
OFFICIAL SHORT CITATION NAME: When referring to 2009 OEA 6, cite this case as ***Fuels, USA*, 2009 OEA 6.**

TOPICS:
pipeline
dispenser
contamination
UST
Environmental Site Assessment
petroleum
tank registration fees
Excess Liability Trust Fund
release

PRESIDING ENVIRONMENTAL LAW JUDGE:
Mary L. Davidsen

PARTY REPRESENTATIVES:
IDEM: Julie E. Lang, Esq.
Petitioner: Glenn D. Bowman, Esq., Robert M. Frye, Esq.; Stewart & Irwin, P.C.

ORDER ISSUED:
February 20, 2009

INDEX CATEGORY:
Land

FURTHER CASE ACTIVITY:
[none]

Objection to Denial of Excess Liability Trust Fund
Claim No. 200710506/FID No. 9465 Fuels, USA
Brazil, Clay County, Indiana
2009 OEA 6, (08-F-J-4068)

STATE OF INDIANA	)	BEFORE THE INDIANA OFFICE OF
	)	ENVIRONMENTAL ADJUDICATION
COUNTY OF MARION	)	
IN THE MATTER OF:	)	
	)	
OBJECTION TO DENIAL OF	)	
EXCESS LIABILITY TRUST FUND	)	
CLAIM NO. 200710506 / FID NO. 9465	)	CAUSE NO. 08-F-J-4068
FUELS, USA	)	
BRAZIL, CLAY COUNTY, INDIANA	)	

FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL ORDER GRANTING SUMMARY JUDGMENT

This matter is before the Court pursuant to Motions for Summary Judgment filed by Claimant Allan Willig, for a facility operated as Fuels, USA, and by Respondent, Indiana Department of Environmental Management, as to whether any genuine issues of material fact exist as to Respondent, Indiana Department of Environmental Management's ("IDEM") determination that Willig was not eligible reimbursement from the Excess Liability Trust Fund for failure to pay tank fees for 1988 through 1992, and Willig was not in substantial compliance with then-applicable spill reporting requirements, based on dispenser-area contamination reported in 2007. The parties fully briefed their positions on summary judgment, participated in oral argument, and submitted proposed findings of fact, conclusions of law and orders. The Chief Environmental Law Judge ("ELJ") having considered the petitions, testimony, evidence, and pleadings of the parties, now finds that judgment may be made upon the record. The Chief ELJ, by substantial evidence, and being duly advised, now makes the following findings of fact and conclusions of law and enters the following Order:

FINDINGS OF FACT

1. Claimant Allan J. Willig and his spouse, (collectively referred to as "Willig"), own real estate located at 227 County Road 450 North, in Brazil, Clay County, Indiana (the "Site"). The Site was assigned federal identification number 9465, and was the location of underground storage tanks (USTs). *Willig Affidavit*.

2. From 1986 to 1991, Willig leased the Site to James and Arlene Boes ("Boes"), who operated a truck stop known as Fuels, USA. *Id*. With Willig's consent, Boes had four USTs installed on the property in 1986. Boes also installed fuel dispensing equipment and pipelines from the USTs to the dispensers. Willig believed that Boes paid required UST tank registration fees for fiscal years 1988 and 1999.[1]

[1] Indiana, via IDEM, began requiring UST owner/operators to pay a registration fee for each UST tank, to be paid annually per the State's fiscal year, which fiscal year begins on July 1, and ends the following June 30. Ind. Code § 1307020-32 (1991). Willig would pass each annual invoice to the Boes for payment.

3. In early 1991, without notice to Willig, Boes ceased operating the Site, had the pipelines and dispensers removed but did not remove the tanks or pay the 1990 tank fees. *Id.* No evidence was submitted that the pipeline or dispenser areas were sampled for contamination upon their removal.

4. Upon discovering that Boes was no longer operating the Site, Willig engaged an environmental contractor to close and remove the USTs. The USTs were removed from the property in June, 1991. *Id*. Soil from the each tank's pit floor and sidewall areas were sampled, and no contamination from petroleum constituents was discovered above 10mg/kg. *Id., Ex. B, 3, 4*. No evidence was submitted that the pipeline or dispenser areas were sampled during this time.

5. In 1991, Willig and his contractor reported the UST closure and removal, including soil sampling results, to IDEM.

6. In the fall, 2007, Willig engaged an environmental contractor to perform a Phase 1 Environmental Site Assessment ("ESA") at the Site, for purposes of a potential Site sale. On the contractor's recommendation based on UST presence in the past at the Site, a Phase II ESA was performed. The Phase II ESA revealed evidence of petroleum releases in the areas of the former gasoline dispenser islands and at the former combined gasoline and diesel dispenser islands, which information was reported to IDEM. *See Initial Site Characterization Report, FID 9465, Incident Nos. 200710500 and 200710506 ("ISC") at 2, 3 and Figure 11.* In drafting the ISC, Willig's consultant noted the absence of any 1991 sampling data related to the pipeline and dispenser areas. *Id. at 2*. The consultant also noted that the contamination seemed to be limited to the dispenser areas. *Id. at 9*.

7. IDEM required Willig to conduct further delineation and characterization of the contamination, which work Willig authorized.

8. On October 25, 2007, IDEM received Willig's request for a determination of eligibility to the IDEM's Excess Liability Trust Fund (ELTF). *Willig Affidavit*. On or about February 6, 2008, IDEM issued its determination that Willig was not eligible for ELTF reimbursement for the following reasons:

    1. Willig had paid less than 50% of the necessary tank fees in a timely manner with years 1988 through 1990 being deficient; and
    2. Willig was not in substantial compliance with spill reporting requirements as no regulated tanks existed at the site since June, 1991 and no release was reported at the time of tank removal. *Id., Ex. C at 1*.

9. Willig timely filed its Petition for Review on February 11, 2008.

10. For 1988 tank registration fees, Willig offered his affidavit statement as evidence of payment to the Indiana Department of Revenue ("IDOR"), as required. *Petitioner's Motion, Exs. 1, 2*. For 1989 fees, during the December 15, 2008 Oral Argument, Willig submitted receipts for registration fees paid in June of 1989. *Petitioner's Supplemental Designation of Matters in Support of Motion for Summary Judgment, Ex. 1*. For 1991 tank registration fees, the parties did not contest that Willig paid tank registration fees for 1991 in a timely manner. *IDEM's Reply in Support of Its Motion for Summary Judgment, pg. 3*.

11. For 1990 fees, Willig provided payment receipts which indicated that payment was not made until January of 1992; more than six months after the USTs were removed. *Petitioner's Motion, Ex. 1A*. When Willig received the February, 1992 invoice for UST registration fees for fiscal year 1991, Willig sent a February 9, 1992 letter to IDOR, informing the State that the USTs had been removed in June, 1991, and to confirm that the State had received 1990 UST fees. 1990 fee payment was confirmed further by an August 5, 1993 letter from IDOR.

12. Both parties filed Motions for Summary Judgment on September 25, 2008, responses on October 24, 2008 and reply briefs on November 26, 2008. Oral Argument was conducted on December 15, 2008. Proposed Findings of Fact, Conclusions of Law and Orders were submitted on December 23. 2008 by Claimant and on December 24, 2008 by Respondent, the IDEM.

CONCLUSIONS OF LAW

1. The Indiana Department of Environmental Management ("IDEM") is authorized to implement and enforce specified Indiana environmental laws, and rules promulgated relevant to those laws, per I.C. § 13-13, *et seq.* The Office of Environmental Adjudication ("OEA") has jurisdiction over the decisions of the Commissioner of IDEM and the parties to this controversy pursuant to I.C. § 4-21.5-7, *et seq*.

2. This is a Final Order issued pursuant to I.C. § 4-21.4-3-27. 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. This Court 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), *Indiana-Kentucky Electric v. Commissioner, Indiana Department of Environmental Management*, 820 N.E.2d 771 (Ind. Ct. App. 2005). Findings of fact must be based exclusively on the evidence presented to the ELJ, I.C. § 4-21.5-3-27(d). Deference to the agency's initial determination is not allowed. *Id.;* "*De novo* review" means that:

> all issues are to be determined anew, based solely upon the evidence adduced at that hearing and independent of any previous findings.

Grisell v. Consol. City of Indianapolis, 425 N.E.2d 247, 253 (Ind. Ct. App. 1981).

4. The OEA may enter judgment for a party if it finds that "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits and testimony, if any, show that a genuine issue as to any material fact does not exist and that the moving party is entitled to judgment as a matter of law." 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). 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). "A genuine issue of material fact exists where facts concerning an issue that would dispose of the litigation are in dispute or where the undisputed facts are capable of supporting conflicting inferences on such an issue." *Laudig v. Marion County Bd. of Voters Registration,* 585 N.E.2d 700, 703 - 704 (Ind. Ct. App. 1992). The moving party bears the burden of establishing that summary judgment is appropriate. 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.

5. "The fact that both parties requested summary judgment does not alter our standard of review. Instead, we must separately consider each motion to determine whether there is a genuine issue of material fact and whether the moving party is entitled to judgment as a matter of law." *Id.* In this case, each party has the burden of showing whether the IDEM's determination on Willig's ELTF claim either complied with, or was contrary to law or is somehow deficient so as to require revocation, as a matter of law. *In the matter of Objection to the Issuance of Permit Approval No. IN 0061042 Aquasource Services and Technology*, 2002 OEA 41 ("*Aquasource*"). Each movant has the burden of proof, persuasion and of going forward on its motion for summary judgment. I.C. § 4-21.5-3-14(c); I.C. § 4-21.5-3-23. In this case, each claimant has the burden of showing whether there is no genuine issue of material fact that IDEM's ELTF claim determination either complied with, or was contrary to law, as a matter of law.

6. 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. § 4-21.5-3-27(d). While the parties disputed whether IDEM's determination of Willig's ELTF claim was proper, OEA is authorized "to make a determination from the affidavits . . . pleadings or evidence." I.C. § 4-21.5-3-23(b). "Standard of proof generally has been described as a continuum with levels ranging from a "preponderance of the evidence test" to a "beyond a reasonable doubt" test. The "clear and convincing evidence" test is the intermediate standard, although many varying descriptions may be associated with the definition of this intermediate test." *Matter of Moore*, 453 N.E.2d 971, 972, n. 2. (Ind. 1983). The "substantial evidence" standard requires a lower burden of proof than the preponderance test, yet more than the scintilla of the evidence test. *Burke v. City of*

Anderson, 612 N.E.2d 559, 565, n.1 (Ind. Ct. App. 1993). *GasAmerica #47,* 2004 OEA 123, 129. *See also 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. (04-F-J-3338)*, 2005 OEA 26, 41.

7. Willig's February 22, 2008 Petition for Review objecting to the February 6, 2008 Determination was filed in a timely manner. The petition raises two (2) issues for consideration. The first is that IDEM erred in calculating Willig's eligibility. The second is that IDEM erred in concluding that Willig was not in substantial compliance with spill reporting requirements as no regulated tanks existed at the site since June, 1991 and no release was reported at the time of tank removal.

8. In order to receive reimbursement from the Excess Liability Trust Fund ("ELTF"), a claimant must meet its requirements to pay annual tank registration fees to the Indiana Department of Revenue, for each tank that has not been closed before July 1 of any year. I.C. § 13-23-12-1. This requirement began in 1998, with the first payment due by September 1, 1998. I.C. § 13-7-20-32(b)(1988)(repealed 1996).

9. For purposes of reimbursement from the Excess Liability Trust Fund ("ELTF"), underground storage tank ("UST") owners and operators may be reimbursed for eligible costs arising out of releases of petroleum according to the formula provided in 328 IAC 1-3-3(b)[2] as follows:

   (b) Persons listed in section 1 of this rule shall be eligible to apply to the fund for reimbursement from the fund according to the following formula:

      (1) Determine the number of payments that were owed under I.C. § 13-23-12-1 on all regulated tanks at the facility from which a release occurred, beginning with the date that the fees for each tank first became due under I.C. § 13-23-12 and continuing until the date on which the release occurred.

      (2) Determine the number of payments actually made under I.C. § 13-23-12-1 on all regulated tanks at the facility from which a release occurred, beginning with the date each tank became regulated under I.C. § 13-23 and continuing until the date on which the release occurred. Divide the number of payments actually made by the number of payments due as determined in subdivision (1).

      (3) Determine the amount of money the person would have received from the fund if all payments due on the date the release occurred had been paid when due and multiply the amount by:

[2] This rule was authorized by Ind. Code § 13-23-8-4.5.

(A) the percentage determined in subdivision (2), if the percentage is fifty percent (50%) or more; or

(B) zero (0), if the percentage determined in subdivision (2) is less than fifty percent (50%). (emphasis added)

10. I.C. § 13-23-12-5(a), and its predecessor I.C. § 13-7-20-32(d), requires the person who pays underground storage tank fees to keep a copy of the receipt. In addition, 328 IAC 1-3-3(a)(1) requires that an applicant to the ELTF demonstrate that "the requirements in I.C. § 13-23-8-4(a)(1) through I.C. § 13-23-8-4(a)(4) have been met." This includes the requirement that tank fees have been paid. Therefore, the obligation to retain UST fee receipts and produce them upon request lies with the owner/operator. Since here, IDEM determined that four years of tank fee payments, 1988-1991, had to be considered in calculating Willig's percent eligibility, Willig, as owner/operator, has the obligation to retain and produce UST fee receipts .

11. As support for its Motion for Summary Judgment, Willig offered affidavit testimony of his belief that 1988 tank fees had been paid. Applicable law, cited above in para. 13, requires the owner/operator to retain and produce UST fee receipts. No provision excepts an owner/operator from that duty, even if those documents may have been maintained by Boes, as Site operators, during the period of their lease. Willig has not provided substantial evidence to support a conclusion that 1988 UST fees were paid for 1988. 1988 tank fees cannot be used in calculating Willig's ELTF eligibility.

12. Claimant Willig has provided substantial evidence of a lack of genuine issue of material fact that UST fees were paid for 1989, 1990 and 1991. IDEM's calculations interpreted applicable ELTF regulations to require UST fees for years 1988, 1989, 1990 and 1991 to be used in calculating Willig's ELTF eligibility. However, there is no dispute of fact that the tanks were closed in June, 1991, before July 1, 1991. Willig's tank fee payment for 1991 is not required for calculating the ELFT eligibility. As Willig paid UST fees for two (2) out of three (3) years of relevant eligibility, or 66%, Willig is 66% eligible for reimbursement, provided Willig was in substantial compliance with applicable requirements.

13. To be eligible for ELTF reimbursement, Willig was required to be in substantial compliance with the spill reporting requirements in effect in 1991. In 1991, the ELTF eligibility requirements of I.C. § 13-7-20-33(d) stated:

An owner or operator may receive money from the fund under subsection (a)(1) or (a)(3) only if the following requirements are satisfied:

(1) The underground petroleum storage tank from which the release occurred was, the time the release was discovered, registered under this chapter.
(2) The owner or operator was, at the time the release was discovered, in substantial compliance with the requirements of the following as determined by the commissioner:

(A) This chapter.
(B) Rules adopted under this chapter.
(C) 42 U.S.C. 6991 through 6991i.
(D) Regulations published under 42 U.S.C. 6991 through 6991i.

A release from an underground petroleum storage tank my not prevent an owner or operator from establishing compliance with this subdivision to receive money from the fund.

(3) The owner or operator has paid all registration fees that are due under section 32 of this chapter by the date the fees are due.
(4) The owner or operator has provided the commissioner with evidence of payment to the amount of liability the owner or operator is required to pay under subsection (b).
(5) The owner or operator has not defaulted on a loan guaranteed under section 33.3 of this chapter.
(6) A corrective action plan is approved by the commissioner.

14. As determined previously by this Court, definition of "substantial compliance" shall define "substantial" as "being largely but not wholly that which is specified", and "compliance" as "conformity in fulfilling official requirements". *In the Matter of: Objections to Denial of Excess Liability Trust Fund #200203501, GasAmerica #47, Greenfield, Hancock County, Indiana*, 2004 OEA 123 (November 19, 2004). Since no statute, regulation, or policy at the time defined 'substantial compliance', this Court has applied a 'totality of the circumstances' test to determine whether substantial compliance has been met. *Objections to Denial of Excess Liability Trust Fund Claim No. 9202513, Johnson Oil Company, Columbus, Bartholomew County, Indiana, Cause No. 03-F-J-3279*, 2005 OEA 63, 68 (December 1, 2005).

15. In 1991, Claimant Willig was subject to Federal Regulation of USTs, including 40 C.F.R. § 280.72, which required:

(a) Before permanent closure or a change-in-service is completed, owners and operators must measure for the presence of a release where contamination is most likely to be present at the UST site.

According to 40 C.F.R. § 280.12, an "UST means any one or combination of tanks (including underground pipes connected thereto)…" IDEM argued that the closure procedures applicable to the site at the time required Willig to test the surrounding underground pipes as well as the tank pit, which may have revealed the release. The surrounding underground pipes were installed and removed by a third party at the direction of the lessee of the site, Boes, prior to Willig's tank closure. Boes contracted with that third party to remove the pumps and pipes prior to the closure of the USTs. No evidence was presented that the surrounding underground pipes had reportable releases prior to their removal. Therefore, when Claimant Willig contracted to have the USTs

closed and removed, he may have assumed that the pipes and pumps were properly removed and that soil testing of that area had been conducted.

16. Under the 'totality of the circumstances' test, Claimant Willig substantially complied with the applicable 1991 UST closure requirements. In June, 1991, Willig engaged the services of an environmental contractor to close and remove the USTs. The contractor sampled the soils from the floor and sidewalls of each of the UST pits at removal. The results of those tests indicated an absence of reportable quantities of petroleum constituents. The contractor reported the UST closure and soil sampling test results to IDEM. IDEM never notified the Willig that there was an issue of non-compliance with the closure or removal procedure and did not require any further action at the site.

17. Claimant Willig discovered the release during the Phase II ESA in 2007. 329 IAC 9-4-1 (2003) provides that a duty to report a release is triggered by the discovery of a release. When Willig discovered the release in 2007, he complied with all applicable statutes and regulations. IDEM was timely notified of the spill. At that time, IDEM required Willig to further delineate and characterize the contaminated site. Willig authorized that testing. No further facts have been introduced by either party to demonstrate a genuine issue of material fact as to whether Willig was required to test at the sites of surrounding underground pipes. The totality of the circumstances indicates that Claimant Willig made a good faith effort to substantially comply with the closure and removal requirements in 1991. In addition, Willig complied with the spill reporting requirements when the release was discovered in 2007. Finally, since the release was reported, Willig has complied with IDEM requirements at the site. Therefore, Willig substantially complied with the ELTF requirements and is entitled to Summary Judgment on the issue of ELTF eligibility as a matter of law.

18. Sufficient evidence has been produced by Claimant Willig to meet his burden of proof that no genuine issue of material fact exists that Willig paid UST fees for 1999 and 1990, and is eligible for 66% reimbursement of ELFT claim number 200710506, if Willig's claim met other reimbursement eligibility requirements. Willig presented sufficient evidence of a lack of genuine issue of material fact that Willig substantially complied with then-applicable spill reporting requirements. On its Motion for Summary Judgment, seeking an opposite result on the same issues, IDEM has not produced sufficient evidence in support of its contentions. As a matter of law, summary judgment should be granted in Claimant Willig's favor, and denied as to IDEM.

FINAL ORDER

For all of the foregoing reasons, **IT IS THEREFORE ORDERED, ADJUDGED AND DECREED** that:

1. Claimant, Allan Willig's Motion for Summary Judgment is **GRANTED,** and Respondent, Indiana Department of Environmental Management's Motion for Summary Judgment is **DENIED,** on the issue that at least 50% of Willig's underground storage tank fees were paid, meeting Willig's eligibility requirements for reimbursement from the Excess Liability Trust Fund for claim number 200710506, for claims which otherwise qualify under applicable law.

2. Claimant Willig paid required underground storage tank fees for two years (1989 and 1990) out of three (not paid for 1988), and is thus eligible for 66% of reimbursement from the Excess Liability Trust Fund for claim number 200710506, for claims which otherwise qualify under applicable law.

3. Claimant, Allan Willig's Motion for Summary Judgment is **GRANTED,** and Respondent, Indiana Department of Environmental Management's Motion for Summary Judgment is **DENIED,** on the issue that Willig substantially complies with then-applicable spill reporting requirements on Willig's claim for reimbursement from the Excess Liability Trust Fund for claim number 200710506.

4. All pending proceedings in this cause are **VACATED.**

You are 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 administrative review of decisions of the Commissioner of the Indiana Department of Environmental Management. A party is eligible to seek Judicial Review of this Order as stated in applicable provisions of I.C. § 4-21.5, *et seq*. Pursuant to I.C. § 4-21.5-5-5, a Petition for Judicial Review of this 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 20th day of February, 2009 in Indianapolis, IN.

Hon. Mary L. Davidsen
Chief Environmental Law Judge