COMMISSIONER, INDIANA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT

v.

NORTHERN INDIANA MANUFACTURING, INC.

2024 OEA 001, OEA CAUSE NO.: 19-S-E-5091

Official Short Cite Name:	**Northern Indiana Manufacturing, 2024 OEA 001**
Cause Nos.:	19-S-E-5091 (IDEM-1912-000556)
Topics/Keywords:	Voluntary Remediation Program (VRP)
	Phase I, II Environmental Assessments
	Soil and groundwater contamination
	Trichloroethene (PCE)
	Information Update Request
	Request for Information Letter
	Notice of Liability Letter
	Demand for Compliance
	Commissioner's Order ~ enforcement
	Motion for Summary Judgment / Ind. Tr. R. 56(C)
	42 U.S.C. § 9613
	42 U.S.C. § 9607(a)(1) and (2)
	42 U.S.C. § 9601(23) and (24)
	IC § 13-30-9-2
	IC § 13-25-4 *et seq.*
	IC §- 13-12-5-8.5
	IC § 13-12-3-2(a)
	IC § 13-11-2-192(b)
	IC § 4-21.5-7-3
	Statute of limitations
	Equitable doctrine of laches
Presiding ELJ:	Lori Kyle Endris
Party Representatives:	E. Sean Griggs – Petitioner
	Julie E. Lang - IDEM
Date of Order:	January 31, 2024
Index Category:	Enforcement
Further Case Activity:	3/1/2024: Request for Judicial Review filed, 49D03-2403-PL-009260. 12/30/2024: Remanded to OALP re attorney fees. 7/15/2025: Final Order on Request for Attorney's Fees, **2025 OALP 065**

INDIANA OFFICE OF ENVIRONMENTAL ADJUDICATION

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STATE OF INDIANA)	BEFORE THE INDIANA OFFICE OF
)	ENVIRONMENTAL ADJUDICATION
COUNTY OF MARION)	
)	CAUSE NO. 19-S-E-5091
IN THE MATTER OF:)	
	)
OBJECTION TO THE ISSUANCE OF THE	)
ORDER OF THE COMMISSIONER OF THE INDIANA	)
DEPARTMENT OF ENVIRONMENTAL MANAGEMENT TO	)
COMPEL RESPONSE ACTION TO	)
NORTHERN INDIANA MANUFACTURING, INC.	)
CHESTERTON, PORTER COUNTY, INDIANA.	)

FINDINGS OF FACT, CONCLUSIONS OF LAW and FINAL ORDER

This matter came before the Office of Environmental Adjudication (OEA or Court), by legal counsels, Julie Lang, Esq. on the Indiana Department of Environmental Management's (IDEM) June 19, 2023 Motion for Judgment on the Pleadings[1] and E. Sean Griggs, Esq., on Northern Indiana Manufacturing, Inc.'s (Northern) Motion for Summary Judgment both of which documents, along with their responses and replies are now part of the Court's record. Oral argument was held September 11, 2023. The presiding Environmental Law Judge (ELJ) having read the Motions, Responses, Replies and supporting Briefs and directed the Oral Argument now enters the following Findings of Fact, Conclusions of Law and Final Order.

Findings of Fact

1. The property at issue is located at 914 Broadway Street, Chesterton, Porter County, Indiana (Site) and has been used for industrial manufacturing from 1974 to the present.[2]

2. The previous owner Electro Seal Corporation,[3] now Dynamic Alliance, Inc., (Dynamic)

[1] Due to an Affidavit being presented to and accepted by the Court, IDEM's Motion for Judgment on the Pleadings is considered a Motion for Summary Judgment. Ind. Trial Rule 12(C).
[2] Petition for Administrative Review, Adjudicatory Hearing and Stay of Effectiveness (Petition), p. 2.
[3] On November 29, 2023, the ELJ requested information from the counsels of record concerning the corporate history of Electro Seal, Dynamic Alliance and Northern Indiana Manufacturing's to clarify content of some of the exhibits proffered in this Cause.

Northern's counsel responded December 8, 2023 and disputed the Secretary of State's records 197405-492 and 1990070580 stating that the records "appear to be a contradiction since the SOS would not have allowed two identically named corporations to exist simultaneously."

owned and operated at the Site from approximately 1974 to 1996.[4] The current owner, Northern, leased the property in March, 1991 and purchased it in July, 1996.[5]

3. When Northern commenced operations at the Site, it became aware of potential contamination and prompted Dynamic to undertake a Phase I Environmental Assessment.[6] Thereafter, Northern hired Mittelhauser Corporation (Mittelhauser) to conduct a Phase II Environmental Assessment which identified impacts to soil and groundwater.[7] Mittelhauser's May 9, 1991, report stated in part, "The levels of tetrachloroethene (PCE) in groundwater samples GW-2 and GW-3 are particularly significant."[8]

4. On May 21, 1991, Northern wrote its attorney regarding the spill of PCE, stating "[t]his is all related to 1978. Longer ago than I expected."[9]

5. On June 4, 1991, Northern sent Dynamic a letter "asserting a claim for indemnification by Dynamic" for

I. Liability for remediation and response costs under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. § 9601 *et seq*. and other laws;

II. Expenses, such as prepaid rent under the Lease Agreement, incurred in reasonable reliance upon the representations in the Agreement;

III. Lost opportunity by virtue of being constrained, if not prohibited, from exercising the option to purchase contained in the Lease as a result of the Hazardous Materials located on the Option Real Estate;

IV. Purchaser's attorneys' fees incurred and to be incurred and necessitated by the

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Fred Cuppy incorporated Electro Seal Corporation (Business ID 197405-492) on May 24, 1974 and merged it into Dynamic Alliance on November 26, 1990 (File # 949241).

Robert Dragani incorporated Northern Acquisition Corporation (Business ID 1990070580) on July 17, 1990. On March 8, 1991, Robert Dragani amended the Articles of Incorporation to change the company's name to Electro Seal Corporation (File # 1694620). At no time did the two (2) Electro Seal Corporations exist simultaneously. Robert Dragani merged Electro Seal into Northern Indiana Manufacturing, Inc. (Business ID 198207-724) on December 31, 2008.

IDEM's counsel requested that the ELJ take judicial notice of the two records showing that Fred Cuppy's Electro Seals merged into Dynamic and the other merged into Northern. The ELJ takes official notice pursuant to IC § 4-21.5-3-26(f)(1).

[4] CO, pp.1 – 2.
[5] *Id*.
[6] VFC No. 80583069, pp. 2 – 9.
[7] *Id*., pp. 1 – 10. -
[8] *Id*., p. 9.
[9] *Id.*, p. 11.

Hazardous Materials found on the Option Real Estate; and

V. Incidental and consequential damages due to the results of a Phase II Assessment.[10]

Northern informed Dynamic that a limited Phase II had detected hazardous substances in the soil and groundwater and "given the limited scope of the Phase II assessment, the possibility of other areas of contamination cannot be precluded" and "other areas of contamination are likely."[11]

6. In December 1991, Dynamic hired Environmental Restoration Systems (ERS) and Fred Krikau & Associates (Krikau) to conduct a site investigation to identify the nature and extent of impacts from chlorinated solvents at the Site.[12]

7. On January 31, 1992, ERS submitted a Work Plan on behalf of Dynamic and Northern to IDEM to address the discovery of PCE in the soil and groundwater at the Site.[13] IDEM received the Work Plan on February 5, 1992[14] which was the first time[15] IDEM learned of the PCE spill that occurred during the delivery of a drum containing PCE in 1978.

8. On February 13, 1992 IDEM responded to ERS in part, stating:

> Thank you for notifying the IDEM of your intention to clean up contamination discovered on your property. Unfortunately, limited staff resources prevent IDEM from conducting the comprehensive review necessary to issue a formal approval of your cleanup. *Formal approval can only be granted when the responsible party enters into a legally binding and enforceable agreement (i.e., a Consent Decree or Agreed Order) with IDEM*. *IDEM, therefore, will not be able to review the site characterization and/or approve the corrective action work plan for this site*.[16] (emphasis added).

Notwithstanding the lack of a Consent Decree or Agreed Order, IDEM encouraged the remediation and set forth specific items that should be included in an initial site characterization and corrective action work plan. IDEM requested that any remediation documentation be provided to IDEM upon completion that a copy of the documentation be retained to document the work. IDEM stated, "[t]his of course does not approve your cleanup nor does it certify that the site is free of contamination. Additional work may be warranted."[17]

9. On March 25, 1992, Northern's counsel sent Dynamic a letter recapping the content of

[10] *Id*., pp. 17 – 19.
[11] *Id*. p. 19
[12] *Id*., pp. 21 - 73.
[13] *Id*. pp. 74 - 81; VFC No. 44914100.
[14] VFC No. 44914414. On February 5, 1992, IDEM received a second communication from Dynamic that contained the exhibits to the Work Plan inadvertently not included in the January 31, 1992 Work Plan.
[15] VFC No. 80583069, p.
[16] VFC No. 80583069, pp. 82 – 84.
[17] *Id*.

Mittelhauser Corporation's Phase II Assessment Report, ERS' Environmental Assessment Report, ERS' Corrective Action Plan and IDEM's response to ERS' Corrective Action Plan.[18] Northern's counsel informed Dynamic that the proposed cleanup plan submitted by ERS to IDEM was lacking in certain aspects, the PCE found in the groundwater exceeded maximum contaminant levels and suggested a "more comprehensive work plan is warranted."[19] Counsel stated, "given the limited scope of the Phase II assessment, the possibility of other areas of contamination cannot be precluded."[20] Northern's counsel emphasized that "without a full and complete clean-up [Northern] will be unable to exercise its option to purchase under the Lease and may be required by its lenders to vacate the premises."[21]

10. On July 24, 1992, Dynamic wrote Northern and stated, "As you know, we have removed all of the contaminated soil and we are at this point completed except for determining whether we can get a no action letter from the state or whether we are going to have to do some residual pump."[22] Northern did not designate evidence to verify the removal of all of the soil.

11. Between March 25, 1992 and August 31, 1992, Northern and Dynamic and/or their representatives corresponded to discuss whether additional investigation and/or remediation would be required for IDEM to "sign off" that all response actions had been completed.[23] None of the designated documents upon which Northern relies in support of its Motion reflects that the parties discussed whether IDEM could approve the cleanup or certify the Site free of contamination in the absence of a Consent Decree or Agreed Order.

12. On August 31, 1992, Dynamic wrote Northern and stated environmental consultant Krikau informed Dynamic

> . . . as to the 1, 2 – dichlorobenzene that [sic] there is nothing to be done as there is nothing in the law that requires that to be removed. As to the contamination of the groundwater at the northeast part of the property that is the groundwater issue, and as I understand, the only issue remaining. . . In any event, I am sure we will be able to work out the remaining issue and we will extend the lease if necessary until the issue is resolved. *[Our consultant] said the levels are so low that it would probably take no longer than a year or two at the max to clean up any residual groundwater problem but that in the past, IDEM has signed off for projects that have residual groundwater at levels higher than we have at present.*[24] (emphasis added).

[18] Through IDEM's correspondence with ERS in March, 1992, Northern knew that in the absence of a Consent Decree or Agreed Order, IDEM would not be able to review the site characterization or approve the Corrective Action Plan.
[19] VFC No. 80583069, pp. 85 – 86.
[20] *Id*.
[21] *Id*.
[22] *Id*. p. 96. Neither Dynamic nor Northern entered into a consent decree or agreed order and thus would not be able to obtain a No Further Action Letter.
[23] *Id*. pp. 85 – 106.
[24] *Id*. pp. 105 - 106.

Northern did not designate evidence supporting Fred Cappy's statements or its investigation into Dynamic's interpretation of Krikau's statements.

13. On November 18, 1993, Dynamic sent Northern a letter claiming Krikau informed it

> There is really nothing further for us to do and as I understand it, there is no requirement by law for me to do anything further. If we attempt to do anything else it could jeopardize both of our positions by allowing seepage material into our site which is not present at this time due to the fact that we have testing samples that indicate the site is literally free of any hazardous substances or at least 'legally clean.'
>
> In addition, [the consultant] has checked with IDEM and they are not going to do anything further about the matter. . . I am still proceeding against UNIVAR to recoup the money that we have expended and at the least, I am going to attempt to obtain a judgment that they are liable for any future cleanup. That way[,] you are doubly protected in the sense that we will have UNIVAR and Dynamic Alliance and myself to cover you in the event that anyone would require any further cleanup which we know will not be the case in light of IDEM's view that they are not interested.[25]

Northern did not proffer documentary evidence to confirm Dynamic's claims regarding Krikau's statements or Krikau's conversations with IDEM.

14. In April 1996, Northern hired August Mack Environmental, Inc. (August Mack) to review the environmental conditions at the Site.[26] In its June 19, 1996 Report, August Mack stated in relevant part,

> . . . In April 1991, Northern Acquisition Corp.[27] hired Mittlehauser to conduct a Phase II environmental assessment . . . *The results of the investigation indicated that soil and groundwater quality impacts were present at the site. Of particular concern were elevated levels of PCE detected in soil and groundwater and elevated levels of 1,2-dichlorobenzene detected in soil*.[28] . . .
>
> In response to the Phase II results, [Dynamic] retained ERS to develop and implement a remediation plan for the site. The remedial strategy involved soil excavation and disposal and groundwater recovery and disposal. *It is our understanding that IDEM has not been contacted and/or involved in the work conducted at the site to date, and that the work at the site had ceased to await application and acceptance into the IDEM Voluntary Remediation Program (VRP). Based on our understanding, the site was never*

[25] *Id*. p. 131.
[26] *Id*. pp. 148 - 149.
[27] It is unclear why August Mack's report states that *Northern Acquisition Corp*. hired Mittlehauser in April 1991 when Northern Acquisition Corp. became *Electro Seal* in March, 1991.
[28] *Id*.

> *entered into the program.*[29] . . .
>
> Groundwater recovery was conducted at the site by pumping groundwater from an onsite recovery well into tanker trucks. It was reported that approximately 5,000 gallons of impacted water was recovered. *Based on our review of the available information, it appears that no groundwater was recovered after June 1992*.[30]
>
> During groundwater remediation activities, groundwater sampling and analysis was conducted to monitor the concentrations of contaminants. The target list of parameters included trichloroethene (TCE), PCE and its breakdown products. *PCE, TCE and total 1, 2-dichloroethene were detected in groundwater samples collected from monitor wells at the site. . . . These levels [found] exceed the IDEM VRP Tier II cleanup levels*.[31]
>
> *No groundwater samples have been collected and/or analyzed since 1993. Sample analysis results for the 1993 samples indicated that groundwater impacts were present at the site above the Tier II cleanup levels for PCE*. Based upon this information, *groundwater impacts remain at the site and additional work (i.e., sampling and analysis and/or remedial action) is warranted regarding groundwater at the site.* At a minimum, we recommend groundwater samples *be collected to determine the current groundwater conditions*.[32]

(emphasis added).

15. Notwithstanding August Mack's concerns and recommendations, on July 11, 1996, Northern purchased the Site. Northern did not designate evidence that reflected it undertook groundwater sampling or confirmed Dynamic's claims about the extent of its work or its conversations with IDEM.

16. On December 17, 1999, IDEM sent a certified letter to Dynamic seeking information about the current status of the work at the Site.[33] IDEM's records do not reflect the agency received a response from Dynamic.

17. On July 29, 2016, IDEM sent an Information Update Request to Dynamic seeking updated information about the remediation that has taken place and the current status of the Site.[34] IDEM's records do not reflect the agency received a response from Dynamic.

18. On August 10, 2016, IDEM sent a Request for Information letter to Dynamic requesting information relating to the Site's cleanup. Dynamic informed IDEM that Northern c/o Robert

[29] *Id*. p. 150.
[30] *Id*.
[31] *Id*.
[32] *Id*. p. 151.
[33] VFC No. 44914412.
[34] VFC No. 80330914.

Dragani held the records.[35]

19. On September 6, 2017, IDEM sent Notice of Liability and Request for Information to Dynamic and Northern.[36] IDEM's records do not reflect the agency received a response from Northern. Northern did not designate documentation reflecting that it responded.

20. On October 3, 2017, Dynamic requested a 30-day extension for it to respond to IDEM's September 6 Notice. On October 4, 2017, IDEM agreed to the extension.[37] On November 1, 2017, IDEM received Dynamic's response.[38]

21. On October 25, 2017, IDEM sent Northern a Demand for Compliance letter to compel a response to the agency's September 6, 2017 letter.[39]

22. On November 25, 2017, Northern sent IDEM a response to the agency's August 10, 2016 Request for Information letter to Dynamic and provided IDEM with IDEM's February 13, 1992 letter to ERS along with Krikau's May 13, 1996 report.[40]

23. On December 5, 2017, IDEM visited Northern's headquarters to research documentation Northern possessed relevant to the 1991 remediation work.[41]

24. On January 9, 2018, IDEM sent Dynamic an email identifying it as a Responsible Party liable for the investigation and cleanup of any remaining contamination.[42]

25. On January 20, 2018, IDEM received Dynamic's response in which Mr. Cuppy agreed to conduct additional groundwater investigation on the property while reserving the right to dispute liability to perform further cleanup. Dynamic informed IDEM he retained consultant David Pyles of KPRG & Assoc. (KPRG) to conduct groundwater sampling.[43]

26. After discussions with KPRG on January 31, 2018, February 26, 2018, and April 10, 2018, IDEM and KPRG reached agreement for locations to install monitoring wells.[44] IDEM's records do not reflect the wells being installed. Northern designated no document to reflect that the wells had been installed.

27. On October 3, 2018, IDEM issued a Demand for Compliance letter to Dynamic to compel the collection of groundwater samples from the Site.[45] To date, IDEM has not received

[35] VFC No. 80338211.
[36] VFC No. 80517552.
[37] VFC Nos. 80531154 and 80531156.
[38] VFC No. 80565342.
[39] VFC No. 80546927.
[40] VFC No. 80564337.
[41] VFC No. 80583069.
[42] VFC No. 80585558.
[43] VFC No. 80595082.
[44] VFC Nos. 80601741, 80617963 and 80642693.
[45] VFC No. 82628716.

documentation reflecting the wells were installed or additional groundwater samples were collected.

28. On February 14, 2019, IDEM emailed Dynamic, KPRG and Northern to inform them IDEM had begun the process to issue a Commissioner's Order (CO) to compel the companies to undertake response activities at the Site.[46] KPRG informed IDEM that he was "no longer in communication and no longer has a professional consulting contracted [sic] for any services with or for Dynamic."[47]

29. On February 24, 2019, Fred Cuppy on behalf of Dynamic informed IDEM the company "does not have the funds to proceed with the matter any further . . .the only alternative is . . .to file a bankruptcy proceeding."[48]

30. On April 16, 2019, IDEM emailed Northern requesting it provide IDEM with a description of the investigation at the property. The same email was reissued on April 29 after a phone call between IDEM and Northern.[49] On May 2, 2019, Northern responded to the emails with a promise to "take care of this matter.[50]

31. On June 14, 2019, IDEM emailed Northern[51] stating,

> Good morning Bob, Do you have any progress to report regarding the investigation requested in my April 16, 2019 email . . .? I am happy to review any figures with your planned investigation, or to contact the environmental consultant you have contracted to perform the required investigation on your behalf. Please let me know if you have any questions regarding the requirements.

Northern did not designate documentation reflecting it responded to the email. IDEM's records do not reflect the agency received a response.

32. On July 24, 2019, IDEM issued Dynamic and Northern a Demand for Compliance letter with an attached Agreed Order to compel them to undertake response activities at the Site. To date, IDEM has not received a response.[52] Northern did not designate documentation reflecting it undertook response activities. IDEM did not receive a signed Agreed Order.

34. On December 13, 2019, IDEM issued its CO[53] to Dynamic and Northern pursuant to IC § 13-25-4-9 "to compel the implementation of appropriate response activities in regard to past

[46] VFC No. 82748491.
[47] VFC No. 82764681.
[48] VFC No. 82764684.
[49] VFC Nos. 82799259 and 82799286.
[50] VFC No. 82799259.
[51] *Id*.
[52] VFC Nos. 82816052, 82822619 and 82822643.
[53] VFC No. 82879333.

and ongoing releases of hazardous substances at the Site."[54]

35. On December 31, 2019, Northern timely filed a Petition for Administrative Review and Adjudicatory Hearing and Stay of Effectiveness (Petition) of the CO.[55]

36. On June 19, 2023, IDEM filed its Motion for Judgment on the Pleadings along with its Brief in Support (IDEM Brief).

37. On June 20, 2023, Northern filed its Motion for Summary Judgment along with its Brief in Support of Motion for Summary Judgment (Northern Brief).[56]

38. On July 19, 2023, IDEM filed its Response to Northern's Motion for Summary Judgment (IDEM Response). On that same date, Northern filed its Response Opposing IDEM's Motion for Judgment on the Pleadings (Northern Response).

39. On August 4, 2023, IDEM filed its Reply in support of its Motion (IDEM Reply) along with an Affidavit of Tim Johnson, Senior Environmental Manager with the State Cleanup section of IDEM's Office of Land Quality. Due to an Affidavit being presented to and accepted by the Court, IDEM's Motion for Judgment on the Pleadings is considered one for summary judgment. Ind. Trial Rule 12(C). On the same date, Northern filed its Reply in support of its Motion (Northern Reply).

40. After the parties filed their Replies, IDEM requested either the opportunity to file a Sur-Reply or schedule an Oral Argument to discuss the Motions and pleadings supporting the Motions.

41. Following an August 11, 2023 Status Conference, the presiding ELJ presided over the Oral Argument on September 11, 2023. Thereafter, both parties submitted proposed findings of facts, conclusions of law and final order.

Conclusions of Law

1. The IDEM is authorized to implement and enforce specified Indiana environmental laws, and rules promulgated relevant to those laws, per IC § 13-13, *et seq*. The OEA has jurisdiction over the decisions of the Commissioner of IDEM pursuant to IC § 4-21.5-7, *et seq*.

2. This is a Final Order issued under IC § 4-21.5-3-23. Findings of fact that may be construed as conclusions of law and conclusions of law that may be construed as findings of fact are so deemed.

3. The OEA must apply a de novo standard of review to this proceeding when determining

[54] Cover letter to CO, p. 1.
[55] As Dynamic did not file a Petition, OEA did not acquire jurisdiction over the company.
[56] In its Brief, Northern stated that the CO specified a spill of twenty (20) gallons of PCE in 1978. Northern Brief, p. 2, ¶ 2. The CO refers to a spill that occurred in 1978 but does not quantify the size.

the facts at issue. *Indiana Dept. of Natural Resources v. United Refuse Co.*, Inc., 615 N.E.2d 100 (Ind. 1993). Findings of fact must be based exclusively on the evidence presented to the ELJ, and deference to the agency's initial factual determination is not allowed. *Id.*; IC §4-21.5-3-27(d). Further, OEA is required to base its factual findings on substantial evidence. *Huffman v. Office of Envtl. Adjud.*, 811 N.E.2d 806, 809 (Ind. 2004); *see also* IC § 4-21.5-3-14 and IC § 4-21.5-3-27(d).

4. The parties have moved for summary judgment. The Court may enter judgment for a party if it finds that "the designated evidentiary matter shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Ind. Tr. R. 56(C); IC § 4-21.5-3-23. The moving party bears the burden of establishing that summary judgment is appropriate. All facts and inferences must be construed in favor of the non-movant, and all doubts as to the existence of a material issue must be resolved against the moving party. *Gibson v. Evansville Vanderburgh Building Commission, et al*., 725 N.E.2d 949 (Ind. Ct. App. 2000); *City of North Vernon v. Jennings Northwest Regional Utilities*, 829 N.E.2d 1, (Ind. 2005); *Tibbs v. Huber, Hunt & Nichols, Inc*., 668 N.E.2d 248, 249 (Ind. 1996).

A party opposing summary judgment must present specific facts demonstrating a genuine issue for trial. *Hale v. Community Hospitals of Indianapolis*, 567 N.E.2d 842, 843 (Ind. Ct. App. 1991) (citing *Elkhart Community School Corp. v. Mills*, 546 N.E.2d 854 (Ind. Ct. App. 1989)). "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him." Ind. Tr. R. 56(E).

An opposing party's mere assertions, opinions or conclusions of law will not suffice to create a genuine issue of material fact as to preclude summary judgment. *Sanchez v. Hamara*, 534 N.E.2d 756, 758 (Ind. Ct. App. 1989), *trans. denied*; *McMahan v. Snap-On Tool Corp*., 478 N.E.2d 116, 122 (Ind. Ct. App. 1985). Factual disputes that are irrelevant or unnecessary will not be considered. *Owen v. Vaughn*, 479 N.E.2d 83, 87 (Ind. Ct. App. 1985). Once a moving party sets out a prima facie case in support of the summary judgment, the burden shifts to the non-movant to establish a factual issue. However, Ind. Tr. R. 56(C) states: "Summary judgment shall not be granted as of course because the opposing party fails to offer opposing affidavits or evidence, but the court shall make its determination from the evidentiary matter designated to the court."

5. In its Petition,[57] Northern raises three issues pertaining to whether it should be held responsible for the groundwater issues that occurred at the Site prior to its leasing or purchasing the property:

I. Whether Northern is exempt from liability arising under IC § 13-25-4-1 *et seq*.

[57] Petition, pp. 2 – 3.

II. Whether Dynamic should be held solely and 100% responsible for the investigation and remediation of the Site.

III. Whether IDEM failed to pursue all avenues of recovery against the actual polluter.

Northern is not exempt from liability arising under IC § 13-25-4-1 *et seq*.

6. The CO to Compel was issued under IC § 13-25-4-9(b) which states, "[t]he Commissioner may issue an administrative order for the purpose set forth in [lC § 13-25-4- 9(a)(l)]." IC § 13-25-4-9(a)(l) states the Commissioner may "compel a responsible person to undertake a removal or remedial action with respect to a release of a hazardous substance from a facility or site in Indiana." *Id*.

lC § 13-11-2-192(b) sets out that a "responsible person" for purposes of lC § 13-25-4 is a person who is:

> (1) liable to:
> a. The United States government;
> b. The state; or
> c. Any other person;
> under Section 107 of CERCLA (42 U.S.C. 9607); or
> (2) liable to the state under IC 13-25-4-8.

IC § 13-25-4-8 in pertinent part incorporates the CERCLA liability provisions of 42 U.S.C. § 9607. Under 42 U.S.C. § 9607(a), the following are persons liable to the U.S. government, a state or Indian tribe for removal or remedial action involving a hazardous substance[58] and costs related thereto:

> (1) the owner and operator of a vessel or a facility,
> (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,
> (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and
> (4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance . . .

Regulatory agencies may order a current owner to address contamination on a site,

[58] CERCLA requires the EPA to create a list of hazardous substances and reportable quantities, and PCE is considered a hazardous substance. *See* 40 C.F.R. § 302.4(a) and Table 302.4 for EPA's list.

"creat[ing] a claim that runs with the land." *In re CMC Heartland Partners*, 966 F.2d 1143, 1146 (7th Cir. 1992), simply stated, responsible person includes the current owner and any person who formerly owned and operated the facility in question at a time of actual or threatened release of a hazardous substance. *Kerr-McGee Chem. Corp. v. Lefton Iron & Metal Co.*, 14 F.3d 321, 325 (7th Cir. 1994).

In its Petition, Northern stated it was the current owner of the facility located at 914 Broadway, Chesterton, Porter County, where there was a release of PCE, a hazardous substance.[59] Consequently, Northern is a Responsible Person under 42 U.S.C. § 9607(a)(1) for remedial action related to the release of PCE at the Site regardless of whether Northern leased or owned the property at the time of the release. Northern's argument claiming it is exempt from liability arising under IC § 13-25-4-1 *et seq*. is without merit.

OEA does not have authority to hold Dynamic solely responsible for the investigation and remediation of the Site.

7. Northern contends Dynamic should be held solely responsible for the investigation and remediation of the Site.[60] Under 42 U.S.C. § 9607(a)(2), Dynamic is also a Responsible Person.[61] *See Kerr-McGee, supra.* There exists no hierarchy under CERCLA or Indiana law that designates which of the multiple responsible persons has primary responsibility or liability to address contamination at a site.

Joint and several liability is the accepted standard for responsible persons under CERCLA § 107(a), and federal district courts are required to allocate response costs in keeping with CERCLA's equitable principles. *Von Duprin LLC v. Major Holdings LLC*, 12 F.4th 751 (7th Cir. 2021). There exists no Indiana law that authorizes an ELJ to apportion liability among responsible persons or authorizes an allocation of response costs.

Northern contends "Fred Cuppy, as an individual, and on behalf of Dynamic 'agreed to remain liable should any further cleanup be required'"[62] as a reason Dynamic should be held solely responsible. As state agencies, IDEM and OEA have authority to take only those actions granted by law. "An agency . . . may not by its rules and regulations add to or detract from the law as enacted, nor may it by rule extend its powers beyond those conferred upon it by law." *Lee Alan Bryant Health Care Facilities, Inc. v. Hamilton*, 788 N.E.2d 495, 500 (Ind. Ct. App. 2003).

While OEA has jurisdiction over the decisions of the Commissioner of IDEM and the parties to the controversy pursuant to IC § 4-21.5-7-3, it does not have authority to overturn a decision on the basis that IDEM failed to consider issues over which the agency has no authority to consider. The fact that Fred Cuppy personally and on behalf of Dynamic agreed to remain liable

[59] Petition, p. 2. Northern has not contended it was not a Responsible Person.
[60] Petition, p. 2.
[61] IDEM identified Dynamic as a responsible person for the investigation and cleanup of any remaining contamination identified on the property. VFC No. 80585558.
[62] Northern Ex. 5.

for the cleanup of the Site is a contractual issue between Dynamic and Northern. As IDEM has no authority to address contractual issues between parties, OEA does not have authority to hold Dynamic solely and 100% responsible.

IDEM has not failed to pursue all avenues of recovery against the actual polluter.

8. Northern contends "IDEM failed to pursue all avenues of recovery[63] against Dynamic."[64] Northern also contends, "[o]nly when Mr. Cuppy[65] claimed an inability to pay did IDEM shift its focus to [Northern] as the current property owner."[66] Other than this statement, Northern did not designate any evidence supporting its contentions.

There exists no statutory or regulatory timeframe by which IDEM is required to pursue the CO's enforcement as to Dynamic. Moreover, it is not an efficient, concise use of judicial time and effort or a prudent use of state resources to address one party in one forum when it involves the same Site, the underlying CO and is in the process of being administratively appealed.[67] Had Northern undertaken a release assessment and completed the remedial action,[68] it would be able to pursue Mr. Cuppy and Dynamic by "bring[ing] an environmental legal action against a person that caused or contributed to the release to recover reasonable costs of a removal or remedial action involving the hazardous substances or petroleum." IC § 13-30-9-2.

The statute of limitations has not expired.

9. Northern proffers three alternative reasons[69] why the statute of limitations barred the issuance of IDEM's CO:

(I) CERCLA's six-year cost recovery statute of limitations;

(II) Indiana's general ten-year statute of limitations; and/or

(III) equitable doctrine of laches.

IDEM posits none of the three reasons apply to the facts of this cause.

CERCLA's six-year cost recovery statute of limitations does not apply.

10. Northern contends that because IDEM knew of the 1978 PCE spill in 1996, but waited

[63] The CO was not issued as an avenue of recovery, but rather an avenue "to compel the implementation of appropriate response activities in regard to past and ongoing releases of hazardous substances at the Site." CO cover letter, p. 1.
[64] Petition, p. 2.
[65] Mr. Cuppy notified IDEM of its inability to pay on February 24, 2019.
[66] Northern Reply, p. 5.
[67] *Cf. Whiteco Industries, Inc. v. Nickolick* 549 N.E.2d 396, 398 (Ind. Ct. App. 1990).
[68] *S*ee IC § 13-12-3-2, § 13-25-4 and § 13-25-5-8.5.
[69] Northern Brief, p. 6.

until 2019 to issue its CO, the statute of limitations expired long before the CO was issued.[70] Northern cites *United States v. Navistar Int'l Transp. Corp*., 152 F.3d 702, 713 (7th Cir. 1998) contending the case is directly applicable to this Cause.[71] In *Navistar*, the Seventh Circuit determined that a six-year statute of limitations applied to federal cost recovery claims under CERCLA Section 113. The Court also found that the six-year statute of limitations applied to Indiana CERCLA-type cost recovery claims because Indiana's CERCLA equivalent, IC § 13-25-4-8, affirmed that a "person that is liable under Section 107(a) of CERCLA . . . the costs of removal or remedial action incurred by the commissioner . . . is liable, in the same manner and to the same extent to the state under this section." *Id.*

CERCLA's cost recovery statute of limitations has requirements that must be met by a responsible person before the clock starts running:

> 42 U.S.C. § 9613. Civil proceedings
> . . .
> (g) Period in which action may be brought
> . . .
> (2) Actions for recovery of costs
> An initial action for recovery of the costs referred to in section 9607 of this title must be commenced:
>
> (A) for a removal action, within 3 years after completion of the removal action, except that such cost recovery action must be brought within 6 years after a determination to grant a waiver under section 9604(c)(1)(C) of this title for continued response action; and
> (B) for a remedial action, within 6 years after initiation of physical on-site construction of the remedial action, except that, if the remedial action is initiated within 3 years after the completion of the removal action, costs incurred in the removal action may be recovered in the cost recovery action brought under this subparagraph.
>
> In any such action described in this subsection, the court shall enter a declaratory judgment on liability for response costs or damages that will be binding on any subsequent action or actions to recover further response costs or damages. A subsequent action or actions under section 9607 of this title for further response costs at the vessel or facility may be maintained at any time during the response action but must be commenced no later than 3 years after the date of completion of all response action. Except as otherwise provided in this paragraph, an action may be commenced under section 9607 of this title for recovery of costs at any time after such costs have been incurred. 42 U.S.C. § 9613(g)(2).

The CO here, issued under IC § 13-25-4-9, is not a cost recovery claim as Northern has not

[70] Northern Reply, p. 6.
[71] Northern Brief, pp. 5 – 6.

undertaken removal or remedial actions at the Site, and IDEM is not seeking monies for work the agency did not undertake. "Removal" is defined by CERCLA, 42 U.S.C. § 9601(23), as:

> ... the cleanup or removal of released hazardous substances from the environment, ... such actions as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances, the disposal of removed material, or the taking of such other actions as may be necessary to prevent, minimize, or mitigate damage to the public health or welfare or to the environment, which may otherwise result from a release or threat of release.

"Remedial" is defined by CERCLA, 42 U.S.C. § 9601(24), as:

> ... those actions consistent with permanent remedy taken instead of or in addition to removal actions in the event of a release or threatened release of a hazardous substance into the environment, to prevent or minimize the release of hazardous substances so that they do not migrate to cause substantial danger to present or future public health or welfare or the environment.

The information ERS presented to IDEM indicates that a release of PCE was discovered at the Site in 1991 and some remediation work was undertaken; however, Northern did not designate evidence reflecting that either it or Dynamic addressed the groundwater contamination. Accordingly, adequate removal action (release assessment) has not been performed, and no remedial action (permanent remedy) has been undertaken at the Site. In sum, even if this were a cost recovery action, the statute of limitations period of 42 U.S.C. 9613(g)(2) has not been triggered. Northern's argument is without merit.

Indiana's 10-year residual statute of limitations does not apply.

11. Northern contends "when a cause of action is enacted without a statute of limitations provision, the General Assembly decided[72] that the missing statute of limitations would be ten years."[73] Indiana's 10-year residual statute of limitations does not apply due to Northern's ongoing failure to comply with IC § 13-12-3-2(a) which requires:

> [t]he remediation and closure goals, objectives, and standards for all remediation projects conducted under ... IC 13-25-4 shall be consistent with the remediation objectives set forth in IC 13-25-5-8.5, regardless of whether the remediation project begins before July 1, 2009 or after June 30, 2009.

IC § 13-25-5-8.5(b) reads,

> The remediation objectives for each hazardous substance and any petroleum on the site shall be based on:

[72] IC § 34-11-1-2(a).
[73] Northern Reply, p. 4.

(1) background levels of hazardous substances and petroleum that occur naturally on the site; or

(2) an assessment of the risks pursuant to subsection (d) posed by the hazardous substance or petroleum presently found on the site taking into consideration the following:

(A) Expected future use of the site.

(B) Measurable risks to human health, natural resources, or the environment based on the:

(i) activities that take place; and

(ii) environmental impact;

on the site.

Northern neither designated evidence to support that PCE naturally exists at the Site nor provided documentation that it completed an adequate risk assessment. Northern's inaction does not meet the requirements of IC § 13-25-5-8.5(b).

The equitable doctrine of laches (laches) does not apply.

12. Northern argues that IDEM's issuance of the CO is barred by laches. Laches may be used against a government body if there is affirmative misconduct. *United States v. Webb*, 486 F. Supp. 3d 1238, 1247 (S.D. Ind. 2020) (stating "[a]ffirmative misconduct is 'more than mere negligence . . . . It requires an affirmative act to misrepresent or mislead"). Laches . . . may not be asserted against governmental bodies[74] unless the party claiming laches . . . can show it is not inconsistent with the public interest. *Muncie Indus. Revolving Loan Fund Bd. v. Ind. Constr. Corp*., 583 N.E.2d 769, 772 (Ind. Ct. App. 1991), reh'g denied, trans. denied. A court must balance the competing interests when determining whether to apply laches against a governmental body. *Nat'l Salvage & Serv. Corp. v. Comm'r of Ind. Dep't of Envtl. Mgmt*., 571 N.E.2d 548, 557 (Ind. Ct. App. 1991), *trans. denied*, *cert. denied*.

Citing *Ind. Real Est. Comm'n v. Ackman*, 766 N.E. 2d 1269, 1273 (Ind. Ct. App. 2002), Northern contends "[t]here is no prohibition against asserting laches against a government entity."[75] The Court in *Ackman* stated more:

> We acknowledge that equitable defenses, such as laches, typically may not be asserted against the government when it acts in its sovereign capacity to protect the public welfare.[76] . . . There does not appear to be a generally recognized prohibition against enforcing the laches defense against a government entity[.][77] While there may not be a 'generally recognized prohibition' against applying the doctrine where a government entity is involved, *we conclude that where government acts to protect the public welfare, the doctrine should not be permitted to frustrate the enforcement of a valid*

[74] *Cablevision of Chicago v. Colby Cable Corp*., 417 N.E.2d 348, 354 (Ind. Ct. App. 1981).
[75] Northern Brief, p. 7.
[76] *See U.S. v. Wedzeb*, 809 F. Supp. 646 (S.D. Ind. I992)
[77] *Hi-Way Dispatch, Inc. v. Indiana Dep't of State Revenue*, 756 N.E.2d 587 (Ind. Tax Ct. 2001).

regulation except in the clearest and most compelling circumstances.

Id. (emphasis added).

Here, IDEM did not engage in affirmative misconduct. Inarguably, using its authority under IC § 13-25-4-9 "to compel a responsible person to undertake a removal or remedial action with respect to a release or threatened release of a hazardous substance from a facility or site in Indiana" is protective of the public's health and welfare. An adequate investigation of groundwater where a hazardous substance was release is in the public's interest. Northern has known that the Site was contaminated since it started operating at the Site in March 1991.[78] Northern has not designated evidence to support engaged in affirmative misconduct, and IDEM's issuing the CO does not constitute a clear and compelling circumstance for this Court to apply laches.

13. Northern cites *Board of Zoning Appeals v. Beta Tau House Corp*., 499 N.E.2d 780, 781 (Ind. Ct. App. 1986) to contend laches is an available defense against an Indiana government agency when the facts are compelling.[79] In that case, the Court barred the Board of Zoning Appeals (BZA) from enforcing a zoning ordinance against Beta Tau House Corp. (Beta Tau) because the BZA misled Beta Tau into believing that its use of its property was permissible, induced the Beta Tau to act, and acquiesced for almost a decade to the improvements the corporation made to the property. *Id*. at 783. The Court found that BZA faced prejudice due to its large expenditure for remodeling. *Id*.

At no time did IDEM represent to Northern their continued lack of responsiveness in addressing the contamination at the Site was permissible, issue a No Further Action letter or express that no additional site investigation and risk assessment needed to occur. Unlike the Beta Tau House Corporation, Northern has not experienced large expenditures as it has not undertaken removal or remediation.

14. Northern cites *Dalton Corp. v. Ind. Dep't of Env't Mgmt*, No. 49-D06-0307-PL-1204; 2003 WL 23353406 (Marion Sup. November 20, 2003) as a demonstration of where "laches was sufficient to bar a government action by IDEM specifically."[80] There, IDEM had confirmed at various times from 1984 through 1989 that certain air quality requirements did not apply to the Dalton facility and settled a court matter, with prejudice, in 1990 involving the same question. In 1998, IDEM asserted the requirements did apply, and the facility's non-compliance resulted in the 2003 IDEM commissioner's order at issue in that case. The trial court judge found the settlement of the case and vital data necessary to refute IDEM's allegations was unavailable prejudicial to the petitioner and found IDEM's order was barred by laches. *Id*.

The facts in this Cause are distinguishable as there occurred no settlement with prejudice or lost vital data for Northern to refute IDEM's allegations. At no time did IDEM release the Site or

[78] CO, p. 2.
[79] Northern Brief, p. 7.
[80] Northern Brief, p. 8.

the current or former owners from their responsibilities to the Site. They did not state that investigation at the Site was unnecessary.

Here, IDEM

- engaged in a telephone call with Northern requesting an update on the status of the remedial activities proposed in the ERS Work Plan;
- sent Northern an Information Update Request letter;
- sent Northern a Notice of Liability and Information Request letter;
- sent Northern a Demand for Compliance letter;
- conducted a Site visit to review pertinent documents in Northern's possession;
- sent Northern an email to inform that IDEM had begun the process to issue the CO;
- sent Northern an email to provide a description of the investigation IDEM was requesting;
- sent Northern an email after Northern didn't follow-up its own email stating it would "take care of this matter"; and
- issued Northern a Demand for Compliance letter with an attached Agreed Order.

In short, the agency did not change its position so as to cause prejudice to Northern. *Richmond State Hosp. v. Brattain*, 961 N.E.2d 1010, 1012 (Ind. 2012) (quoting *Shafer v. Lambie*, 667 N.E.2d 226, 231 (Ind. Ct. App. 1996)). Northern's mere assertions that it reasonably believed any liability for the PCE spill resided with Dynamic and IDEM only shifted its focus after Dynamic informed the agency it did not have the money are not supported by IDEM's actions. IDEM neither misled Northern into believing its continued lack of responsiveness in addressing the contamination at the Site was permissible nor engaged in affirmative misconduct by not asking Northern to do what it promised to do. Given the fact that *Dalton* is an unpublished case, and the facts differ significantly from the Cause at hand, the Court does not find it persuasive.[81]

15. Northern argues it "has been prejudiced by IDEM's delay in pursuing the actual polluter which now claims to be unable to pay for a cleanup"[82] but its argument is self-serving and unconvincing. Notwithstanding the fact that Northern was aware of what was and was not happening at the Site with respect to investigation and remediation, it still chose to purchase

[81] Unpublished trial court decisions do not serve as precedent and may only be considered for their persuasive value. *See Ind. Dep't of Natural Res. V. United Minerals, Inc*., 686 N.E.2d 851, 857 (Ind. Ct. App. 1997), *trans. denied.*

[82] Northern Brief, p. 8.

the property in July 1996.[83] To date, it continues to use the Site and yet has not addressed the issues it raised to Dynamic after Northern started leasing in 1991. Northern cannot complain it has been prejudiced by its perceived "IDEM's delay" when Northern repeatedly and consistently failed to take action for the same issues for which it is now being held accountable. Clearly, an adequate groundwater investigation of a hazardous substance release is in the public interest, and the public's interest in having that information to address outstanding risks outweighs Northern's unsupported belief that, as a responsible person, it has been prejudiced.

The remaining four claims appearing in Northern's Petition were neither argued in any of its subsequent pleadings nor supported by any documentary evidence.

Northern raised four issues in its Petition[84] without addressing any of them in its Motion for Summary Judgment, Brief in Support, Reply or at Oral Argument:

I. Whether the claims against Northern are arbitrary, capricious, and an abuse of discretion;

II. Whether the [CO] is void for vagueness under Indiana law;

III. Whether the vagueness of the [CO] violates due process and due course of law rights under the U.S. Constitution and Indiana Constitution; and

IV. Whether the [CO] or IDEM's implementation of the [CO] violates . . . [IC § 4-21.5] or other Indiana law.

Pursuant to Ind. Tr. R. 56 (E) "an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him." A party's mere assertions, opinions or conclusions of law will not suffice to create a genuine issue of material fact as to preclude summary judgment. *Sanchez*, *supra* at 758; *McMahan*, *supra* at 122.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED Northern's Motion for Summary Judgment is **DENIED**, and IDEM's Motion for Summary Judgment is **GRANTED**. This case is **DISMISSED**. All further proceedings are **VACATED**.

You are hereby further notified that pursuant to provisions of IC § 4-21.5-7-5, the Office of Environmental Adjudication serves as the Ultimate Authority in the administrative review of decisions of the Commissioner of the Indiana Department of Environmental Management. This is a Final Order subject to Judicial Review consistent with applicable provisions of IC § 4-21.5. Pursuant to IC § 4-21.5-5-5, a Petition for Judicial Review of this Final Order is timely only if it is filed with a civil court of competent jurisdiction within thirty (30) days after the date this notice

[83] VFC No. 80564337.
[84] Petition, pp. 2 – 3.

is served.

IT IS SO ORDERED this 31st day of January, 2024 in Indianapolis, IN.

_____
Hon. Lori Kyle Endris
Environmental Law Judge