit any sales tax. In determining who may acquire personal liability, IC § 6-2.5-9-3 is applicable:

An individual who:

(1) is an individual retail merchant or is an employee, officer, or member of a corporate or partnership retail merchant; and

(2) has a duty to remit state gross retail or use taxes (as described in IC § 6-2.5-3-2) to the department;

holds those taxes in trust for the state and is personally liable for the payment of those taxes, plus any penalties and interest attributable to those taxes to the state.

See also, 45 IAC 2.2-9-4.

In order to determine which persons are personally liable for the payment of these "trust" taxes, the Department must initially determine which parties had a duty to remit the taxes to the Department. *Indiana Department of Revenue v. Safayan*, 654 N.E.2d 270, 273 (Ind. 1995) is instructive:

The method of determining whether a given individual is a responsible person is the same under the gross retail and the withholding tax…. An individual is personally liable for unpaid sales and withholding taxes if she is an officer, employee, or member of the employer who has a duty to remit the taxes to the Department…. The statutory duty to remit trust taxes falls on any officer or employee who has the authority to see that the taxes are paid.

The Indiana Supreme Court in *Safayan* identified three relevant factors:

(1) the person's position within the power structure of the corporation;

(2) the authority of the officer or employee as established by the articles of incorporation, bylaws, or the person's employment contract; and

(3) whether the person actually exercised control over the finances of the business.

The Supreme Court also stated in *Safayan* that "where the individual was a high ranking officer, we presume that he or she had sufficient control over the company's finances to give rise to a duty to remit the trust taxes." Id. at 273. The Department further notes that *Safayan* specifically rejects the defense of failure by an officer to exercise oversight.

Taxpayer has provided documents, and the Department records corroborate those documents, showing that taxpayer was a passive investor in the business. As such, taxpayer had no active involvement in the management of the business.

The Department finds that taxpayer has provided sufficient evidence to overturn the Department's initial determination of responsible officer liability.

FINDING

Taxpayer's protest concerning the Department's determination of responsible officer liability for unpaid gross retail taxes is sustained.

DEPARTMENT OF STATE REVENUE

0320040188P.LOF

LETTER OF FINDINGS NUMBER: 04-0188P
Withholding Tax
For the months of January, February, March, April, & May 2002

NOTICE: Under IC 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication.

It shall remain in effect until the date it is superceded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUE

I. Tax Administration – Penalty

Authority: IC 6-8.1-10-2.1(d); 45 IAC 15-11-2;

The taxpayer protests the late penalty.

STATEMENT OF FACTS

The late penalty was assessed on the late payment of monthly withholding tax returns for the months of January, February, March, April, and May 2002.

The taxpayer is a company residing in Indiana.

I. Tax Administration – Penalty

DISCUSSION

The taxpayer argues the late penalty should be abated as (1) the taxpayer relied on the payroll provider, and (2) the Department failed to send the filing frequency change letter to the payroll provider even though the payroll provider sent the Department a Power-of-Attorney form.

With regard to the reliance on the payroll provider, the taxpayer's payroll provider is in an agency relationship with the taxpayer, and therefore, the taxpayer is liable for the payroll provider's actions when the payroll provider acts on behalf of the taxpayer. 45 IAC 1-1-54.

With regard to the Power-of-Attorney form, the only way the Department can control a Power-of-Attorney form is for the taxpayer to be registered for EFT filing and identify the taxpayer's payroll provider as the payroll contact (as determined by Department policy, the EFT Program Information Guide). The taxpayer is not registered for EFT filing. Therefore, the Department sent the filing frequency change letter to the contact of record which was the taxpayer. In addition, the filing frequency change letter informed the taxpayer to advise the taxpayer's payroll provider of the filing frequency change.

45 IAC 15-11-2(b) states, "Negligence, on behalf of a taxpayer is defined as the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Negligence would result from a taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the
Indiana Code or department regulations. Ignorance of the listed tax laws, rules and/or regulations is treated as negligence. Further, failure to read and follow instructions provided by the department is treated as negligence. Negligence shall be determined on a case by case basis according to the facts and circumstances of each taxpayer."

The Department finds the taxpayer was inattentive of tax duties as the taxpayer failed to advise the payroll provider of the filing frequency change. Inattention is negligence and negligence is subject to penalty. As such, the Department finds the penalty proper and denies the penalty protest.

FINDING

The taxpayer's penalty protest is denied.

DEPARTMENT OF STATE REVENUE

0320040260.LOF

LETTER OF FINDINGS NUMBER: 04-0260
Withholding Tax
Responsible Officer
For the Tax Period 1995-1996

NOTICE: Under IC 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUE

1. Withholding Tax-Responsible Officer Liability

Authority: IC 6-3-4-8(f), IC 6-8.1-5-1(b), Indiana Department of Revenue v. Safayan 654 N.E. 2nd 279 (Ind.1995).

The taxpayer protests the assessment of responsible officer liability for unpaid corporate withholding taxes.

STATEMENT OF FACTS

The taxpayer was associated with a corporation that did not properly remit withholding taxes to the state during the tax period 1995-1996. The Indiana Department of Revenue, hereinafter referred to as the "department," assessed the unpaid withholding taxes, interest, and penalty against the taxpayer as a responsible officer of that corporation. The taxpayer protested the assessment of tax, interest, and penalty. A hearing was held and this Letter of Findings results.

1. Withholding Tax - Responsible Officer Liability

DISCUSSION

Indiana Department of Revenue assessments are prima facie evidence that the taxes are owed by the taxpayer who has the burden of proving that the assessment is incorrect. IC 6-8-1-5-1(b).

The proposed withholding taxes were assessed against the taxpayer pursuant to IC 6-3-4-8(f), which provides that "In the case of a corporate or partnership employer, every officer, employee, or member of such employer, who, as such officer, employee, or member is under a duty to deduct and remit such taxes shall be personally liable for such taxes, penalties, and interest."

Pursuant to Indiana Department of Revenue v. Safayan 654 N.E. 2nd 279 (Ind.1995), any officer, employee, or other person who has the authority to see that they are paid has the statutory duty to remit withholding taxes to the state. The taxpayer submitted substantial documentation indicating that he did not have a duty to remit the withholding taxes to the state. Therefore, he is not personally liable for said taxes.

FINDING

The taxpayer's protest is sustained.

DEPARTMENT OF STATE REVENUE

0320040305.LOF

LETTER OF FINDINGS NUMBER: 04-0305
Withholding Tax
Responsible Officer
For the Tax Period 1997

NOTICE: Under IC 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUE

1. Withholding Tax-Responsible Officer Liability

Authority: IC 6-3-4-8(f), IC 6-8.1-5-1(b), Indiana Department of Revenue v. Safayan 654 N.E. 2nd 279 (Ind.1995).

The taxpayer protests the assessment of responsible officer liability for unpaid corporate withholding taxes.

STATEMENT OF FACTS

The taxpayer was a shareholder in a subchapter S corporation that did not properly remit withholding taxes to the state during the tax period 1997. The Indiana Department of Revenue, hereinafter referred to as the "department," assessed the unpaid withholding taxes, interest, and penalty against the taxpayer as a responsible officer of that corporation. The taxpayer protested the assessment of tax. A hearing was held and this Letter of Findings results.

1. Withholding Tax-Responsible Officer Liability

DISCUSSION

Indiana Department of Revenue assessments are prima facie evidence that the taxes are owed by the taxpayer who has the burden of proving that the assessment is incorrect. IC 6-8-1-5-1(b).

The proposed withholding taxes were assessed against Taxpayer pursuant to IC 6-3-4-8(f), which provides that "In the case of a corporate or partnership employer, every officer, employee, or member of such employer, who, as such officer, employee, or member is under a duty to deduct and remit such taxes shall be personally liable for such taxes, penalties, and interest."

Pursuant to Indiana Department of Revenue v. Safayan 654 N.E. 2nd 279 (Ind.1995) any officer, employee, or other person who has the authority to see that they are paid has the statutory duty to remit sales and withholding taxes to the state. The taxpayer submitted substantial documentation indicating that he did not have a duty to remit the withholding taxes to the state. Therefore, he is not personally liable for said taxes.

FINDING

The taxpayer's protest is sustained.

DEPARTMENT OF STATE REVENUE

0320040306.LOF

LETTER OF FINDINGS NUMBER: 04-0306
Withholding Tax
Responsible Officer
For the Tax Period 1997

NOTICE: Under IC 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of

publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUE

1. Withholding Tax-Responsible Officer Liability

Authority: IC 6-3-4-8(f), IC 6-8.1-5-1(b), Indiana Department of Revenue v. Safayan 654 N.E. 2nd 279 (Ind.1995).

The taxpayer protests the assessment of responsible officer liability for unpaid corporate withholding taxes.

STATEMENT OF FACTS

The taxpayer was a shareholder in a subchapter S corporation that did not properly remit withholding taxes to the state during the tax period 1997. The Indiana Department of Revenue, hereinafter referred to as the "department," assessed the unpaid withholding taxes, interest, and penalty against the taxpayer as a responsible officer of that corporation. The taxpayer protested the assessment of tax. A hearing was held and this Letter of Findings results.

1. Withholding Tax-Responsible Officer Liability

DISCUSSION

Indiana Department of Revenue assessments are prima facie evidence that the taxes are owed by the taxpayer who has the burden of proving that the assessment is incorrect. IC 6-8-1-5-1(b).

The proposed withholding taxes were assessed against Taxpayer pursuant to IC 6-3-4-8(f), which provides that "In the case of a corporate or partnership employer, every officer, employee, or member of such employer, who, as such officer, employee, or member is under a duty to deduct and remit such taxes shall be personally liable for such taxes, penalties, and interest."

Pursuant to Indiana Department of Revenue v. Safayan 654 N.E. 2nd 279 (Ind.1995) any officer, employee, or other person who has the authority to see that they are paid has the statutory duty to remit sales and withholding taxes to the state. The taxpayer submitted substantial documentation indicating that she did not have a duty to remit the withholding taxes to the state. Therefore, she is not personally liable for said taxes.

FINDING

The taxpayer's protest is sustained.

DEPARTMENT OF STATE REVENUE
LETTER OF FINDINGS NUMBER: 04-0311
Individual Income Tax
For the Year 2001

NOTICE: Under IC 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUE

Individual Income Tax—Assessment

Authority: IC 6-8.1-5-1(a), (b), (c).

Taxpayer protests the assessment of individual income tax.

STATEMENT OF FACTS

Taxpayer filed an IT-40 for the year ending 2001 listing no income. A cross-match with his federal return indicated income. The Department mailed to Taxpayer a Proposed Assessment and a Demand Notice for Payment. Taxpayer mailed a protest letter to the Department, stating that he does not agree with the proposed amount. A hearing officer was assigned to hear the protest and mailed a letter informing Taxpayer of the hearing date. Taxpayer did not show for the tax protest hearing and this Letter of Finding was written based on the information in Taxpayer's case file.

DISCUSSION

All tax assessments are presumed to be accurate. The taxpayer bears the burden of proving that an assessment is incorrect. IC 6-8.1-5-1(b). If the Department reasonably believes that a person has not reported the proper amount of tax due, the Department shall make a proposed assessment of the amount of the unpaid tax on the basis of the best information available to the Department. The amount of the assessment is considered a tax payment not made by the due date and is subject to IC 6-8.1-10 concerning the imposition of penalties and interest. The Department shall send the person a notice of the proposed assessment through the United States mail. IC 6-8.1-5-1(a). The notice shall state that the person has sixty (60) days from the date the notice is mailed to pay the assessment or to file a written protest. If the person files a protest and requires a hearing on the protest, the Department shall:

(1) set the hearing at the Department's earliest convenient time; and

(2) notify the person by United States mail of the time, date, and location of the hearing.
IC 6-8.1-5-1(c).

The Department has followed the statutes and has provided Taxpayer with the opportunity to be heard at hearing—which Taxpayer chose not to attend. Based on the information and evidence in Taxpayer's case file, the Department finds the assessment to be accurate. No evidence to rebut the accuracy of the assessment was provided by Taxpayer.

FINDING

Taxpayer's protest is denied. The assessment of individual income tax is due.

DEPARTMENT OF STATE REVENUE

04-20040352P.LOF

LETTER OF FINDINGS NUMBER 04-0352P
TAX ADMINISTRATION—NEGLIGENCE PENALTIES FOR
THE PERIOD COVERING CALENDAR YEARS 1999-2002

NOTICE: Under IC § 4-22-7-7, this document is required to be published in the *Indiana Register* and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the *Indiana Register*. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUE

I. Tax Administration—Negligence Penalties

Authority: IC §§ 6-8.1-5-1(b), -10-2.1 (1998) (2004); 45 IAC §§ 15-5-3(b)(8), -11-2 (1996) (2001)

The taxpayer protests the parts of the proposed assessments that assess negligence penalties.

STATEMENT OF FACTS

The taxpayer is a corporation engaged in the business of distributing automotive paints, coatings and paint-related accessories, mainly to the automotive collision repair industry. Including its headquarters, it maintained four business locations in Indiana during calendar years 1999-2002 (hereinafter "the audit period").

The Department conducted an audit of the taxpayer for gross retail (i.e., sales) and use tax for the audit period. The Department ultimately adjusted both the sales and use tax liabilities of the taxpayer for the audit period. The Audit Division issued Notices of Proposed Assessment of both sales and use tax. The taxpayer paid the respective base taxes and interest, but protested the respective proposed negligence penalties. The Department will provide additional facts as needed.

DISCUSSION

The taxpayer argues that the Department erred by imposing negligence penalty assessments. In its initial protest letter, which the taxpayer submitted itself, it contended that the deficiencies were attributable to the disruption caused by relocating to Indiana before the audit period. However, at the protest hearing, in response to a question from the hearing officer, the taxpayer's representative indicated that the taxpayer was no longer pursuing this argument, which the Department accordingly deems to be waived for purposes of this protest.

The taxpayer now submits the Department allegedly erred in deciding to propose negligence penalties based on a comparison of use tax actually paid to the tax the Department determined the taxpayer should have paid, i.e. to the tax paid with its returns plus the audited deficiencies. It contends the Department instead should view the use tax assessments, which were each in the low five-figure range, as a percentage of the respective total purchases for the corresponding period. The taxpayer represents (but has not documented) that these purchases are in the low nine-figure range annually. The taxpayer submits that, if so viewed, the respective error percentages for each assessed period are so low as to prove that its use tax self-accrual system is highly accurate and that the taxpayer therefore was not negligent. The taxpayer also argues that it would not be exercising "ordinary business care and prudence" as 45 § IAC 15-11-2(c) (1996) (2001) (which defines "negligence") uses that phrase, if it were to implement a use tax self-assessment system that was one hundred percent accurate. In the taxpayer's view, ordinary business care and prudence would require it to do a cost-benefit analysis of any such system, which it claims would indicate that the (unspecified) cost would be prohibitive and far outweigh any additional compliance benefit. Lastly, the taxpayer submits that even if the Department applies the audit error percentage it found for the assessed period with the highest percentage, the use tax self-accrual system is at its worst approximately 95% accurate. The taxpayer argues that this percentage is accurate enough to make the taxpayer's use of its system not negligent.

Before addressing the taxpayer's new arguments, to make clear what they do not cover and the resulting narrow scope of this Letter of Findings, the Department must first lay a factual foundation by describing the use tax audit methodologies employed, two of which the taxpayer later ratified. The field auditor's focus was on the taxable categories of capital assets, leases and expensed purchases. She conducted census audits of the taxpayer's capital asset purchases and of one computer hardware lease because it began in mid-2000, unlike the taxpayer's other tangible personal property leases. The auditor sampled these remaining leases and the

expensed purchases. She used the total lease activity for the lease sample period, excluding the computer hardware lease, as her total sampled leases.

In contrast, to generate the expensed purchases sample, the Audit Division used computer software to select random accounts, and random cost centers at the taxpayer's Indiana business locations, from which to select the purchases for the sample period. The size of the sample selected was large enough to make estimates at a 90% level of confidence with a goal of 10% precision. The software also divided the sampled purchases into five strata defined by price ranges. (The Audit Summary includes a written description of the design of this sample.) The software also selected purchases from each stratum in the sample on which neither sales nor use tax had been charged, and on which the taxpayer's self-assessment system had not accrued (and on which the taxpayer therefore had not paid) use tax (hereinafter "untaxed sampled purchases"). Within each stratum the auditor divided untaxed sampled purchases by total sampled purchases to arrive at error percentages that ranged up to 23.4613% per stratum. She also divided total untaxed sampled purchases from all strata by total sampled purchases from all strata to arrive at an average error percentage of 5.4267%. Lastly, she multiplied total expensed purchases for each assessment period by the average error percentage to arrive at additional taxable expensed purchases.

The taxpayer retained its current representative late in the audit. This representative signed on the taxpayer's behalf separate Agreements for Projecting Audit Results (Forms AD-10A) for the expensed purchases and for the remaining tangible personal property leases. (The Audit Summary includes signed copies of both projection agreements.) By doing so the representative bound the taxpayer to accept the respective methodologies of the sample audits that had already been conducted in these categories. The expensed purchases Form AD-10A in particular incorporated the previously mentioned written description of the computer-aided design of the expensed purchases audit sample.

Viewed against these facts, it becomes apparent that the taxpayer's argument by its own terms speaks only to expensed purchases, and therefore does not and cannot apply to any portions of the proposed penalties attributable to other components of the deficiencies. Neither the taxpayer nor its representative has even mentioned the taxpayer's sales tax deficiencies or any of the other components of its use tax deficiencies, much less argued for waiver of, the parts of the negligence penalties proposed as a result.

However, even ignoring these omissions, the Department would find the taxpayer's position flawed. The taxpayer's representative signed a Form AD-10A agreeing to a sampling audit methodology for expensed purchases that incorporated the Audit Division's previous written description of the computer-aided design for generating this sample. This description in turn set out in detail the accounts and cost centers that would constitute the population from which the sample of these purchases would be drawn. The taxpayer did not object to this design at the time, nor does it now claim that the Department erred in selecting the sample derived from it or in computing any of the error percentages. Instead, the taxpayer is tacitly contending that the Department should now, after it has completed the audit, expand the sampled expensed purchases to include all expensed purchases for the sample period from all of the taxpayer's Indiana locations, as was done for the non-computer hardware leases.

The taxpayer's present argument would substantially modify the projection agreement for expensed purchases and impeach the sample audit methodology underlying it. The Department will not change agreed-upon audit methodology after the fact simply because the taxpayer does not like the result of its application. Moreover, the result of the taxpayer's proposed modification would be to lower the error percentages inaccurately and drastically. The proposed modification would have this result because the numerators of all of the error percentage ratios would still include only the original untaxed sampled purchases, not total untaxed purchases, both per stratum and overall. The Department therefore will neither agree to the modification the taxpayer has impliedly proposed nor entertain any argument premised on it, since the effect of doing so would be to impeach the Form AD-10A on expensed purchases the taxpayer signed, and its underlying sample methodology. Even if the Department were to accept the taxpayer's argument, however, as noted in summarizing this argument, the taxpayer has not submitted any documentation of the total volume of its expensed purchases for the assessed periods. The Department thus has no data it can use to make the proposed modification and test the taxpayer's assertion, even if the Department were inclined to do so, which, for the reasons previously stated, it is not.

The taxpayer has also submitted that its adoption of its use tax self-assessment system was an exercise of ordinary business care and prudence (i.e. not negligent). It has also argued that a perfect system would have been cost prohibitive, thereby implying that the system it adopted was the most cost-effective available. The Department notes that the taxpayer has submitted no proof that a better system would have been cost prohibitive. The Department would also note that if the taxpayer's system generated errors notwithstanding its being the most cost-effective available, then the errors should have cut both ways, generating overpayments as well as underpayments, thereby prejudicing both parties equally. In other words, if a use tax self-accrual system generates any errors, one would expect it to cause remittances of use tax to the Department on non-taxable transactions, as well as to fail to remit tax on taxable ones. The taxpayer has not called any errors of the latter type to the Department's attention. Therefore, consistent with the presumption of validity of the proposed assessments mandated by IC § 6-8.1-5-1(b) (1998) and 45 IAC § 15-5-3(b)(8) (1996) (2001), the Department presumes that either no, or no substantial, errors of this type occurred during the audit period. The absence, or substantial absence, of any such errors, suggests that the taxpayer's system fell below the standard of ordinary business care and prudence, and thus was negligent.

The per-stratum error factors at which the auditor arrived, which ranged as high as over 23%, support this inference. The

average error factor on which the taxpayer bases its assertion that its self-accrual system is at worst nearly 95% accurate is just that, an average. Where stratified or otherwise more detailed error factors are available, as is the case here, an average error factor standing alone is not enough information on which to make an informed evaluation of such a system's adequacy, or more accurately in this case, inadequacy. It is also necessary to consider the more detailed error factors. Having done so, the Department finds that the taxpayer's employment of a use tax self-assessment system that in some cases results in failing to accrue tax on as many as nearly one purchase transaction in four is negligent, and does not constitute reasonable cause for waiving the proposed negligence penalties.

FINDING

The taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0120040368.LOF

LETTER OF FINDINGS: 04-0368
Individual Income Tax
For 2001

NOTICE: Under IC 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of the document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUES

I. Constitutionality of the Indiana Adjusted Gross Income Tax.

Authority: U.S. Const. amend. X: U.S. Const. amend. XVI; U.S. Const. art. I, § 1, cl. 1; U.S. Const. art. I, § 1, cl. 3; N.Y. ex rel. Cohn v. Graves, 300 U.S. 308 (1937); Ind. Const. art. X, § 8; IC 6-3-1-3.5 et seq.

Taxpayer maintains that he is not subject to the Indiana adjusted gross income tax because the United States Congress did not delegate to Indiana the right to eliminate the federal requirement that taxes be apportioned among the "several States."

II. Applicability of the State Adjusted Gross Income Tax.

Authority: 26 U.S.C.S. § 7701(a)(1); 26 U.S.C.S. § 7701(a)(14); United States v. Karlin, 785 F.2d 90 (3d Cir. 1986); United States v. Studley, 783 F.2d 934 (9th Cir. 1986); McKeown v. Ott, No. H 84-169, 1985 WL 11176 (N.D. Ind. Oct. 30, 1985).

Taxpayer maintains that he is not a "person" required to report his income for federal or state income tax purposes.

STATEMENT OF FACTS

On September 13, 2004, The Department of Revenue (Department) sent the taxpayer a notice of "Proposed Assessment" indicating that taxpayer owed individual income tax for 2001. Taxpayer disagreed and, in a response dated September 24, 2004, indicated that he was "not an individual required by any law and authoritative regulation of Title 26, USC, Subtitle A, to file or report any income derived from any source named by Congress in Title 26." The Department determined that taxpayer's response should be treated as a "protest" of the proposed assessment and sent taxpayer a letter indicating that he was entitled to an administrative hearing during which he would be provided an opportunity to further explain the basis for the "protest." Taxpayer responded by a letter dated November 8, 2004, in which he asserted that he did not file a "protest" but that the September 13 letter was simply a statement of his position regarding the proposed assessment; taxpayer concluded that he was "unwilling to participate in [the Department's] hearing" and that he "[chose] not to discuss anything with [the Department] by telephone." This Letter of Findings was prepared based upon the information contained within the taxpayer's two letters.

DISCUSSION

I. Constitutionality of the Indiana Adjusted Gross Income Tax.

As best that can be determined from taxpayer's letters, taxpayer maintains that the state of Indiana is precluded from assessing an individual income tax by U.S. Const. amend. XVI. According to the taxpayer, this amendment was written to amend the Constitution for federal purposes only and that "the apportionment clause of the U.S. constitution remains in place, with the exception applicable to the federal government."

Taxpayer apparently refers to the express provisions of the Constitution granting powers of taxation to the Congress. U.S. Const. art. I, § 1, cl. 3 states that, "Representatives and direct Taxes shall be apportioned among the several states which may be included within this Union, according to their respective Numbers...." U.S. Const. art. I, § 8, cl. 1, states that, "The Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States." The Sixteenth Amendment permitted imposition of a federal income tax without apportionment among the states. "The Congress shall have power to lay and collect taxes on income, from whatever source derived, without apportionment among the several states, and without regard to any census or enumeration." U.S. Const. amend. XVI.

In taxpayer's view, Indiana's taxing authority is constrained by U.S. Const. art. I, § 1, cl.1, 3 and that the authority granted Congress pursuant to U.S. Const. amend. XVI did not extend Indiana parallel authority. Taxpayer's analysis is fundamentally flawed because the U.S. Constitution is a limitation on the federal government's authority and is irrelevant in determining state taxing authority. As the United States Supreme Court found, "That the receipt of income by a resident of the territory of a taxing sovereignty is a taxable event is universally recognized." N.Y. ex rel. Cohn v. Graves, 300 U.S. 308, 312-13 (1937). Subject to the federal Commerce Clause, the Due Process Clause, and the Equal Protection Clause, the states are free to determine the boundaries of their individual taxing authority. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X.

Indiana has chosen to exercise the taxing authority reserved to it under the federal Constitution. As set out in the Indiana Constitution, "The general assembly may levy and collect a tax upon income, from whatever source derived, at such rates, in such manner, and with such exemptions as may be prescribed by law." Ind. Const. art X, § 8. The Indiana General Assembly exercised its constitutional prerogative by imposing an adjusted gross income tax on individuals and corporations. IC 6-3-1-3.5 et seq.

Taxpayer's constitutional challenge to the Indiana adjusted gross income tax is not well founded. Absent any Commerce Clause, Due Process Clause, or Equal Protection Clause challenge to the imposition or administration of the state's individual income tax system, taxpayer's constitutional challenge of the "Proposed Assessment" of 2001 income tax is without foundation.

FINDING

Taxpayer's protest is denied.

II. Applicability of the State Adjusted Gross Income Tax.

Taxpayer argues that he is not a "person" required to report his income or to pay tax on that income. Taxpayer predicates this statement on the ground that he is not subject to the provisions of the Internal Revenue Code (IRC). Taxpayer errs. The IRC clearly defines "persons" and sets out which persons are subject to federal taxes. 26 U.S.C.S. § 7701(a)(14) defines "taxpayer" as any person subject to any internal revenue tax. 26 U.S.C.S. § 7701(a)(1) defines a "person" as any individual, trust, estate, partnership, or corporation. Taxpayer's argument that an individual – such as himself – is not a "person" within the meaning of the IRC has been uniformly rejected. In United States v. Karlin, 785 F.2d 90, 91 (3d Cir. 1986), the court affirmed the defendant's conviction for failing to file income returns and rejected the defendant's contention that he was "not a 'person' within the meaning of 26 U.S.C. § 7203" as "frivolous and require[ing] no discussion." In United States v. Studley, 783 F.2d 934, 937 n.3 (9th Cir. 1986), the court affirmed defendant's conviction for failing to file income tax returns on the ground that defendant was "an absolute freeborn, and natural individual" stating that "this argument has been consistently and thoroughly rejected by every branch of the government for decades." "*[A]rguments about who is a 'person' under the tax laws,* the assertion that 'wages are not income', and maintaining that payment of taxes is a purely voluntary function do not comport with common sense - let alone the law." McKeown v. Ott, No. H 84-169, 1985 WL 11176 at *2 (N.D. Ind. Oct. 30, 1985) (*Emphasis added*).

Taxpayer's argument, that he is not a "person" subject to the IRC or – by extension – to the Indiana individual income tax, does not warrant further consideration.

Taxpayer has set out certain other objections to the "Proposed Assessment" each of which is less comprehensible, less well defined, and less meritorious than the previous. The Department will not expend additional resources in attempting to discern taxpayer's arguments or theories.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

04-20040303P.LOF
04-20040372P.LOF

LETTERS OF FINDINGS
NUMBERS 04-0303P AND 04-0372P
TAX ADMINISTRATION—NEGLIGENCE PENALTIES FOR
THE PERIOD COVERING CALENDAR YEARS 1999-2001

NOTICE: Under IC § 4-22-7-7, this document is required to be published in the *Indiana Register* and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the *Indiana Register*. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUE

I. Tax Administration—Negligence Penalties

Authority: IC §§ 6-8.1-5-1(b), -10-2.1 (1998) (2004); 45 IAC § 15-11-2 (1996) (2001)

The taxpayers protest the parts of the proposed assessments that assess negligence penalties.

STATEMENT OF FACTS

The taxpayers are affiliated corporations with their commercial domiciles in the same state, one other than Indiana, and are engaged in retailing across the United States. During calendar years 1999-2001 (hereinafter "the audit period") the taxpayers had multiple outlets in Indiana.

The taxpayers paid the vast majority of the principal tax and accrued interest portions of the combined proposed assessments, but one of the taxpayers did timely protest a computational error of use tax and both protested the proposed imposition of negligence penalties. The Department corrected, and abated the part of the proposed assessments of the affected taxpayer attributable to the computational error, leaving the proposed negligence penalties as the only matters at issue in this protest.

DISCUSSION

The main point of the taxpayers' argument appears to be that the benefits that their new, expanded and remodeled stores provided to Indiana outweighed the unreported use tax the auditor assessed on the property used on those buildings, thereby justifying abatement of the negligence penalties. If the Department understands the taxpayers correctly, these benefits included improvements to Indiana real property, employment opportunities for Indiana citizens and additional consequential state and local tax revenues. The taxpayers also represent, but have submitted no proof, that since the audit they have put more internal accounting controls in place in order to strive for more accurate reporting of their sales and use tax liabilities.

IC § 6-8.1-10-2.1 (1998) (current version at *id.* (2004)) is the statute that authorizes the Department to impose a penalty for any negligence of a taxpayer in failing to comply with the tax laws that the Department administers. These taxes are listed in IC § 6-8.1-1-1 and include the gross retail and use tax. IC § 6-8.1-10-2.1(a)(3) states that "(a) [i]f a person:… (3) [i]ncurs, upon examination by the department, a deficiency that is due to *negligence*;… the person is subject to a penalty." *Id.* The amount is set by IC § 6-8.1-10-2.1(b)(4), which states that "(b) [e]xcept as provided in subsection (g) [,] [not in issue here], the penalty described in subsection (a) is ten percent (10%) of:… (4) the amount of deficiency as finally determined by the department[.]" *Id.* However, IC § 6-8.1-10-2.1(d) states that "[i]f a person subject to the penalty imposed under this section can show that the failure to…pay the deficiency determined by the department was due to *reasonable cause* and not due to willful neglect, the department shall waive the penalty." *Id* (emphasis added).

Under IC § 6-8.1-5-1(b) (1998) (current version at *id.* (2004)) and 45 IAC § 15-5-3(b)(8) (1996) (2001), the person against whom a proposed assessment is made has the burden of proving that it is wrong. That burden applies to abatement of penalty assessments, as well as substantive tax assessments. *"A person who wishes to avoid the penalty imposed under [IC § 6-8.1-10-2.1(a) and (b)] must make an affirmative showing of all facts alleged as a reasonable cause* for the person's failure to file the return, pay the amount of tax shown on the person's return, pay the deficiency, or timely remit tax held in trust[.]" IC § 6-8.1-10-2.1(e) (emphasis added). The burden of proof is not on the Department to show negligence, willful or otherwise, by a taxpayer.

Title 45 IAC § 15-11-2(b) states:

> (b) "Negligence" on behalf of a taxpayer is defined as the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Negligence would result from a taxpayer's *carelessness,* thoughtlessness, disregard or inattention *to duties placed upon the taxpayer by the Indiana Code or department regulations.* Ignorance of the listed tax laws, rules and/or regulations is treated as negligence. Further, failure to read and follow instructions provided by the department is treated as negligence. Negligence shall be determined on a case by case basis according to the facts and circumstances of each taxpayer.

Id (emphases added). The next subsection of the regulation sets out the standard of care a taxpayer must prove pursuant to IC § 6-8.1-10-2.1(e) to establish reasonable cause for failing to meet its tax compliance duties to the Department. Subsection (c) of 45 IAC § 15-11-2 reads in relevant part as follows:

> (c) The department shall waive the negligence penalty imposed under IC 6-8.1-10-1 [sic; should read IC 6-8.1-10-2, repealed and re-enacted in 1991 as IC 6-8.1-10-2.1] if the taxpayer affirmatively establishes that the failure to…pay a deficiency was due to reasonable cause and not due to negligence. *In order to establish reasonable cause, the taxpayer must demonstrate that it exercised ordinary business care and prudence in carrying out or failing to carry out a duty giving rise to the penalty imposed under this section.*....
>
> …
>
> Reasonable cause is a fact sensitive question and thus will be dealt with according to the particular facts and circumstances of each case.

Id (emphasis added).

The Department did not include in 45 IAC § 15-11-2(b) or (c) the kind of revenue cost-benefit analysis in which the taxpayers would now have the Department engage. The reason for the Department's omitting such a test from the regulation becomes obvious upon reflection: Title 45 IAC § 15-11-2(b) defines "negligence" "as the failure to use such reasonable care,…as would be expected of an ordinary reasonable taxpayer[ ]…[in performing] duties placed upon the taxpayer by the Indiana Code or department regulations." *Id.* Conversely, 45 IAC § 15-11-2(c) states that a taxpayer must submit proof that it "exercised ordinary business care

and prudence" in order to establish "reasonable cause" to abate a negligence penalty. *Id*. Thus, evidence that a taxpayer engaged in business/es in Indiana that directly or indirectly created more state and local tax revenues than the sum of its proposed substantive tax assessment/s is quite simply irrelevant to proving the absence of "negligence" and the existence of "reasonable cause" as 45 IAC § 15-11-2(b) and (c) respectively define these terms. Specifically, such evidence has no tendency to make it more, or less, probable that the taxpayer in question "exercised [the] ordinary business care" in performing any such statutory or regulatory duty that is needed to establish "reasonable cause." 45 IAC § 15-11-2(c).

Even if the taxpayers had submitted any evidence of their alleged creation of additional internal accounting controls since the audit, any such evidence also would have been irrelevant to whether the taxpayers were negligent during the audit period in failing, or had reasonable cause for their failures, to report use tax on their capital assets and fixed assets. Their implementation of such safeguards, if true, would have occurred well after the audit period ended. Thus as a matter of causation (or, more accurately, lack of causation), their alleged installation of those procedures could not have had any mitigating effect on the taxpayers' negligence during that period. In addition to the absence of evidence and lack of relevance of the alleged controls, the Department also notes that in any original tax appeal, they would not be able to introduce evidence of the such controls as proof that the taxpayers were negligent during the audit period. *See* IND. R. EVID. 407 (making evidence of subsequent remedial measures inadmissible to prove negligence or culpable conduct in connection with an event). It is therefore only fair that, at the administrative level, the Department should decline to consider the taxpayers' request for relief from the proposed negligence penalties for such after-the-fact reasons.

The present taxpayers have not submitted any evidence in support of their protests of the proposed negligence penalties that would establish the existence of "reasonable cause" under IC § 6-8.1-10-2.1(d) and 45 IAC § 15-11-2(c). The taxpayers have therefore failed to sustain their burden of proof under IC § 6-8.1-5-1(b) that the proposed negligence penalty assessments are wrong, i.e. that they were not negligent in, and had reasonable cause for, failing to remit use tax on its capital assets and fixed assets.

FINDING

The taxpayers' protests are denied.

DEPARTMENT OF STATE REVENUE

0420030295.LOF

SUPPLEMENTAL LETTER OF FINDINGS NUMBER: 03-0295
Sales and Withholding Tax
Responsible Officer
For the Tax Period 1999-2000

NOTICE: Under IC 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUE

1. Sales and Withholding Tax-Responsible Officer Liability

Authority: IC 6-2.5-9-3, IC 6-3-4-8(f), IC 6-8.1-5-1(b), Indiana Department of Revenue v. Safayan 654 N.E. 2nd 279 (Ind.1995).

The taxpayer protests the assessment of responsible officer liability for unpaid corporate sales and withholding taxes.

STATEMENT OF FACTS

The Indiana Department of Revenue assessed sales taxes, withholding taxes, interest, and penalty against the taxpayer as a responsible officer of a corporation that did not properly remit said taxes during the tax period 1999-2000. The taxpayer protested the assessments of tax. A hearing was held. The department determined that the taxpayer was responsible for the taxes due to the state before May 9, 2000. The taxpayer requested and was granted a rehearing. This Supplemental Letter of Findings results.

1. Sales and Withholding Tax-Responsible Officer Liability

DISCUSSION

Indiana Department of Revenue assessments are prima facie evidence that the taxes are owed by the taxpayer who has the burden of proving that the assessment is incorrect. IC 6-8-1-5-1(b).

The proposed sales tax liability was issued under authority of IC 6-2.5-9-3 that provides as follows:

An individual who:

(1) is an individual retail merchant or is an employee, officer, or member of a corporate or partnership retail merchant; and

(2) has a duty to remit state gross retail or use taxes to the department;

holds those taxes in trust for the state and is personally liable for the payment of those taxes, plus any penalties and interest attributable to those taxes, to the state.

The proposed withholding taxes were assessed against taxpayer pursuant to IC 6-3-4-8(f), which provides that "In the case of a corporate or partnership employer, every officer, employee, or member of such employer, who, as such officer, employee, or member is under a duty to deduct and remit such taxes shall be personally liable for such taxes, penalties, and interest." Pursuant to Indiana Department of Revenue v. Safayan 654 N.E. 2nd 279 (Ind.1995) any officer, employee, or other person who has the authority to see taxes are paid has the statutory duty to remit sales and withholding taxes to the state.

The Letter of Findings found that the taxpayer was the person with the authority to see that the trust taxes were remitted to the state prior to May 9, 2000. On that date, the corporation's default on its primary loan caused the primary lender to require the execution of a document known as the "Surrender Agreement." This agreement gave the lender official control over all of the corporation's collateral which included inventory, accounts receivable, most equipment, and junior security interests in all other assets. Concurrently, the lender took control over the corporation's business premises and operations. On that date, the lender became the party with the duty to remit trust taxes to the state.

The taxpayer disagreed with this decision. The taxpayer contended that even prior to May 9, 2000, the primary lender was the party who actually made all decisions concerning the financial and operational affairs of the corporation. At the rehearing, the taxpayer offered additional evidence concerning the relationship between the taxpayer and the primary lender during the period leading up to the execution of the Surrender Agreement. The taxpayer also offered additional evidence on the actual operations of the corporation during this period. While it is clear that the primary lender was deeply involved in the corporation's affairs, the taxpayer was still the President. As the President of the corporation, the taxpayer had the responsibility to oversee the corporation. As the President, the taxpayer had the final responsibility to insure that the corporation fulfilled its financial responsibilities by remitting trust taxes to the Indiana Department of Revenue. Therefore, the taxpayer had the statutory duty to remit the sales taxes and is personally liable for the payment of those taxes.

FINDING

The taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

04-20040021SLOF

SUPPLEMENTAL LETTER OF FINDINGS NUMBER: 04-0021
Responsible Officer
Periods 2000 through 2001

NOTICE: Under IC 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superceded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUES

I. Sales and Withholding Tax: Responsible Officer Liability

Authority: Ind. Code § 6-2.5-9-3; Ind. Code § 6-3-4-8; Ind. Code § 6-8.1-5-1(b); Indiana Department of Revenue v. Safayan, 654 N.E.2nd 270, 273 (Ind.1995).

The taxpayer protests the proposed assessment of responsible officer liability for unpaid sales and withholding taxes.

STATEMENT OF FACTS

Taxpayer was employed by a company ("Company"). On Company's filing of Articles of Incorporation and all subsequent filings with the Indiana Secretary of State's office, Taxpayer was listed as Company's President, and the address for Company was listed as being in care of Taxpayer.

Taxpayer was granted a rehearing upon providing additional information that the Department did not possess prior to the issuance of the previous letter of findings, and accordingly this supplemental letter of findings results.

I. Sales and Withholding Tax: Responsible Officer Liability

DISCUSSION

The proposed sales tax and withholding tax liability was issued under authority of Ind. Code § 6-2.5-9-3 that provides as follows:

An individual who:

(1) is an individual retail merchant or is an employee, officer, or member of a corporate or partnership retail merchant; and

(2) has a duty to remit state gross retail or use taxes (as described in IC 6-2.5-3-2) to the department;

holds those taxes in trust for the state and is personally liable for the payment of those taxes, plus any penalties and interest attributable to those taxes, to the state. If the individual knowingly fails to collect or remit those taxes to the state, he commits a Class D felony.

The proposed withholding taxes were assessed against taxpayer pursuant to Ind. Code § 6-3-4-8. Also of import is Indiana Department of Revenue v. Safayan, 654 N.E.2nd 270, 273 (Ind.1995), which states "The statutory duty to remit trust taxes falls on any officer or employee who has the authority to see that they are paid."

Finally, the Indiana Department of Revenue's "notice of proposed assessment is prima facie evidence that the department's claim for the unpaid tax is valid." Ind. Code § 6-8.1-5-1(b). That statute also states the burden of proof rests with the taxpayer.

Taxpayer argues that he was only an employee of Company, and neither an owner nor officer of Company, at the time of the proposed assessments. Taxpayer provided information that he had been terminated by Company both as an officer and as an employee prior to the assessment period. Taxpayer further provided documentation signed by another person as president of Company. Taxpayer's subsequent re-employment by Company in an employee-only capacity did not result in Taxpayer being accorded a position in which Taxpayer had a statutory duty to remit the taxes in question. In short, Taxpayer has provided sufficient information that he was not Company's president, other corporate officer or other responsible person during the period in question, and accordingly the protest should be sustained.

FINDING

The taxpayer's protest is sustained.

DEPARTMENT OF STATE REVENUE
Indiana Department of State Revenue
Revenue Ruling #2004-02IT
December 2, 2004

Notice: Under IC 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUE

Adjusted Gross Income Tax, Et Al. – Community Revitalization Enhancement District Tax Credit

Authority: IC 6-3.1-19-2; IC 6-3.1-19-3; IC 6-3.1-19-5

The taxpayer requests the Department to rule on the timing of taking a CReED credit—whether the credit may be taken when the investment is made or if the credit is to be taken only after completion of the project.

STATEMENT OF FACTS

The taxpayer, an LLC, plans to construct a building in a part of a district that has been designated as a Community Revitalization Enhancement District (CReED) under IC 6-3.1-19. The taxpayer has obtained approval for a tax credit authorized under the CReED statute. The taxpayer has secured investors for the project—which is expected to begin in 2005 and to be completed in 2006. The taxpayer would like to take the credit for investments made in 2005.

DISCUSSION

IC 6-3.1-19-3(a) provides:

Subject to section 5 of this chapter, a taxpayer is entitled to a credit against the taxpayer's state and local tax liability for a taxable year if the taxpayer makes a qualified investment in that year.

It is clear from the above statute, a taxpayer is entitled to a tax credit if the taxpayer makes a qualified investment. A qualified investment is defined in IC 6-3.1-19-2:

"[Q]ualified investment" means the amount of a taxpayer's expenditures that is:

(1) for redevelopment or rehabilitation of property located within a community revitalization enhancement district designated under IC 36-7-13;

(2) made under a plan adopted by an advisory commission on industrial development under IC 36-7-13; and

(3) approved by the department of commerce before the expenditure is made.

Based on these two provisions, the credit may be taken in the same year as a qualified investment is made. In the instant case then, to the extent the taxpayer makes a qualified investment in a given tax year, the taxpayer may take the credit in that year.

One limitation is imposed in IC 6-3.1-19-5. A taxpayer is not entitled to claim the credit to the extent the taxpayer substantially reduces or ceases its operations in Indiana in order to relocate them within a district. The taxpayer has stated that it will not be ceasing or reducing operations to relocate within the district. Based on this, there appears to be no reduction to the credit.

RULING

The Department rules that the taxpayer may take the credit in 2005 for investments made in 2005. The taxpayer does not need to wait until the anticipated completion of the project in 2006 to take qualified investments made in 2005.

CAVEAT

This ruling is issued to the taxpayer requesting it on the assumption that the taxpayer's facts and circumstances, as stated herein are correct. If the facts and circumstances given are not correct, or if they change, then the taxpayer requesting this ruling may not rely on it. However, other taxpayers with substantially identical factual situations may rely on this ruling for informational purposes in preparing returns and making tax decisions. If a taxpayer relies on this ruling and the Department discovers, upon examination, that the fact situation of the taxpayer is different in any material respect from the facts and circumstances given in this ruling, then the ruling will not afford taxpayer any protection. It should be noted that subsequent to the publication of this ruling, a change in statute, regulation, or case law could void the ruling. If this occurs, the ruling will not afford the taxpayer any protection.

Indiana Department of State Revenue