Objections to Denial of Excess Liability Trust Fund Claim No. 9202513
Johnson Oil Company, Columbus, Bartholomew County, Indiana
2005 OEA 63 (03-F-J-3279)

TOPICS:
Excess Liability Trust Fund
ELTF
underground storage tanks
USTs
spill reporting
substantial compliance

PRESIDING JUDGE:
Gibbs

PARTY REPRESENTATIVES:
Petitioner: Madonna McGrath, Esq.
Respondent/IDEM: Robert Keene, Esq.

ORDER ISSUED:
December 1, 2005

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:	)	
	)	
OBJECTIONS TO DENIAL OF EXCESS	)	
LIABILITY TRUST FUND CLAIM NO. 9202513	)	CAUSE NO. 03-F-J-3279
JOHNSON OIL COMPANY	)	
COLUMBUS, BARTHOLOMEW COUNTY,	)	
INDIANA	)	

FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL ORDER

This matter having come before the Court for the final hearing, held on October 25, 2005, of the Petition for Administrative Review and Request for Hearing by the Petitioner, Mac's Convenience Stores LLC; and the Environmental Law Judge having considered the evidence presented at the hearing, now finds that judgment may be made upon the record; and the ELJ, being duly advised, now makes the following findings of fact and conclusions of law and enters the following Order:

STATEMENT OF THE CASE

1. On January 28, 2003 and again on April 7, 2003, Johnson Oil Company ("Johnson Oil") submitted a claim to the Indiana Department of Environmental Management ("IDEM") for reimbursement from the Excess Liability Trust Fund (the "ELTF") for corrective action costs.

2. On January 7, 2004, the IDEM notified Johnson Oil that its claim was denied because Johnson Oil was not in "substantial compliance" with the applicable regulations. Specifically, IDEM's sole basis for its denial was the allegation that Johnson Oil had failed to substantially comply with the requirement to report the 1991 release in a timely manner.

3. The Petitioner, Mac's Convenience Stores LLC, filed its Petition for Review on January 22, 2004.

4. The Petitioner filed its Motion for Summary Judgment on October 8, 2004. IDEM filed its Response to Mac's Motion for Summary Judgment on November 10, 2004 and the Petitioner filed its Reply Brief in Support of Motion for Summary Judgment on November 29, 2004. The Environmental Law Judge (the "ELJ") issued Findings of Fact, Conclusions of Law and Order denying the Petitioner's Motion for Summary Judgment on May 20, 2005.

5. A final hearing was held on this matter on October 25, 2005. Both parties were present and presented evidence.

FINDINGS OF FACT

1. The Findings of Fact issued by the ELJ on May 20, 2005 are incorporated into these findings of fact.

2. The stipulations entered into by the parties and filed with the ELJ on October 17, 2005 are incorporated into these findings of fact.

3. On March 13, 1991, Sub-Tech, Inc. ("Sub-Tech"), an environmental consultant retained by Johnson Oil, the former owner of this Facility, began work at the facility (known as Big Foot #7, located in Bedford, Indiana). Sub-Tech had been hired to perform the necessary environmental work associated with the underground storage tank ("UST") closure. The actual closure work was performed by another contractor, Marlin Ellett Maintenance, Inc.

4. The companies were retained to close the USTs located at the site. Johnson Oil believed that there were only 3 tanks located at this facility. However, after beginning work at the site, a fourth tank was discovered.

5. During the closure activities, petroleum contamination was found in the soil surrounding the USTs. Laboratory analysis conducted on soil samples revealed contamination ranging from 362 ppm (parts per million) to 7,380 ppm. Some, but not all, of the contaminated soil was excavated and disposed of.[1] Sub-Tech also encountered contaminated water that collected in the tank pit. Gasoline, contaminated with water, was discovered in the previously unknown tank. This water was collected and disposed of.

6. Sometime in June or July of 1991, American Environmental Corporation ("AEC") was hired by Johnson Oil to replace Sub-Tech as the environmental consultant. Johnson Oil relied upon these consultants to perform whatever actions were necessary to comply with the applicable environmental regulations.

7. AEC reviewed the file on this facility and performed a subsurface investigation. This investigation consisted, initially, of drilling four (4) soil borings 11 feet to 15 feet deep. No contamination was found in these borings.

8. AEC submitted its findings to Johnson Oil in a Subsurface Investigation report dated August 2, 1991 (Petitioner's Exhibit D). In this report, AEC states, "Although Sub-Tech excavated and disposed of petroleum hydrocarbon contaminated soils (the exact quantity could not be found in the reports), it is apparent that elevated levels of TPH are still present." (Petitioner's Exhibit D, page 10).

[1] It was not possible to excavate all of the contaminated soil as some of it lay under the building on the site. The IDEM's regulations did not require the removal of the building in order to fully excavate the contaminated soil.

9. Johnson Oil properly registered the USTs in compliance with the regulations in effect in 1991. It also properly notified the IDEM that it intended to close the USTs. Johnson Oil complied with the requirements that the Facility implement an approved method of release detection.

10. Johnson Oil was in compliance with the reporting requirements on many occasions between 1991 and 2005.

11. Johnson Oil presented substantial evidence that the IDEM has, on at least three other occasions, allowed eligibility for other facilities under similar circumstances, that is, when a release was not reported in a timely manner.

CONCLUSIONS OF LAW

1. The Office of Environmental Adjudication ("OEA") has jurisdiction over the decisions of the Commissioner of the IDEM and the parties to the controversy pursuant to IC 4-21.5-7-3.

2. This office 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). "*De novo* review" means that:

> all 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).

3. In March of 1991, the ELTF eligibility requirements of IC 13-7-20-33(d) were:

> An owner or operator may receive money from the fund under subsection (a)(1) or (a)(3) only if the following requirements are satisfied:
> (1) The underground petroleum storage tank from which the release occurred was, the time the release was discovered, registered under this chapter.
> (2) The owner or operator was, at the time the release was discovered, in substantial compliance with the requirements of the following as determined by the commissioner:
> (A) This chapter.
> (B) Rules adopted under this chapter.
> (C) 42 U.S.C. 6991 through 6991i.
> (D) Regulations published under 42 U.S.C. 6991 through 6991i.
> A release from an underground petroleum storage tank my not prevent an owner or operator from establishing compliance with this subdivision to receive money from the fund.

(3) The owner or operator has paid all registration fees that are due under section 32 of this chapter by the date the fees are due.
(4) The owner or operator has provided the commissioner with evidence of payment to the amount of liability the owner or operator is required to pay under subsection (b).
(5) The owner or operator has not defaulted on a loan guaranteed under section 33.3 of this chapter.
(6) A corrective action plan is approved by the commissioner.

4. This ELJ has previously defined "substantial compliance" in the Findings of Fact, Conclusions of Law and Order, dated May 20, 2005. That conclusion is affirmed and incorporated here. In March 1991, the term "substantial compliance" was not defined in statute, regulation or policy. As determined previously by this office, *In the Matter of: Objections to Denial of Excess Liability Trust Fund #200203501, GasAmerica #47, Greenfield, Hancock County, Indiana,* 2004 OEA 123, Chief Environmental Law Judge Mary Davidsen held that "substantial compliance" shall be defined as follows:

> Merriam-Webster Online Dictionary's (at www.m-w.com) pertinent definition of "substantial" is "being largely but not wholly that which is specified", and of "compliance" is "conformity in fulfilling official requirements".

5. There was significant evidence that a release had occurred in March 1991, therefore, this release should have been reported at that time. However, it is also true that Johnson Oil complied with every applicable regulation except for reporting this release within 24 hours.

6. No evidence was presented that, even though IDEM knew about the release in 1992, the IDEM considered this a significant violation of the rule. For example, no enforcement action was ever taken. This was not an issue until the Petitioner applied for reimbursement in 2003. Also, no evidence was presented that the delay in reporting between March 1991 and February 1992 exacerbated the contaminated condition of the facility, thereby creating an imminent or substantial threat to human health or the environment. In short, there is no evidence that Johnson Oil's failure to report within 24 hours substantially changed the cleanup of this facility.

7. The Petitioner also argues that the IDEM's action is arbitrary and capricious and points to other cases, in which reimbursement was initially denied for a failure to timely report a release and then subsequently allowed, as support for this contention. The Supreme Court held in *South Gibson School Board v. Sollman,* 768 N.E.2d 437, 441 (Ind. 2004):

> We have said "an action of an administrative agency is arbitrary and capricious only where there is no reasonable basis for the action." *Ind. Civil Rights Comm'n v. Delaware County Cir. Ct.*, 668 N.E.2d 1219, 1221 (Ind. 1996); compare *City of Indianapolis v. Woods*, 703 N.E.2d 1087, 1091 (Ind. Ct. App. 1998) ("An arbitrary and capricious decision is one which is patently unreasonable. It is made without consideration of the facts and in total disregard of the circumstances and lacks any basis which might lead a reasonable person to the same conclusion."). The burden of proving that the administrative action of the school was arbitrary or capricious falls on the party attempting to upset the administrative decision. *Forrest v. Sch. City of Hobart,* 498 N.E.2d 14, 17 (Ind. Ct. App. 1986).

8. Johnson Oil did not comply with the regulation requiring it to report a release within 24 hours of discovery[2] even though it was presented with two opportunities to do so, in March of 1991 and in September of 1991 when its consultant, AEC, indicated that it believed that contamination was still present. If one looked at only these facts, one could reach the conclusion that Johnson Oil was not in substantial compliance with the reporting requirement. However, the totality of the circumstances in this case tip the balance in this case towards the conclusion that Johnson Oil should be considered in substantial compliance and therefore eligible for reimbursement.[3] These circumstances are (1) Johnson Oil was in compliance with other regulations in effect at the time; (2) Johnson Oil took immediate action (the excavation of contaminated soil and groundwater) to mitigate the possible migration of contamination; (3) the lack of any written guidance or "ascertainable standards"[4] from IDEM regarding a definition of "substantial compliance"[5]; (4) that IDEM has determined that other owners and operators were eligible for reimbursement under similar circumstances; (5) that IDEM presented no evidence that the failure to report created an imminent or substantial threat to human health or the environment or affected the ultimate cleanup of the facility; and (6) Johnson Oil presented evidence that it made a good faith effort to comply with the regulations[6].

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[2] The ELJ does not condone the failure to report the release. This is an important part of the IDEM's efforts to protect human health and the environment. That the Petitioner took immediate action to remove as much of the contamination as possible is a crucial fact in the ELJ's determination in this matter.

[3] The cases, in which late reporting is an issue, are fact sensitive and no single reason cited here should be considered dispositive in other pending or future matters.

[4] "In order to satisfy due process, an administrative decision must be in accord with previously stated, ascertainable standards." *Podgor v. Indiana University,* 178 Ind.App. at 258, 381 N.E.2d 1274 at 1283 (Ind.App. 1978). "This requirement is to make certain that administrative decisions are fair, orderly and consistent rather than irrational and arbitrary. The standards should be written with sufficient precision to give fair warning as to what the agency will consider in making its decision." *Id*

.

[5] Between 1991 and the present, the IDEM has revised the rules at least twice so this circumstance may not be a factor in other cases involving this issue.

[6] This includes evidence that Johnson Oil had (1) employed 2 different consultants in order to ensure compliance with the regulations and (2) a good compliance history at other facilities during this time period.

9. This last circumstance is significant only because of the language of regulations promulgated later in which IDEM defined "substantial compliance" to include "Proof of substantial compliance includes, but is not limited to, evidence of contractual agreements or other verifiable action undertaken sufficiently in advance of a compliance date to provide a reasonable probability of meeting the terms of the statute or regulation." 328 IAC 1-1-9. Johnson Oil presented substantial evidence that it relied upon its environmental consultants to take the necessary actions to comply with the environmental regulations.

10. The totality of these circumstances necessitates a conclusion that the Petitioner was in substantial compliance with the regulations and is eligible for reimbursement from the Excess Liability Trust Fund for the necessary and reasonable costs of corrective action.

FINAL ORDER

AND THE COURT, being duly advised, hereby **ORDERS, JUDGES AND DECREES** that the Petitioner has met its burden of proof in this matter and is in substantial compliance with the regulations and therefore is eligible for reimbursement from the Excess Liability Trust Fund.

You are hereby further notified that pursuant to provisions of IND. CODE § 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 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 THIS 1st day of December, 2005.

Catherine Gibbs
Environmental Law Judge