

**Objection to the Denial of Excess Liability Trust Fund Claim**  
**ELTF #200706512-19**  
**Witt's Knucklebuster Garage**  
**Portland, Jay County, Indiana**  
**2014 OEA 15, (11-F-J-4467)**

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**OFFICIAL SHORT CITATION NAME:** When referring to 2014 OEA 15 cite this case as  
*Witt's Knucklebuster Garage, 2014 OEA 15.*

**TOPICS:**

costs  
hearing  
closure  
removal  
necessary  
dictionary  
corrective action  
statutory construction  
excess liability trust fund (ELTF)  
underground storage tanks (UST)  
*Rickets v. State*  
*IDEM v. Okun*  
328 IAC 1-3-5(e)  
328 IAC 1-3-5(d)(13)

**PRESIDING JUDGE:**

Catherine Gibbs

**PARTY REPRESENTATIVES:**

Petitioners: Nicholas Gahl, Esq.; Katz & Korin  
IDEM: Julie Lang, Esq.

**ORDER ISSUED:**

March 19, 2014

**INDEX CATEGORY:**

Land

**FURTHER CASE ACTIVITY:**

[none]

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|                  |   |                              |
|------------------|---|------------------------------|
| STATE OF INDIANA | ) | BEFORE THE INDIANA OFFICE OF |
|                  | ) | ENVIRONMENTAL ADJUDICATION   |
| COUNTY OF MARION | ) |                              |

|                                   |   |                       |
|-----------------------------------|---|-----------------------|
| IN THE MATTER OF:                 | ) |                       |
|                                   | ) |                       |
| OBJECTION TO THE DENIAL OF EXCESS | ) |                       |
| LIABILITY TRUST FUND CLAIM        | ) | CAUSE NO. 11-F-J-4467 |
| ELTF #200706512-19                | ) |                       |
| WITT’S KNUCKLEBUSTER GARAGE       | ) |                       |
| PORTLAND, JAY COUNTY, INDIANA     | ) |                       |

**FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL ORDER**

This matter came before the Office of Environmental Adjudication (the OEA) for the final evidentiary hearing, held on February 28, 2014. And the presiding Environmental Law Judge (the ELJ), being duly advised and having heard the testimony and examined the record, pleadings and evidence, now enters the following findings of fact, conclusions of law and final order.

**Summary of Decision**

The Petitioner, HydroTech Environmental Consulting & Engineering, seeks reimbursement of costs associated with the removal of 5 underground storage tanks (USTs) from Witt’s Knucklebuster Garage. The Indiana Department of Environmental Management (the IDEM) denied reimbursement as the removal of the USTs was not necessary to the corrective action. The ELJ concludes that some costs should be reimbursed, but reimbursement of other costs was correctly denied.

**FINDINGS OF FACT**

1. John and Amanda Witt own an automotive service station located at 611 South Meridian Street, Portland, Jay County, Indiana (the Site). One 4,000-gallon gasoline UST, two 6,000-gallon gasoline USTs, and two 4,000-gallon diesel USTs were installed on the Site in 1988. One 550-gallon heating oil tank was installed sometime prior to 1988.
2. On or about June 25, 2007, Mr. Witt reported a release from the underground storage tanks located at the Site. The release was assigned Incident Number 200706512.
3. The gasoline, diesel and heating oil USTs were removed in June of 2008.

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4. The parties disagree about whether the costs associated with the removal of the gasoline and diesel USTs should be reimbursed from the ELTF. The parties stipulate that the costs associated with the removal of the heating oil UST are not eligible for reimbursement from the ELTF.
5. As a result of the release, the Witts hired HydroTech Environmental Consulting & Engineering (the Petitioner in this matter<sup>1</sup>) to perform an investigation regarding the nature and extent of the contamination. On July 11, 2008, HydroTech submitted an Investigation Report to the IDEM. The Investigation Report did not include any information gathered during the UST removal.
6. On September 18, 2008, HydroTech submitted a UST Removal Report<sup>2</sup> to the IDEM. Figures 3 and 4 of this Report indicate that, at the time of the UST removal, no contaminants of concern were found above RISC<sup>3</sup> industrial action levels in the excavation soil samples taken from the gasoline and diesel UST pits. Benzene was detected above RISC industrial action levels in excavation water samples taken during UST removal.<sup>4</sup>
7. The UST Removal Report further indicates that the condition of the USTs at the time of removal as follows: "All of the fiberglass gasoline and diesel USTs were in good condition with no holes and no other signs of deterioration at the time of closure."<sup>5</sup>
8. The IDEM requested a Further Site Investigation (FSI)<sup>6</sup> on December 17, 2008. HydroTech submitted this FSI Report<sup>7</sup> on February 20, 2009. Figure 6 of this Report show soil samples with contaminants of concern above RISC industrial action levels in the area around the dispenser islands. The IDEM approved the FSI Report and requested a corrective action plan.<sup>8</sup>
9. HydroTech submitted a Remediation Work Plan<sup>9</sup> on July 31, 2009. The IDEM denied approval of the corrective action proposed in this Plan on March 22, 2010.<sup>10</sup>

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<sup>1</sup> The Witts are the responsible parties for this Site. However, HydroTech is pursuing reimbursement from the ELTF pursuant to a Limited Power of Attorney and Limited Assignment of Rights to the Indiana Excess Liability Trust Fund, executed January 31, 2014 by P. Cory Smith and Morgan Pryor of HydroTech and Mark A. Wasco, Chapter 7 Trustee over the Bankruptcy Estate of John A. Witt.

<sup>2</sup> IDEM Exhibit 2.

<sup>3</sup> RISC is the Risk Integrated System of Closure, Technical and User's Guide, NPD #W-0046, effective February 15, 2001.

<sup>4</sup> IDEM Exhibit 2, Figure 5.

<sup>5</sup> IDEM Exhibit 4, page 10.

<sup>6</sup> IDEM Exhibit 3.

<sup>7</sup> IDEM Exhibit 4.

<sup>8</sup> IDEM Exhibit 5.

<sup>9</sup> IDEM Exhibit 6.

<sup>10</sup> IDEM Exhibit 7.

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10. HydroTech submitted a Corrective Action Plan (CAP)<sup>11</sup> on July 28, 2010. HydroTech proposed the excavation of shallow contaminated soil<sup>12</sup> in the area under the former canopy above dispenser islands and around the former dispenser islands.<sup>13</sup> The CAP did not include the excavation of soil in the gasoline UST pit or the diesel UST pit. The IDEM approved the CAP on October 1, 2010.<sup>14</sup>
11. The CAP was implemented in June and July of 2012.<sup>15</sup> The Site has received No Further Action status.
12. HydroTech filed for reimbursement of \$103,915.61 from the ELTF on November 5, 2010. The IDEM labeled this as ELTF Submittal #16.
13. The IDEM had previously determined that this Site was eligible to receive reimbursement from the ELTF. Further, the deductible for this Site had been met.
14. On January 14, 2011, the IDEM denied reimbursement of the corrective action costs submitted as ELTF Submittal #16 (hereinafter referred to as Denial Letter #1) for the following reason:

As noted in 328 IAC 1-3-5(e), "Tank removal, decommissioning, cutting and disposal are not eligible for reimbursement unless specifically approved as part of an ELTF approved Corrective Action Plan (CAP)." Also, according to letters sent by the IDEM UST section on May 15, 2003 and January 19, 2006, the USTs were required to be permanently closed since the USTs were last used in 2002. Moreover, as stated in the UST Closure report, "All of the fiberglass gasoline and diesel USTs were in good condition with no holes and other signs of deterioration a (*sic*) the time of closure." As well as "Confirmatory analytical results for soil sampling from the gasoline and diesel excavations. . .were either below laboratory reporting limits or below IDEM RISC residential action limits."

15. HydroTech resubmitted its claim for reimbursement of these costs with additional supporting documentation as ELTF Submittal #19. The IDEM denied the ELTF Submittal #19 on March 11, 2011 (hereinafter referred to as Denial Letter #2). The reason given for denial of the costs was as follows:

As noted in 328 IAC 1-3-5(e), "Tank removal, decommissioning, cutting and disposal are not eligible for reimbursement unless specifically approved as part of an ELTF approved Corrective Action Plan (CAP)."

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<sup>11</sup> IDEM Exhibit 8.

<sup>12</sup> IDEM Exhibit 8, page 42-47.

<sup>13</sup> IDEM Exhibit 8, Figure 6.

<sup>14</sup> IDEM Exhibit 10.

<sup>15</sup> Petitioner's Exhibit 3.

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16. On March 18, 2011, HydroTech filed its Petition for Review objecting to the denial of reimbursement for the costs associated with the removal of the gasoline and diesel USTs. HydroTech maintains that the IDEM wrongfully denied reimbursement because it failed to cite to the proper regulation and further that the UST removal was necessary to the corrective action.
17. The presiding ELJ held an evidentiary hearing on February 28, 2014. HydroTech's Exhibits 1 through 7 were admitted. The parties stipulated to the admissibility of IDEM Exhibits 1 through 12.

**Applicable Law**

The OEA 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).

The parties agree that the applicable law is that law in effect at the time of the UST removal. The applicable regulation, 328 IAC 1-3-5(e) stated that "Tank removal, decommissioning, cutting and disposal are not eligible for reimbursement unless necessary as part of the corrective action." Further, in June 2008, 328 IAC 1-3-5(d)(13) stated that the following costs were not eligible for reimbursement: "(13) Any costs for remediation of contamination not shown to be concentrations exceeding the risk integrated system of closure as described in IC 13-23-8-4(a)(4)(A)(ii)<sup>16</sup> (RISC) industrial cleanup standards ..."<sup>17</sup>

HydroTech initially argues that IDEM's failure to cite to the proper regulation compels the conclusion that reimbursement was unlawfully denied. The OEA has addressed this issue in previous cases. See *Marathon Point Service and Winamac Service*, 2005 OEA 26; *Rowe Brothers, Inc.*, 2007 OEA 94. In *Indiana Department of Environmental Management v. Okun*, Cause No. 49F12-0410-PL-003215 (Marion Superior Court, April 13, 2005), the IDEM had denied reimbursement for failure to report a spill, citing to a regulation that was not in effect at the time of the spill. On judicial review, the Hon. Michael D. Keele, Marion County Superior Court, addressed this issue. He stated: "The applicable statute requires that 'the administrator shall notify the claimant of all reasons for a denial or partial denial.' I.C. § 3-23-9-2(d)." Judge Keele decided that the IDEM had complied with the requirement to notify the claimant of all reasons for denial because the IDEM's denial letter "gave timely and sufficient notice of the specific facts to invoke the rule-based reason for denial..." *Id. at 4*. The Court went on to hold that Okun "was clearly on notice" for the reason for the denial of his claim, regardless of whether the IDEM had referred to the proper cite. *Id. at 4*.

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<sup>16</sup> An approved CAP is required before an applicant will be reimbursed. A CAP may be deemed approved only if the plan conforms to the IDEM's cleanup guidelines including RISC.

<sup>17</sup> The exceptions to this regulation are not applicable to this Site.

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One of the issues in this case is whether the UST removal was *necessary* to the corrective action. This requires the ELJ to interpret the regulation to determine the meaning of “necessary.” “When construing a statute or regulation, this Court must apply certain rules of statutory construction. The first rule is that when a statute or regulation is clear and unambiguous on its face, the court does not need to “apply any rules of construction other than to require that words and phrases be taken in their plain, ordinary and usual sense.” *St. Vincent Hosp. & Health Care Ctr., Inc. v. Steele*, 766 N.E.2d 699, 703-704 (Ind. 2002).

A court may look to dictionaries to determine the plain and ordinary definition of a word, as the appellate court did in *Scott v. Marshall County Bd. of Zoning Appeals*, 696 N.E.2d 884, 1998 Ind. App. LEXIS 1193 (Ind. Ct. App. 1998). In *Osolo Twp. v. Elkhart Maple Lane Assocs. L.P.*, 789 N.E.2d 109, 112, 2003 Ind. Tax LEXIS 44 (Ind. Tax Ct. 2003), the Court defined “necessary” as “‘that [which] cannot be done without . . . absolutely required: essential, indispensable.’ citing to WEBSTER'S THIRD NEW INT'L DICTIONARY at 1511 (1981 ed.)” The Court, in *Ricketts v. State*, 598 N.E.2d 597, 600, 1992 Ind. App. LEXIS 1344 (Ind. Ct. App. 1992), stated, “Precedent reveals the term ‘necessary’ does not have an exact meaning. ‘It is flexible and relative; it is an adjective expressing degree. The degree may range from mere convenience to that which is indispensable.’ *Indiana Broadcasting Corp. v. Star Stations of Indiana* (1979), 180 Ind. App. 207, 214, 388 N.E.2d 568, 573 . . . We resolve this dilemma by referring to the dictionary definition of the term ‘necessary’ to ascertain its plain and ordinary meaning. Both Random House Webster's College Dictionary and Webster's Third New International Dictionary define ‘necessary’ as essential, indispensable, or absolutely required.”

According to the Merriam-Webster Dictionary, “necessary” is defined as:

1. a. of an inevitable nature: inescapable
- b. (1): logically unavoidable
- (2): that cannot be denied without contradiction
- c. determined or produced by the previous condition of things
2. absolutely needed: required

*Merriam-WebsterDictionary.com*, n.d. Web 11 Mar 2014, <http://www.merriam-webster.com/dictionary/necessary>.

### **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 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. The Applicable Law, cited above, is incorporated herein by reference.

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3. 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.
4. The IDEM cited 328 IAC 1-3-5(e) as the reason for denying costs and stated that “Tank removal, decommissioning, cutting and disposal are not eligible for reimbursement unless specifically approved as part of an ELTF approved Corrective Action Plan (CAP).” The IDEM quote was taken from the version of the regulation in effect in 2011, when HydroTech applied for reimbursement. Both parties stipulate that the 2008 version, when the USTs were removed, is applicable, rather than the 2011 version. The 2008 version states “Tank removal, decommissioning, cutting and disposal are not eligible for reimbursement unless necessary as part of the corrective action.”
5. The difference between the 2 versions is whether the UST removal was “necessary” to the corrective action (2008 version) vs. whether the UST removal was a part of an approved CAP (2011 version). So, while the Denial Letters provided the correct citation, the summary was incorrect in stating the standard. The Denial Letters made it clear that reimbursement of the UST removal costs was being denied because the IDEM questioned whether the UST removal was necessary. Therefore, the Denial Letters provided sufficient notice to HydroTech of the factual basis for the IDEM’s denial.
6. Further, HydroTech suffers no prejudice by the citation to the wrong standard. The wording of the 2008 version gives HydroTech an opportunity to argue that the UST removal was necessary to the corrective action. If the 2011 version applied, HydroTech would not have any argument to make in support of reimbursement because the UST removal wasn’t part of the approved CAP. Therefore, HydroTech’s argument that reimbursement was unlawfully denied is not persuasive.
7. Neither Title 13 of the Indiana Code nor Titles 328 or 329 of the Indiana Administrative Code defines the term “necessary”. While the Court in *Ricketts v. State*, 598 N.E.2d at 600, stated that “necessary” is “flexible and relative”, the ELJ finds no reason not to apply the common definition. Therefore, it is appropriate to look to the dictionary for a definition. The definition of “necessary” means that a thing is required, absolutely needed or unavoidable.
8. The Petitioner argues that the removal of the USTs was justified as the removal of the source of the contamination. However, while it is logical to conclude that the USTs were one of the sources of the contamination, this does not make their removal necessary. The evidence, including but not limited to, the condition of the USTs and the lack of soil contamination in the gasoline and diesel UST pits above RISC industrial action levels, does not support the conclusion that the gasoline and diesel USTs were a significant source of contamination at the Site and that it was therefore necessary to remove them. Furthermore, the approved CAP authorized the removal of contaminated soil in the area of the dispenser islands. So, the CAP addresses the area of the greatest contamination at the Site.

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9. The ELJ concludes that the removal of the USTs and contaminated soil was not necessary to the corrective action.
10. This conclusion is supported by the application of 328 IAC 1-3-5(d)(13). The IDEM, in Submittal #16, cited to this regulation, which prohibits the reimbursement of costs for remediation of contamination at levels below RISC industrial action levels. The Petitioner had notice that this was one of the reasons for denial. As the soil contamination in the UST pits did not exceed RISC industrial levels, denial of these costs was proper.
11. However, the wastewater collected during the UST removal was contaminated with contaminants of concern above the RISC industrial action levels. The applicable regulations required HydroTech to collect and dispose of this wastewater. Therefore, the costs associated with the transportation and disposal of the wastewater should be reimbursed. The IDEM cannot deny reimbursement of these costs on the basis of 328 IAC 1-3-5(d)(13).<sup>18</sup>
12. In Petitioner's Exhibit #5, the amount attributable to transportation and disposal of wastewater is \$17,054. This amount should be reimbursed.
13. Further, some portion of the costs attributable to (a) laboratory analysis of the water samples and (b) HydroTech's labor costs related to the removal and disposal of wastewater should be reimbursed. The ELJ does not have sufficient evidence to break down the costs and determine which portion is attributable to these activities. The IDEM shall review the claims and determine which costs can be reimbursed under this conclusion.
14. The IDEM shall review all of the approved costs for compliance with the allowable rates, as set out in 328 IAC 1-3-5.

**FINAL ORDER**

**IT IS THEREFORE ORDERED, ADJUDGED AND DECREED** that judgment is entered as follows:

1. The IDEM shall pay those costs associated with the removal and disposal of water collected from the gasoline and diesel pits during and after excavation of the USTs, including laboratory analysis and labor as set out in Conclusions of Law 8, 9 and 10.
2. The IDEM shall review the costs approved in paragraph 1 above and determine which costs are reimbursable pursuant to the requirements of 328 IAC 1-3-5; shall notify the Petitioner as soon as practicable; and, pursuant to I.C. §13-23-89-2(e), forward a copy of the request for

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<sup>18</sup>“(13) Any costs for remediation of contamination not shown to be concentrations exceeding the risk integrated system of closure as described in IC 13-23-8-4(a)(4)(A)(ii) (RISC) industrial cleanup standards ...”



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reimbursement to the Auditor of the State not later than seven (7) days after the IDEM approves such costs as eligible for reimbursement.

3. The IDEM did not err in denying reimbursement of the other costs associated with the UST removal, other than those specifically approved by the ELJ in Conclusions of Law 8, 9 and 10. HydroTech Environmental Consulting and Engineering is not entitled to reimbursement of any other costs submitted for reimbursement in ELTF Submittal Nos. 16 and 19.
4. Costs associated with the removal of the heating oil tank are not eligible for reimbursement. Denial of reimbursement of these costs was proper.

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 19th day of March 2014 in Indianapolis, IN.**

Hon. Catherine Gibbs  
Environmental Law Judge