

**OBJECTION TO THE DENIAL OF REIMBURSEMENT OF
EXCESS LIABILITY CLAIM # 9101502
THE SANDS CORPORATION
1997 OEA 062, OEA CAUSE NO.: 96-F-J-1627**

Official Short Cite Name:	Sands Corp, ELF Claim 9101502, 1997 OEA 062
OEA Cause No.:	96-F-J-1627
Topics/Keywords:	IC 13-23-8-2(1) IC 13-23-8-4 328 IAC 1-3-5 Corrective Action Plan Tank fees Costs exceeding deductible
Presiding ELJ:	Wayne E. Penrod, Esq.
Party Representatives:	Catherine Gibbs, Esq. Steve Sands
Order Issued:	August 21, 1997
Index Category:	Excess Liability Trust Fund or ELTF
Further Case Activity:	

5. At the time of the release, Sands owed tank fees for the following fiscal years: 1988-1989, 1989-1990 and 1990-1991.
6. Sands paid the tank fees for the 1990-1991 fiscal year, but not for any of the preceding years.
7. On January 31, 1994, Sands applied for reimbursement from the fund.
8. Sands did not submit a Corrective Action Plan, with its application, to IDEM, as required by IC 13-7-20-33 (now at IC 13-23-8-4).
9. On January 17, 1996, IDEM denied Sands' application because Sands had failed to pay all annual registration fees for its underground storage tanks.
10. On April 25, 1996, Sands requested a reconsideration of its claim for reimbursement.
11. On October 8, 1996, the agency again denied Sands' request for reimbursement because Sands had failed to pay at least 50% of the annual underground storage tank registration fees (hereinafter referred to as "tank fees") prior to the date of the release; Sands did not have an approved Corrective Action Plan; and because Sands had not incurred eligible costs greater than the applicable deductible of Thirty-five Thousand Dollars (\$35,000).
12. On October 24, 1996, Sands filed a petition for administrative review with the Office of Environmental Adjudication.
13. To determine the amount of Sand's possible reimbursement, Thirty-five Thousand Dollars (\$35,000) would be deducted from Sand's total eligible costs, pursuant to IC 13-23-8-2(1).
14. Only those costs associated with a corrective action are eligible for reimbursement from the fund. 328 IAC 1-3-5. Costs associated with the upgrade of underground storage tanks are not eligible. Id.

15. Sands did not incur more than Thirty-five Thousand Dollars (\$35,000) in eligible costs.
16. IDEM, by counsel, filed its Motion for Summary Judgment on July 7, 1997.
17. Sands did not file a response to the Motion for Summary Judgment on or before July 28, 1997, which was ordered by the Chief Administrative Law Judge on June 17, 1997.

CONCLUSIONS OF LAW

1. The Indiana Office of Environmental Adjudication has jurisdiction over decisions of the Excess Liability Fund Administrator pursuant to IC 4-21.5-7 and the parties to the action.
2. IC 4-21.5-3-23(b) provides in pertinent part the "the judgment [on a motion for summary judgment] shall be rendered immediately if the pleadings, dispositions, 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."
3. IC 4-21.5-3-23(f) provides "[i]f a motion for summary judgment is made and supported under this section, an adverse party may not rely upon the mere allegations or denials made in the adverse party's pleadings as a response to the motion. 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 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."
4. IC 13-7-20-33(d) (now at IC 13-23-8-4) requires an owner or operator to meet all of its prescriptions to collect from the fund as follows:

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, at 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. 6991i.

(D) Regulations published under 42 U.S.C. 6991 through 6991i.

A release from an underground petroleum storage tank may 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 [IC 13-7-20-32] of this chapter.

(4) The owner or operator has provided the commissioner with evidence of payment of, or the ability to pay, the twenty-five thousand dollars (\$25,000) of liability under subsection (b).

5. P.L. 67-1996 Section 10 effective March 21, 1996, provides that an owner or operator who fails to pay all of its registration fees may still be eligible for reimbursement from the fund if the owner or operator has paid at least fifty percent (50%) of the annual registration fees for the underground storage tanks when due.

6. Sands is not eligible for reimbursement for costs incurred in remediating the release of petroleum from the underground storage tanks at the facility because Sands, at the time of the release, had not paid at least fifty percent (50%) of the annual registration fees for the underground storage tanks when due.

7. Sands is not eligible for reimbursement from the Excess Liability Trust Fund because it does not have an approved Corrective Action Plan as required by IC 13-7-20-33 (now at IC 13-23-8-4).

8. Sands is not eligible for reimbursement, because Sands' eligible costs have not exceeded the appropriate deductible.

ORDER

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Indiana Department of Environmental Management's Motion for Summary Judgment is hereby **GRANTED** and it is found that Petitioner, Sands Mini Mart, Inc. is not eligible to collect from the Excess Liability Fund; the fund administrator's denial is **AFFIRMED**.

You are further notified that pursuant to the provisions of P.L. 41-1995, amending Ind. Code §4-21.5-7, which became effective July 1, 1995, 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 the applicable provisions of Ind. Code §4-21.5-5, 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 at Indianapolis, Indiana this 21st day of August, 1997.

Wayne B. Penrod, Chief
Administrative Law Judge