Objection to the Denial of Excess Liability Trust Fund Claim No. 200011504/FID #10539
GasAmerica #40
2002 OEA 21 (01-F-J-2806)

TOPICS:
proposed corrective action
Excess Liability Fund ("ELF")
corrective action plan
addendum
dual phase extraction system
Monitored Natural Attenuation (MNA)
non-rule policy document
IC 13-14-1-11.5
CAP Review
summary judgment
reimbursement
arbitrary and capricious

PRESIDING JUDGE:
Penrod

PARTY REPRESENTATIVES:
Petitioner: Catherine Gibbs
IDEM: Robert B. Keene

ORDER ISSUED:
October 21, 2002

INDEX CATEGORY:
Land

FURTHER CASE ACTIVITY:
[none]

STATE OF INDIANA	)	BEFORE THE INDIANA OFFICE OF
	)	
COUNTY OF MARION	)	ENVIRONMENTAL ADJUDICATION
IN THE MATTER OF:	)	
	)	
OBJECTION TO THE DENIAL OF	)	
EXCESS LIABILITY TRUST FUND	)	CAUSE NO. 01-F-J-2806
CLAIM NO. 20001 1504/FID #10539	)	
GASAMERICA#40	)	

FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL ORDER

Findings of Fact

1. The Petitioner, GasAmerica Services, Inc., owns and operates the underground storage tanks at GasAmerica #40 located at the intersection of U.S. Highway 31 and S.R. 26 in Kokomo, Indiana.

2. On November 13, 2000, a release from an underground petroleum storage tank at this facility was reported to IDEM.

3. An Initial Site Characterization was performed. IDEM approved the Initial Site Characterization Report on April 20, 2001.

4. On or about August 21, 2001, the Petitioner submitted a proposed Corrective Action Plan (CAP) to the Indiana Department of Environmental Management (IDEM).

5. The Petitioner proposed using a limited dual phase extraction system to clean up the facility (the "proposed corrective action"). The dual phase extraction system would remove the majority of the contamination by extracting vapors from the soil and contamination from the ground water. The system would only operate for a relatively short period of time and then natural attenuation would finish the remedial process.

6. On September 26, 2001, IDEM sent an order to Petitioner entitled "CAP Review" in which IDEM refused to approve the proposed corrective action and instead ordered Petitioner to submit a Corrective Action Plan Addendum requiring the use of Monitored Natural Attenuation (MNA). IDEM admits that cost is the only factor it considered in determining that MNA was the appropriate corrective action.

7. Petitioner received the order on October 4, 2001.

8. Petitioner filed its Petition for Review on October 18, 2001.

9. IDEM used a draft non-rule policy document that did not meet the requirements of IC 13-14-1-11.5 to make the determination that MNA was an appropriate corrective action.

10. On June 7, 2002, IDEM formally withdrew that portion of its order requiring Petitioner to implement monitored natural attenuation (MNA) at this facility. IDEM has ordered Petitioner to implement a different corrective action consisting of the use of a mobile vacuum extraction remediation system on a weekly basis for four (4) months.

11. On January 14, 2002, IDEM was served with Requests for Admissions. To date, IDEM has not responded to these Requests for Admissions.

12. On April 5, 2002, the Petitioner filed its Motion for Order Deeming Requests for Admissions Admitted.

13. On April 12, 2002, the Petitioner and IDEM filed Motions for Summary Judgment.

14. On June 7, 2002, the Petitioner filed a Response to IDEM's Motion for Summary Judgment.

15. On June 7, 2002, IDEM filed a Response to Petitioner's Motion for Summary Judgment and withdrew its Motion for Summary Judgment.

16. On June 25, 2002, Petitioner filed its Motion to Strike Affidavit.

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. The Chief Administrative Law Judge has authority to review the Indiana Underground Storage Tank Excess Liability Trust Fund (ELTF) Administrator's decision pursuant to IC §4-21.5-7 and IC § 13-23-9-4.

2. This is a Final Order issued pursuant to Ind. Code §4-21.5-3-27.

3. Ind. Code §4-21.5-3-23(b) provides in pertinent part that "[tjhe 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. Pursuant to Ind. Trial Rule 36, IDEM has failed to respond to Petitioner's Requests for Admissions and therefore said Requests are deemed admitted.

5. Summary judgment is appropriate if the designated evidence shows that there is no genuine issue of material fact and that a party is entitled to judgment as a matter of law. Ind. Trial Rule 56(C); Wade v. Norfolk and Western Railway Company, 694 N.E.2d 298, 301 (Ind. App. 1998).

6. IC 13-23-8-4(a)(5) states that an owner or operator may receive reimbursement when:
A corrective action plan is approved by the commissioner or deemed approved under this subdivision. The corrective action plan for sites with a release from an underground petroleum storage tank that impacts soil or groundwater, or both is automatically deemed approved only as long as:

   (A) the owner or operator, or an agent of the owner or operator, conforms with:
      (i) the department's initial site investigation report guidelines, including an investigation that completely defines the horizontal and vertical extent of any soil and groundwater contamination.
      (ii) the department's cleanup guidelines set forth in the Underground Storage Tank Branch Guidance Manual, including the department's risk-based corrective action plan standards when the standards become effective; and
   (B) the soil and groundwater contamination is confined to the owner's or operator's property.

   If the corrective action plan fails to satisfy any of the requirements of clause (A) or (B), the plan is automatically deemed disapproved. If a plan is disapproved, an owner or operator may supplement the corrective action plan. The corrective action plan is automatically deemed approved when the cause for the disapproval is corrected. For purposes of this subdivision, in the event of a conflict between compliance with an owner's or operator's corrective action plan and the department's cleanup guidelines or standards in clause (A), the department's cleanup guidelines or standards control. The department may audit any corrective action plan. If the commissioner denies the plan, a detailed explanation of all the deficiencies of the plan must be provided with the denial.

7. 329 IAC 9-5-7(b) states:
   (b) The commissioner will approve the corrective action only after ensuring that implementation of the plan will adequately protect human health, safety, and the environment. In making this determination, the commissioner shall consider the following factors, as appropriate:
      (1) The physical and chemical characteristics of the regulated substance, including its toxicity, persistence, and potential for migration.
      (2) The hydrogeologic characteristics of the facility and the surrounding area.
      (3) The proximity, quality, and current and future uses of nearby surface water and ground water.
      (4) The potential effects of residual contamination on nearby surface water and ground water.
      (5) An exposure assessment.
      (6) Any information assembled in compliance with this rule.
      (7) The suitability of the chosen remediation method for site conditions.

8. When a court, as in this case, has not previously considered a statute's meaning, the interpretation is controlled by the statute's express language. Chavis v. Patton, 683 N.E.2d 253, 257 (Ind.Ct.App. 1997). It is a well-established rule of statutory construction that a court may not read into a statute that which is not the expressed intent of the legislature. State v. Derossett, 714 N.E.2d 205 (Ind.Ct.App. 1999). Another rule of statutory construction is that statutes must be read in pari materia to "produce a harmonious statutory scheme." State v. Eilers, 697 N.E.2d 969 at 970 (Ind.App. 1998). Another relevant rule of statutory construction is that a court may look to the pertinent regulations to help it interpret statutory language. Sullivan v. Day, 661 N.E.2d 848 (Ind.App. 1996).

9. The statute and rule cited above does not authorize IDEM to supersede an owner or operator's decision regarding the appropriate corrective action if the owner or operator has selected a corrective action for the facility, which meets the criteria published in IDEM's rules and guidance.

10. In addition, as the statute and rule do not specifically cite cost considerations as a factor in determining whether a corrective action is appropriate, IDEM has exceeded its authority by basing its decision regarding the corrective action on cost.

11. IDEM's decision is arbitrary and capricious in that its decision is based solely on a cost comparison, which cannot be considered as a factor in this decision.

12. IDEM cannot require the use of a non-rule policy document that has not been published pursuant to IC 13-14-1-11.5.

13. A decision by an administrative agency "will be found to be arbitrary and capricious 'only where it is willful and unreasonable, without consideration and in disregard of the facts or circumstances in the case or without some basis which would lead a reasonable and honest person to the same conclusion." Stansberry v. Howard, 758 N.E.2d 540, 543 (Ind.Ct.App. 2001) quoting Indiana High School Athletic Ass'n v. Martin, 731 N.E.2d 1, 6 (Ind.Ct.App. 2000), *trans. denied* (quoting Dep't. of Natural Resources v. Indiana Coal Council, Inc., 542 N.E.2d 1000, 1007 (Ind. 1989), *cert. denied*, 493 U.S. 1078, 110 S.Ct. 1130, 107 L.Ed.2d 1036 (1990)). "In order to avoid judicial reversal of its action as arbitrary and capricious, an agency must engage in 'reasoned decisionmaking,' defined to include an explanation of how the agency proceeded from its findings to the action it has taken." Stansberry v. Howard, 758 N.E.2d 540, 543 (Ind.Ct.App. 2001) quoting KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 11.4 (3rd ed. 1994). "An agency's duty of explanation reflects the fact that the agency is exercising delegated adjudicative powers in a quasi-judicial capacity." Stansberry v. Howard, 758 N.E.2d 540, 543 (Ind.Ct.App. 2001) quoting Hubbard v. State, 683 N.E.2d 618, 621 n. 2 (Ind.Ct.App. 1997). "The only limitation on the legislature's delegation of authority to administrative bodies is that sufficient standards must be established to guide the agency in the exercise of this power." Stansberry v. Howard, 758 N.E.2d 540, 543 (Ind.Ct.App. 2001)

14. IDEM is arbitrary and capricious in that it has failed to engage in "reasoned decisionmaking" by overreaching its own statutes, rules, and policies.

Final Order

It is therefore ORDERED:

Petitioner's Motion for Summary Judgment is hereby GRANTED, and IDEM is hereby ORDERED to approve the Corrective Action Plan submitted by Petitioner to IDEM on August 21, 2001.

You are hereby further notified that pursuant to provisions of 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 21st day of October, 2002.

Wayne E. Penrod
Chief Administrative Law Judge