

**Objection to the Denial of Excess Liability Fund, Claim No. 8910516, B&R Oil Company
2002 OEA 13 (00-F-J-2499)**

TOPICS:

underground storage tanks
Excess Liability Fund
summary judgment
petroleum contamination
failure to pay tank fees
waiver

PRESIDING JUDGE:

Penrod

PARTY REPRESENTATIVES:

Petitioner: Michael Stepanek
IDEM: Robert B. Kenne

ORDER ISSUED:

July 2, 2002

INDEX CATEGORY:

Land

FURTHER CASE ACTIVITY:

[none]

**Objection to the Denial of Excess Liability Fund, Claim No. 8910516, B&R Oil Company
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STATE OF INDIANA)	BEFORE THE INDIANA OFFICE OF
)	ENVIRONMENTAL ADJUDICATION
COUNTY OF MARION)	
IN THE MATTER OF:)	
)	
OBJECTION TO THE DENIAL OF EXCESS)	
LIABILITY FUND CLAIM NO. 8910516)	CAUSE NO. 00-F-J-2499
B & R OIL COMPANY)	

ORDER GRANTING IDEM’S MOTION FOR SUMMARY JUDGMENT

This constitutes notice that on November 8, 2001, the Indiana Department of Environmental Management (IDEM) filed a Motion and Brief in Support of Summary Judgment. Thereafter, On December 7, 2001, Objector, B & R Oil, Company, Inc. (B&R) filed a Response to IDEM’s Motion for Summary Judgment along with B & R’s Motion for Summary Judgment. On January 7, 2002 IDEM filed a Reply to B & R’s Response to IDEM’s Motion for Summary Judgment and a Brief in Opposition to B&R’s Motion for Summary Judgment. Finally, On January 23, 2002, B & R filed a Response to IDEM’s Reply to B & R’s Response. The Environmental Law Judge considered the Motions and the Responses and hereby finds:

FINDINGS OF FACT

1. The Petitioner in this matter is B & R Oil Company, Inc. (B & R), owner of a gasoline station located at 110 Dixieway, South Bend Indiana, (the Site).
2. On or about May 6, 1986, B & R purchased the gasoline station at 110 Dixieway, South Bend, Indiana, and utilized three (3) existing underground storage tanks (USTs) from May 14, 1986 to June 20, 1986.
3. B & R did not register the USTs¹ ,or pay any tank fees² on the tanks at the Site subsequent to purchase.
4. On July 15, 1986, B & R had four (4) underground storage tanks removed from the Site.
5. On May 22, 1989, counsel for B & R notified the Indiana Department of Environmental Management (IDEM) of petroleum contamination of the Site.

¹ Pursuant to 42 U.S.C. § 6991(a), within 18 months after November 8, 1984, each owner of an underground storage tank shall notify the State or local agency or department designated pursuant to subsection (b)(1) of this section of the existence of such tank, specifying the age, size, type, location, and uses of such tank.

² Indiana’s Underground Petroleum Tank Excess Liability Fund, Ind. Code Ann. § 1307020-31, was established by the Indiana Legislature in 1988 in order to allow owners and operators of petroleum USTs to establish evidence of financial responsibility for corrective action and third party liability as required by RCRA § 9003(c)(6). All UST owners in the state pay into the ELF through required annual tank registration fees. In re: B&R Oil Company, Inc. 1998 EPA App. Lexis 106. footnote 5, [*15].

**Objection to the Denial of Excess Liability Fund, Claim No. 8910516, B&R Oil Company
2002 OEA 13 (00-F-J-2499)**

6. On January 31, 1993 B & R filed its application for reimbursement from the Indiana Excess Liability Fund (ELF) for costs incurred at the Site for investigation and remediation of the petroleum contamination.
7. On August 6, 1993, IDEM issued a Notice of Violation to B & R.
8. On December 14, 1994 IDEM issued a Notice and Order of the Commissioner to B&R that ordered B & R, among other things, to complete Site investigation, submit a corrective action plan (CAP) and pay costs and penalties.
9. IDEM denied Petitioner's ELF claim on April 5, 2000 for the following reasons:
"The underground storage tanks were closed in 1986. Therefore, the release should have been discovered at the time. Corrective Action costs and third party liability claims arising from releases reported or discovered before April 1, 1988, are not eligible for payment from the fund. (328 IAC 1-3-1 (b))."
 1. "No tank fees have been paid on the tanks from which the release occurred".
 2. "Not in substantial compliance with the requirements of IC 13-23 and the rules adopted there under, 329 IAC 9, (as evidenced by the Commissioner's Order issued in 1994)".
 3. "This site does not have an approved Initial Site Characterization (ISC) or Corrective Action Plan (CAP) as required b(y) sic Indiana Code 13-23-8-4 (formerly IC 13-7-20-33(d) (6))."
10. On April 17, 2000, Petitioner filed the instant appeal of the denial of the ELF claim.

CONCLUSIONS OF LAW

1. The Indiana Office of Environmental Adjudication has jurisdiction over decisions of the Excess Liability Fund Administrator pursuant to S.E.A. 156 (P.L. 41-1995 amending Ind. Code 4-21.5-7).
2. The Indiana Excess Liability Fund was enacted by P.L. 69-1988 § 20 and took effect on April 1, 1988.
3. Eligibility requirements for access to funds from the ELF are to be governed by rules adopted under I.C. 4-22-2 and I.C. 13-7-7 per P.L. 69-1988 §22.
4. The eligibility requirements were amended in 1991 pursuant to Indiana P.L. 129-1991 § 22 (uncodified):

SECTION 22. (a) Notwithstanding IC 13-7-20, an owner or operator of an underground petroleum storage tank who reported to the department of environmental management a **release from the underground petroleum storage tank that occurred:**

- (1) **after March 31, 1988, and before July 1, 1990** (*emphasis added by author*), may receive money from the underground petroleum storage tank excess liability fund by meeting the requirements to receive money from the fund under IC 13-7-20 that were in effect June 30, 1990; and

**Objection to the Denial of Excess Liability Fund, Claim No. 8910516, B&R Oil Company
2002 OEA 13 (00-F-J-2499)**

- (2) after June 30, 1990, and before May 9, 1991, may receive money from the underground petroleum storage tank excess liability fund by meeting the requirements to receive money from the fund IC 13-7-20 that were in effect May 8, 1991.
5. B & R admits that the tanks located on 110 Dixieway, South Bend were removed from the Site in July of 1986 and since the release of petroleum must have occurred at that time or prior to the tank removal, the releases that occurred before March 31, 1988 are ineligible for ELF.
 6. The Indiana Supreme Court and the Court of Appeals have consistently held that a statute is presumed to operate prospectively only, unless the statute explicitly states otherwise or unless the legislature's intention to have the statute apply retroactively is unambiguously shown by necessary implication. *The Pantry, Inc. v. Stop-N-Go Foods, Inc.*, 777 F. Supp. 713, (1991 U.S. Dist. LEXIS 15271).
 7. The language of P.L. 129-1991 §22 indicates that petroleum releases that occurred prior March 31, 1988 are to be excluded from eligibility for ELF.

ARGUMENTS

IDEM argues in its Motion for Summary Judgment that B & R is ineligible for the ELF for the reasons that B & R failed to register the tanks at their time of purchase in 1986, or pay into the tank fund. Further IDEM argues that eligibility for access to the ELF does not operate retroactively, and claims for releases that occurred prior to April 1, 1988 are ineligible.

B & R has argued in its Cross Motion that no tank fees were required in 1986, when the tanks were removed, and so the company was in substantial compliance with the regulations in 1989, at the time of the discovery of the release, and thus qualifies for ELF. Further, B & R claims that IDEM has waived any arguments for "failure to pay tank fees" and cites *Indiana Department of Environmental Management v. Adapto, Inc.*, 717 N.E.2d 646, (Ind. App. 1999) to support its position. This Court cannot agree that *Adapto (supra)* supports waiver in this case; *Adapto* supports the proposition that where the parties have stipulated to an agreement, the parties are bound by the limitations of the agreement, and have waived the litigation of issues covered by that agreement. In the instant case, the parties have not stipulated to any agreement; thus the parties are not precluded from litigation of "failure to pay tank fees" issues. Finally, B & R claims that the legislature did not intend that the ELF not apply retroactively. This Court disagrees. The language of P.L. 129-1991 §22 indicates that ELF is unavailable for releases that occurred prior March 31, 1988.

**Objection to the Denial of Excess Liability Fund, Claim No. 8910516, B&R Oil Company
2002 OEA 13 (00-F-J-2499)**

FINAL ORDER

It is therefore found that no material facts at issue exist and that the Petitioner, B&R Oil Company, Inc. is ineligible to collect from the Excess Liability Fund because the release of petroleum occurred prior to the effective date of the statute creating the fund and therefore does not meet the eligibility requirements of P. L. 129-1991 § 22 (uncodified). The Petition for Review is hereby DENIED and the fund administrator's denial is hereby AFFIRMED.

You are further notified that pursuant to the provisions of S.E.A. 156 (P.L.41-1995 amending I.C. 4-21.5-7) that became effective on July 1, 1995, the Office of Environmental Adjudication serves as the Ultimate Authority in administrative reviews of decisions of the Fund Administrator of the Indiana Department of Environmental Management. This is a Final Order subject to Judicial Review consistent with the applicable provisions of I.C. 4-12.5. 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.

Dated this 2nd day of July, 2002

Wayne E. Penrod
Chief Administrative Law Judge