Objection to the Denial of Excess Liability Trust Fund Claim
ELTF #200705054 / FID #14932
ELTF Submittal No. 3.
Pilot Travel Centers, LLC
Shelbyville, Shelby County, Indiana
2011 OEA 36, (08-F-J-4177)

OFFICIAL SHORT CITATION NAME: When referring to 2011 OEA 36 cite this case as ***Pilot Travel Centers, LLC*, 2011 OEA 36.**

TOPICS:

final order
reconsideration
Excess Liability Trust Fund (ELTF)
underground storage tanks (UST)
annual fees
onsite
offsite
substantial compliance
summary judgment
compartments
combination of tanks
statutory construction
deference
resubmittal
directory
mandatory
back-up
documentation
due process
equitable estoppel
laches
emergency response
328 IAC 1-3-5
329 IAC 9-5-2
I.C. § 13-23-8-4(b)
I.C. § 13-23-9-2(d)

PRESIDING JUDGE:
Catherine Gibbs

PARTY REPRESENTATIVES:
IDEM: Julie Lang, Esq.
Petitioner: Donald Snemis, Esq., Victoria Calhoon, Esq.; Ice Miller LLP

ORDER ISSUED:
April 4, 2011

INDEX CATEGORY:
Land

FURTHER CASE ACTIVITY:
[none]

Objection to the Denial of Excess Liability Trust Fund Claim
ELTF #200705054 / FID #14932
ELTF Submittal No. 3.
Pilot Travel Centers, LLC
Shelbyville, Shelby County, Indiana
2011 OEA 36, (08-F-J-4177)

STATE OF INDIANA	)	BEFORE THE INDIANA OFFICE OF
	)	ENVIRONMENTAL ADJUDICATION
COUNTY OF MARION	)	
IN THE MATTER OF:	)	
	)	
OBJECTIONS TO THE DENIAL OF EXCESS	)	
LIABILITY TRUST FUND CLAIM	)	
NO. 200705054 / FID NO. 14932	)	
ELTF SUBMITTAL NO. 3	)	CAUSE NO. 08-F-J-4177
PILOT TRAVEL CENTERS LLC	)	
SHELBYVILLE, INDIANA	)	

FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL ORDER

This matter came before the Office of Environmental Adjudication (the OEA or the Court) on Petitioner Pilot Travel Centers LLC's Motion to Reconsider and Request for Entry of Final Order, filed by Pilot Travel Centers LLC (the Petitioner or Pilot), which pleadings are parts of the Court's record; and the Court, being duly advised and having read the motion and response, now enters the following findings of fact, conclusions of law and order:

Summary of the Decision

The Petitioner appealed the Indiana Department of Environmental Management's (the IDEM) denial of its request for reimbursement from the Excess Liability Trust Fund (ELTF). The Court has previously determined that (1) Onsite costs[1] were reimbursable at 83% eligibility[2] and (2) Offsite costs were not reimbursable because the Petitioner was not in substantial compliance with 329 IAC 9-5-2(2) and (4)[3]. The Court allowed the IDEM to conduct a review of the Onsite costs to determine if (1) the Petitioner had provided sufficient back up documentation; (2) the costs are for activities that are clearly designated as not reimbursable in 328 IAC 1-3-5(d); or (3) costs exceeded the maximum amounts set out in 328 IAC 1-3-5(e).[4] The IDEM reimbursed the Petitioner for 83%[5] of the undisputed Onsite costs, but continues to

[1] The parties were able to stipulate as to what constituted "onsite" and "offsite" costs. There is no dispute regarding the definition of "onsite" vs. "offsite".
[2] Findings of Fact, Conclusions of Law and Order entered May 25, 2010; Order Partially Denying and Partially Granting Motion to Reconsider entered June 17, 2010
[3] Findings of Fact, Conclusions of Law and Order entered September 8, 2010
[4] See Order Partially Denying and Partially Granting Motion to Reconsider, issued June 17, 2010, Conclusion of Law #8.
[5] The Petitioner reserved the right to appeal the ELJ's determination that only 83% of annual tank fees had been paid. This determination was not raised as an issue in the Petitioner's Motion to Reconsider and Request for Entry of Final Order.

deny reimbursement for $20,005.13[6] (the "Disputed Costs") for various reasons. The Petitioner now contends that the Disputed Costs should be paid because (1) the Petitioner's due process rights have been denied and (2) the IDEM should be estopped from asserting new grounds for denial. The OEA denies the Petitioner's motion for reconsideration and dismisses the disputed costs without prejudice and enters a final order in this matter.

Statement of the Case

1. The Petitioner applied for reimbursement from the Excess Liability Trust Fund (the ELTF) of corrective action costs incurred in remediating a release of petroleum from the underground storage tanks located at its facility in Shelby County.

2. The Petitioner received notice of the IDEM's denial of reimbursement from the ELTF on September 4, 2008 (Submittal #3). On September 18, 2008, the Petitioner timely filed its Petition for Adjudicatory Hearing and Administrative Review and Request for Stay of Effectiveness of ELF Determination. This case was assigned Cause No. 08-F-J-4177.

3. The Petitioner received another denial of ELTF reimbursement (Submittal #4) for additional costs on February 13, 2009. On February 26, 2009, the Petitioner timely filed a second Petition for Adjudicatory Hearing and Administrative Review and Request for Stay of Effectiveness. This case was assigned Cause No. 09-F-J-4231.

4. The two denials were consolidated under Cause No. 08-F-J-4177.

5. Summary judgment was granted in Pilot's favor on May 25, 2010 (the May 25, 2010 Order) in regards to the Onsite Costs. In addition, the Court concluded that the Petitioner was eligible to receive only 83% of its reimbursable costs because the Petitioner had paid only 83% of annual underground storage tank registration fees.

6. The IDEM filed a Motion to Reconsider on June 1, 2010. The Petitioner filed its Motion to Reconsider on June 11, 2010. On June 17, 2010, the presiding Environmental Law Judge (the ELJ) modified the May 25, 2010 Order. The Court ordered the following: The corrective action costs incurred for on-site corrective action activities are eligible for reimbursement at a rate of 83% eligibility. The IDEM shall determine which costs are reimbursable pursuant to 328 IAC 1-3-5 and shall notify the Petitioner no later than June 25, 2010 and pursuant to I.C. §13-23-9-2(e)[7], not later than seven (7) days after the IDEM approves such costs as eligible for reimbursement, forward a copy of the request for reimbursement to the Auditor of the State.

[6] 83% of $24,102.57 (the amount of Onsite Costs that IDEM did not reimburse).
[7] The Order cites to I.C. § 13-23-89-2(e), however, this citation is incorrect. The correct citation is I.C. § 13-23-9-2(e).

7. Subsequent to the May 25, 2010 Order, IDEM made a partial payment to Pilot for its "Onsite Costs." The parties stipulated, and the Court agreed, that the parties should have additional time to work out any remaining differences as to "Onsite Costs."

8. On July 14, 2010 a hearing was held. The hearing was limited to the issue of whether Pilot's "Offsite Costs" in the amount of $195,702.60 (83% of $235,786.27, which were Pilot's total Offsite Costs) were reimbursable under the ELTF statutes and regulations. The Court issued Findings of Fact, Conclusions of Law and Order on September 8, 2010. The Court determined that Pilot was not eligible to receive reimbursement of the "Offsite Costs" as it was not in substantial compliance with the regulations promulgated under Title 13, Article 23 of the Indiana Code.

9. As the parties had not reached an agreement about reimbursement of the Onsite costs, the September 8, 2010 Order was not a final order.

10. On February 7, 2011, the Petitioner filed Pilot Travel Centers LLC's Motion to Reconsider and Request for Entry of Final Order. The IDEM filed its Response to Pilot's Motion to Reconsider and Request for Entry of Final Order on February 22, 2010.

FINDINGS OF FACT

1. All findings of fact[8] previously entered by the ELJ in this matter are incorporated herein.

2. The ELJ determined in the June 17, 2010 Order that "The IDEM may deny costs only on the basis that (1) the Petitioner has not provided sufficient back up documentation; (2) the costs are for activities that are clearly designated as not reimbursable in 328 IAC 1-3-5(d); or (3) costs that exceed the maximum amounts set out in 328 IAC 1-3-5(e). The IDEM may NOT deny costs requested in Submittals #3 and #4 on the basis that the Petitioner does not have an approved CAP or emergency measures."[9]

3. The IDEM has reimbursed Pilot for eligible Onsite Costs. The IDEM continues to deny reimbursement for $20,005.13 (83% of $24,102.57). The reasons given for the denial were (1) lack of back-up documentation; (2) costs exceeded the reasonable costs set in 328 IAC 1-3-5; and (3) costs were incurred for corrective action taken off-site.

[8] Findings of Fact, Conclusions of Law and Order entered May 25, 2010; Order Partially Denying and Partially Granting Motion to Reconsider entered June 17, 2010; Findings of Fact, Conclusions of Law and Order entered September 8, 2010.

[9] Order Partially Denying and Partially Granting Motion to Reconsider entered June 17, 2010, Conclusion of Law #8.

Objection to the Denial of Excess Liability Trust Fund Claim
ELTF #200705054 / FID #14932
ELTF Submittal No. 3.
Pilot Travel Centers, LLC
Shelbyville, Shelby County, Indiana
2011 OEA 36, (08-F-J-4177)

Applicable Law

In *Murphy v. Terrell,* 938 N.E.2d 823, 827 (Ind. Ct. App. 2010), the Indiana Court of Appeals held that due process required certain minimum procedures. The Supreme Court in *Goldberg v. Kelly*, 397 U.S. 254, 267-268, 90 S. Ct. 1011, 25 L. Ed. 2d 287 (1970), held "The fundamental requisite of due process of law is the opportunity to be heard. The hearing must be at a meaningful time and in a meaningful manner. In the present context these principles require that a recipient have timely and adequate notice detailing the reasons for a proposed termination, and an effective opportunity to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally." The Court of Appeals went on to say, "The Supreme Court also held that the opportunity to be heard must be tailored to the capacities and circumstances of those who are to be heard, that the individual be allowed to be represented by counsel, if he so chooses, and that the decision maker's conclusion regarding eligibility rest solely on the legal rules and evidence adduced at the hearing. *Id.* at 268-71. However, hearings need not take the form of a judicial or quasi-judicial trial. *Id.* at 266."

The Indiana Tax Court addressed *equitable estoppel* in *Hi-Way Dispatch v. Indiana Dep't of State Revenue*, 756 N.E.2d 587, 598 (Ind. Tax Ct. 2001). The Court held "The elements of *equitable estoppel* are: (1) a representation or concealment of material fact; (2) made by a person with knowledge of the fact and with the intention that the other party act upon it; (3) to a party ignorant of the fact; (4) which induces the other party to rely or act upon it to his detriment." Further, the Court held that *equitable estoppel* cannot be applied to governmental agencies unless the "public interest would be threatened by the government's conduct". *Id*. at 599-600.

The Court, in *Hi-Way Dispatch*, also addressed whether laches may be asserted as a defense against a government agency. "The defense of laches has three elements: (1) inexcusable delay in asserting a right; (2) an implied waiver arising from knowing acquiescence in existing conditions; and (3) circumstances resulting in prejudice to the adverse party." *Hi-Way Dispatch* at 600.

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 I.C. § 4-21.5-7, *et seq*.

2. This is a Final Order issued pursuant to I.C. § 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 requests that the ELJ reconsider its conclusion that the IDEM should be allowed to review the Onsite Costs for compliance with the rules. The Petitioner argues that this conclusion deprives Pilot of due process because the IDEM should be barred from asserting new grounds for denial after an appeal has been initiated. Further, Pilot argues that the IDEM should be estopped from denying any of the Disputed Costs as it failed to identify all reasons for denying reimbursement in the initial determinations made on September 4, 2008 and February 26, 2009.

4. As the IDEM points out, an applicant to the ELTF has more than one opportunity to submit an application for reimbursement. If an application, in whole or in part, is denied, the applicant may choose to appeal the denial to the OEA or to resubmit the application with additional justification for IDEM to reverse its initial decision. An applicant can resubmit until such time as there is no new evidence for IDEM to consider. At this point in time, the applicant can appeal the denial to the OEA.

5. 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.[10]

6. The rules at 328 IAC 1-3-5 are clear that adequate documentation is necessary for reimbursement. These rules, the IDEM's written guidance and the IDEM's common practice provide sufficient support for a conclusion that the Petitioner should have known that certain types of documentation, such as boring logs and manifests, were necessary.[11] This defeats any argument by Pilot that *estoppel* is appropriate as there is no evidence that the IDEM misrepresented or concealed these requirements or that Pilot was ignorant of the requirements.

7. In addition, Pilot argues that the IDEM should be estopped from denying any costs because Pilot is unable to produce the back-up documents due to the amount of time between the time that the costs were incurred and the time that the OEA issued its initial decision in this matter. This is unpersuasive. Corrective actions frequently take several years to complete so it is common and reasonable for the owner or operator of USTs to maintain documentation for the life of a project. Approximately a year passed between the time this appeal was initiated (September of 2008 and February of 2009) and the time that the motion for summary judgment was filed (March 2010). The Petitioner consented to the delay while it negotiated with the IDEM about this matter. As this delay can partially be attributed to the Petitioner, the Petitioner's complaint about any harm it incurred because of this delay does not have a legal basis.

---

[10] 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.

[11] These documents serve other purposes besides documenting ELTF expenses therefore it is reasonable to assume that Pilot would have these documents.

8. To the extent that the doctrine of laches may be asserted against the IDEM, again, the evidence does not support such a conclusion. Nothing in the IDEM's conduct supports a conclusion that the IDEM inexcusably delayed asserting its need to review the costs for compliance with the rules. While the IDEM arguably took too much time to review the initial applications, the Petitioner had alternatives to waiting for the IDEM to conclude its review, such as filing an appeal under I.C. § 4-21.5-3 for the IDEM's failure to issue a determination.

9. The Petitioner has failed to assert a convincing public policy reason for applying either *estoppel* or laches against the IDEM.

10. The Court has previously determined that it was appropriate to allow the IDEM an opportunity to review the Onsite costs for compliance with 328 IAC 1-3-5. As Pilot has not been deprived of an opportunity to present evidence and argument to the OEA as to why the IDEM erred in denying reimbursement, Pilot has not been deprived of due process. Further, the ELJ finds no grounds, in this case, to find that the IDEM should be barred upon the doctrine of laches or *equitable estoppel* from denying reimbursement for previously unspecified reasons.

11. However, as previously discussed, an ELTF applicant may resubmit a claim for reimbursement if the applicant can produce evidence that the IDEM erred in its denial. In accordance with this principle, if Pilot can produce the documentation that the IDEM requires, it can resubmit for reimbursement of the Disputed Costs. Therefore, the Disputed Costs should be dismissed without prejudice.

FINAL ORDER

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that (1) Pilot Travel Centers LLC's Motion to Reconsider is **DENIED;** (2) Pilot Travel Centers LLC's claims regarding the Disputed Costs are **DISMISSED WITHOUT PREJUDICE;** and (3) Pilot Travel Centers LLC's Request for Entry of Final Order is **GRANTED**. The Court enters the Findings of Fact, Conclusions of Law and Order entered May 25, 2010; Order Partially Denying and Partially Granting Motion to Reconsider entered June 17, 2010; Findings of Fact, Conclusions of Law and Order entered September 8, 2010 and this Order as **FINAL ORDERS.**

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 4th day of April, 2011 in Indianapolis, IN.

Hon. Catherine Gibbs
Environmental Law Judge