

**Objection to the Denial of
 Voluntary Remediation Application
 Permit No.: #6940801
 Dana Corporation**

1997 OEA 021, OEA CAUSE NO.: 94-S-J-1142

Official Short Cite Name:	Dana Corporation, 1994 OEA 021
OEA Cause No.:	94-S-J-1142
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Presiding ELJ:	Wayne E. Penrod
Party Representatives:	Kathleen P. Mills, Esq. for IDEM S. Curtis DeVoe, Esq. for Petitioner
Order Issued:	May 9, 1997
Index Category:	Solid waste / hazardous
Further Case Activity:	



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INDIANA OFFICE OF ENVIRONMENTAL ADJUDICATION

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Chief Administrative Law Judge

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STATE OF INDIANA)
)
COUNTY OF MARION)

BEFORE THE INDIANA OFFICE OF
ENVIRONMENTAL ADJUDICATION

IN THE MATTER OF:)
)
)

DENIAL OF VOLUNTARY REMEDIATION)
APPLICATION #6940801)
DANA CORPORATION)
WAYNE COUNTY, INDIANA)

CAUSE NO. 94-S-J-1142

FINAL ORDER GRANTING DANA'S MOTION FOR SUMMARY JUDGMENT

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This constitutes notice that on January 19, 1995, each party, the Indiana Department of Environmental Management (IDEM), by counsel, and the Dana Corporation (DANA), by counsel, filed a Motion for Summary Judgment. Thereafter, on March 27, 1995, the IDEM, by counsel, filed a Response to DANA's Motion for Summary Judgment, and DANA, by counsel, filed its Reply in Support of its Motion for Summary Judgment. On April 27, 1995, each party, by counsel, filed a Reply in Support of its Motion for Summary Judgment (DANA's being labeled "Final Brief").

The Chief Administrative Law Judge considered the Motions, the Responses, and the Replies and hereby finds the following:

Findings of Fact and Conclusions of Law:

1. The Office of Environmental Adjudication has jurisdiction over decisions of the Commissioner of the Indiana Department of Environmental Management (IDEM) and the parties to this controversy pursuant to Ind.Code §4-21.5-7.
2. This is a Final Order issued pursuant to Ind.Code §4-21.5-3-27. 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. Ind.Code §4-21.5-3-23(b) provides in pertinent part that "[t]he judgment [on a motion for summary judgment] shall be rendered immediately 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."
4. Dana, at its Richmond Perfect Circle Products Division Machining Plant (facility number IND 980503841), manufactures internal combustion engines and air compressor piston rings. On February 7, 1991, IDEM personnel conducted an inspection of Dana's facility.
5. On April 8, 1991, the Assistant Commissioner of the Office of Solid and Hazardous Waste Management of the IDEM, H. Martin Harmless, II, issued a Violation Letter to Mr. Gregory R. Dillman at that facility. In the Violation Letter (VL-10755), the Assistant Commissioner alleged more than ten (10) violations of 329 IAC 3, including the failure to make statutorily required inspections of a tank used to store chromic acid; a lack of a leak detection system for the concrete secondary containment vault of the tank; and a lack of impermeable interior coating or lining that would prevent the migration of waste into the concrete secondary containment vault.
6. On November 20, 1991, Roger Wilson, inspector for the OSHWM compliance section, conducted a follow-up inspection of Dana's facility where he observed that a greenish liquid had filled the bottom of the secondary containment unit which surrounded a hazardous waste storage tank, and that cracks were present in the inside and outside of the concrete walls of the containment unit. (Affidavit of Roger Wilson, Exhibit 2, the IDEM's Motion for Summary Judgment, filed January 19, 1995).
7. Thereafter, on September 23, 1993, the Director of the Office of Enforcement of the IDEM, Kathryn Watson, issued a Notice of Violation (NOV), Cause No. EH-10755) to Dana pursuant to IC 13-7-11-2 (now IC 13-30-3-3), which included a proposed Agreed Order. An enforcement action is initiated by a written notice of violation (NOV) issued under IC 13-7-11-2 (now IC 13-30-3) and pends until the IDEM files a motion to dismiss the action against the violator, the parties enter into an agreed order satisfactory to the commissioner pursuant to IC 13-7-11-2(f) (now IC 13-30-3-6), or a final order is issued, after dispositional motion or hearing, by

the ultimate authority pursuant to IC 13-7-11-2(f) (now IC 13-30-3-7) and IC 4-21.5.

8. Neither the April 8, 1991 Violation Letter nor the September 23, 1993 NOV and initial proposed agreed order mentioned chromium contaminated soil, and neither contained a requirement to remediate chromium contaminated soil. Further, in its statement of disputed issued filed with the OEA on January 19, 1995, the IDEM stated, "[a]nalysis of the cause of the chromium contamination is inconclusive." Lastly, no agreed order was ever executed with respect to enforcement action VL-10755 by the IDEM and Dana.

9. On August 17, 1994, Dana submitted to IDEM an application and then paid the requisite fee to participate in the Indiana Voluntary Remediation Program (VRP) under IC 13-7-8.9. The purpose of Dana's application was to allow the facility to investigate soil and groundwater and remediate chromium contamination near a chrome plating line used in Dana's production process.

10. The application stated that the source of the chromium contamination was believed to be from inside the machining plant in the area of a chrome plating line, and was not related to the above ground waste storage tank or any matters described in the IDEM enforcement action. In an August 18, 1994 letter from the IDEM's Office of Enforcement, Hazardous Waste Section Chief, Rosemary Cantwell, to Jerel Bieck, Dana, in which the IDEM agreed to allow Dana to submit additional information "necessary to determine whether the chromium contamination is attributable to the waste chromium tank area or the chrome plating line area." Dana submitted the requested information on September 22, 1994. In a letter dated September 12, 1994, counsel for Dana wrote to Lisa Smith of the IDEM Hazardous Waste Enforcement office to confirm a telephone conversation in which she agreed to "an extension of time to and including Friday September 23, 1994 within which Dana Corporation may respond to the request for additional information as set forth in Ms. Rosemary Cantwell's letter of August 18, 1994...." (Exhibit E, Dana's Motion for Summary Judgment filed January 19, 1995).

11. By letter September 21, 1994, the day before the IDEM received the requested information from Dana, the Assistant Commissioner for the Office of Environmental Response, Greta Hawvermale, notified Dana that the IDEM was rejecting the VRP application pursuant to IC 13-7-8.9-10(a)(1) (now IC 13-25-5-5(a)(1)), which states "the department may reject an application submitted under [this program] only for one (1) or more of the following reasons...(1)[a] state or federal enforcement action that concerns the remediation of the hazardous substance or petroleum described in the application is pending." The Notice of Rejection letter stated, "IDEM cannot deem eligible a cleanup which is integrally involved with contamination discovered during enforcement."

12. On October 11, 1994, Dana timely filed its Petition for Administrative Review of the IDEM's decision to reject Dana's application for voluntary remediation.

13. The IDEM has the burden of demonstrating a prima facie case in support of its rejection

of the VRP application. IC 4-21.5-3-14(c). *See also, Peabody Coal Co. v. Ralston*, 578 N.E.2d 715, 753 (Ind.App. 1991). The IDEM failed to demonstrate that it ever provided Dana with written notice of the chromium contaminated soil allegation, which was the basis the IDEM used to deny Dana's application under the VRP. IC 13-7-11-2 (now IC 13-30-3). *See also*, number 8 *supra*.

14. The IDEM's rejection of Dana's application without the benefit of information that the agency itself deemed necessary to determine eligibility of the application is arbitrary. *See County DPW v. Deaconess Hospital*, 588 N.E.2d 1322, 1327 (Ind.App. 1992) (agency's action was arbitrary when it failed to consider a letter containing facts essential to the issue because it was made in disregard of the facts and circumstances of the case without some basis which would lead a reasonable person to the same conclusion).

Final Order

Dana's Motion for Summary Judgment is hereby GRANTED. The IDEM's Motion for Summary Judgment and April 27, 1995, Request to Further Respond to Petitioner's Motion for Summary Judgment is hereby DENIED. The September 21, 1994, Rejection of Dana's Remediation Application #6940801 is hereby OVERRULED and this cause is REMANDED to the IDEM for further action consistent with this Order. The OEA is without authority at this juncture in the administrative process to grant Dana participation in the VRP; the IDEM must first consider the supplemental information submitted by Dana on September 22, 1994 before a determination may be made as to Dana's eligibility to participate in the VRP.

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.

Dated this 9th day of May, 1997.

Wayne E Penrod
Chief Administrative Law Judge

cc: Bruce Palin, Acting, Assistant Commissioner
Office of Solid and Hazardous Waste Management