Objection to the Denial of Excess Liability Trust Fund Claim
ELTF #200212502 / FID #16
Mystick Food Mart
Akram and Manel Yennes
Indianapolis, Marion County, Indiana
2016 OEA 48, (16-F-J-4893)

OFFICIAL SHORT CITATION NAME: When referring to 2016 OEA 48 cite this case as ***Mystick Food Mart*, 2016 OEA 48.**

TOPICS:
summary judgment
eligibility
reimbursement
denial
fees
substantial compliance
post hoc rationalization
retroactive
mandatory
directory
due process
underground storage tank ("UST")
Excess Liability Trust Fund ("ELTF")
Phase II Initial Site Characterization ("ISC")
328 IAC 1-3-1(b)(2)
329 IAC 9
329 IAC 9-5-5.1
I.C. §13-23-8-4(a)
I.C. §13-23-9(d)

PRESIDING LAW JUDGE:
Catherine Gibbs

PARTY REPRESENTATIVES:
IDEM: Kyle Burns, Esq.
Petitioners: David Dearing, Esq.

ORDER ISSUED:
November 16, 2016

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	)	
ELTF #200212502 / FID #16	)	CAUSE NO. 16-F-J-4893
MYSTICK FOOD MART	)	
AKRAM and MANEL YENNES	)	
INDIANAPOLIS, MARION COUNTY, INDIANA	)	

FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL ORDER

This matter came before the Office of Environmental Adjudication (the "Court" or the "OEA") on the Indiana Department of Environmental Management ("IDEM") and the Petitioner's cross Motions for Summary Judgment. And the Court, being duly advised and having read the motion and record, which documents are a part of the Court's record, **GRANTS** IDEM's Motion for Summary Judgment and enters the following Findings of Fact, Conclusions of Law and Final Order.

FINDINGS OF FACT

1. Akram and Manel Yennes (the "Petitioners") own the gasoline station located at 3232 South Keystone Avenue, Indianapolis, Indiana (the "Site"). The facility identification number for the Site is 16.

2. The previous owners of the Site reported a release from the underground storage tanks (USTs) on December 3, 2002. The incident was assigned incident number 200212502.

3. The Petitioners purchased the Site in 2006.

4. The Petitioners submitted a Limited Phase II Environmental Site Assessment (the "Phase II") to IDEM for the Site on February 16, 2016. The Phase II is dated November 12, 2007.

5. On March 4, 2016, the Petitioners submitted an application for reimbursement of corrective action costs from the Excess Liability Trust Fund ("ELTF").

6. On March 30, 2016, IDEM denied the application (the Denial) and stated that the reason for the denial was that, pursuant to 328 IAC 1-3-1(b)(2), an Initial Site Characterization ("ISC") report had not been submitted to IDEM. Further, the IDEM required a current Notification for UST form.[1] IDEM did not cite nonpayment of UST fees as a reason for denial.

7. The Petitioners filed a Petition for Administrative Review and Adjudicatory Hearing on April 11, 2016.

8. The Petitioners and IDEM each filed a Motion for Summary Judgment on July 29, 2016. Each party filed a response on September 1, 2016. IDEM filed its reply on September 16, 2016.

9. Thirty-nine percent (39%) of annual underground storage tank fee payments were paid between 1991 and the date of the release.

10. Akram and Manel Yennes did not remit the unpaid annual UST fees within thirty (30) days of acquiring ownership of the USTs as permitted by 328 IAC 1-3-3(d)(2).

CONCLUSIONS OF LAW

1. The IDEM is authorized to implement and enforce specified Indiana environmental laws, and rules promulgated relevant to those laws, per Ind. Code (I.C.) § 13-13, *et seq.* The OEA has jurisdiction over the decisions of the Commissioner of IDEM pursuant to I.C. § 4-21.5-7, *et seq*.

2. 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 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 environmental law Judge (the "ELJ"), and deference to the IDEM's initial factual determination is not allowed. *Id.*; I.C. § 4-21.5-3-27(d).

4. The OEA shall consider a motion for summary judgment "as would a court that is considering a motion for summary judgment filed under Trial Rule 56 of the Indiana Rules of Trial Procedure." I.C. § 4-21.5-3-23. Trial Rule 56 states, "The judgment sought shall be rendered forthwith if the designated evidentiary matter shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." The moving party bears the burden of establishing that summary judgment is appropriate.

[1] The Petitioners do not contest that they must submit the Notification.

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).

5. Each party has requested summary judgment in this matter. "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, 703-704, (Ind. Ct. App. 1992) *see also; Five Star Concrete, L.L.C. v. Klink, Inc.*, 693 N.E.2d 583, 585 (Ind. Ct. App. 1998).

6. "An issue of material fact "is 'genuine,' if a trier of fact is required to resolve the parties' differing accounts of the truth." *Williams v. Tharp*, 914 N.E.2d 756, 761 (Ind. 2009) (citing *Gaboury v. Ireland Road Grace Brethren, Inc.*, 446 N.E.2d 1310, 1313 (Ind. Ct. App. 1983))." Moreover, the court in *Best Homes, Inc. v. Rainwater*, 714 N.E.2d 702, 706 (Ind. Ct. App. 1999), further addresses the standard when conflicting evidence is presented. "Summary judgment must be denied if the resolution hinges upon state of mind, credibility of the witnesses, or the weight of the testimony. Mere improbability of recovery at trial does not justify the entry of summary judgment against the plaintiff. On a motion for summary judgment, the evidence must be construed in favor of the non-movant**,** and any doubt about the existence of a genuine issue of material fact must be resolved against the moving party."

7. IDEM's denial of ELTF eligibility is based on a rule (328 IAC 1-3-1(b)(2)) in effect in 2016, when the Petitioners applied for eligibility. This rule was not in effect in 2002, when the release occurred. 328 IAC 1-3-1(b)(2) (2011) now requires an ISC for ELTF eligibility.[2] The rule states:

   (b) Any or all persons listed under subsection (a) may apply to the fund for payment of reimbursable costs or third party liability claims if all of the following have occurred:
      (1) A fund qualifying occurrence. To be eligible to be paid from the fund, the occurrence must be a fund qualifying occurrence.
      (2) Submission of an initial site characterization ("ISC") as described in rules of the solid waste management board at 329 IAC 9-5-5.1.

   . . .

8. The Petitioner contends that IDEM impermissibly retroactively applied 328 IAC 1-3-1(b)(2). The ELTF rules in effect in 2002, *when the release was reported*, did not explicitly require an ISC for eligibility. Thus, the Petitioner argues, IDEM cannot deny the Petitioner ELTF eligibility for failure to submit an ISC. It is a generally accepted rule that statutes cannot be applied retroactively without an express statement of the legislature's intent to do so.

[2] Previously, an ISC had to be submitted and approved before IDEM would approve payment of specific costs associated with the ISC, but was not required for eligibility. This rule conditions eligibility on the submission of an ISC.

Indiana Dep't of Envtl. Management v. Chemical Waste Management, 604 N.E.2d 1199, 1992 Ind. App. LEXIS 1797 (Ind. Ct. App. 1992). "Regulations, like statutes, cannot be applied retroactively without express direction to do so." *Haelfing v. United Parcel Service*, 169 F.3d 494, *certiorari den*., 120 S. Ct. 64, 528 U.S. 820, 145 L.Ed.2d 55 (2000). See *GasAmerica #47*, 2004 OEA 123 at 127 and *Sun Chemical Corporation*, 2013 OEA 78 at 81.

9. The OEA has previously determined that IDEM must apply the rule in effect at the time of the triggering event[3]. IDEM cannot expect compliance with a rule that was not in existence at the time an event occurred. Just as an owner or operator must comply with the requirements in effect at the time of the release, the owner or operator must comply with the regulations in effect at the time the application is submitted. In this instance, the event that triggered a determination of which rules should be applied was the filing of an ELTF application, not the reporting of the release. Therefore, the Petitioners' ELTF application must comply with all requirements in effect at the time it is filed with IDEM. This includes the submission of an ISC.

10. Further, even if one considers the release as the trigger event, the Petitioners may not have been in compliance with applicable law in effect at the time the release was reported. I.C. §13-23-8-4(a), in effect at the time that this release was reported, states that "an owner or operator may receive money from the excess liability trust fund … if the owner or operator is in substantial compliance with the following requirements:
    (1) The owner or operator has complied with the following:
        (A) This article ….
        (B) Rules adopted under this article ….

11. The rules adopted under I.C. § 13-23 are found in Title 329 of the Indiana Administrative Code. Therefore, at the time that the release was reported, I.C. § 13-23-8-4(a) required an owner or operator to be in substantial compliance with 329 IAC 9 *et seq*.

12. 329 IAC 9 sets out the requirements for UST owners and operators, including the actions that must be taken in response to the release of petroleum from a UST. 329 IAC 9-5-5.1(a)[4] requires an owner or operator of USTs to "assemble information about the site and the nature of the release, including information gained while confirming the release or completing the initial abatement measures in sections 2 and 4.1 of this rule." The rule then proceeds to spell out the minimum information required to comply with this rule. At all times relevant to this matter starting when the release was reported (2002) to the time the application was submitted (2016), 329 IAC 9-5-5.1 required the owner or operator to conduct an initial site

[3] See *Road Ranger #226*, 2012 OEA 57 at 63.

[4] *Solid Waste Management Board*; *329 IAC 9-5-5.1*; filed Jul 19, 1999, 12:00 p.m.: 22 IR 3710; errata filed Sep 10, 1999, 9:08 a.m.:23 IR 26; readopted filed Jan 10, 2001, 3:25 p.m.: 24 IR 1535

characterization. Any suggestion that the Petitioners, as UST owners and operators, do not have to comply with this rule has no basis in law.

13. The Petitioners also argue that the Phase II serves as an ISC and submits an affidavit from David Russian as support. Mr. Russian is a licensed professional engineer and the director of Engineering Services of Golars Environmental. He opines that the Phase II meets the requirements of an ISC and that IDEM is seeking a Further Site Characterization (FSI). In response to this argument, IDEM points to information in the public file that supports IDEM's contention that the Phase II does not meet the requirements for an ISC. The parties have presented conflicting evidence as to whether the Phase II meets the requirements for an ISC. This is sufficient to raise a question of fact that cannot be resolved through summary judgment. Under the standard for summary judgment, it is not proper for a court to weigh the evidence, assess credibility or "resolve the parties' differing accounts of the truth." *Williams*, 914 N.E.2d at 761.

14. IDEM properly applied 328 IAC 1-3-1(b)(2). Whether the Phase II can be considered an ISC is a material fact. Therefore, summary judgment cannot be entered on this issue as a genuine issue of material fact exists.

15. In its July 29, 2016 Motion for Summary Judgment, IDEM raises a third basis for denying the Petitioners' application. IDEM argues that the Petitioners are not eligible because at least 50% of the annual UST fees were not paid[5]. There is no question that IDEM did not assert this as a reason for denial in the Denial. There is also no question that if IDEM is correct, that the Petitioners are not eligible for the ELTF program. This raises 2 questions: (1) whether IDEM can assert a wholly new basis for denial in summary judgment and (2) whether this creates a question of fact that precludes entry of summary judgment.

16. The Petitioners contend that IDEM may not put forth a new reason for the denial and cites to the rule barring post hoc rationalizations. However, in a review of Indiana case law, "it is the reviewing court, and not the administrative agency, that is barred from considering post hoc rationalizations." *Development Services Alternatives, Inc. v. Indiana Family and Social Services Administration*, 915 N.E.2d 169, 184 (Ind. Ct. App. 2009). Thus, the rule prohibiting post hoc rationalizations does not apply to administrative agencies during their decision making process (*Id*. at 189), but does apply to the reviewing court. Post hoc rationalizations can be articulated contemporaneously with an agency's final decision, but not in review. *Word of His Grace Fellowship, Inc. v. State Board of Tax Commissioners*, 711 N.E.2d 875, 879 (Ind. T.C. 1999).

[5] As required by I.C. § 13-23-8-4(a)(2) and 328 IAC 1-1-9(a)(2).

17. However, I.C. § 13-23-9(d) states: "If the administrator denies an ELTF claim, the administrator shall provide the claimant with a written explanation of all reasons for the denial of reimbursement."

18. 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). Further, the Court in *Allen County Dep't of Public Welfare v. Ball Memorial Hospital Ass'n.*, 253 Ind. 179, 252 N.E.2d 424, 427 (Ind. 1969) said, "The meaning and intention of the legislature are to be ascertained not only from the phraseology of the statute but also by considering its design, its nature and the consequences that flow from the various interpretations." The Court further held, "The basic test, we believe, to determine whether the requirement is essential or not, is to consider the consequences of the failure to follow the statute and, in this regard, other possible interpretations." *Id. at 428.* I.C. § 13-23-9-2(d) does not provide for consequences if the administrator fails to provide all reasons for the denial. Courts presented with this issue in the past have held that the word "shall" in such a case is directory rather than mandatory. *See Civil Rights Commission v. Indianapolis Newspapers, Inc.*, 702 N.E.2d370, 376 (Ind. Ct. App. 1998) ("the term 'shall' has often been held to be directory in cases where the statute fails to specify adverse consequences. . ."); and *In the Matter of Middlefork Watershed Conservancy District*, 508 N.E.2d 574, 576 (Ind. Ct. App. 1987) ("shall/may be construed as directory instead of mandatory to prevent the defeat of the legislative intent.")

19. Moreover, the OEA has determined on previous occasions that the language stating that "the administrator shall notify the claimant of all reasons for a denial or partial denial" in I.C. § 13-23-9-2(d) is directory, not mandatory.[6]

20. IDEM has introduced evidence that the Petitioners (or the preceding owners) have paid only 39% of the tank fees due between 1991 and the date of the release. The Petitioners have not introduced any evidence that IDEM's calculations regarding the amount of tank fees paid are incorrect. The Petitioners were given the opportunity to respond to the assertions made in IDEM's motion for summary judgment, but chose not to.

21. The Petitioners have waived any argument that their due process rights were infringed upon. It is well settled that before an action affecting a party's interest in life, liberty, or property protected by the Due Process Clause of the Fourteenth Amendment proceeds, the State, at a minimum, must provide "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.* (1950), 339 U.S. 306, 314,

[6] Findings of Fact, Conclusions of Law and Order entered May 25, 2010; *GasAmerica #45*, 2008 OEA 83; *IDEM v. Lee & Ryan Environmental Consulting, Inc.* Cause No. 49F12-0808-CC-039232.

70 S. Ct. 652, 657, 94 L. Ed. 865. Such notice must reasonably convey the required information to the affected party, must afford a reasonable time for that party to respond, and is constitutionally adequate when the practicalities and peculiarities of the case are reasonably met. 70 S. Ct. at 657." *Yoder v. Elkhart County Auditor*, 632 N.E.2d 369, 372 (Ind. Ct. App. 1994). The Petitioners had notice that IDEM was asserting this basis for denial when IDEM filed the motion for summary judgment. They then had the opportunity to submit evidence that the tank fees had been paid when they submitted their response to IDEM's motion for summary judgment.

22. There is no genuine issue that the Petitioners did not pay at least 50% of the required annual underground storage tank fees prior to the release. Summary judgment should be entered in IDEM's favor on this issue.

23. Summary judgment could not be entered on whether IDEM properly denied ELTF eligibility because an ISC had been submitted. However, the conclusion that the UST fees had not been paid controls whether the Petitioners are eligible for ELTF reimbursement. Summary judgment in IDEM's favor is appropriate.

FINAL ORDER

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that IDEM's motion for summary judgment is **GRANTED.** The Petitioners' motion for summary judgment is **DENIED. Judgment is entered in the Indiana Department of Environmental Management's favor. The Petitioners' petition for review is DISMISSED.**

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 16th day of November, 2016 in Indianapolis, IN.

Hon. Catherine Gibbs
Environmental Law Judge