

**OBJECTION TO THE DENIAL OF
EXCESS LIABILITY TRUST FUND ("ELTF") CLAIM
ELTF #2021 07 502-2 / FID # 11218
MCCLURE OIL CORPORATION
2025 OALP 051, CAUSE NO.: IDEM-2309-002968**

Official Short Cite Name:	McClure Store #43, 2025 OALP 051
Cause Nos.:	IDEM-2309-002968 (OEA 23-F-J-5261)
Topics/Keywords:	Excess Liability Trust Fund ELTF 312 IAC 13-10-2 328 IAC 1-3-3; (a) 328 IAC 1-3-3(a)(2); (A) – (C) 328 IAC 1-3-3(a)(4) 328 IAC 1-3-4 329 IAC 9 329 IAC 9-5-5.1 IC § 14-10-2-4 IC § 4-21.5 IC § 4-21.5-3-7 IC § 4-21.5-3-23 IC § 4-21.5-3-27(d) IC § 4-21.5-5-5 IC § 25-39-4 Ind. Tr. R. 56(C) Dept. of Natural Resources v. United Refuse Co., Inc., 615 N.E.2d 100 (Ind. 1993) 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) Hale v. Community Hospitals of Indianapolis, 567 N.E.2d 842, 843 (Ind. Ct. App. 1991) Williams v. Tharp, 914 N.E.2d 756 (Ind. 2009) Burke v. City of Anderson, 612 N.E.2d 559, 565, (Ind. Ct. App. 1993) Bourbon Mini-Mart, Inc. v. Commissioner, Indiana Department of Environmental Management, 806 N.E.2d 14, 20 (Ind.Ct.App. 2004) Matter of Middlefork Watershed Conservancy Dist., 508 N.E.2d 574, 577 (Ind. Ct. App. 1987) GasAmerica # 47, 2004 OEA 123, 129 Blue River Valley, 2005 OEA 1, 11-12

Topics/Keywords, cont.:	HydroTech Consulting and Engineering, Inc. 2005 OEA 26, 41
	Sun Chemical Corporation, 2013 OEA 78
	Clark Station #379, 2017 OEA 72
	Ohio Farmers Insurance Co., 2018 OEA 39
Presiding ELJ:	Hon. Lori Kyle Endris
Party Representatives:	Petitioner/Owner/Operator - Richard VanRheenen, Esq. and Emily R. Vlasak, Esq.
	Respondent - Sarah E. Sharpe, Esq.
Order Issued:	May 21, 2025
Index Category:	Excess Liability Trust Fund or ELTF
Further Case Activity:	Verified Petition for Judicial Review filed 6/20/2025 in Grant County Circuit Court (27C01-2506-RA-000002).



ISSUED:
May 21, 2025

**STATE OF INDIANA
OFFICE OF ADMINISTRATIVE LAW PROCEEDINGS**

MCCLURE OIL CORPORATION on behalf
of MCCLURE STORE 43,
Petitioner/Owner/Operator,

v.

INDIANA DEPT OF ENVIRONMENTAL
MANAGEMENT,
Respondent.

Administrative Case Number: IDEM-2309-002968
OEA 23-F-J-5261

Agency Number: EXCESS LIABILITY TRUST FUND
("ELTF") CLAIM No. 2021 07 502-2 / FID # 11218

FINDINGS OF FACT, CONCLUSIONS OF LAW and FINAL ORDER

The Administrative Law Judge (ALJ) having considered the pleadings now issues this Final Order addressing the Indiana Department of Environmental Management's (IDEM) denial of McClure Oil Corporation, Store 43's (McClure) Claim No. 2021 07 502-2.

Jurisdiction

The Office of Administrative Law Proceedings (OALP or Court) has jurisdiction over this case pursuant to Ind. Code § 4-15-10.5-12.

Procedural History

1. On August 15, 2023, IDEM denied McClure's claim for reimbursement in its entirety, stating that McClure's claim was untimely under 328 IAC 1-3-3(a)(4).
2. On September 1, 2023, McClure timely filed a Petition for Administrative Review.
3. On January 27, 2025, Petitioner filed its Motion for Summary Judgment, Brief in Support and Designation of Evidence and Exhibits.

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4. On February 26, 2025, Respondent filed its Response to Petitioner's Motion for Summary Judgment and Designation of Evidence and Exhibits.

5. On March 17, 2025 - Petitioner filed their Reply Brief in support of its MSJ.

Issues

1. Whether McClure's claim for ELTF reimbursement was timely.
2. Whether IDEM's denial of McClure's claim constitutes an abuse of discretion.

Findings of Fact

1. McClure owns and operates a gas station at 4945 West 71st Street, Indianapolis, Indiana (the Site).¹

2. The Site previously contained five Underground Storage Tanks (USTs), which were removed in July of 2021.²

3. While removing one of the USTs, McClure's consultant performing the tank removal discovered a petroleum release and reported the suspected release to the Indiana Department of Environmental Management (IDEM) on July 9, 2021.³ IDEM issued Incident Number #202107502 to the release.⁴

4. On July 22, 2021, McClure submitted an Excess Liability Trust Fund (ELTF) Eligibility Application (Eligibility Application) to IDEM to qualify for reimbursement from the ELTF for costs associated with LUST Incident #202107502.⁵

5. From August 10, 2021, to September 16, 2021, McClure conducted remedial actions on the Site to address the release.⁶

6. On November 12, 2021, McClure submitted an Initial Site Characterization (ISC)⁷ report to IDEM, which concluded that remaining soil and groundwater sampling results showed no detections of petroleum contaminants above their respective screening levels and no

¹ McClure Ex. A, Initial Site Characterization, VFC #83243359, p. 2.

² *Id.*, p. 1.

³ McClure Ex. D, Leaking Underground Storage Tank Initial Incident Report (Initial Incident Report), VFC #83190339.

⁴ *Id.*, p. 1.

⁵ IDEM Ex. 3, McClure's Excess Liability Trust Fund Eligibility Application.

⁶ McClure Ex. E, Corrective Action Plan and Implementation (CAP), VFC #83252268, p. 1.

⁷ McClure Ex. A, Initial Site Characterization, VFC #83243359.

indication of residual petroleum impact in soil or groundwater.⁸

7. The ISC concluded that site conditions did not pose an environmental exposure risk, and McClure requested that IDEM issue an unconditional No Further Action Letter (NFA) and close the incident number.⁹

8. On February 18, 2022, IDEM issued the NFA Letter to McClure.¹⁰

9. The NFA Letter stated that “[b]ased on the technical reports reviewed by IDEM and the additional lines of evidence, IDEM concludes that no further response actions are required.”¹¹ The Letter granted unconditional closure for soil exposure, groundwater exposure, and vapor intrusion exposure with regards to the release.

10. The NFA Letter contained instructions for submitting a claim for reimbursement to the Excess Liability Trust Fund, including the following language, “Please note that as required by 328 IAC 1-3-3(a)(2) you must submit all claims for payment of reimbursable costs related to the ISC conducted under 329 IAC 9-5-5.1 within three hundred sixty-five (365) days after submittal of all reports required under 329 IAC 9. Additionally, any remaining claims for payment of reimbursable costs must be submitted within three-hundred sixty-five (365) days after the date those costs were incurred.”¹²

11. The NFA Letter explicitly stated that the determination of status was a final agency action subject to administrative review under IC § 4-21.5 and included instructions for filing a timely appeal with the Office of Environmental Adjudication, the final authority for IDEM at the time the letter was issued.¹³ The NFA Letter included language referencing the abandonment of monitoring wells that are no longer necessary for the investigation of the release at issue.¹⁴ McClure did not appeal the NFA determination.

12. The Indiana Department of Natural Resources (IDNR) administers 312 IAC 13-10-2 and regulates wells and well abandonment.¹⁵

13. IDEM noted the requirements of 312 IAC 13-10-2 in its NFA Letters as a reminder to responsible parties that the wells are regulated by IDNR and should be abandoned in

⁸ *Id.*, at 2.

⁹ McClure Ex. A, ISC, p. 9.

¹⁰ McClure Ex. F, Veatch Depo Ex. 2, NFA Letter, VFC #83290234, p.1

¹¹ McClure Ex. F, NFA Letter, p. 2.

¹² *Id.*

¹³ *Id.*, p. 3.

¹⁴ *Id.*, p. 2.

¹⁵ See 328 IAC § 13-10-2, Ind. Code § 14-10-2-4 and IC § 25-39-4.

accordance with IDNR regulations.¹⁶

14. On February 22, 2022, IDEM approved McClure's Eligibility Application for Incident Number #202107502.¹⁷

15. The ELTF Eligibility Approval contained instructions for submitting a claim for reimbursement to the Excess Liability Trust Fund, including the following language, "Please note that as required by 328 IAC 1-3-3(a)(2) you must submit all claims for payment of reimbursable costs related to the ISC conducted under 329 IAC 9-5-5.1 within three hundred sixty-five (365) days after submittal of all reports required under 329 IAC 9. Additionally, any remaining claims for payment of reimbursable costs must be submitted within three-hundred sixty-five (365) days after the date those costs were incurred."¹⁸

16. The ELTF Eligibility Approval included instructions for filing a timely appeal with the Office of Environmental Adjudication, the final authority for IDEM at the time the letter was issued.¹⁹ The instructions included the following language: "Failure to properly submit a request for review within the time period described above waives your right to administrative review of this determination."²⁰ McClure did not appeal the ELTF eligibility approval.

17. On June 26, 2023, four-hundred ninety-three (493) days after IDEM issued the NFA letter, and three-hundred thirty-three (333) days after the last costs were incurred, McClure submitted a claim for reimbursement from the ELTF for \$117,938.68 for costs incurred between June 16, 2021, and July 31, 2022.²¹

18. On August 15, 2023, IDEM issued a letter denying McClure's June 26, 2023, claim for reimbursement from the ELTF (ELTF Denial).²² Included with the ELTF Denial was a Cost Review Summary. In this summary, the reason for the denial was as follows:

As noted in 328 IAC 1-3-3(a)(4),²³ costs shall be submitted within three-hundred

¹⁶ McClure Ex. F, Veatch Deposition, at p. 23:19-25.

¹⁷ IDEM Ex. 4, IDEM's Review of Excess Liability Trust Fund Eligibility Application – Final Determination Approval.

¹⁸ IDEM Ex. 4, ELTF Eligibility Approval, p. 2.

¹⁹ *Id.*

²⁰ *Id.*

²¹ McClure Ex. J, Claim for ELTF Reimbursement, VFC #83497099, p. 5; McClure Ex. K, Veatch Deposition Ex. 1, IDEM's Denial of McClure's Claim for ELTF Reimbursement (ELTF Denial).

²² McClure Ex. K., VFC #83284798.

²³ When initially reviewing McClure's claim for reimbursement from the ELTF, IDEM mistakenly applied the deadline standard applicable to claims that occurred prior to July 1, 2016 in 328 IAC 1-3-3(a)(4) relative to the date of the NFA determination. See McClure Ex. K, ELTF Denial, p. 4. After McClure filed its appeal, IDEM realized its error and informed McClure that, because the date of the release cannot be determined and the release was discovered on July 8, 2021, the appropriate deadline for McClure to submit a reimbursement request was the time frame

sixty-five days after a No Further Action approval. The NFA was approved on 2/18/2022 and the claim was submitted on 6/26/2023. These costs were submitted past the three-hundred sixty-five (365) day requirement; therefore, this claim²⁴ is denied.²⁵

19. On September 1, 2023, McClure filed a Petition for Administrative Review (Petition) with the Indiana Office of Environmental Adjudication.

20. On March 29, 2024, the consulting firm Troy Risk, on behalf of McClure, submitted to IDEM a technical memorandum, in which Troy Risk claims that the presence of methyl tertiary-butyl ether (MTBE) in soil samples in the tank pit shows that the release occurred prior to 2004.²⁶ The Troy Risk Memo states that the exact age of the release is unknown.²⁷

21. The Troy Risk Memo based its conclusions on sampling data obtained in July 2021, which data was available to it prior to when the NFA Letter and the ELTF Eligibility Determination were issued.²⁸

Conclusions of Law

1. This is a Final Order issued under Ind. Code § 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.

2. OALP must apply a de novo standard of review when determining 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 ALJ, and deference to the agency's initial factual determination is not allowed. *Id.*; IC § 4-21.5-3-27(d). Pursuant to IC § 4-21.5-3-23, an ALJ shall consider a summary judgment motion as would a court that is

specified from 328 IAC 1-3-3(a)(2) relative to report submission and the date costs were incurred, which was the time frame specified in both the NFA letter and the ELTF Eligibility Determination. *See* McClure Ex. I, Blackburn Depo, p. 26:8-16.

²⁴ IDEM acknowledges that costs for abandoning the monitoring wells may be reimbursable as they were abandoned on July 5, 2022, and McClure submitted its ELTF claim on June 26, 2023, which is fewer than three-hundred and sixty-five (365) days after the costs of abandoning the wells were incurred. IDEM is not requesting summary judgment in its favor with respect to these costs. These costs have not been reviewed for reasonableness and cost effectiveness. Therefore, summary judgment ordering the payment of these costs is also not appropriate, as there are remaining issues of fact as to whether those costs are reimbursable.

²⁵ McClure Ex. K, ELTF Denial, p. 4.

²⁶ McClure Ex. B, Timothy E. Veatch Deposition Exhibit 3, Troy Risk Technical Memorandum (Troy Risk Memo).

²⁷ *Id.*

²⁸ *See Id.*, Att. 5, Figure 4 and Table 1.

considering a motion for summary judgment filed under Trial Rule 56 of the Indiana Rules of Trial Procedure.

3. The Court may enter summary 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).

4. 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). When a motion for summary judgment is made, an adverse party may not rest upon the mere allegations or denials of their pleading but must set forth specific facts showing that there is a genuine issue for trial. *Williams v. Tharp*, 914 N.E.2d 756 (Ind. 2009). Summary judgment shall be rendered if the designated evidentiary matter shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Ind. T.R. 56(C).

5. The OALP is required to base its findings, including its determination as to whether there is a genuine issue of material fact, on substantial evidence. IC § 4-21.5-3-27(d). The substantial evidence standard “requires a lower burden of proof than the preponderance [of the evidence] test, yet more than the scintilla of the evidence test.” *Burke v. City of Anderson*, 612 N.E.2d 559, 565, (Ind. Ct. App. 1993). See also *GasAmerica # 47*, 2004 OEA 123, 129; *Blue River Valley*, 2005 OEA 1, 11-12; *Objection to the Denial of Excess Liability Trust Fund Claim Marathon Point Service, ELF # 9810570/FID # 1054, New Castle, Henry County, Indiana; Winimac Service, ELF # 9609539/FID # 14748, Winimac, Pulaski County, Indiana; HydroTech Consulting and Engineering, Inc.* 2005 OEA 26, 41.

McClure neither appealed the No Further Action Letter nor the ELTF Eligibility Determination, both of which imposed the ELTF claim deadline found in 328 IAC 1-3-3(a)(2); thus, McClure waived its right to appeal IDEM’s imposition of 328 IAC 1-3-3(a)(2).

6. McClure contends IDEM failed to utilize 328 IAC 1-3-3(a)(4) in lieu 328 IAC 1-3-3(a)(2). 328 IAC 1-3-3(a)(4) states as follows:

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For eligible releases that occurred *before* July 1, 2016, or, if the date of occurrence cannot be determined, that were discovered *before* July 1, 2016, an eligible party shall submit all:

As the leak was not found until 2021, the NFA Letter and ELTF Eligibility Determination occurred *after* July 1, 2016; thus, 328 IAC 1-3-3(a)(4) was not applicable to the facts here. (Emphasis added).

7. Both the NFA Letter and ELTF Eligibility Determination documents included language indicating they were final agency actions, included instructions for seeking administrative review of the determinations therein, and indicated that a failure to seek review of those determinations within fifteen (15) days of receiving them would waive any right to administrative review of those determinations: “Failure to properly submit a request for review within the time period described above waives your right to administrative review of this determination.” McClure did not appeal either the NFA letter or the ELTF Eligibility Determination.

By failing to file a Petition for Administrative Review under IC § 4-21.5-3-7, McClure waived its right to appeal the determination that the applicable deadline for submitting claims related to the release is that found in 328 IAC 1-3-3(a)(2). Issues not appealed are waived.²⁹ See *Bd. Of Comm’rs v. Great lakes Transfer, LLC*, 888 N.E.2d 784, (Ind. Ct. App. 2008).

McClure’s claim for payment of reimbursable costs was not submitted within 365 days after the date required for reports to be submitted or the date the costs were incurred under 328 IAC 1-3-3(a)(2) and thus could not be considered for reimbursement.

8. On June 26, 2023, four-hundred ninety-three (493) days after IDEM issued the NFA letter, and three-hundred thirty-three (333) days after the last costs were incurred, McClure submitted a claim for reimbursement from the ELTF for \$117,938.68 for costs incurred between June 16, 2021, and July 31, 2022. Thus, the application was not submitted within 365 days after the date necessary reports were submitted or the date the costs were incurred as required under 328 IAC 1-3-3(a)(2).

9. 328 IAC 1-3-3(a)(2)(A) – (C) state,

²⁹ On page 4 of its Reply brief, McClure’s assertion, “if IDEM’s argument were to be accepted [regarding waiver], the resulting administrative review process would be unworkable, inefficient, and potentially wasteful” does not negate IC § 4-21.5’s requirement to appeal final agency orders.

(a) A person listed in section 1 of this rule *shall* comply with the following requirements for a claim for reimbursable costs or an ELTF indemnity claim to be considered for reimbursement from the fund by the administrator:

...

(2) For eligible releases that occur on or *after* July 1, 2016, or, if the date of occurrence cannot be determined, that are discovered on or after July 1, 2016, an eligible party *shall* submit all:

(A) claims for payment of reimbursable costs related to the ISC conducted under 329 IAC 9-5-5.1 within three hundred sixty-five (365) days after submittal of all reports required under 329 IAC 9;

(B) remaining claims for payment of reimbursable costs within three hundred sixty-five (365) days after the date those costs were incurred; and

(C) resubmittals associated with any disallowed cost within three hundred sixty-five (365) days after the denial of the claim.

10. McClure claims that “[t]he designated evidence clearly demonstrates that the Release occurred over many years beginning, at the latest, in 2004, and “[t]he nature of the contamination indicates that the tank had been slowly leaking since at least 2004.”³⁰ McClure’s Designation of Evidence contains no documentation supporting this claim. Moreover, McClure’s own language supports that 328 IAC 1-3-3(a)(2) was correctly used:

In May 2021, while McClure was in the process of redeveloping the Site, McClure chose to close and remove the tanks. While removing the tanks on July 8, 2021, McClure’s consultant noted petroleum odor in soil and water samples taken from one of the tank pits as well as elevated PID readings in soil samples. As such, and in accordance with IDEM rules, McClure reported a suspected release to IDEM on July 9, 2021³¹ and, after conducting an investigation, the release was confirmed.³²

³⁰ McClure Memorandum, p. 2.

³¹ McClure, Ex. D, Initial Incident Report, VFC #83190339.

³² McClure’s Memorandum, p. 2.

McClure's consultant admitted that the exact date of the release is unknown.³³ When the date of release cannot be determined, the rule provides the date of discovery as an alternative. The date of discovery is July 8, 2021, which is after July 1, 2016. Relying upon the plain meaning of the language in the rule,³⁴ the post-July 2016 deadline in 328 IAC 1-3-3(a)(2) is the appropriate deadline.

Lastly, McClure contends “. . . even if McClure's claim for reimbursement was untimely, IDEM has the discretion to grant reimbursement for untimely ELTF reimbursement claims and its failure to do so here constitutes an abuse of that discretion.”³⁵ McClure also attempts to argue that IDEM has utilized its discretion to reimburse costs that were not timely submitted by pointing to various administrative appeals IDEM identified in response to McClure's discovery request.³⁶ McClure requested, and IDEM provided, all non-privileged documents relative to instances where IDEM settled administrative appeals involving costs that were initially denied as being untimely submitted.³⁷ McClure did not present any evidence to support its claim that IDEM has the discretion to extend the deadline for an untimely claim or that IDEM had discretion to approve the claims prior to appeal. McClure cited no authority that supports IDEM having discretion to grant reimbursement for untimely ELTF claims. There is case precedence reflecting that IDEM has won appeals based on failure to meet time requirements.³⁸ The fact that IDEM denied a claim for reimbursement that was submitted after the deadline had passed does not constitute an abuse of discretion.

IDEM's inclusion of IDNR's requirement to properly remove the monitoring wells in its NFA Letter does not impact the agency's use of 328 IAC 1-3-3(a)(2) versus 328 IAC 1-3-4.

11. McClure contends the NFA Letter explicitly required McClure to take an additional response action, namely that “[a]ll wells installed associated with the release at the

³³ McClure Ex. B, Troy Risk Memo, p. 3.

³⁴ When interpreting a statute or regulation, the Court must apply certain rules of statutory construction, and “the cardinal rule of statutory construction is to ascertain the intent . . . by giving effect to the ordinary and plain meaning of the language used.” *Bourbon Mini-Mart, Inc. v. Commissioner, Indiana Department of Environmental Management*, 806 N.E.2d 14, 20 (Ind.Ct.App. 2004).

³⁵ McClure Memorandum, p. 26.

³⁶ McClure's Memorandum, p. 2.

³⁷ McClure Ex. L.

³⁸ McClure provided no case law where IDEM won appeals based on failure to meet time requirements: .See *Sun Chemical Corporation*, 2013 OEA 78 (affirming denial based on failure to meet claim submission time frame); *Clark Station #379*, 2017 OEA 72 (affirming denial on the basis of timeliness and noting the NFA letter specifically informed McClure of the time frame for submission); *Ohio Farmers Insurance Co.*, 2018 OEA 39 (affirming the denial for failure to submit within the previous nine month time frame and noting ([t]he rule does not allow for an extension and must be enforced as it is written.)

site must be permanently abandoned in accordance with the Indiana Department of Natural Resources (IDNR) regulation 312 IAC 13-10-2 (Permanent Abandonment of Wells) and IDEM's 'Drilling Procedures and Monitoring Well Guidelines Non-rule Policy Document (Waste-0053).'

³⁹

12. McClure interpreted the inclusion of the reference to 312 IAC 13-10-2⁴⁰ and IDEM NPD 0053 as additional requirements and contends it did not achieve NFA status until it abandoned the wells referenced in 312 IAC 13-10-2 on July 5, 2022. 328 IAC 1-3-3(a)(2) specifically refers only to the reports required under 329 IAC 9, and whether McClure abandoned the well under 312 IAC 13-10-2 is not a reportable requirement under 329 IAC 9. The only report required for purposes of addressing the release under 329 IAC 9 was the ISC dated November 11, 2021.

IDNR has sole authority over the abandonment of monitoring wells, and any additional actions that may have been required specific to the monitoring wells are required by IDNR rules and enforced by IDNR. Forms that must be submitted pursuant to well abandonment are solely IDNR forms and must be reviewed by IDNR. IDEM only requires the IDNR form to be submitted to IDEM if a responsible party is seeking reimbursement from the ELTF for well abandonment; the agency is not, however, exercising authority over the abandonment itself.

The deadline for submitting an ELTF claim under 328 IAC 1-3-3 is mandatory and IDEM's denial due to timeliness was neither arbitrary nor capricious.

13. McClure contends "[a]lthough the deadline rule contains the word 'shall,' which is generally used to impose a mandatory requirement, "'shall' may be construed as directory instead of mandatory 'to prevent the defeat of the legislative intent'" and "courts have concluded that the term 'shall' is directory, rather than mandatory, when the code section 'fails to specify adverse consequences, the provision does not go to the essence of the statutory purpose, and a mandatory construction would thwart the legislative purpose.'" citing *Matter of Middlefork Watershed Conservancy Dist.*, 508 N.E.2d 574, 577 (Ind. Ct. App. 1987) in support of its contention.

328 IAC 1-3-3(a) states, "A person listed in section 1 of this rule shall comply with the following requirements for a claim for reimbursable costs or an ELTF indemnity claim to be considered for reimbursement from the fund by the administrator." If a person seeking reimbursement does not comply with the requirements in the rule, their claim will not be

³⁹ McClure's Memorandum, p. 4.

⁴⁰ See Ind. Code § 14-10-2-4 and Ind. Code § 25-39-4 for well closing requirements.

considered for reimbursement from the fund by the administrator. The rule's language goes directly to its regulatory purpose. Construing the language as directory would thwart the rule's purpose because it would void the deadlines which are required to meet eligibility.

McClure erroneously also relies upon *Ceres Solution Cooperative Inc.*, 2021 OEA 75 to support its contention. That case was centered upon Governor Holcomb's March 19, 2020 Executive Order 20-05 granting the state's agencies discretion for deadlines deemed "non-essential" for no more than sixty (60) days during the COVID-19 pandemic. On July 27, 2020, then IDEM Commissioner Bruno Pigott published the Enforcement Discretion, Extension of Submission Deadlines and Waiver of Specific Regulations Policy. On October 22, 2020, twenty-five (25) days after the regulatory deadline had passed, Ceres submitted its claim for reimbursement, which IDEM Denied. OEA held that IDEM's denial of Cere's claim for ELTF reimbursement was an abuse of discretion because it was not in keeping with the Governor's Executive Order 20-05 or the Commissioner's published Policy.

Executive Order 20-05 was rescinded by Governor Holcomb on May 19, 2021, by Executive Order 21-13, more than two years before McClure submitted its claim for reimbursement on June 26, 2025. The discretion granted to IDEM by Executive Order 20-05 and the corresponding IDEM policy is therefore not applicable to this case. The instant case is also further distinguished from *Ceres* by the lateness of the claim. McClure submitted its claim for reimbursement on June 26, 2023, which is one hundred twenty-eight days after the deadline regulatorily imposed.⁴¹ McClure's contention is without merit.

THE COURT, BEING DULY ADVISED, **ORDERS, ADJUDGES AND DECREES** that McClure failed to show there exists a genuine issue of material fact and **GRANTS** IDEM summary judgment as to those issues raised by McClure. McClure's Petition is hereby **DISMISSED** as to those issues.

You are further notified that this is a Final Order subject to judicial review consistent with the 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 30 days after the date this notice is served.

⁴¹ McClure Ex. J, ELTF Application.

SO ORDERED: May 21, 2025.

Administrative Law Judge
Hon. Lori Kyle Endris