

**Objection to the Denial of Excess Liability Trust Fund Claim,
ELTF #200609504 / FID #15307, Former Smith Food Shop
Fort Wayne, Allen County, Indiana
2009 OEA 143, (09-F-J-4201)**

OFFICIAL SHORT CITATION NAME: When referring to 2009 OEA 143 cite this case as
Former Smith Food Shop, 2009 OEA 143.

TOPICS:

Excess Liability Trust Fund Claim
summary judgment
underground storage tanks
release
report
spill rule
closure report
substantial compliance
discovery
day

PRESIDING ENVIRONMENTAL LAW JUDGE:

Catherine Gibbs

PARTY REPRESENTATIVES:

IDEM: Julie Lang, Esq.
Petitioner: Ginny Peterson, Esq.; Kightlinger & Gray LLP

ORDER ISSUED:

November 13, 2009

INDEX CATEGORY:

Land

FURTHER CASE ACTIVITY:

[none]

**Objection to the Denial of Excess Liability Trust Fund Claim,
ELTF #200609504 / FID #15307, Former Smith Food Shop
Fort Wayne, Allen County, Indiana
2009 OEA 143, (09-F-J-4201)**

7. Sampling conducted as part of the UST closure indicated that there had been a release from the UST system¹ at the Site. BTEX² was detected in ground water above the reporting limit in the tank area. See Petitioner Jacqueline Smith as Owner of Former Smith Food Shop's Motion for Summary Judgment, *Exhibit 3*, Underground Petroleum Storage Tank Environmental Closure Assessment (the Closure Report), *Appendix B, pages 14 of 17*. BTEX and TPH³, above the reporting limits, were detected in soil in the dispenser region. See Petitioner Jacqueline Smith as Owner of Former Smith Food Shop's Motion for Summary Judgment, *Exhibit 3*, Underground Petroleum Storage Tank Environmental Closure Assessment (the Closure Report), *Appendix B, pages 4 and 5 of 14*.
8. The Closure Report was signed by the Petitioner on November 22, 2005.
9. The cover letter from Petitioner's consultant to the IDEM, attached to the Closure Report, is dated December 1, 2005. The Closure Report was received by the IDEM on December 14, 2005.

CONCLUSIONS OF LAW

1. The Office of Environmental Adjudication ("OEA") has jurisdiction over the decisions of the Commissioner of the Indiana Department of Environmental Management ("IDEM") and the parties to this controversy pursuant to I.C. § 4-21.5-7, *et seq.*
2. This is a Final Order issued pursuant to I.C. § 4-21.4-3-27. 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. This Court must apply a *de novo* standard of review to this proceeding when determining the facts at issue. *Indiana Dept. of Natural Resources v. United Refuse Co., Inc.*, 615 N.E.2d 100 (Ind. 1993), *Indiana-Kentucky Electric Corporation v. Commissioner, Indiana Department of Environmental Management*, 820 N.E.2d 771 (Ind. Ct. App. 2005). Findings of fact must be based exclusively on the evidence presented to the ELJ, I.C. § 4-21.5-3-27(d). Deference to the agency's initial determination is not allowed. *Id.*; "*De novo* review" means that:

all issues 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).

¹ 329 IAC 9-1-49 defines UST system as including underground piping and underground ancillary equipment. The release was discovered under the dispenser. The piping leading to the dispenser is part of the UST system.

² Benzene, toluene, ethyl benzene and xylenes.

³ Total petroleum hydrocarbons.

**Objection to the Denial of Excess Liability Trust Fund Claim,
ELTF #200609504 / FID #15307, Former Smith Food Shop
Fort Wayne, Allen County, Indiana
2009 OEA 143, (09-F-J-4201)**

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.” I.C. § 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). All evidence must be construed in favor of the opposing party, and all doubts as to the existence of a material issue must be resolved against the moving party. *City of North Vernon v. Jennings Northwest Regional Utilities*, 829 N.E.2d 1, (Ind. 2005), *Tibbs v. Huber, Hunt & Nichols, Inc.*, 668 N.E.2d 248, 249 (Ind. 1996).”
5. “The fact that both parties requested summary judgment does not alter our standard of review. Instead, we must separately consider each motion to determine whether there is a genuine issue of material fact and whether the moving party is entitled to judgment as a matter of law.” *Laudig v. Marion County Bd. of Voters Registration*, 585 N.E.2d 700, (Ind. Ct. App. 1992) at 703-704.
6. “The cardinal rule of statutory construction is to ascertain the intent of the legislature by giving effect to the ordinary and plain meaning of the language used.” *Bourbon Mini-Mart, Inc. v. Commissioner, Indiana Department of Environmental Management*, 806 N.E.2d 14, 20 (Ind.Ct.App. 2004). The same rules that govern construction of statutes also govern construction of rules. *Miller Brewing Co. v. Bartholomew County Beverage Cos., Inc.*, 674 N.E.2d 193 (Ind. Ct. App. 1996).
7. An owner or operator who wishes to receive reimbursement from the ELTF must be in substantial compliance with “this article” (I.C. § 13-23-8-4(a)(1)(A)) and “rules adopted under this article” (I.C. § 13-23-8-4(a)(1)(B)). The reference to “this article” clearly means Chapter 13, Article 23 of the Indiana Code. Therefore, an owner or operator must be in substantial compliance with any rule adopted under I.C. § 13-23 in order to be eligible for ELTF reimbursement.
8. 329 IAC 9 was promulgated by the Solid Waste Management Board under the authority of Chapter 13, Article 23 of the Indiana Code. All owners and operators of USTs must comply with the requirements promulgated in 329 IAC 9 (329 IAC 9-1-1(a)), regardless of whether they are eligible for reimbursement from the ELTF. Various provisions of 329 IAC 9 require that the owner or operator of USTs report releases within twenty-four (24) hours of discovery. Which specific reporting provision applies depends on the circumstances under which the release was discovered.

**Objection to the Denial of Excess Liability Trust Fund Claim,
ELTF #200609504 / FID #15307, Former Smith Food Shop
Fort Wayne, Allen County, Indiana
2009 OEA 143, (09-F-J-4201)**

9. 328 IAC 1-1-9⁴, in effect in during the time in question in this case, defines “substantial compliance” as follows:
- (a) "Substantial compliance" means that, at the time a release was first discovered or confirmed:
 - (1) the owner or operator has met the requirements of I.C. § 13-23-8-4(a), with the exception of minor violations of:
 - (A) statutory deadlines;
 - (B) regulatory deadlines; or
 - (C) regulatory requirements; that do not cause harm or threaten to harm human health or the environment; and
 - (2) registration fees have been paid as required under I.C. § 13-23-12 and 328 IAC 1-3-3.
 - (b) An owner or operator is not in substantial compliance if the release:
 - (1) Has not been reported within seven (7) days of the date the release was required to be reported under the spill reporting rule in effect at the time of the release.
 - (2) Harms public health or the environment and was not timely reported under the spill reporting rule applicable at the time of the release.
10. In order to be eligible for ELTF reimbursement, an owner or operator of a UST must be in substantial compliance with the rules. The Underground Storage Tank Financial Assurance Board has defined “substantial compliance” with regard to the reporting requirements contained in 329 IAC 9. In order to be in substantial compliance with the reporting requirements, an owner or operator must report the release within seven (7) days.
11. It is clear from the rule that the critical fact in determining whether the owner or operator had substantially complied with release reporting is when the report was made. Whether the violation was minor or did not cause harm to human health or the environment is applicable in determining whether the owner or operator was in substantial compliance with rules *other than those mandating spill reporting*. The Petitioner’s argument that the rule is too vague is unpersuasive.
12. All of the rules governing reporting require that the owner or operator report a release within 24 hours of discovery. Therefore, it is irrelevant *which* particular rule applies in this matter as the critical fact is whether the release in this matter was reported within the appropriate time frame.

⁴ Underground Storage Tank Financial Assurance Board; 328 IAC 1-1-9; filed Dec 4, 1992, 11:00 a.m.: 16 IR 1052; filed Nov 1, 1995, 8:30 a.m.: 19 IR 343; readopted filed Jan 10, 2001, 3:21 p.m.: 24 IR 1534; filed Oct 17, 2001, 4:30 p.m.: 25 IR 789; filed Aug 30, 2004, 9:40 a.m.: 28 IR 125; readopted filed May 14, 2007, 1:52 p.m.: 20070523-IR-328070137BFA

**Objection to the Denial of Excess Liability Trust Fund Claim,
ELTF #200609504 / FID #15307, Former Smith Food Shop
Fort Wayne, Allen County, Indiana
2009 OEA 143, (09-F-J-4201)**

13. In accordance with 329 IAC 1-1-9(b)(1), the appropriate time frame for purposes of determining ELTF eligibility is seven (7) days. Giving the term “day” its ordinary meaning, the release had to be reported within seven (7) calendar days.
14. Neither the IDEM nor the Petitioner have provided any information about whether the Petitioner knew that a release had been discovered prior to her signature on the Closure Report. However, it is known that she signed the notification that the USTs had been permanently closed on November 22, 2005. The Closure Report, containing the sampling results showing that a release had occurred, was attached to this notification. Therefore, this is the date on which the Petitioner discovered the release.
15. The release should have been reported within seven (7) calendar days or no later than November 29, 2005.
16. The Closure Report was sent to the IDEM on December 1, 2005 and received on December 14, 2005. If the presiding ELJ assumes that the Closure Report could serve as notice to the IDEM that a release had occurred⁵, the Closure Report was not filed with IDEM on or before November 29, 2005.
17. The Petitioner has presented no evidence that the release was reported on or before November 29, 2005.
18. There is no genuine issue of material fact. The Petitioner failed to substantially comply with the requirement to timely report a release at the Site. The IDEM’s determination that she is not eligible for reimbursement is proper.
19. This analysis is dispositive of the issues in this cause. The parties’ arguments about whether (1) the release date assigned by IDEM is proper; (2) the Petitioner has waived any arguments; (3) 327 IAC 2-6-1 is applicable; or (4) the submission of the Closure Report can be considered a “release report” are irrelevant and will not be addressed.

FINAL ORDER

AND THE COURT, being duly advised, hereby **ORDERS, ADJUDGES AND DECREES** that the Indiana Department of Environmental Management’s Motion for Summary Judgment is **GRANTED**. Petitioner, Jacqueline Smith as Owner of Former Smith Food Shop’s Motion for Summary Judgment is **DENIED**. The Petition for Administrative Review is **DISMISSED**.

⁵ The ELJ declines to decide this issue as it is not necessary to do so.

**Objection to the Denial of Excess Liability Trust Fund Claim,
ELTF #200609504 / FID #15307, Former Smith Food Shop
Fort Wayne, Allen County, Indiana
2009 OEA 143, (09-F-J-4201)**

You are hereby further notified that pursuant to provisions of I.C. § 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 I.C. § 4-21.5. 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.

IT IS SO ORDERED this 13th day of November, 2009 in Indianapolis, IN.

Hon. Catherine Gibbs
Environmental Law Judge