

**Request For Review Speedway Superamerica LLC, Speedway Station #6672,
ELF #200105505/FAC ID 15832, Hobart, Lake County, Indiana.
2006 OEA 40 (05-F-J-3564 including consolidation with 05-F-J-3501 and 04-F-J-3383)**

OFFICIAL SHORT CITATION NAME: When referring to 2006 OEA 40, cite this case as
Speedway #6672 ELTF, 2006 OEA 40.

TOPICS:

ELTF, Excess Liability Trust Fund
USTs, underground storage tanks
substantial compliance
summary judgment
spill reporting
affirmative steps
327 IAC 2-6.1
328 IAC 1-3-3(a)(2)
328 IAC 1-1-9

PRESIDING JUDGE:

Gibbs

PARTY REPRESENTATIVES:

Petitioner: Richard Paulen, Esq.; Sean Griggs, Esq.; David Gillay, Esq.: Barnes & Thornburg
IDEM: Robert Keene, Esq.

ORDER ISSUED:

March 15, 2006

INDEX CATEGORY:

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FURTHER CASE ACTIVITY:

IDEM requested judicial review

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STATE OF INDIANA)
)
COUNTY OF MARION)

BEFORE THE INDIANA OFFICE OF
ENVIRONMENTAL ADJUDICATION

IN THE MATTER OF:)
)
REQUEST FOR REVIEW)
SPEEDWAY SUPERAMERICA LLC) CAUSE NO. 05-F-J-3564
SPEEDWAY STATION #6672) including consolidation with
ELF #200105505/FAC ID 15832) CAUSE NOS. 05-F-J-3501 and 04-F-J-3383
HOBART, LAKE COUNTY, INDIANA)

**ORDER GRANTING PETITIONER'S
MOTION FOR SUMMARY JUDGMENT**

This matter having come before the Court on the Motion for Summary Judgment filed by the Petitioner, Speedway SuperAmerica LLC (“SSA”), which pleading is a part of the Court’s record; and the Environmental Law Judge (“ELJ”), having read and considered the petitions, motions, evidence, and the briefs and responses of the parties, finds that judgment may be made upon the record and makes the following findings of fact and conclusions of law and enters the following Order:

Findings of Fact

1. On three separate occasions, the Administrator of the Excess Liability Trust Fund (the “ELTF”) denied SSA’s claims for reimbursement of monies in connection with various remedial activities at SSA Station #6672, located in Hobart, Lake County, Indiana (the “Site”).
2. On March 27, 2001, SSA’s consultant collected subsurface samples from the Site.
3. The analytical data in connection with this sampling revealed elevated levels of petroleum-related constituents.
4. On May 8, 2001, SSA notified IDEM of a release.
5. On May 11, 2001, IDEM assigned LUST Incident #200105505 to this Site.
6. For the sole purpose of SSA’s Motion for Summary Judgment, SSA stipulates that it did not report a release within 24 hours and thus did not comply with the applicable spill reporting rule.
7. On May 26, 2004, SSA submitted a request for ELTF eligibility determination to the Administrator.

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8. In letter dated June 28, 2004, the Administrator denied SSA's claim on the following basis:

In accordance with 329 IAC 9-4 and 327 IAC 2-6.1, communicate a spill report to IDEM: The applicant is not in substantial compliance with this requirement. Though evidence of contamination was found earlier (samples collected on March 27, 2001), the release was not reported to IDEM until May 11, 2001.

9. SSA submitted two subsequent claims for ELTF reimbursement in connection with the Site.
10. The Administrator denied these claims on the same basis set forth in the June 2004 letter.
11. SSA was, at the time of each determination, in compliance with all other applicable regulations under Title 329 of the Indiana Administrative Code.
12. SSA filed timely petitions requesting administrative review and an adjudicatory hearing for each of these denials.
13. On the Petitioner's motion and with IDEM's consent, the ELJ consolidated the separate appeals into this proceeding.
14. The total amount of money denied SSA is \$95,849.64.
15. SSA filed a Motion for Summary Judgment on October 26, 2005. The IDEM filed a response on December 2, 2005 and SSA filed its reply on December 19, 2005.

Conclusions of Law

1. 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 IC 4-21.5-7-3.
2. Contrary to the IDEM's assertion that the ELJ must give deference to the IDEM's interpretation of regulations, it is clear from the case law that this office must apply a *de novo* standard of review to this proceeding when determining the facts and law 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 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).

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3. This was held to be directly applicable to the Office of Environmental Adjudication in *Indiana-Kentucky Electric v. Commissioner, Indiana Department of Environmental Management*, 820 N.E.2d 771, 781 (Ind.App. 2005). In this case, the ELJ specifically concluded that she must give deference to the agency's interpretation. The Appellate Court reversed OEA's decision because the ELJ used the wrong standard of review. The Court stated that the ELJ mistakenly applied the appellate standard of review rather than a *de novo* standard of review. at 781. The OEA must apply a *de novo* standard of review when making conclusions of law.
4. The OEA may enter judgment for a party if it finds that "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 judgment as a matter of law." IC 4-21.5-3-23. 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). As the non-movant, all facts and inferences should be construed in the IDEM's favor.
5. The IDEM has not presented any evidence in opposition to the affidavit offered by the Petitioner in support of its Motion for Summary Judgment. However, "[s]ummary judgment may not be granted as a matter of course because the opposing party fails to offer opposing affidavits or evidence, but the administrative law judge shall make a determination from the affidavits and testimony offered upon the matters placed in issue by the pleadings or by the evidence." IC 4-21.5-3-23(b). If the opposing party does not respond to the motion for summary judgment, the ALJ *may* enter summary judgment against that party. IC 4-21.5-3-23(f).
6. The statute in question in this matter is IC 13-23-8-4. In March of 2001, the pertinent portion of this law stated:
 - (a) Except as provided under subsection (b), and subject to section 4.5 of this chapter, an owner or operator may receive money from the excess liability trust fund under section 1(1) or 1(3) [IC 13-23-8-1(1) or IC 13-23-8-1(3)] of this chapter only if the owner or operator is in substantial compliance (as defined in 328 IAC 1-1-9) with the following requirements:
 - (1) The owner or operator has complied with the following:
 - (A) this article or IC 13-7-20 (before its repeal).
 - (B) Rules adopted under this article or IC 13-7-20 (before its repeal).A release from an underground petroleum storage tank may not prevent an owner or operator from establishing compliance with this subdivision to receive money from the excess liability fund.
 - (2) The owner or operator has paid all registration fees that are required under rules adopted under IC 13-23-8-4.5.

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- (3) The owner or operator has provided the commissioner with evidence of payment of the amount of liability the owner or operator is required to pay under section 2 of this chapter.

...

7. "Substantial compliance", was defined by 328 IAC 1-1-9 as follows:

That at the time a release was discovered, the tank was registered under IC 13-7-20 and the owner or operator had taken affirmative steps to meet the requirements of the following underground storage tank laws:

- (1) IC 13-7-20 [currently IC 13-23].
- (2) Rules adopted under IC 13-7-20 [currently IC 13-23].
- (3) 42 U.S.C. 6991 through 42 U.S.C. 6991i.
- (4) Regulations adopted under 42 U.S.C. 6991 through 42 U.S.C. 6991i.

Proof of substantial compliance includes, but is not limited to, evidence of contractual agreements or other verifiable actions undertaken sufficiently in advance of a compliance date to provide a reasonable probability of meeting the terms of the statute or regulation.

8. The requirements of 328 IAC 1-3-3 in March 2001 were:

- (a) All owners or operators of underground storage tanks must do the following to be eligible for reimbursement from the fund:

- (1) Meet the requirements set forth in IC 13-23-8-4.
- (2) In accordance with 329 IAC 9-4 and 327 IAC 2-6.1 communicate a spill report to the department of environmental management.
- (3) Current owners or operators who have failed to pay all tank fees that are due under IC 13-23-12-1 by the date that the fees are due shall be eligible for reimbursement from the fund in accordance with subsection (b) upon payment of all past due fees and interest.
- (4) A person who acquires ownership in accordance with subsection (e) shall be eligible for reimbursement from the fund upon timely payment of all past due tank fees, interest, and penalties in accordance with subsection (h).

9. The Petitioner's first argument is that 328 IAC 1-3-3(a)(2) is invalid as it attempts to create a threshold requirement for reimbursement which is not authorized by the statute. The appellate court in *Lee Alan Bryant Health Care Facilities, Inc. v. Hamilton*, 788 N.E.2d 495, 500 (Ind.Ct.App. 2003) said "In addressing Bryant Health Care's contention, we are mindful that a State agency has the undoubted right to adopt rules and regulations designed to enable it to perform its duties and to effectuate the purposes of the law under which it operates, when such authority is delegated to it by legislative enactment. *See Dep't. of Ins. v. Golden Rule Ins.*, 639 N.E.2d 339, 341 (Ind. Ct. App. 1994) (referring to administrative boards). An

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agency, however, may not by its rules and regulations add to or detract from the law as enacted, nor may it by rule extend its powers beyond those conferred upon it by law. *Id.* Any regulation that conflicts with statutory law is wholly invalid. *Dep't of Pub. Welfare v. St. Joseph's Med. Ctr.*, 455 N.E.2d 981, 983 (Ind. Ct. App. 1983).”

10. The appellate court in *Indiana Dep't. of Pub. Welfare v. St. Joseph's Med. Ctr., Inc.*, 455 N.E.2d 981, 983 (Ind. Ct. App. 1983) said “A specific legislative yardstick is provided, which cannot be broken or shortened by an administrative regulation. Rules and regulations promulgated by administrative boards must be reasonable, and such boards cannot enlarge or vary, by the operation of such rules, the powers conferred upon them by the Legislature, or create a rule out of harmony with the statute. Any regulation which is in conflict with the organic law or statutes of the State is wholly invalid. *Blue v. Beach* (1900), 155 Ind. 121, 56 N.E. 89, *Wallace v. Feehan* (1934), 206 Ind. 599, 190 N.E. 438; *Whitcomb Hotel v. California Employment Comm.*, (1944), 24 Cal.2d 753, 151 P.2d 233, 155 A.L.R. 405.”
11. To the extent that IDEM contends that 328 IAC 1-3-3(a)(2) establishes a separate requirement of total compliance with the spill reporting rules under 329 IAC, the IDEM has overstepped the boundaries of its enabling legislation, IC 13-23-8-4. This statute requires only *substantial* compliance with the regulations adopted under IC 13-23 and the IDEM may not enlarge upon this grant of authority from the legislature by requiring complete compliance with the spill reporting rules.¹
12. The Petitioner argues that the IDEM cannot require compliance of any degree with 327 IAC 2-6.1 as a prerequisite for ELTF eligibility. Under the plain meaning of IC 13-23-8-4(a)(1), substantial compliance with only those rules adopted under IC 13-7-20 (currently IC 13-23) is required for ELTF reimbursement. 327 IAC 2-6.1 (the “Spill Rule”) was adopted by the Water Pollution Control Board under the water pollution control laws (IC 13-18). As such, any rule under 328 IAC that attempts to require compliance with the Spill Rule as a condition for ELTF eligibility is invalid and the IDEM may not condition eligibility for ELTF reimbursement upon the owner or operator’s compliance with this rule.²
13. This ELJ has determined that 328 IAC 1-3-3(a)(2), as it was written in March 2001, is invalid and cannot be used to require complete compliance with the applicable spill reporting rules (i.e. those rules promulgated under IC 13-23 in Title 329 of the Indiana Administrative Code). However, IC 13-23-8-4(a) clearly authorizes the IDEM to deny ELTF reimbursement if the owner or operator is not in substantial compliance with the applicable regulations. This includes the spill reporting regulations which were promulgated under IC 13-23 or its

¹ It should be noted that amendments to this rule now requires only that the tank owner or operator demonstrate that it was “in substantial compliance with the spill reporting rule or law applicable at the time the release is discovered.”

² Obviously, the IDEM may still, under its general enforcement authority, *enforce* the Spill Rule and require corrective action or the payment of a penalty if the owner or operator violates the rule.

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predecessor.³ The Petitioner argues that if it can prove that it was in compliance with the majority of the regulations promulgated under IC 13-23, then it is in substantial compliance. The Petitioner relies on the decision for *In the Matter of: Objection to the Denial of Excess Liability Trust Fund Claim No. 92020513, Johnson Oil Company*, (Office of Environmental Adjudication, May 20, 2005)⁴ that suggests that this is true.⁵ The ELJ determined in *Johnson Oil* that the owner or operator was in substantial compliance by showing that it was in compliance with the majority of the applicable regulations.⁶

14. The term “substantial compliance” has been defined in the regulations applicable to this matter. 328 IAC 1-1-9 (set out in Conclusion of Law #7 above). The definition includes a showing that the owner or operator had taken “affirmative steps” to comply with the regulations. The Petitioner has presented substantial evidence that (1) it has employed a “Corporate Environmental Manager” to manage leaking underground storage tank sites in Indiana, including this facility, since 1999 and (2) that the facility in question was in compliance with all other regulations other than (possibly) the spill reporting regulations. Exhibit B, Affidavit of Raymond S. Hiser, Speedway SuperAmerica LLC’s Brief in Support of Motion for Summary Judgment.
15. It is important to note that the parties stipulated to the fact that SSA performed subsurface samples on March 27, 2001 and reported a release to IDEM on May 8, 2001. Neither of the parties presented evidence of when the release was actually *discovered*. SSA has stipulated that it did not report the release within twenty-four (24) hours, but there is no way for this ELJ to know when the release was discovered. So, the release was reported within a range of 42 to 2 days after discovery. No evidence was presented that showed that the delay in reporting had any effect on the clean up of the petroleum contamination discovered at this facility. Therefore, this ELJ determines that the release was reported in a reasonable amount of time and therefore, SSA is in substantial compliance with the spill reporting rules promulgated under 329 IAC.
16. The evidence presented by SSA constitutes sufficient evidence to shift the burden to the IDEM. The IDEM did not present any affidavits or other evidence that contradicts the evidence submitted by SSA.

³ There is more than one regulation that requires an owner or operator to report a release from an underground storage tank depending on the circumstances of the release. The IDEM never specifically identifies the regulation with which the Petitioner failed to comply.

⁴ This case has been appealed and is pending in Marion Superior Court.

⁵ This order denied the Petitioner’s Motion for Summary Judgment. As it did not dispose of the proceeding, it is not a *final* order and therefore, is not binding precedent.

⁶ However, there are instances where the results of non-compliance with a single regulation may be severe enough to justify denying eligibility to the ELTF, even after a showing of compliance with the remaining regulations.

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17. The ELJ concludes that the Petitioner has met its burden of proof and that there are no genuine issues as to any material fact and that summary judgment in favor of the Petitioner is proper.

Final Order

AND THE COURT, being duly advised, hereby **ORDERS, ADJUDGES AND DECREES** that the Petitioner, Speedway SuperAmerica LLC has met its burden of proof in this matter and is in substantial compliance with the regulations and therefore is eligible for reimbursement from the Excess Liability Trust Fund.

You are hereby further notified that pursuant to provisions of IND. CODE § 4-21.5-7.5, the Office of Environmental Adjudication serves as the Ultimate Authority in the 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 THIS 15th day of March, 2006.

Catherine Gibbs
Environmental Law Judge