

STATE OF INDIANA )  
 )SS:  
COUNTY OF MARION )

IN THE MARION SUPERIOR COURT  
CIVIL DIVISION, ROOM NO. F12  
CAUSE NO. 49F12-0707-PL-031388

INDIANA DEPARTMENT OF )  
ENVIRONMENTAL MANAGEMENT, )  
 )  
Petitioner, )  
 )  
v. )  
 )  
ROWE BROTHERS, INC., )  
 )  
Respondent. )

**FILED**

(189) JAN 20 2009

*Elizabeth A. White*  
CLERK OF COURT

**FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT**

This case is before the Court on the Indiana Department of Environmental Management’s (“IDEM”) Verified Petition for Judicial Review of the Office of Environmental Adjudication’s (“OEA”) Findings of Fact, Issues of Law, and Final Order (the “OEA Final Order”). The OEA granted summary judgment in favor of Rowe Brothers, Inc. (“Rowe Brothers”) and found that that Rowe Brothers is entitled to full reimbursement for its eligible remediation expenses from the excess liability trust fund (“ELTF”). The parties have submitted their briefs and conducted oral argument before the Court. The Court now finds in favor of Rowe Brothers, denies IDEM’s Petition and enters its Findings of Fact, Conclusions of Law and Judgment.

**I. FINDINGS OF FACT**

**A. The Discovery Of The Petroleum Release**

1. Rowe Brothers owned and operated underground storage tanks (“USTs”) and a gasoline service station located at 2801 Massachusetts Avenue, Indianapolis, Indiana (the “Site”). Affidavit of Vern Rowe, ¶ 2; R. at 57. In 2003 Rowe Brother’s president, Vern Rowe, planned to sell the Site and requested that its environmental consultant, Capital Environmental

*JCSA*

Enterprises, Inc. (“Capital”), complete a phase II environmental investigation at the request of the Buyer.<sup>1</sup> Rowe Aff. ¶ 5; R. at 58.

2. Capital conducted a site investigation and collected soil and groundwater samples at the Site on July 28, 2003. Affidavit of Davies H. Batterton, ¶ 5; R. at 110. During Capital’s site investigation on July 28, 2003 no free product, vapor, petroleum sheen, or other reportable petroleum release was discovered on the Site or on nearby properties. Batterton Aff. ¶ 5; Rowe Aff. ¶ 5; R. at 58, 110. In addition, there were no unusual operating conditions related to the petroleum dispensing equipment. Batterton Aff. ¶ 5; Rowe Aff. ¶ 5; R. at 58, 110.

3. Capital did not receive the lab results for the July 28, 2003 soil and groundwater samples until after August 14, 2003 when Capital’s secretary received the lab results in the mail. Batterton Aff. ¶ 6; R. at 111.

4. Capital’s secretary initially receiving the lab results was not trained or qualified to interpret the lab results for the chemicals of concern (“COCs”) and did not know whether the lab results showed a reportable release of petroleum on Rowe Brothers’ Site.<sup>2</sup> Batterton Aff. ¶ 6; R. at 111.

5. Capital’s president, Davies H. Batterton (“Batterton”), was the Capital employee responsible for reviewing and interpreting the lab results. Batterton Aff. ¶¶ 2 and 6; R. 111-112. Batterton has over sixteen years experience as an environmental consultant conducting environmental investigations and was able to interpret the lab results. Batterton Aff. ¶ 2; R. 111.

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<sup>1</sup> During the course of this litigation, Vern Rowe died on August 23, 2008. Vern’s wife, Mickey Rowe, is the sole remaining shareholder of Rowe Brothers, Inc.

<sup>2</sup> Pursuant to 329 I.A.C. 9-4-1 (2003), the owner of a UST is required to report to IDEM within 24 hours the *discovery* of a release of petroleum in the soil or groundwater.

6. Rowe Brothers was a small family company and Vern Rowe, the President of Rowe Brothers, was the only Rowe Brothers' employee authorized to receive the lab results from Capital. Rowe Aff. ¶ 8; R. 59, 111, 471.

7. During the late summer of 2003 Rowe and Batterton left Indianapolis for their respective family vacations. Rowe Aff. ¶¶ 7-8; Batterton Aff. ¶¶ 7-8; R. at 58, 112. Rowe was on a family vacation in Las Vegas, Nevada from the middle of August 2003 until September 15, 2003. Rowe Aff. ¶¶ 7-8; R. at 59, 112. Batterton was on a family vacation in the remote Minnesota-Canada boundary region from September 4, 2003 until Monday, September 15, 2003. Batterton Aff. ¶¶ 7-8; R. at R. at 59, 112.

8. Batterton and Rowe did not discuss the lab results for the Site until Monday, September 15, 2003 when Rowe returned to work from his vacation in Nevada. Batterton Aff. ¶¶ 6-8; R. at 59, 112; OEA Findings of Fact ¶ 7; R. at 465.

9. Rowe Brothers did not *discover* the release until Monday, September 15, 2003 when both Batterton and Rowe had returned from their respective vacations and discussed the laboratory results. Rowe Aff. ¶ 8; R. at 59, 112; OEA Findings of Fact ¶ 7; R. at 465. Upon discovery of the release, Capital and Rowe Brothers promptly reported the release to IDEM within 24 hours on September 15, 2003. Rowe Aff. ¶¶ 8-9; Batterton Aff. ¶¶ 8-9; R. at 59, 112.

10. The OEA found as follows:

The consultant and owner/operator were small companies which had delegated the responsibility for environmental compliance for this facility to one individual, and no evidence was presented that other individuals within each company were skilled or authorized to address Rowe Brothers' ELTF claim. Substantial evidence was presented that Rowe Brothers, as owner and operator, received the results indicative of contamination on September 15, 2003. No evidence was presented that timing of delivery of this information to Rowe Brothers could reasonably have been delivered more promptly, nor intentionally delayed.

\* \* \*

Rowe Brothers communicated the release to IDEM on September 15, 2003 which was the same day that it discovered the release. Substantial evidence was presented that Rowe Brothers complied with 329 I.A.C. 9-4-1 [the release reporting rule].

OEA's Findings of Fact and Conclusions of Law ¶¶ 18-19; R. 471.

**B. Rowe's Remediation Expenses And ELTF Claim**

11. Rowe Brothers submitted an initial ELTF claim ("First ELTF Claim") to IDEM in the amount of zero dollars (\$0.00) requesting an eligibility determination on October 27, 2003. Supp. Rowe Aff. ¶ 4; R. at 287. During 2003 through 2005 Rowe Brothers never received a response from IDEM on whether Rowe Brothers was eligible to receive reimbursement from the ELTF. Supp. Rowe Aff. ¶ 4; R. at 287; OEA Findings of Fact ¶ 15; R. at 465.

12. On November 22, 2005 Rowe Brothers submitted a second claim to the ELTF ("Second ELTF Claim") in the amount of \$73,352.75. Supp. Rowe Aff. ¶ 5; R. at 287. This Second ELTF Claim contained new and additional information that was not contained in the First ELTF claim. Supp. Rowe Aff. ¶ 5; R. at 287.

13. On December 7, 2005 IDEM sent a letter to Rowe Brothers denying Rowe Brothers' second claim for reimbursement of remediation expenses in the amount of \$73,352.75. Supp. Rowe Aff. ¶ 6; R. at 287. IDEM alleged that Rowe Brothers failed to report a release of petroleum within IDEM's spill reporting period of 24 hours in violation of 329 I.A.C. 9-4. Supp. Rowe Aff. ¶ 6; R. at 287.

14. After learning the reason for the denial of the Second ELTF Claim, Rowe Brothers learned of and provided IDEM with new information concerning IDEM's policy to pay ELTF claims when the petroleum release is reported to IDEM with 30 days. Supp. Rowe Aff. ¶ 9; R. at 288; Deposition of Assistant Commissioner Bruce Palin; R. at 335, 342-343.

15. In 2006, as part of this litigation, IDEM alleged for the first time that IDEM sent Rowe Brothers a letter sometime between 2003 and 2005 (“IDEM’s First Determination Letter”) that denied Rowe Brothers’ Request For Eligibility Determination. Supp. Rowe Aff. ¶ 7; R. at 287.

16. Unlike IDEM’s Second Determination Letter, IDEM’s First Denial Letter was not dated, was not signed, and was not sent via certified mail. Supp. Rowe Aff. ¶ 7; R. at 287. Rowe Brothers did not receive IDEM’s undated and unsigned First Determination Letter. Supp. Rowe Aff. ¶ 7; R. at 287.

17. IDEM’s Second ELTF Determination letter states:

In accordance with 329 IAC 9-4 and 327 IAC 2-6.1, communicate a spill report to IDEM: The applicant is not in substantial compliance with this requirement. Though evidence of contamination was found earlier (groundwater samples from July 28, 2003), the release was not reported to IDEM until September 15, 2003.

\* \* \*

Your claim was submitted for \$73,352.75. After review by the ELTF section, your claim has been approved for \$0.00

Second ELTF denial letter,<sup>3</sup> R. at 65.

18. IDEM alleged that Rowe Brothers discovered the release of petroleum on August 14, 2003, the day Capital’s secretary received the laboratory results. IDEM’s Resp. Br.; R. at

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<sup>3</sup> IDEM in its denial letter admitted that Rowe Brothers paid 100 % of its annual UST registration fees and that Rowe Brothers is eligible to receive 100 % reimbursement for eligible remediation expenses. IDEM stated:

Owner or operator has paid at least 50% of UST registration fees when due: The applicant is in substantial compliance with requirement and is eligible to receive 100 % of eligible costs. However, this percentage is not applicable until substantial compliance is demonstrated for the above requirement.

Second ELTF Denial Letter, R. at 65.

179. The parties agree that Rowe Brothers reported the release to IDEM on September 15, 2003. Rowe Aff. ¶ 8; R. 59, 61.

19. IDEM alleges that Rowe Brothers reported the release of petroleum 31 days late. Pursuant to Ind. Code § 13-23-8-4, in order to receive ELTF reimbursement, Rowe Brothers need only be in “substantial compliance” not full compliance with the release reporting and other UST requirements.

20. In 2003 “substantial compliance” was defined in 328 IAC 1-1-9 to mean “that, at the time a release was *discovered*, the owner or operator *had taken affirmative steps* to comply with the requirements of IC 13-23-8-4.” (Emphasis added).

21. Rowe Brothers provided uncontested evidence that Rowe Brothers timely reported the release of petroleum to IDEM within 24 hours of *discovery*. Rowe Aff. ¶¶ 4 and 8; Batterton Aff. ¶¶ 4 and 8; R. at 58-59, 111-112.

22. However, even if Rowe Brother reported the release 31 days late, Rowe Brothers is still entitled to ELTF reimbursement because Rowe Brothers reported the release of petroleum well within IDEM’s 42-day “substantial compliance” period established by the case Speedway SuperAmerica LLC, Cause No. 05-F-J-3564 (OEA 2006); Slip Op. pg. 6; R. at 131 and the 11 month “substantial compliance” period established by In the Matter of Objection To ELTF Claim of Johnson Oil Company, 2005 OEA 63, 68; R. at 142.

23. IDEM in its denial letter gave only one reason (violations of release reporting rule) to deny Rowe Brothers’ ELTF claim. Pursuant to Ind. Code § 13-23-9-2(d) IDEM is required to notify Rowe Brothers of all the reasons for the denial of its ELTF claim in the initial denial letter. R. at 161. IDEM may not develop additional reasons to deny Rowe Brothers’ ELTF claim.

## II. STANDARD OF REVIEW

24. In reviewing the OEA's order, this Court must apply a deferential, appellate standard of review. Id.; Ind. Code § 4-21.5-5-14. As the petitioner, IDEM bears the burden of demonstrating that the administrative action it is appealing is invalid. Ind. Code § 4-21.5-5-14(a). An administrative decision should be reversed *only* if it is:

(1) arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law; (2) contrary to a constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations or short of statutory right; (4) without observance of procedure required by law; or (5) unsupported by substantial evidence.

Ind. Code § 4-21.5-5-14(d); Ind. Dept. of Env'tl. Mgmt. et al. v. Lake County Solid Waste Management District, 847 N.E.2d 974, 981 (Ind. Ct. App. 2006). Ind. Dept. of Env'tl. Mgmt. v. Conard, 614 N.E.2d 916, 919 (Ind. 1993).

25. An agency's action is "arbitrary and capricious when it is made without any consideration of the facts and lacks any basis that may lead a reasonable person to make the same decision . . . ." Lake County, 847 N.E.2d at 981, *quoting* Ind. Dept. of Env'tl. Mgmt. v. Schnippel Constr., Inc., 778 N.E.2d 407, 412 (Ind. Ct. App. 2002).

26. The trial court may not try the case *de novo*, but rather must defer to the administrative findings. Ind. Code § 4-21.5-5-11; State v. Carmel Healthcare Management, 660 N.E.2d 1379, 1384 (Ind. Ct. App. 1996). Indiana State Ethics Comm'n v. Nelson, 656 N.E.2d 1172, 1174 (Ind. Ct. App. 1995).

## III. ARGUMENT

### A. Rowe Brothers' Communicated The Release To IDEM The Same Day It Discovered The Release

1. IDEM denied Rowe Brothers ELTF claim alleging that Rowe Brothers discovered the release of petroleum on August 14, 2003 and that Rowe Brothers reported the release to IDEM 31 days late on September 15, 2003. IDEM contends the delay of 31 days is in violation of 329 I.A.C. 9-4-1 (release reporting regulation) and Ind. Code §13-23-8-4 (substantial compliance law).

2. Rowe Brothers provided Affidavits from two eyewitnesses that were actually present during the site investigation and both of these eyewitnesses state that Rowe Brothers did not discover a release prior to September 15, 2003. Rowe Affidavit and Batterton Affidavit; R. at 57, 110. OEA Findings of Fact ¶ 17; R. at 471.

3. In relevant part, 329 IAC 9-4 requires that a UST owner report to IDEM the *discovery* of a release of petroleum at the UST site or in the surrounding area. 329 IAC 9-4-1(1). The petroleum discovery includes the presence of free product in soils, basements, storm, utility or sanitary sewer lines, surface water or ground water. 329 IAC 9-4-1. Unusual operating conditions or release detection monitoring results which indicate a release may have occurred also must be reported. 329 IAC 9-4-1. There is no evidence that Rowe Brothers failed to comply with any of these provisions. OEA Findings of Fact ¶ 3; R. at 465.

4. The uncontested evidence shows that IDEM's allegations that Rowe Brothers discovered the contamination prior to September 15, 2003 are not correct. Rowe Brothers reported the discovery of petroleum to IDEM within 24 hours of discovery and fully complied with 329 I.A.C. 9-4-1.

5. IDEM alleges that Rowe Brothers was aware of the petroleum release on August 14, 2003. However, Capital's secretary, received laboratory results of the site investigation on August 14, 2003. Capital's secretary was not trained or qualified to interpret the laboratory



results showing the COCs and did not know whether the COCs exceeded IDEM's action standards found in IDEM's RISC industrial default closure levels ("IDCL").<sup>4</sup>

6. Rowe Brothers did not learn of the petroleum release, until Vern Rowe returned from his vacation on September 15, 2003 and discussed the laboratory results with Capital's expert, Dave Batterton. IDEM has not presented any evidence that Rowe Brothers was aware of a release before September 15, 2003. The Environmental Law Judge ("ELJ") found: "No evidence was presented that timing of delivery of this information to Rowe Brothers could reasonably have been delivered more promptly, nor intentionally delayed." OEA Findings of Fact and Conclusions of Law ¶ 18; R. at 471.

7. The ELJ properly found that IDEM's decision to deny Rowe Brothers' ELTF claims is without a reasonable basis and was arbitrary and capricious. An action is arbitrary and capricious where there is no reasonable basis for the action. South Gibson School Board v. Sollman, 768 N.E.2d 437, 441 (Ind. 2004); Indiana Civil Rights Comm'n v. Delaware County Cir. Ct., 668 N.E.2d 1219, 1221 (Ind. 1996).

8. Rowe Brothers provided evidence that it communicated the release to IDEM on September 15, 2003 which was the same day that it learned about the release. Rowe Affidavit ¶ 8; Batterton ¶ 8; R. at 59, 112. Because IDEM's decision to deny Rowe Brothers' ELTF claim was made in disregard of the facts, IDEM's decision is arbitrary and capricious. The Court affirms the OEA's decision to order IDEM to pay Rowe Brothers' ELTF claim.

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<sup>4</sup> The chemicals of concern included Benzene, Toluene, Ethylbenzene, and Xylene ("BTEX"). The BTEX COCs and other volatile organic compounds are found in petroleum products.

**B. Rowe Brothers Was In “Substantial Compliance” With The ELTF Laws**

9. Indiana law requires only “substantial compliance,” not complete compliance, with the requirements of Ind. Code § 13-23 to obtain ELTF reimbursement. *See*, Ind. Code § 13-23-8-4. The applicable statute, Ind. Code § 13-23-8-4, states:

(a) 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 [IC 13-23] or IC 13-7-20 (before its repeal).

(B) Rules adopted under this article or IC 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 IC 13-23-8-4.5.

Ind Code § 13-23-8-4. (Emphasis added).

10. In 2003 “substantial compliance” was defined in 328 IAC 1-1-9 to mean “that, at the time a release was discovered, the owner or operator *had taken affirmative steps* to comply with the requirements of IC 13-23-8-4.” (Emphasis added).

11. In Johnson Oil, the OEA found that even a 11 month delay in reporting a release to IDEM did not prevent Johnson Oil from receiving full ELTF reimbursement because Johnson Oil was in substantial compliance with the existing regulations. Johnson Oil Company, 2005 OEA 63, 68; R. at 142. An owner or operator of a UST demonstrates “substantial compliance” by showing that it was in compliance with the majority of the applicable regulations. Johnson Oil, 2005 OEA 63, 68; R. at 142.

12. In Speedway, the OEA found that a 42 day delay in reporting a release of petroleum did not prevent Speedway from receiving ELTF reimbursement. Speedway SuperAmerica LLC, Cause No. 05-F-J-3564 (OEA 2006); Slip Op. pg. 6; R. at 131. At most Rowe Brothers reported the release of petroleum within 31 days, well within IDEM's 42-day "substantial compliance" period established by the Speedway case; R. at 131.

13. In Speedway the OEA held that substantial compliance "includes a showing that the owner or operator had taken 'affirmative steps' to comply with the regulations." Speedway, Cause No. 05-F-J-3564; Slip op. p. 6; R. at 136. In both Speedway and Johnson Oil, the OEA awarded ELTF reimbursement after Speedway and Johnson Oil presented evidence that they had substantially complied with all the applicable regulations. Speedway, Slip op. p. 6; R. at 136. Johnson Oil, Slip. op. p.5; R. at 143.

14. Likewise, Rowe Brothers has presented evidence that it "has taken affirmative steps to comply with the regulations" and that it was in substantial compliance with the regulations. *See* Speedway, Slip op. p. 6; R. at 136. This evidence of substantial compliance includes a showing that Rowe Brothers:(1) registered its USTs; (2) paid annual UST fees; (3) conducted monthly tank tightness tests with its Veeder Root TLS 350; (4) conducted annual cathodic protection tests on its tanks; (5) reported the release of petroleum as soon as it was discovered; (6) retained Environmental Petroleum Services to confirm the tanks were "tight" and not leaking; (7) retained its environmental consultant, Capital, to investigate the release; (8) completed several site characterization reports which IDEM approved by letter dated January 4, 2005; (9) completed a corrective action plan ("CAP") which IDEM approved by letter dated December 16, 2005. *See* Rowe Affidavit, ¶ 9; Rowe Supp. Aff. ¶ 3; R. at 59, 286.

15. Rowe Brothers has presented evidence that shows that Rowe Brothers is in substantial compliance with the UST regulations and therefore the Court orders IDEM to approve Rowe Brothers' ELTF claim.

**C. Rowe Brothers Never Received IDEM'S First Determination Letter And Thus Rowe Brothers' Time To Appeal Did Not Expire**

16. IDEM alleges that Rowe Brothers waived its right to appeal the ELTF determination because Rowe Brothers failed to appeal a First ELTF Determination Letter within fifteen (15) days.

17. Rowe Brothers presented uncontested evidence that Rowe Brothers never received IDEM's First Determination Letter until its counsel received a copy in 2006 as part of this litigation. IDEM may not deprive Rowe Brothers ELTF reimbursement until it shows that Rowe Brothers received actual notice of the IDEM's First ELTF Determination Letter. IDEM's own Determination Letter which states: "you may appeal this determination by filing a written request for review with the Indiana Office of Environmental Adjudication not later than fifteen (15) days after **receiving** notice of the determination." IDEM's First Determination Letter, pg. 2; R. at 332.

18. In Coulopoulos, the OEA found a similar argument by IDEM to be unconscionable. IDEM v. Coulopoulos, Cause No. 06-S-E-3683 (OEA 2006) pg. 5; R. at 350, 354. In Coulopoulos IDEM sent a Commissioners Order via certified mail to Ms. Constance Coulopoulos. Constance presented evidence that her sister, Diane Coulopoulos, had accepted the certified mailing on December 27, 2005 but that Diane lost the document and did not give the document to Constance. Id. at 2; R. at 351.

19. Like Rowe Brothers, Coulopoulos' attorney eventually obtained IDEM's correspondence but after the 15 day appeal period asserted by IDEM. Id. at 2; R. at 351. IDEM

argued that Coulopoulos' petition for review should be dismissed for failing to file her petition within 15 days. Id.; R. at 351. The OEA found that IDEM was required to provide the best possible notice to Coulopoulos before a motion to dismiss could be granted. Id. at 5; R. at 351.

20. Likewise, IDEM must provide the best possible notice to Rowe Brothers before IDEM may waive Rowe Brothers' ELTF appeal rights. Other cases, requires IDEM and other public agencies to give the best possible notice to citizens before it deprives them of their rights and money. Wayne Metal Products Co., Inc. v. IDEM, 721 N.E.2d 316, 318 (Ind. Ct. App. 1999); Indiana Department of Highways v. Dixon, 541 N.E.2d 877, 880 (Ind. 1989). It is fundamental that in order for an agency – or any government entity for that matter – to take action against an individual, that the individual must have notice of the action. Abdirizak v. Review Bd. Of Indiana Dep't of Workforce Dev., 826 N.E.2d 148, 150 (Ind. Ct. App. 2005); Mullane v. Central Hanover Bank, 339 U.S. 306, 314-315 (1950).

21. In Wayne Metal Products, the Indiana Court of Appeals held that the period of time in which to file a petition for review begins to run on the date that the alleged violator “receives” IDEM’s Commissioners Order. Wayne Metal Products, 721 N.E.2d at 318. Furthermore, in Dixon, the Indiana Supreme Court found that the public agency bore the burden of proving the petitioner received the Indiana Department of Highway (“DOH”) notice that Dixon had been discharged from his employment. Dixon, 541 N.E.2d at 880.<sup>5</sup> The Supreme Court held that the use of the word “receipt” in the statute required DOH to produce evidence of the date that Dixon *actually* received the notice. Id. at 880.

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<sup>5</sup> The Court notes that IDEM sent the Second ELTF Determination Letter via certified mail and currently sends all ELTF determination letters via certified mail. Had IDEM sent the First Determination Letter by certified mail IDEM would have evidence to met its burden of showing the ELTF claimant received the determination letter. *See* Dixon, 541 N.E.2d at 880.

22. IDEM's First Determination Letter gave Rowe Brothers "15 days after receiving notice" to file its petition for review. *See* IDEM's First Determination Letter, pg. 2; R. at 232. The uncontested evidence shows that Rowe Brothers did not receive IDEM's First Determination Letter. Pursuant to Wayne Metals, and Dixon, the Court finds that due process requires that Rowe Brothers is allowed to proceed with its ELTF appeal and the Court orders IDEM to pay Rowe Brothers' ELTF claim. Wayne Metals, 721 N.E.2d at 318; Dixon, 541 N.E.2d at 880.

**D. IDEM's 30-Day Spill Rule**

23. IDEM followed an unwritten and unpromulgated rule that allowed ELTF reimbursement so long as the petroleum release was reported to IDEM within 30 days ("IDEM's 30-day Release Reporting Rule"). Deposition of Bruce Palin dated August 12, 2005, p. 31; R. at 342.

24. IDEM denied Rowe Brothers ELTF claim for failure to comply with a 24-hour reporting rule when IDEM's true and unpromulgated rule required release reporting within 30 days. *See* Deposition of Bruce Palin, pg. 31; R. at 342.

25. Substantive and procedural due process - - as well as general fairness - - require that Rowe Brothers be notified of IDEM's 30-Day Release Reporting Rule and that IDEM follow its 30-Day Release Rule when it denies Rowe Brothers' claim. "In order to satisfy due process, an administrative decision must be in accord with previously stated, ascertainable standards." Podgor v. Indiana University, 381 N.E.2d 1274, 1283 (Ind. App. 1978)(Emphasis added).

26. Even if Rowe Brothers had received IDEM's First Determination Letter, Rowe Brothers did not know of IDEM's unpromulgated 30-Day Release Reporting Rule that was

effective in 2003 and it would have been impossible for Rowe Brothers to file a petition for review based on a 30-Day Release Rule that IDEM never divulged.

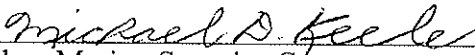
#### IV. FINAL ORDER

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by this Court as follows.

1. There was substantial evidence that Rowe Brothers discovered the petroleum release on September 15, 2003 and that Rowe Brothers timely reported the release to IDEM the same day.
2. IDEM contended that Rowe Brothers should not receive ELTF reimbursement because Rowe Brothers reported the petroleum release 31 days late. Rowe Brothers presented unrefuted evidence that it reported the petroleum release the same day it discovered the release. Even if IDEM's contention were true, Rowe Brothers would still be entitled to ELTF reimbursement pursuant to Ind. Code § 13-23-8-4. This statute allows ELTF reimbursement when a UST owner is in partial or "substantial compliance" with the UST regulations. Rowe Brothers presented evidence that it was in substantial compliance with the ELTF regulations.
3. Rowe Brothers provided uncontested evidence that Rowe Brothers did not receive IDEM's First Determination Letter. Pursuant to Wayne Metals, 721 N.E.2d at 318 and Dixon, 541 N.E.2d at 880, IDEM bears the burden of proving Rowe Brothers received IDEM's First Determination Letter and IDEM has failed to meet its burden.
4. For the foregoing reasons, the Court DENIES IDEM's Petition for Judicial Review, FINDS in favor of Rowe Brothers and AFFIRMS the OEA Final Order to the extent that the OEA Final Order is not inconsistent with this Court's Final Order.
5. The Court finds that Rowe Brothers is entitled to reimbursement for its eligible remediation expenses from Indiana's Excess Liability Trust Fund on its claim in the amount of

\$73,352.75. This judgment shall be deemed as final and there is no just cause for delay in entering the same.

ORDERED THIS 20<sup>TH</sup> DAY OF January, 2009.

  
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Judge, Marion Superior Court  
Civil Division, Room No. F12

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