

Objection to the Denial of Excess Liability Trust Fund
Claim No. 200707144 / FID No. 19416, Waggoners Fuel Company, Inc.,
South Bend, St. Joseph County, Indiana
2009 OEA 30, (08-F-J-4073)

OFFICIAL SHORT CITATION NAME: When referring to 2009 OEA 30 cite this case as
Waggoners Fuel Company, Inc., 2009 OEA 30.

TOPICS:

de novo
Excess Liability Trust Fund
ELTF
spill
release
report
catchment basins
1998 upgrade
percentage
eligibility
annual fees
combination of tanks
USTs
tanks
compartment

PRESIDING ENVIRONMENTAL LAW JUDGE:

Catherine Gibbs

PARTY REPRESENTATIVES:

IDEM: Denise Walker, Esq.
Petitioner: Daniel McNerny, Esq., Alex Intermill, Esq.; Bose McKinney & Evans LLP

ORDER ISSUED:

April 2, 2009

INDEX CATEGORY:

Land

FURTHER CASE ACTIVITY:

[none]

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5. In addition, the IDEM determined that the Petitioner had paid only 67% of the annual underground storage tank fees due for this Site and was eligible to receive 67% of its eligible corrective action costs if the Site was otherwise eligible for ELTF reimbursement. The IDEM determined that the Petitioner was eligible to receive this amount because “The 12,000-gallon gasoline tank has two compartments (7,000 gallons for premium fuel and 5,000 gallons for regular fuel). This tank should have been registered and billed as two separate tanks. Accordingly, one tank fee payment is missing from 1996 through 2007.” *Exhibit F*.
6. The Petitioner timely filed its Petition for Review on February 25, 2008.
7. This matter was heard on December 12, 2008. Judicial notice was taken of Ind. Code (I.C.) § 13-23, 329 IAC 9 and 328 IAC.
8. On August 3, 2005, Barbara Humphrey, an UST inspector employed by the IDEM, inspected the Site. During her inspection, she noted that there was “leakage” under the dispensers. She did not take a sample of it. She also observed that there were 3 fill pipes at the Site indicating the number of USTs. *Hearing Transcript, page 50, lines 6 -19*. She observed catchment basins at the Site. *Hearing Transcript, page 58, lines 1-3*. However, she did not note that there were catchment basins at the Site in the report. *Petitioner’s Exhibit 1*. After her inspection, she went to the Petitioner’s office and spoke with Gordon Norquist, president of the Petitioner. A copy of the inspection report (Exhibit 1) was given to him.
9. Humphrey made no determination that the leakage observed was (1) a regulated substance; (2) that the leakage reached the groundwater, surface water, subsurface and/or surface soils; or (3) that it was in sufficient quantity to be reportable. She did not inform Norquist that the release must be reported to the IDEM.
10. Norquist did not inspect the dispensers immediately upon learning from Humphrey that possible leakage had occurred. In the usual course of business, the Site and dispensers were inspected every two weeks.
11. In 2007, as part of a business transaction, the Petitioner engaged SESCO, an environmental consulting company, to perform an investigation at the Site. Carla Gill was the project manager for SESCO. Initial sampling showed no soil contamination, but ground water contamination was above RISC² residential levels. A release was reported to the IDEM and an incident number assigned. A Further Site Investigation (FSI) was performed. At the IDEM’s suggestion, the method of collecting ground water samples was modified. The FSI revealed no soil or ground water contamination.

² Risk Integrated System of Closure, IDEM Nonrule Policy Document #W0046, date originally effective February 15, 2001.

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12. The USTs were installed in November of 1994. IDEM's Exhibit B. Norquist testified that he supervised the ordering and installation of the USTs at this Site and observed catchment basins being installed. Photographs taken at the time of the installation show the catchment basins in the ground. *Petitioner's Exhibit 5*. Rich Molini, an inspector with the IDEM, observed catchment basins at the Site on June 1, 2008.
13. Both Molini and Humphrey observed 3 fill pipes at the Site.
14. One 12,000 gallon diesel tank and one 12,000 gallon, two-compartment gasoline tank were ordered for this Site.³ *Petitioner's Exhibit 2*. One compartment in the 12,000 gallon, two-compartment tank was used to store diesel fuel and the other compartment was used to store gasoline.
15. The Petitioner paid annual fees for 2 USTs between 1996 and 2007. *IDEM's Exhibit E*.

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 the controversy pursuant to I.C. § 4-21.5-7-3.
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 office 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). "*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 (Ind.Ct.App. 1981).

³ Exhibit 2 also shows that one 2,000 gallon oil water separator tank was ordered. However, the IDEM does not contend that annual fees were owed for this tank.

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4. As a preliminary matter, the IDEM argues that this Court should not consider evidence produced by the Respondent at the hearing, which was not available to the IDEM for review when it made its decision. The evidence that the IDEM sought to exclude was any evidence, either documentary or testimonial, regarding the presence of catchment basins at the Site. While it may be improper to consider such evidence when the Court is considering whether a permit was properly issued, that is not the case in this situation. An applicant to the ELTF must provide certain information as part of the claim. However, the IDEM will commonly review other sources of information. In this instance, the IDEM, in its review of the files maintained by the agency about the Site, noticed that the Petitioner had not checked the boxes on a form indicating that catchment basins had been installed on the Site. The Petitioner's only opportunity to disprove IDEM's conclusions is during the hearing on this matter. This Court must apply a *de novo* review standard. Therefore, the evidence produced at the hearing regarding the catchment basins must be considered.

Substantial compliance

5. The pertinent portions of I.C. § 13-23-8-4(a) state:

Except as provided under subsection (b), and subject to section 4.5 of this chapter, an owner or operator may receive money from the excess liability trust fund under section 1 of this chapter only if the owner or operator is in substantial compliance (as defined in 328 IAC 1-1-9) with the following requirements:

- (1) The owner or operator has complied with the following:
(A) This article or I.C. § 13-7-20 (before its repeal)
(B) Rules adopted under this article or I.C. § 13-7-20 (before its repeal).

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

- (2) The owner or operator has paid all registration fees that are required under rules adopted under I.C. § 13-23-8-4.5.

6. Substantial compliance is defined in 328 IAC 1-1-9 as:

- (a) "Substantial compliance" means that, at the time a release was first discovered or confirmed:

- (1) the owner or operator has met the requirements of I.C. § 13-23-8-4(a), with the exception of minor violations of:
(A) statutory deadlines;
(B) regulatory deadlines; or
(C) regulatory requirements; that do not cause harm or threaten to harm human health or the environment; and
(2) registration fees have been paid as required under I.C. § 13-23-12 and 328 IAC 1-3-3.

- (b) An owner or operator is not in substantial compliance if the release:

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- (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.
7. The requirements for reporting a suspected release are found in 329 IAC 9-4-1. The requirements for reporting a spill/overflow are found in 329 IAC 9-4-4. The IDEM has not specified which rule the Petitioner has allegedly failed to substantially comply with.
 8. In examining the rules, however, it is clear that under either rule, the owner/operator has some discretion in determining whether a *reportable* spill has occurred, that is, whether the operating conditions or monitoring indicate a release occurred; whether the substance that was allegedly released was regulated; whether the substance impacted groundwater, surface water, subsurface and/or surface soils; or whether the amount released was sufficient to trigger a requirement to report.
 9. No release was reported in 2005. The IDEM inspector could not conclude that the leakage she observed was a reportable release of a regulated substance. The rule places the burden on the owner/operator to determine whether it is appropriate to report a release. The Petitioner presented evidence that the dispensers were inspected on a regular basis. The dispensers were equipped with catchment basins which would catch any leakage before it reached the groundwater, surface water, subsurface and/or surface soils. No contamination was found in 2007 during a site investigation which might indicate that an earlier release had occurred. The Petitioner presented sufficient evidence that no reportable release of regulated substance occurred in August 2005. The IDEM presented no evidence to rebut this conclusion other than the inspector's observation of "leakage" in the dispensers.
 10. The Petitioner presented sufficient evidence that the Site has catchment basins. In denying the request for reimbursement, the IDEM relied upon the documents submitted by the Petitioner which show that the Site was not equipped with catchment basins. However, the Petitioner presented sufficient evidence, including testimony from both IDEM inspectors and documentation showing the basins were installed, that catchment basins were installed and that the documents upon which the IDEM relied were incorrect. The Site is in substantial compliance with the applicable 1998 regulations regarding the catchment basins.

Amount of reimbursement

11. 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)⁴ as follows:

⁴ This rule was authorized by I.C. § 13-23-8-4.5.

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- (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:
 - (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%).
12. The pertinent portion of the definition (I.C. § 13-11-2-241) of “underground storage tank” is: “for purposes of section 161 of this chapter and I.C. § 13-23, means one (1) tank or a combination of tanks, including underground pipes connected to the tank or combination of tanks: (1) that is used to contain an accumulation of regulated substances; and (2) the volume of which, including the volume of the underground connected pipes, is at least ten percent (10%) beneath the surface of the ground.
13. I.C. § 13-23-12-1(c) states: “If an underground storage tank consists of a combination of tanks, a separate fee shall be paid for each tank.”
14. “The cardinal rule of statutory construction is to ascertain the intent of the legislature 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).
15. I.C. § 13-23-12-1(c) is clear that a separate fee is due for each compartment in a combination of tanks. The IDEM based its initial determination of the number of tanks at the Site on information supplied by the Petitioner in the notifications. Upon a review of the inspection reports, the IDEM determined that there were three (3) tanks at this Site based on the fact that one of the tanks was in fact a combination of tanks and had two (2) compartments. The IDEM presented sufficient evidence that there are three (3) USTs at this Site for which annual fees are due. The IDEM was correct in its determination that the Petitioner has paid only 67% of applicable UST fees due and is, thus, eligible to receive reimbursement of 67% of eligible corrective action costs.

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FINAL ORDER

AND THE COURT, being duly advised, hereby **ORDERS, ADJUDGES AND DECREES** that:

1. The Petitioner was in substantial compliance with the spill reporting requirements in August 2005 for this Site.
2. Catchment basins are present at the Site. The Petitioner is in substantial compliance with this requirement of the 1998 upgrade regulations.
3. The Petitioner has paid 67% of annual tank fees due for this Site.

Waggoners Fuel Co., Inc., (the Petitioner) is eligible to receive reimbursement from the Excess Liability Trust Fund of 67% of eligible costs for the facility located at 312 South Mayflower, South Bend, Indiana.

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. 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 2nd day of April, 2009 in Indianapolis, IN.

Hon. Catherine Gibbs
Environmental Law Judge