

**Objections to the Denial of ELTF Claim No. 200709510/FID No. 4352,
Tobacco Bob's, Northwood Management Company, LLC,
Rushville, Rush County, Indiana.
2008 OEA 118 (07-F-J-4033)**

OFFICIAL SHORT CITATION NAME: When referring to 2008 OEA 118 cite this case as
Northwood Management Co., 2008 OEA 118.

TOPICS:

summary judgment
Excess Liability Trust Fund, ELTF
underground storage tanks
petroleum
Phase II
release
report
substantial compliance
discovery
rulemaking
reasonableness
rules
328 Ind. Admin. Code 1-1-9
insurance
“another person”

PRESIDING JUDGE:

Gibbs

PARTY REPRESENTATIVES:

Petitioner: Kathryn Watson, Esq.: Spalding & Hilmes
IDEM: Julie Lang, Esq.

ORDER ISSUED:

August 12, 2008

INDEX CATEGORY:

Land

FURTHER CASE ACTIVITY:

[none]

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6. The reason given for the denial was that the Petitioner was not in substantial compliance with the requirement to communicate a spill report to the IDEM, as required by 329 Ind. Admin. Code 9-4 and 327 Ind. Admin. Code 2-6.1.¹ The notice of denial states, "The applicant is not in substantial compliance with this requirement. Though evidence of contamination was found earlier (samples from August 31, 2005), the release was not reported to IDEM until March 20, 2006."
7. The petition for review of this denial was timely filed on December 21, 2007.
8. The IDEM and the Petitioner filed Motions for Summary Judgment on May 23, 2008; the Petitioner's response was filed on June 20, 2008; IDEM's response was filed on June 23, 2008; IDEM's reply was filed on July 31, 2008; and the Petitioner's reply was filed on August 1, 2008.

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") and the parties to this controversy 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. 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 Corporation 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, Ind. Code § 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 (Ind. Ct. App. 1981).

¹ This ELJ has already determined that the IDEM may not require compliance with 327 I.A.C. 2-6 as a prerequisite for eligibility so the alleged non-compliance with 327 I.A.C. 2-6.1 will not be addressed by this order. See *Speedway #6672 ELTF*, 2006 OEA 40.

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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.” Ind. Code § 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).
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.” *Laudig v. Marion County Bd. of Voters Registration*, 585 N.E.2d 700, 703-04 (Ind. Ct. App. 1992).
6. Ind. Code § 13-23-8-4(a)(1) requires an owner or operator of USTs to be in substantial compliance with applicable rules or statutes in order to be eligible to receive reimbursement from the Excess Liability Trust Fund.
7. 329 I.A.C. 9-4 requires that the owner or operator of USTs report a suspected release within twenty-four (24) hours of discovery.
8. 328 Ind. Admin. Code 1-1-9 defines “substantial compliance” as follows:
 - (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 Ind. Code § 13-23-12 and 328 Ind. Admin. Code 1-3-3.
 - (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.

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9. The obligation to report a release is triggered by the *discovery* of the release not the actual release itself. Therefore, the Petitioner, as the owner or operator of the USTs, had the obligation to report the release when it discovered that a release had occurred, that is, in December of 2005, when the Petitioner received a copy of the Phase II report. The Petitioner's argument that compliance was impossible because a third party's intervention is without merit. Clearly, it is impossible for the Petitioner to report a release that it did not know had occurred.² But the Petitioner had an obligation to report a release as soon as it knew or suspected that a release had occurred. Thus, the Petitioner should have reported the release within seven days of discovering that a release had occurred. The Petitioner had possession of the entire Phase II report on December 1, 2005. The release should have been reported no later than December 8, 2005. As the Petitioner did not report the release until March 20, 2006, the release was not reported in a timely fashion.

10. The Petitioner argues that it had no right to rely on the Phase II report. However, as the IDEM points out, even *suspected* releases should be reported. The Phase II report was prepared by an environmental consulting firm and presents the appearance of being a reliable source. No argument has been made that the report or the underlying sampling is inherently unreliable. The Petitioner merely argues that because they did not contract for the assessment that they should not be required to rely on it. This argument has no merit as the rule says that a release discovered by "another person" must be reported. The facts of this case clearly fall under this category.

11. The Petitioner argues that 328 I.A.C. 1-3-3, 328 I.A.C. 1-1-9 and 329 I.A.C. 9-4 are an unreasonable exercise of rulemaking authority. The appellate court in *Lee Alan Bryant Health Care Facilities, Inc. v. Hamilton*, 788 N.E.2d 495, 500 (Ind.Ct.App. 2003) said "In addressing Bryant Health Care's contention, we are mindful that a State agency has the undoubted right to adopt rules and regulations designed to enable it to perform its duties and to effectuate the purposes of the law under which it operates, when such authority is delegated to it by legislative enactment." See *Dep't. of Ins. v. Golden Rule Ins.*, 639 N.E.2d 339, 341 (Ind. Ct. App. 1994) (referring to administrative boards). An agency, however, may not by its rules and regulations add to or detract from the law as enacted, nor may it by rule extend its powers beyond those conferred upon it by law. *Id.* Any regulation that conflicts with statutory law is wholly invalid. *Dep't of Pub. Welfare v. St. Joseph's Med. Ctr.*, 455 N.E.2d 981, 983 (Ind. Ct. App. 1983).

² No argument has been made that the Petitioner *should* have known about the release sooner than it did so this issue will not be addressed.

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12. The appellate court in *Indiana Dep't. of Pub. Welfare v. St. Joseph's Med. Ctr., Inc.*, 455 N.E.2d 981, 983 (Ind. Ct. App. 1983) said, "A specific legislative yardstick is provided, which cannot be broken or shortened by an administrative regulation. Rules and regulations promulgated by administrative boards must be reasonable, and such boards cannot enlarge or vary, by the operation of such rules, the powers conferred upon them by the Legislature, or create a rule out of harmony with the statute. Any regulation which is in conflict with the organic law or statutes of the State is wholly invalid." *Blue v. Beach* (1900), 155 Ind. 121, 56 N.E. 89, *Wallace v. Feehan*, 206 Ind. 599, 190 N.E. 438 (1934); *Whitcomb Hotel v. California Employment Comm.*, 24 Cal.2d 753, 151 P.2d 233, 155 A.L.R. 405 (1944).
13. The ELTF was established to help owners and operators of USTs pay for corrective action. The legislature determined that only those owners and operators that were in substantial compliance with the rules applicable to owning and operating USTs should benefit from the ELTF. No one rule is any more important than any of the others and all have a role in ensuring that releases are promptly and efficiently remediated. It is reasonable that the legislature would consider the prompt reporting of releases to be important to the goal of remediating releases before they develop into threats to human health or the environment. The Financial Assurance Board (the "FAB") has the statutory authority to promulgate rules which implement the laws which involve the ELTF. Ind. Code § 13-23-11-7. These rules include a definition of "substantial compliance".
14. The Solid Waste Management Board (the "SWMB") is the entity with the duty to promulgate rules regulating the operation of USTs. For the reasons stated above, it was reasonable for the SWMB to promulgate rules that require the prompt reporting of spills and releases. In addition, as the IDEM points out, the SWMB had an obligation to adopt rules consistent with federal requirements.
15. In the absence of a compelling argument that either the FAB or the SWMB had overstepped the boundaries of the statutes, the rules are valid.
16. Whether the contamination was exacerbated by the failure of the Petitioner to report within seven (7) days is irrelevant. This was only relevant in previous cases where there was no rule or guidance as to what "substantial compliance" meant in relation to spill reporting. Once the FAB stated that "substantial compliance" means that a spill must be reported within seven (7) days, this factor became irrelevant.
17. The Petitioner's argument that the ELTF is analogous to insurance is unpersuasive. Insurance is a contract between private parties. The ELTF is a fund established and controlled by the General Assembly and administered by a state agency with duties and obligations to the general public in addition to owners or operators of USTs. This difference undercuts any similarities.
18. There is no genuine issue to any material fact and summary judgment in IDEM's favor is appropriate.

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Final Order

AND THE COURT, being duly advised, hereby **ORDERS, ADJUDGES AND DECREES** that the Indiana Department of Environmental Management's Motion for Summary Judgment is **GRANTED**. Northwood Management Company LLC's Motion for Summary Judgment is **DENIED**. The Petition for Administrative Review is **DISMISSED**.

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 12th day of August, 2008 in Indianapolis, IN.

Hon. Catherine Gibbs
Environmental Law Judge