

**In Re: Objection to Excess Liability Trust Fund Claim Denial, 5206 West 86th Street LLC
2004 OEA 77 (03-F-J-3159)**

TOPICS:

Excess Liability Trust Fund
denial
spill report
spill rule
release
reporting
substantial compliance
statutory construction of "shall"

PRESIDING JUDGE:

Gibbs

PARTY REPRESENTATIVES:

Petitioner: Glenn D. Bowman, Esq., Donn H. Wray, Esq., Philip R. Thompson, Esq.
IDEM: Anne M. Patterson, Esq.

ORDER ISSUED:

September 24, 2004

INDEX CATEGORY:

Land

FURTHER CASE ACTIVITY:

[none]

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6. On January 26, 2003, the Petitioner submitted a claim for reimbursement of corrective action costs from the Excess Liability Trust Fund (“the ELTF”) to the IDEM.
7. On August 11, 2003, IDEM denied the Petitioner eligibility to the ELTF on the following basis:

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 September 1991), the release was not reported to IDEM until June 3, 1992.

8. On August 22, 2003, Environmental Services Associates, LLC, submitted a Petition for Administrative Review on the Petitioner’s behalf to the Indiana Office of Environmental Adjudication.

Conclusions of Law

1. The Office of Environmental Adjudication (“OEA”) has jurisdiction over the decisions of the Commissioner of the Indiana Department of Environmental Management (“IDEM”) pursuant to Ind. Code § 4-21.5-7, et seq.
2. This is a Final Order issued pursuant to Ind. Code § 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. The Petitioner has the burden of proving, by a preponderance of the evidence, that the IDEM improperly denied the application for reimbursement from the ELTF.
4. Both parties agree that the applicable law should be determined by the date that the release should have been reported. This Court concurs that this is the appropriate date as this was the date that Petitioner’s right to reimbursement from the ELTF accrued.
5. Applicable law, codified under IC § 13-7-20-33(d) in September 1991, stated:

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

(2) The owner or operator is in substantial compliance with the requirements of the following by the date the requirements became effective as determined by the commissioner:
(A) This chapter.
(B) Rules adopted under this chapter.
(C) 42 U.S.C. 6991 through 6991i.
(D) regulations adopted under 42 U.S.C. 6991 through 6991i.
6. The Court takes judicial notice of the fact that in September of 1991, neither 329 IAC § 9-4 nor 327 IAC § 2-6.1 was in effect. The Petitioner could not have violated any reporting requirements under 329 IAC § 9-4 or 327 IAC § 2-6.1.

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7. The Court also takes judicial notice of the fact that while 327 IAC § 2-6 (327 IAC 2-6.1's predecessor and commonly known as the Spill Rule), was in effect during September 1991, IC § 13-7-20-33(d)(2) did not require compliance with this rule as a prerequisite to ELTF eligibility. IDEM concedes that this is true. IDEM's Prehearing Brief, page 2, footnote #1.
8. IDEM concedes that neither of the rules cited as the basis for denial was in effect at the time of the alleged release. However, IDEM argues that the regulations adopted under 42 U.S.C. 6991 through 6991i were in effect and applicable to this Facility. Both 40 C.F.R. § 280.50 and § 280.53 required an owner or operator of a UST to report a release of petroleum from a UST within twenty-four (24) hours "or another reasonable time period specified by the implementing agency".
9. IC § 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.
10. In a case regarding the removal of a county welfare board member where the statute required due notice and hearing before a board member could be removed, the Supreme Court held that "Inherent in the above statute are the fundamental notions of due process under the law. Due process demands that the challenged member be given "notice in writing" of the *specific* allegations leveled against him, and further that he be afforded a "hearing thereon before the appointing authority." *State ex rel. Sedam v. Ripley Circuit Court*, 262 Ind. 19, 22 (Ind. 1973). This court concludes that IC § 13-23-9-2(d) requires that IDEM notify a claimant of the specific reasons for the denial of a claim for reimbursement from the ELTF. In this case, IDEM notified the Petitioner that he was being denied reimbursement because he failed to substantially comply with 2 regulations, 329 IAC § 9-4 and 327 IAC § 2-6.1. Because neither of these regulations was applicable to this Facility at the time of the report, the Petitioner has met his burden in proving that IDEM's denial was improper.
11. IDEM argued it properly denied the Petitioner ELTF reimbursement on the basis that the Petitioner had not substantially complied with the reporting requirements in 40 C.F.R. § 280. IDEM also asserted at the hearing that the Petitioner had not complied with the requirement to have some method of release detection in place. Due process and fundamental fairness dictates that when IDEM was required by the statute to identify the reasons for the denial, IDEM may not, on the day of the hearing, raise other grounds for the denial.

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12. When the word "shall" appears in a statute, it is construed as mandatory rather than directory unless it appears clear from the context or the purpose of the statute that the legislature intended a different meaning. *United Rural Elec. Membership Corp. v. Indiana & Michigan Elec.*, 549 N.E.2d 1019, 1022 (Ind. 1990). This Court concludes that "shall" in IC 13-23-9-2(d) is mandatory and that due process and fundamental fairness requires the IDEM must state each and every reason for the denial of a claim in the initial notice of denial. Fundamental fairness holds that the IDEM should not get more than one opportunity to deny eligibility unless there are circumstances that indicate that the IDEM made an error of fact or law. In this instance, IDEM had all of the information that was introduced at the hearing available to it at the time of its August 11, 2003 decision; there was no attempt by the Petitioner to conceal any of this information from the IDEM nor was there any attempt to mislead the IDEM. The IDEM was not attempting to correct an earlier error of fact or law, it simply did not state all of its reasons for denial.

Order

IT IS THEREFORE ORDERED that the Petitioner, 5201 West 86th Street LLC, is eligible for reimbursement from the Excess Liability Trust Fund. This matter is remanded to IDEM and IDEM is ordered to take all actions consistent with this decision.

You are further advised that, pursuant to Indiana Code §4-21.5-5, this Final Order is subject to judicial review. Pursuant to Indiana Code §4-21.5-5, 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 in Indianapolis, Indiana this 24th day of September, 2004.

Hon. Catherine Gibbs
Environmental Law Judge