

Objection to the Denial of Excess Liability Trust Fund Claim
ELTF #199705081-61 / FID #2989
Clark Station #379
EnviroSolutions
South Bend, St. Joseph County, Indiana
2017 OEA 72, (16-F-J-4929)

OFFICIAL SHORT CITATION NAME: When referring to 2017 OEA 72 cite this case as
Clark Station #379, 2017 OEA 72.

TOPICS:

Summary judgment
Underground storage tanks (UST)
Excess Liability Trust Fund (ELTF)
No further action
Reimbursement
Timely
Final claim
Pro se
Lay person
Corporation
Unrepresented
328 IAC 1-3-1
328 IAC 1-5-1
I.C. § 13-23-9-2(d)

PRESIDING ENVIRONMENTAL LAW JUDGE:

Catherine Gibbs

PARTY REPRESENTATIVES:

IDEM: Timothy Junk, Esq.
Petitioner: unrepresented

ORDER ISSUED:

August 2, 2017

INDEX CATEGORY:

Land

FURTHER CASE ACTIVITY:

[none]

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STATE OF INDIANA)
)
COUNTY OF MARION)

BEFORE THE INDIANA OFFICE OF
ENVIRONMENTAL ADJUDICATION

IN THE MATTER OF:)

OBJECTION TO THE DENIAL OF EXCESS)

LIABILITY TRUST FUND CLAIM)

ELTF #199705081-61 / FID #2989)

CLARK STATION #379)

CAUSE NO. 16-F-J-4929

ENVIROSOLUTIONS)

SOUTH BEND, ST. JOSEPH COUNTY, INDIANA)

**FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL ORDER GRANTING
SUMMARY JUDGMENT**

The Indiana Department of Environmental Management (IDEM) filed for summary judgment on May 23, 2017. The Office of Environmental Adjudication (the OEA), having read the record, the motion, response and reply, enters the following findings of fact and conclusions of law and final order granting the motion for summary judgment.

FINDINGS OF FACT

1. The owners or operators of Clark Station #379, located at 2701 Lincoln Way West, South Bend, Indiana (the Site), reported a release of petroleum from underground storage tanks (USTs) in 1997. An incident number (#199705081) was assigned to this release.
2. Corrective action was undertaken at the Site. EnviroSolutions, Inc. (the Petitioner) performed the corrective action at the Site and applied for reimbursement of corrective action costs from the Excess Liability Trust Fund Claim (ELTF). IDEM determined that the site was eligible for reimbursement.
3. On January 8, 2016, IDEM determined that no further action was necessary and issued a No Further Action letter (NFA Letter). EnviroSolutions was sent a copy of the NFA Letter. The notice contained the following information:

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Please note, as per 328 IAC 1-3-1(d)¹, costs submitted for ELTF reimbursement must be submitted with nine months of NFA status being achieved to be eligible for reimbursement consideration. You therefore have until October 8, 2016 to submit all claims for eligible costs associated with this release.

4. EnviroSolutions applied more than 60 times for reimbursement. On July 13, 2016, EnviroSolutions submitted Claim #60 for \$20,623.70. On October 28, 2016, IDEM approved the reimbursement of \$19,798.75.
5. On November 2, 2016, EnviroSolutions submitted Claim #61² for reimbursement of \$26,324.43. These costs generally related to decommissioning the corrective action system, abandoning the wells and other site restoration activities associated with finalizing the corrective action. No part of this claim was a resubmission of previously denied costs. On November 15, 2016, IDEM denied this claim as untimely under 328 IAC 1-3-1(c).
6. On December 2, 2017, Petitioner filed a petition for review objecting to IDEM's denial of reimbursement from the ELTF. Kelly M. Gallagher signed the petition for review on Petitioner's behalf. Ms. Gallagher is Petitioner's president and a principal according to the Indiana Secretary of State.³
7. On January 6, 2017, IDEM filed a Motion to Dismiss or, in the Alternative, for an Order Requiring an Amended Petition. IDEM argued that Ms. Gallagher, as a lay person, could not represent EnviroSolutions. On February 22, 2017, the presiding Environmental Law Judge (the ELJ) entered Findings of Fact, Conclusions of Law and Order Denying Motion to Dismiss. As part of this order, Ms. Gallagher was ordered to demonstrate and acknowledge the following: Ms. Gallagher is an internal agent; Ms. Gallagher is not an attorney; Ms. Gallagher may not make or address legal arguments on Petitioner's behalf; if such legal arguments are raised at a later date, Petitioner may not be allowed to make such arguments if doing so would result in undue delay or prejudice to IDEM; failure to raise any such legal arguments may result in such arguments being waived in this proceeding or in judicial review. Ms. Gallagher filed this demonstration on March 13, 2017.
8. On May 23, 2017, IDEM filed its Motion for Summary Judgment. EnviroSolutions filed a response on June 23, 2017; IDEM filed its reply on June 28, 2017.

¹ This is not the correct citation. The rule that applies in this instance is 328 IAC 1-3-1(c). However, the ELJ finds this error to be inconsequential to the decision as the notice correctly states the appropriate standard and the date by which claims must be submitted.

² EnviroSolutions filed Claim #62 on December 30, 2016, but this was a resubmission of the costs denied in Claim #61.

³ <https://bsd.sos.in.gov/PublicBusinessSearch/BusinessInformation?businessId=349940&isSeries> The ELJ takes official notice of these facts pursuant to I.C. 4-21.5-3-26(f).

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CONCLUSIONS OF LAW

1. The Indiana Department of Environmental Management (“IDEM”) is authorized to implement and enforce specified Indiana environmental laws, and rules promulgated relevant to those laws, per I.C. § 13-13, *et seq.* 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 I.C. § 4-21.5-7-3.
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. 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 issues 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).
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. 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. EnviroSolutions is represented by Kelly Gallagher. Ms. Gallagher is not an attorney. Indiana appellate courts have held that:

“One who proceeds pro se is held to the same established rules of procedure that a trained legal counsel is bound to follow and, therefore, must be prepared to accept the consequences of his or her action. ... We will not become an advocate for a party, nor will we address arguments which are either inappropriate, too poorly developed or improperly expressed to be understood.”

Ramsey v. Review Bd. of Indiana Dept. of Workforce Dev., 789 N.E.2d 486, 487 (Ind. Ct. App. 2003) (internal quotation marks and citations omitted). Ms. Gallagher was previously advised of the consequences of proceeding without counsel.

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6. IDEM denied Claim #61 as untimely pursuant to 328 IAC 1-3-1(c). This rule states:

(c) All claims for payment of reimbursable costs must be submitted within nine (9) months after the fund qualifying occurrence is granted a status of no further action (NFA) by the administrator. All resubmittals associated with any disallowed cost must be received by the department within twelve (12) months after the denial of the claim.
7. Under this rule, which was promulgated in 2011, EnviroSolutions had nine months after January 8, 2016 (the date the NFA Letter was issued) to submit claims. In other words, all claims must have been submitted before October 8, 2016.
8. There is no question that Claim #61, submitted on November 2, 2016, was not timely under 328 IAC 1-3-1(c). However, EnviroSolutions explains that it waited to submit Claim #61 until it had received a decision on Claim #60 because 328 IAC 1-5-1(d) requires that “Claims, other than final claims, that had costs disallowed, if resubmitted, must be resubmitted with subsequent claims.”
9. Further, EnviroSolutions argues that had IDEM reviewed Claim #60 in a timely manner, as required by I.C. § 13-23-9-2, then Claim #61 would have been submitted on time. I.C. § 13-23-9-2(d) states that IDEM shall notify a claimant within sixty (60) days whether the claim has been approved or denied. However, the OEA has determined that the sixty day time frame is not mandatory for IDEM.⁴ EnviroSolutions has failed to show that IDEM should be estopped from denying Claim #61 because IDEM failed to review Claim #60 in 60 days.
10. EnviroSolutions argues that that these rules conflict and create confusion. However, this argument is not persuasive. Ms. Gallagher, on EnviroSolutions’ behalf, acknowledged that she understood the consequences of proceeding without counsel. 328 IAC 1-3-1(c) was promulgated in 2011. If EnviroSolutions wanted to conduct business in Indiana, it was obligated to become familiar with the applicable requirements. Further, the NFA letter explicitly informed EnviroSolutions that claims for ELTF reimbursement must be submitted within nine months of receiving NFA status, pursuant to 328 IAC 1-3-1(c). The NFA Letter provided a specific date by which they must submit the final claim.
11. The regulation (328 IAC 1-5-1(d)) that EnviroSolutions points to as explanation for their delay in submitting the final claim (#61) does not support their stand that IDEM’s regulations are inconsistent. This rule exempts final claims from the requirement for resubmissions. IDEM presented sufficient evidence that Claim #61 was the final claim.
12. There is no genuine issue as to any material fact. Summary judgment should be entered in IDEM’s favor.

⁴ *Circle K Mini Mart*, 2000 OEA 75; *GasAmerica #45*, 2008 OEA 83.

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ORDER

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED is entered in favor of the Indiana Department of Environmental Management.

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 2nd day of August, 2017 in Indianapolis, IN.

Hon. Catherine Gibbs
Environmental Law Judge