Objections to the Withdrawal of Approval of the Baseline Risk Assessment for Shelly Ditch and to the Disapproval of the Technical Memorandum for Removal Activities
Raybestos Products Company
2000 OEA 43 (98-S-J-2169)

TOPICS:
summary judgment
dismissal
risk assessment
technical memorandum
authority
agreed order
dispute resolution
waive
administrative review
judicial review
removal
hazardous substances
contract
stipulation

PRESIDING JUDGES:
Penrod, Lasley

PARTY REPRESENTATIVES:
Petitioner: Sue Shadley, Esq.; Leonardo Robinson, Esq.;
Jeffrey A. Townsend, Esq.; Carol S. Comer, Esq.
Plews Shadley Racher & Braun
IDEM: Catherine Gibbs, Esq.

ORDER ISSUED:
September 15, 2000

INDEX CATEGORY:
Land

FURTHER CASE ACTIVITY:
Judicial review, appellate review

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

IN THE MATTER OF:	)	
	)	
OBJECTIONS TO THE WITHDRAWAL	)	
OF APPROVAL OF THE BASELINE	)	
RISK ASSESSMENT FOR SHELLY	)	
DITCH AND TO THE DISAPPROVAL OF	)	CAUSE NO. 98-S-J- 2169
THE TECHNICAL MEMORANDUM FOR	)	
REMOVAL ACTIVITIES	)	
RAYBESTOS PRODUCTS COMPANY	)	

FINAL ORDER MODIFYING RECOMMENDED ORDER

This constitutes notice that on June 27, 2000, the Administrative Law Judge issued a Recommended Order in the above-captioned matter. On July 14, 2000, the Petitioner, by counsel, filed an appeal of the Recommended Order. The Chief Administrative Law Judge, acting as the ultimate authority for final decisions by the Indiana Department of Environmental Management, and having reviewed the record of these proceedings, hereby **MODIFIES** the Recommended Order as follows:

(1) The Recommended Order makes separately stated findings of fact to support the conclusion that Petitioner is not entitled to administrative review of the Agreed Order.

(2) While not explicitly stating that Petitioner sought administrative review of the Agreed Order and its terms, the Administrative Law Judge appropriately referenced the Agreed Order to determine the intent of the parties regarding the issues raised in the Petition for Administrative Review. Recommended Order page 2. Additionally, the Petition for Administrative Review time and again references the Agreed Order as a basis for Petitioner's appeal of IDEM's decision to withdraw approval of the Baseline Risk Assessment and the disapproval of the Technical Memorandum. Petition for Administrative Review pages 1, 3 (paragraph 3) and 4 (Reason No. 4 and Reason No. 7).

(3) Petitioner's own pleadings indicate a concurrence with the Administrative Law Judge's assessment that this tribunal cannot change the terms of the Agreed Order now. *See* "Memorandum In Opposition To IDEM's Motion For Partial Summary Judgment page 6 ("The Agreed Order does not authorize the agency to 'withdraw' approval of the Baseline Risk Assessment. . . Nor can this Court change the Agreed Order to permit such action." And, "IDEM's motion for partial summary judgment which seeks to have this court rewrite the Agreed Order and insert terms and rights that are not there, and gut the requirements of a clean-up based on site specific risk that is there, must be denied.") Moreover, the Agreed Order in Section XXV, paragraph 79 allows the parties to amend

the Agreed Order. If the parties agree that paragraph 2 of Section 2 has no effect, then they are free to amend the Agreed Order to state just that. This tribunal, however, will not inject ambiguity where there is none.

(4) In any event, even if Petitioner were entitled to administrative review it has not demonstrated that IDEM had no authority to withdraw the Baseline Risk Assessment or disapprove of the Technical Memorandum. Both actions by the agency were procedurally lawful and within the sound discretion of the agency. *See* Agreed Order Section IX, paragraph 32 and 33.

(5) On the other hand, IDEM must technically justify the withdrawal of approval for the Baseline Risk Assessment pursuant to the Notice of Dispute contained in the Dispute Resolution provisions of the Agreed Order, Section XVIII. Additionally, it must afford Petitioner an opportunity to resolve the dispute prior to any evidentiary hearing.

(6) Given the above legal conclusions, the Chief Administrative Law Judge hereby certifies the above questions for Judicial Review. The evidentiary hearing on IDEM's justification for its withdraw of approval for the Baseline Risk Assessment and the disapproval of the Technical Memorandum is hereby held in abeyance until the trial court has had an opportunity to decide whether (1) Petitioner is entitled to administrative review and (2) whether IDEM's withdrawal of approval and disapproval was procedurally lawful. If determined necessary by the trial court, an evidentiary hearing will be held.

The Recommended Order is hereby **MODIFIED** as set out above and incorporated by reference herein.

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 September, 2000.

Wayne Penrod
Chief Administrative Law Judge

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RECOMMENDED ORDER VACATING DENIAL OF CROSS MOTIONS FOR SUMMARY JUDGMENT AND ORDER RECOMMENDING DISMISSAL OF PETITION FOR ADMINISTRATIVE REVIEW

This constitutes notice that on April 25, 2000 a prehearing conference in the above-captioned matter was held. During the prehearing conference, Petitioner made representations about IDEM's understanding that it would approve or deny the Baseline Risk Assessment (BRA). Based on those statements, the Administrative Law Judge requested briefs regarding that issue and others. Upon further consideration, the Administrative Law Judge hereby finds the following:

1. The Petitioner is not entitled to administrative review of the Agreed Order and its terms. Paragraph 2 of the Agreed Order specifically states:

> The Respondent agrees to undertake the actions required by the terms and conditions of this Order and to waive its right to administrative review of this Order and agrees not to contest the jurisdiction of IDEM to enter into in this Order. However, the Respondent reserves all rights they may have under common law, the Indiana Code and federal statutes to seek contribution or indemnity from others not signatories to this Order.

While the parties stipulate that this paragraph has no effect on these proceedings, it is clear that nothing could be further from the truth. Indiana Code §4-2 1.5-2-2 states that: "Except to the extent precluded by a law, a person may waive any right conferred upon that person by this article." Here, Petitioner has intentionally, expressly and unambiguously waived its right to administrative review. This includes not only review of the BRA, which was a non-final agency action, but also of the Technical Memorandum. And, the Agreed Order is replete with examples of Petitioner's intentional relinquishment of the right to administrative and judicial review. *See* Agreed Order, paragraph 58, page 11 ("Should Respondent's failure to comply with IDEM's decision result in IDEM's initiation of administrative or judicial action . . ."); Agreed Order, paragraph 61, page 11 ("In any administrative or judicial proceeding initiated by IDEM concerning this Order . . ."); and Agreed Order, paragraph 69, page 13 ("IDEM and Respondent reserve all rights and defenses they may have pursuant to any available legal authority unless expressly waived herein"). Nowhere in the Agreed Order is there the slightest mention of Petitioner filing for administrative or judicial review. It is of little consequence that Petitioner reserves its rights under the Administrative Orders and Procedures Act in paragraph 58 because it only reserved those rights subject to IDEM filing an action for administrative or judicial review. *See* Petitioner's Memorandum of Law on Waiver, page 2 (Petitioner agrees that its reservation is subject to IDEM seeking review, but then erroneously concludes that it did not waive its rights in any other situation, which directly contradicts paragraphs 2, 58, 61 and 69). Thus, the parties' agreement does not contemplate Petitioner filing for review.

2. Generally, construction of settlement agreements are governed by contract law. Indiana State Highway Commission v. Curtis, 704 N.E.2d 1015, 1018 (Ind. 1998). Therefore, this tribunal must interpret the Agreed Order "so as to ascertain the intent of the parties." First Federal Savings Bank of Indiana v. Key Markets, Inc., 559 N.E2d 600, 603 (Ind. 1990). In addition, much like statutory construction principles, the provisions of the Agreed Order should be interpreted in a way that "harmonizes its provisions as opposed to one which causes the provisions to be conflicting." *Id.* If a court finds that the contract's provisions are clear and unambiguous, then "the court will require the parties to perform consistently with the bargain they made." *Id.* at 604. In this case, the Agreed Order is unambiguous. And, the parties overall intentions are clear: (1) Petitioner is to conduct a removal of hazardous substances from the environment under IDEM's supervision and (2) Any disputes are to be resolved informally or IDEM may undertake the removal action and seek cost recovery or IDEM may seek administrative or judicial review. Nothing in the Agreed Order points to Petitioner seeking administrative or judicial review of the Agreed Order's terms.

3. Further, even though the parties attempt to change the contract terms by stipulating that paragraph 2 has no effect, such stipulation must fail for one important reason. This tribunal has no equitable powers to reform the Agreed Order to conform with the parties' stipulation. Thus, the Administrative Law Judge cannot make a new contract for the parties or add new terms to it. Ballew v. Town of Clarksville, 683 NE.2d 636, 640 (Ind.Ct.App. 1997) ("the court cannot rewrite and then enforce contracts which, to the knowledge of the court, the parties themselves did not enter into." (quoting Puetz v. Cozmas, 147 N.E.2d 227, 231 (md. 1958))). Consequently, the parties' stipulation is meaningless and the exact terms of the Agreed Order will be enforced.

4. Finally , when the terms of a contract are clear and unambiguous, a person is presumed to understand and assent to the terms of the contract. Lake County Trust Co. v. Wine, 704 N.E.2d 1035, 1040 (Ind.Ct.App. 1998). The Petitioner in this case was free to reject or accept the terms presented in the Agreed Order. It accepted them. As a result, it cannot argue now for different terms. The Agreed Order is clear on its face, despite any later misgivings by the parties. It is proper for this tribunal to enforce the Agreed Order as written. *See* First Federal Savings Bank of Indiana, 559 N.E.2d at 604 ("the proper posture for the court is to find and enforce the contract as it is written and leave the parties where it finds them.").

5. Based on the foregoing analysis, the findings and order denying the Motions for Partial Summary Judgment are hereby **VACATED**. By dismissing the Petition for Administrative Review, Petitioner may now attempt to seek judicial review and, therefore, Petitioner's Motion for Interlocutory Appeal is moot. In addition, no further pleadings in reply to the April 25, 2000 order are necessary.

Recommended Order:

The Administrative Law Judge, *sua sponte*, recommends that the Petition for Administrative Review be **DISMISSED** pursuant to the terms of the Agreed Order.

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 27th day of June 2000.

Linda C. Lasley
Administrative Law Judge