Objection to the Denial of Excess Liability Trust Fund Claim
ELTF #200609003 / FID #6550
Road Ranger #226 / First Ranger Petroleum LLC
Greenwood, Johnson County, Indiana
2012 OEA 57, (09-F-J-4309)

OFFICIAL SHORT CITATION NAME: When referring to 2012 OEA 57 cite this case as ***Road Ranger #226*, 2012 OEA 57.**

TOPICS:
summary judgment
petroleum
release
report
Excess Liability Trust Fund (ELTF)
leaking underground storage tanks (LUST)
estoppels
equitable estoppels
substantial compliance
328 IAC 1-1-9
329 IAC 9-4-1
I.C. § 13-23-9-2
Johnson Oil
Speedway
Waggoners
off-site

PRESIDING JUDGE:
Catherine Gibbs

PARTY REPRESENTATIVES:
IDEM: Julie Lang, Esq.
Petitioner: Christopher Braun, Esq., John Moriarty, Esq., Angela Green, Esq., Brianna Schroeder, Esq.; Plews, Shadley, Racher & Braun LLP

ORDER ISSUED:
August 8, 2012

INDEX CATEGORY:
Land

FURTHER CASE ACTIVITIY:
[none]

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STATE OF INDIANA	)	BEFORE THE INDIANA OFFICE OF
	)	ENVIRONMENTAL ADJUDICATION
COUNTY OF MARION	)	
IN THE MATTER OF:	)	
	)	
OBJECTION TO THE DENIAL OF	)	
EXCESS LIABILITY TRUST FUND CLAIM	)	
ELTF #200609003 / FID #6550	)	CAUSE NO. 09-F-J-4309
ROAD RANGER #226	)	
FIRST RANGER PETROLEUM, LLC	)	
GREENWOOD, JOHNSON COUNTY, INDIANA	)	

FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL ORDER

This matter came before the Office of Environmental Adjudication (the OEA or the Court) on Petitioner First Ranger Petroleum's Motion for Summary Judgment and the Indiana Department of Environmental Management's Cross-Motion for Summary Judgment. The Court, having read the motion, evidence, response, cross motion, and replies, now enters the following findings of fact, conclusions of law and order.

Summary of Decision

The Petitioner moves for summary judgment on the basis that it is in substantial compliance with the release reporting rules. The IDEM cross moves for summary judgment. The ELJ concludes that the Petitioner is not justified in failing to report a release, but that the IDEM is estopped from denying eligibility in this matter. Summary judgment should be granted in the Petitioner's favor.

Statement of the Case

1. The Petitioner received the notice the IDEM had rescinded its approval for Excess Liability Trust Fund (the ELTF) reimbursement on September 21, 2009 (hereinafter referred to as Denial #6). It filed its petition for review of the rescission on October 7, 2009. This case was assigned Cause No. 09-F-J-4309.

2. The Petitioner received four (4) additional denials on October 20, 2009 (hereinafter referred to as Denials #7, 8, 9 and 10). Three of the denials were dated September 22, 2009. The fourth denial was dated October 15, 2009. The Petitioner filed its petition for review of these 4 denials on October 26, 2009. This case was assigned Cause No. 09-F-J-4316.

3. The cases were consolidated on October 27, 2009 under Cause No. 09-F-J-4309.

4. The Petitioner filed a Motion for Summary Judgment on December 28, 2011. IDEM filed its Cross-Motion for Summary Judgment and Response to Petitioner's Motion for Summary Judgment on January 27, 2012. The Petitioner filed its Reply in Support of Summary Judgment and Response in Opposition to IDEM's Cross-Motion for Summary Judgment on April 4, 2012. IDEM filed its Reply in Support of Its Cross-Motion for Summary Judgment on April 18, 2012.

5. The ELJ raised the issue whether the petitions had been timely filed in a conference call with counsel on May 23, 2012. The parties were given the opportunity to brief this issue, which briefing concluded on June 6, 2012. On June 14, 2012, the Court issued Findings of Fact, Conclusions of Law and Order, deciding that the petitions for review had been timely filed.

FINDINGS OF FACT

1. First Ranger Petroleum LLC (the Petitioner) has operated the gasoline station located at 1615 East Main Street, Greenwood, Johnson County, Indiana (hereinafter referred to as the "Site") since February 27, 2003.

2. The owner of the Site is Indy Corp.

3. The Site has been a truck stop since 1975.

4. Six (6) petroleum releases from the underground storage tanks located at the Site have been reported to the IDEM.

5. Two releases in 1987 were assigned Leaking Underground Storage Tank (LUST) Incident Numbers 198703102 and 198706015. A release reported in 1993 was assigned LUST Incident Number 199305516; a release reported in 2001 was assigned LUST Incident Number 200101500; and a release reported in 2003 was assigned LUST Incident Number 200302509. The Petitioner was not the owner or operator of the Site when these releases were reported.

6. The IDEM determined that no further action (NFA) was necessary for LUST Incident Nos. 198703102, 198706015 and 200302509. NFA determinations have not been issued for the remaining LUST incidents.

7. As a result of the 2001 release, Indy Corp (the owner of the Site) contracted with an environmental consultant, August Mack Environmental, Inc., to investigate the scope of the release, that is, perform an Initial Site Characterization (ISC), as required by applicable regulations. The ISC report for the 2001 release was submitted to IDEM on June 19, 2006.

8. On or about August 12, 2006, the Petitioner contracted with Environmental Remediation Services, Inc. ("ERS") to investigate a report of a petroleum sheen on a retention pond near the Site. The Petitioner reported a release on September 1, 2006; this release was assigned LUST Incident Number 200609003.

9. As the result of the 2006 release, the Petitioner initiated an investigation and requested reimbursement of the costs associated with the investigation and corrective action from the ELTF.

10. The Petitioner filed a Project Summary and Abatement Report for Incident No. 200609003 on December 4, 2006 with the IDEM. Thereafter, it filed its ISC report with the IDEM on May 7, 2007. A Further Site Investigation (FSI) Report was filed with IDEM on October 16, 2007. The IDEM approved the ISC on October 24, 2008.

11. The Petitioner filed an application for reimbursement on May 25, 2007. On July 24, 2007, IDEM determined that the Petitioner was eligible to receive reimbursement of corrective action costs from the ELTF at 85%[1] for LUST Incident No. 200609003.

12. On November 14, 2008, the Petitioner submitted an application for reimbursement. On December 12, 2008, IDEM notified the Petitioner that it had approved the claim and applied the claim amount towards the deductible.[2]

13. No new claim applications were submitted between November 14, 2008 and August 20, 2009.

14. On the basis of the claim application submitted on May 25, 2007, IDEM rescinded the Petitioner's eligibility on September 17, 2009, on three grounds: (1) the Petitioner was not in substantial compliance with the requirement to report a release; in this case, IDEM alleged that a release was discovered on August 12, 2006 but was not reported until September 1, 2006; (2) the release was "the result of negligence in maintenance of the UST system"; and (3) the release was not related to a UST, but was from an oil/water separator at the Site.[3]

15. The Petitioner received four (4) additional denials on October 20, 2009 (hereinafter referred to as Denials #7, 8, 9 and 10). Three of the denials were dated September 22, 2009. The fourth denial was dated October 15, 2009. IDEM denied these applications on the basis that ELTF eligibility for this release had been rescinded.

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[1] The Petitioner does not contest IDEM's determination that it is eligible for 85% reimbursement.
[2] The owner or operator must pay a deductible pursuant to I.C. § 13-23-8-3 prior to receiving reimbursement. In this case, the deductible is $35,000.
[3] Petitioner First Ranger Petroleum's Motion for Summary Judgment, filed December 28, 2011, Exhibit 5: IDEM notice dated September 17, 2009, pg. 1.

Applicable Law

The OEA must apply a *de novo* standard of review to this proceeding 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 ELJ, and deference to the agency's initial factual determination is not allowed. *Id.*; I.C. § 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) (appeal of OEA review of NPDES permit); *see also* I.C. § 4-21.5-3-14; I.C. § 4-21.5-3-27(d).

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); I.C. § 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. *Gibson v. Evansville Vanderburgh Building Commission, et al.*, 725 N.E.2d 949 (Ind. Ct. App. 2000). When the 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. All evidence must be construed in favor of the opposing party, and all doubts as to the existence of a material issue must be resolved against the moving party. *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).

At all times pertinent to this case[4], the definition of "substantial compliance" is found at 328 IAC 1-1-9[5]. The pertinent portion of this definition states:

> (b) An owner or operator is not in substantial compliance if the release:
> (1) Has not been reported within seven (7) days of the date the release was required to be reported under the spill reporting rule in effect at the time of the release.
> (2) Harms public health or the environment and was not timely reported under the spill reporting rule applicable at the time of the release.

The applicable regulation in effect at the time pertinent to this case for spill reporting is 329 IAC 9-4-1[6]. This rules states:

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[4] This definition was in effect in 2006, when the release was discovered and reported.

[5] *Underground Storage Tank Financial Assurance Board; 328 IAC 1-1-9; filed Dec 4, 1992, 11:00 a.m.: 16 IR 1052; filed Nov 1,1995, 8:30 a.m.: 19 IR 343; readopted filed Jan 10, 2001, 3:21 p.m.: 24 IR 1534; filed Oct 17, 2001, 4:30 p.m.: 25 IR 789; filed Aug 30, 2004, 9:40 a.m.: 28 IR 125*

[6] *Solid Waste Management Board; 329 IAC 9-4-1; filed Dec 1, 1992, 5:00 p.m.: 16 IR 1069; filed Jul 19, 1999, 12:00 p.m.: 22 IR 3706; readopted filed Jan 10, 2001, 3:25 p.m.: 24 IR 1535*

> The owner and operator of a UST system shall report to the agency within twenty-four (24) hours and follow the procedures in 329 IAC 9-5-4.1 for any of the following conditions:
> (1) The discovery by the owner and operator or another person of released regulated substances at the underground storage tank site or in the surrounding area. Released regulated substances may include the presence of free product or vapors in any of the following:
> (A) Soils.
> (B) Basements.
> (C) Storm sewer lines.
> (D) Sanitary sewer lines.
> (E) Utility lines.
> (F) Nearby surface water.
> (G) Ground water.
> (2) Unusual operating conditions observed by the owner and operator that may include the erratic behavior of product dispensing equipment, the sudden loss of product from the UST system, or an unexplained presence of water in the tank unless the system equipment is:
> (A) found to be defective but not leaking; and
> (B) immediately repaired or replaced.
> (3) Monitoring results from the release detection method required under 329 IAC 9-7-2 and 329 IAC 9-7-3 that indicate a release may have occurred unless:
> (A) the monitoring device is:
> (i) found to be defective; and
> (ii) immediately repaired, recalibrated, or replaced; and additional monitoring does not confirm the initial result; or
> (B) in the case of inventory control, a second month of data does not confirm the initial result.

The parties argue whether the IDEM should be equitably estopped from denying eligibility. Generally, "government entities are not subject to equitable estoppel." *Equicor Dew, Inc. v. Westfield-Washington Township Plan Comm'n*, *758 N.E.2d 34, 39 (Ind. 2001).* However, in certain circumstances application of estoppel of government entities is appropriate. *Id*. "Specifically, estoppel may be appropriate where the party asserting estoppel has detrimentally relied on the governmental entity's affirmative assertion or on its silence where there was a duty to speak." *Id*. (citations omitted). A party asserting an estoppel defense must prove its "1) lack of knowledge and of the means of knowledge as to the facts in question, 2) reliance upon the conduct of the party estopped, and 3) action based thereon of such a character as to change his position prejudicially." *U.S. Outdoor Adver. Co., Inc. v. Ind. Dep't of Transp.*, *714 N.E.2d 1244, 1259 (Ind. Ct. App. 1999)*, trans. denied (citation omitted)" *Brown County v. Booe, et al.*, 789 N.E.2d 1, 7, (Ind. Ct. App. 2003). Courts are especially reluctant to apply estoppel against the government where unauthorized acts of government officials implicate government spending powers or unless it is in the public interest to do so. *National Salvage & Service Corporation v.*

Commissioner of the Indiana Department of Environmental Management, 571 N.E.2d 548, 556 (Ind. App. 1991). "Reliance on a governmental entity's affirmative acts is a sufficient public interest to warrant the application of the estoppel defense." *Brown County* at 11.

I.C. § 13-23-9-2(d) states, "The administrator shall notify the claimant of an approval or a denial of a request made under subsection (b) not later than sixty (60) days after receiving the request. Except as provided in subsection (f), the administrator shall notify the claimant of all reasons for a denial or partial denial."

CONCLUSIONS OF LAW

1. The Office of Environmental Adjudication ("OEA") has jurisdiction over the decisions of the Commissioner of the IDEM and the parties to this controversy pursuant to I.C. § 4-21.5-7-3.

2. 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 Petitioner relies on two OEA cases, *Johnson Oil*, 2005OEA 63 and *Speedway #6672 ELTF*, 2006 OEA 40. Both of these cases can be distinguished from the fact situation here. In *Johnson Oil*, "substantial compliance" had not yet been defined in statute or regulation. In *Speedway*, although a definition existed, it was substantially different than the definition as it existed in 2006. The ELJ is obligated to apply the definition in effect at the time of the release. In this case, in 2006, the Financial Assurance Board[7] (FAB) had promulgated a rule that defined "substantial compliance," which required that a release must be reported "within seven (7) days of the date the release was required to be reported…" 328 IAC 1-1-9(b)(1). This was not the case in either *Johnson Oil* or *Speedway*. The Petitioner's reliance on these cases, therefore, is not persuasive.

4. The Petitioner states that "IDEM is obligated to apply the eligibility requirements in effect on the date that the petroleum release was observed."[8] It then argues that it meets the definition of substantial compliance; however, it cites to the definition that came into effect in 2011. The definition that applied in 2006 is stated above in Applicable Law.

5. It is clear under 328 IAC 1-1-9(b)(1) that an owner or operator must report a release within seven (7) days in order to be in substantial compliance. However, the Petitioner argues that it is only obligated to report a "new" release. The ELJ finds no support in the regulation for this interpretation. The rule is clear that the presence of free product on nearby surface water is a reportable release. In this case, a petroleum sheen was noticed on a nearby lake[9]. The rule contains no qualifying language that indicates that if the sheen was the result of a previously reported release, there is no obligation to report. Further, the release must be

[7] This is the board responsible for promulgating rules for the Excess Liability Trust Fund.
[8] Petitioner First Ranger Petroleum's Motion for Summary Judgment, filed on December 28, 2011, pg. 12.
[9] The sheen was noticed and addressed on at least 2 occasions.

reported if any of the conditions under subsection (1), (2) or (3) is met. Therefore, the Petitioner's argument that the absence of unusual operating conditions or monitoring results showing a leak negated its obligation to report is not supported by the rule. The Petitioner argues that interpreting the rule in this manner will lead to absurd consequences, such as, being required to report a release because a sheen was observed on a puddle in the middle of the station. However, the rule has been in effect since 2001 and the Petitioner did not supply examples of the IDEM enforcing the rule on the basis of sheen on a puddle. A sheen on an off-site lake is very different from that proposed scenario.

6. The facts in this case can be distinguished from the factual setting in *Waggoners Fuel Co., Inc.*, 2009 OEA 30. In *Waggoners*, IDEM was unable to present sufficient evidence to establish that a release, either reportable or not, had even occurred. This is not an issue in this cause. The Petitioner concedes that a reportable release occurred, but argues only it was not obligated to report until it had determined that the release was a *new* one and not the result of a previously reported release. The ELJ concludes that the Petitioner has failed to meet its burden of proof on this issue and summary judgment is not appropriate.

7. The ELJ does not find it necessary to resolve the question of what constitutes a "spill" as the rule in question (329 IAC 9-4-1) does not address spills, but instead addresses what constitutes a reportable "release."
8. The Petitioner argues that the IDEM should be estopped from rescinding eligibility. Under I.C. § 13-23-8-7, the Petitioner does not have an enforceable right to payment of claims. Further, the Petitioner has a statutory and regulatory duty to address a release of regulated substances from its USTs. However, the IDEM had initially granted this right then rescinded it. The grant of eligibility was an official act by the IDEM, which it was authorized to perform under I.C. § 13-23-8. On each of the 2 occasions that IDEM approved this Site for reimbursement for ELTF, IDEM reviewed the information for the Site and made an affirmative determination that the Site was eligible. The Petitioner was entitled to rely on this.

9. The Petitioner had submitted both a Project Summary/Abatement Report and the ISC with IDEM prior to the first ELTF eligibility determination. Between the time of the first determination (July 27, 2007) and the second determination (December 12, 2008), the Petitioner submitted a FSI. In addition, the ISC was approved by IDEM. On September 17, 2009, for no apparent reason as the IDEM had not received any new information, IDEM changed its mind about the Petitioner's eligibility and rescinded this decision. There is no evidence in the Court's record that, between the period of time in which IDEM initially decided that the Petitioner was eligible and the rescission, (1) IDEM received any new information about the Site; (2) there was any change in conditions at the Site; or (3) IDEM determined that the Petitioner had falsified or submitted materially inaccurate information. The only thing that changed was IDEM's interpretation of the events. The Petitioner had no knowledge of this change as it related to the Site. The Petitioner alleges that it relied on the

IDEM's representations to its detriment in that it was unable to properly budget for the corrective action costs. This is sufficient to show detrimental reliance.

10. Further, under I.C. § 13-23-9-2(d), the IDEM is required to list all reasons for its denial. In previous decisions, the OEA has held that this statute is directory, not mandatory, and has held that IDEM has complied with this law if it provided sufficient information to give an applicant notice of the reasons for a denial. In all of the previous cases, the applicant was denied eligibility on the first application. In this case, the IDEM granted eligibility, and then rescinded this decision. The IDEM provides no reason for why it failed to notice the alleged noncompliance with the ELTF regulations prior to this date. The IDEM has not presented any evidence that conditions at the Site had changed; it rescinded eligibility because of the discovery of new information; or that the Petitioner submitted false or materially inaccurate information.

11. In failing to list all reasons for the denial in the initial eligibility notice (July 24, 2007), IDEM failed to comply with the statute and improperly rescinded the Petitioner's eligibility for reimbursement from the ELTF. Summary judgment in the Petitioner's favor is appropriate.

FINAL ORDER

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that First Ranger Petroleum LLC's Motion for Summary Judgment is **GRANTED** and judgment is entered in First Ranger Petroleum LLC's favor.

You are hereby further notified that pursuant to provisions of I.C. § 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 I.C. § 4-21.5. Pursuant to I.C. § 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 is served.

IT IS SO ORDERED this 8th day of August, 2012 in Indianapolis, IN.

Hon. Catherine Gibbs
Environmental Law Judge