

**OBJECTION TO THE DENIAL OF  
EXCESS LIABILITY TRUST FUND (“ELTF”) ELTF CLAIM  
NO.: 1997 06 504  
TOWN OF DYER  
2000 OEA 082, OEA CAUSE NO.: 99-F-J-2311**

Official Short Cite Name:	Town of Dyer, 2000 OEA 082
OEA Cause No.:	99-F-J-2311
Topics/Keywords:	IC 13-23-12-1 IC 13-23-8-4 IC 13-23-1-2 IC 4-21.5-3-23 Underground storage tank leaks UST failure to pay fees         
Presiding ELJ:	Wayne E. Penrod
Party Representatives:	Catherine Gibbs, Esq. – IDEM David Austgen, Esq. - PETITIONER  
Date of Order:	August 15, 2000
Index Category:	Excess Liability Trust Fund or ELTF
Further Case Activity:	Included in the attached pdf is the: <ul style="list-style-type: none"> <li>▪ Final Order Affirming Recommended Order, Aug 15, 2000, and</li> <li>▪ Recommended Order Granting IDEM’s Motion for Summary Judgement, Jun 26, 2000.</li> </ul>

AUG 15 2000



INDIANA OFFICE OF ENVIRONMENTAL ADJUDICATION

Wayne E. Penrod  
Chief Administrative Law Judge

150 West Market Street  
Suite 618  
Indianapolis, IN 46204  
Telephone 317-232-8591  
Fax 317-233-0851

STATE OF INDIANA             )  
  )             SS:     BEFORE THE INDIANA OFFICE OF  
COUNTY OF MARION           )             ENVIRONMENTAL ADJUDICATION

IN THE MATTER OF:                     )  
  )  
OBJECTION TO THE DENIAL OF         )             CAUSE NO. 99-F-J-2311  
ELF CLAIM NO. 9706504                )  
TOWN OF DYER                            )

**FINAL ORDER AFFIRMING RECOMMENDED ORDER**

This constitutes notice that on June 26, 2000, the Administrative Law Judge issued a Recommended Order in the above-captioned matter. None of the parties filed an appeal of the Recommended Order, and, therefore, the Recommended Order is **AFFIRMED** and incorporated herein by reference.

You are further notified that pursuant to Indiana Code 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 IC 4-21.5. Pursuant to IC 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** in Indianapolis, Indiana this 15th day of August 2000.

\_\_\_\_\_  
Wayne E. Penrod, Chief  
Administrative Law Judge

cc: Marybeth Touhy, Assistant Commissioner  
Office of Land Quality



JUN 26 2000

# INDIANA OFFICE OF ENVIRONMENTAL ADJUDICATION

Wayne E. Penrod  
Chief Administrative Law Judge

150 West Market Street  
Suite 618  
Indianapolis, IN 46204  
Telephone 317-232-8591  
Fax 317-233-0851

STATE OF INDIANA )  
 )  
COUNTY OF MARION )  
 )

SS: BEFORE THE INDIANA OFFICE OF ENVIRONMENTAL ADJUDICATION

IN THE MATTER OF: )  
 )  
OBJECTION TO THE DENIAL OF ) CAUSE NO. 99-F-J-2311  
ELF CLAIM NO. 9706504 )  
TOWN OF DYER )

## RECOMMENDED ORDER GRANTING IDEM'S MOTION FOR SUMMARY JUDGMENT

### I. Statement of the Case:

On June 1, 1999, the Town of Dyer (the Town) appealed the denial of its Excess Liability Fund (ELF) reimbursement. A prehearing conference was held on December 20, 1999. The Town appeared by counsel, David Austgen and the Indiana Department of Environmental Management appeared by counsel, Catherine Gibbs. The parties were ordered to file dispositive motions on or before March 31, 2000. After a request for extension of time, IDEM filed its Motion for Summary Judgment on April 14, 2000. The Town also requested an extension of time to file its response on May 30, 2000. The Town neither filed a response nor a second extension of time.

### II. Undisputed Facts:

The Administrative Law Judge finds the following facts undisputed:

1. The Town owns and operates a facility located at 516 Edmond Drive, Dyer, Lake County, Indiana. There are three registered underground storage tanks (UST) at that facility.
2. On June 4, 1997, the Town reported a release of petroleum from those tanks to IDEM.
3. The Town undertook corrective action and incurred cost remediating the release. It submitted a claim for reimbursement on March 9, 1999.
4. IDEM approved the Town for 80% reimbursement of its costs. IDEM cited the fact that the Town had not paid annual UST fees for 1994 and 1995 as the reason it did not receive 100%

reimbursement. See Exhibit C, Affidavit of Steven Browning, IDEM's Motion for Summary Judgment.

5. The Town received permission from IDEM to close one tank at the facility on June 18, 1997. It received permission to close the other two on July 7, 1998. See Exhibit A and B, IDEM's Motion for Summary Judgment.

6. None of the tanks were closed on or before July 1, 1994 or July 1, 1995.

7. IDEM properly calculated the percentage of registration fees paid on the date of the reported release as 23 payments instead of 29 payments, which translates into 80% reimbursement.

### III. Conclusions of Law:

The Administrative Law Judge concludes as a matter of law that:

1. Pursuant to Indiana Code §4-21.5-3-23(b), summary judgment may be entered in favor of one party if 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 a judgment as a matter of law."

2. Furthermore, Ind. Code §4-21.5-3-23(f), "the adverse party shall respond to the motion with affidavits or other evidence permitted under this section and set forth specific facts showing that there is a genuine issue of material fact in dispute. If the adverse party does not respond as required by this subsection, the administrative law judge may enter summary judgment against the adverse party."

3. The only issue in this case is whether the Town paid all of the necessary annual UST fees to make it eligible for 100% reimbursement.

4. The duty to pay annual UST fees is found at Ind. Code §13-23-12-1:

(a) Each year the owner of an underground storage tank that has not been closed before July 1 of any year under:

(1) rules adopted under IC 13-23-1-2; or

(2) a requirement imposed by the commissioner before the adoption of rules under IC 13-23-1-2;

shall pay to the department of state revenue an annual registration fee.

5. Indiana Code §13-23-8-4(a) provides that a owner or operator may receive money from the excess liability fund if the owner or operator is in substantial compliance with paying all of the registration fees required.

6. 328 IAC 1-3-3(b) requires IDEM to calculate the percentage an owner or operator is eligible to receive by "(1) determining the number of payments that were owed under IC 13-23-12-1 on all regulated tanks at the facility from which the release occurred . . . and (2) determine the number of payments actually made under IC 13-23-12-1 on all regulated tanks at the facility from which a release occurred, beginning with the date each tank became regulated . . ."

7. Based on the affidavits and exhibits presented, the Town is only eligible to receive 80% reimbursement from the excess liability fund because it did not pay annual UST fees for 1994 and 1995. IDEM calculated that percentage based on the fact that the Town made 23 payments on its regulated USTs when it should have made 29 payments on all of its regulated tanks.

**IV. Recommended Order:**

The Administrative Law Judge hereby recommends that IDEM's Motion for Summary Judgment be **GRANTED**.

**V. Appeal Rights:**

You are hereby notified that pursuant to §4-21.5-3-29, you have the right to appeal the Recommended Order of the Administrative Law Judge. In order to do so, you must object in a writing that does the following:

- (1) specifies which portions of the Recommended Order you object to;
- (2) specifies which portions of the administrative record supports the objection(s); and
- (3) is filed with the ultimate authority responsible for reviewing the order within fifteen (15) days. Objections should be sent to:

Wayne E. Penrod, Chief Administrative Law Judge  
Office of Environmental Adjudication  
150 West Market Street, Suite 618  
Indianapolis, IN 46204

A final order disposing of the case or an order remanding the case to the administrative law judge for further proceedings shall be issued within sixty (60) days after the latter of:

- (1) the date that the order was issued under §4-21.5-3-27;
- (2) the receipt of briefs; or
- (3) the close of oral argument;

unless the period is waived or extended with the written consent of all parties or for good cause shown.

**IT IS SO ORDERED** in Indianapolis, Indiana this 26<sup>th</sup> day of June 2000.

Linda C. Lasley  
Administrative Law Judge

cc: Mary Beth Touhy, Assistant Commissioner  
Office of Land Quality