Objection to Denial of Excess Liability Trust Fund Claim No.1999104505 / FID 5123, Edgewood Service Center, Inc., HydroTech Corporation
Anderson, Madison County, Indiana
2009 OEA 38, (07-F-J-4019)

OFFICIAL SHORT CITATION NAME: When referring to 2009 OEA 38, cite this case as ***Edgewood Service Center, Inc.*, 2009 OEA 38.**

TOPICS:
underground storage tanks
UST's
asphalt
resurfacing
excavation
reimbursement
costs
corrective action

PRESIDING ENVIRONMENTAL LAW JUDGE:
Catherine Gibbs

PARTY REPRESENTATIVES:
IDEM: Denise Walker, Esq.
Petitioner: Donn Wray, Esq., Nicholas Gahl, Esq.; Stewart & Irwin

ORDER ISSUED:
June 4, 2009

INDEX CATEGORY:
Land

FURTHER CASE ACTIVITY:
Motion to Reconsider denied June 16, 2009

Objection to Denial of Excess Liability Trust Fund Claim No.1999104505 / FID 5123, Edgewood Service Center, Inc., HydroTech Corporation Anderson, Madison County, Indiana 2009 OEA 38 (07-F-J-4019)

STATE OF INDIANA	)	BEFORE THE INDIANA OFFICE OF
	)	ENVIRONMENTAL ADJUDICATION
COUNTY OF MARION	)	
IN THE MATTER OF:	)	
	)	
OBJECTION TO THE DENIAL OF EXCESS	)	
LIABILITY TRUST FUND CLAIM	)	
ELTF # 199104505 / FID # 5123	)	
EDGEWOOD SERVICE CENTER, INC.	)	CAUSE NO. 07-F-J-4019
HYDROTECH CORPORATION	)	
ANDERSON, MADISON COUNTY, INDIANA	)	

FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL ORDER

This matter having come before the Court for the final hearing, held on May 29, 2009, on the Petition for Review filed by the Petitioner, HydroTech Environmental Consulting and Engineering; and the Environmental Law Judge, being duly advised and having read the record, pleadings, and having heard and considered the evidence presented at the hearing, now finds that judgment may be made upon the record and makes the following findings of fact and conclusions of law and enters the following Final Order:

FINDINGS OF FACT

1. Mr. Marty Hall owns a property located at 2802 Nichol Avenue, Anderson Indiana (the Site). The Site was the location of four underground storage tanks (USTs). As the result of a release from the USTs, Mr. Hall contracted with HydroTech Corporation (HydroTech) to perform corrective action at the Site.

2. On or about August 25, 2003, HydroTech submitted a Corrective Action Plan (CAP) to the Indiana Department of Environmental Management (the IDEM). The CAP included a proposal to excavate approximately 5,300 square feet of soil from the Site. *Exhibit 11, Remedial Work Plan, August 22, 2003, page 37.*

3. The CAP was approved on September 23, 2003. Thereafter, HydroTech implemented the CAP and submitted a CAP Implementation/Soil Excavation Report to the IDEM on May 24, 2006. HydroTech reported that approximately 5,800 square feet were excavated from the Site. *Exhibit 9, CAP Implementation/Soil Excavation Report, May 24, 2006, page 7.*

4. On or about August 7, 2007, HydroTech filed a claim for reimbursement from the Excess Liability Trust Fund (the ELTF) with the IDEM. The claim requested reimbursement of the costs associated with the corrective action, including the costs for resurfacing certain portions of the Site, beyond the specified excavation area.[1]

5. On November 16, 2007, the IDEM issued its decision regarding the claim. The IDEM allowed reimbursement for the costs of paving the 5800 square feet directly associated with the excavation approved in the CAP (the "Approved Area") and denied reimbursement of the remainder of the costs associated with paving the rest of the parking lot (the "Disputed Area"). The IDEM denied reimbursement of $15,433.00 for the reason that "Charge exceeds reasonable cost guidelines as noted in 328 IAC 1-3-5 for asphalt resurfacing ($2.15 per square foot). The ELTF does not reimburse charges for site improvements such as using concrete in lieu of asphalt. Per the IDEM technical project manager, the approved excavation area was 5,800 square feet. The resurfacing of only 5,800 square feet has been reimbursed. All other costs are denied."

6. HydroTech filed its Petition for Review on November 27, 2007.

7. The Statement of Joint Stipulations for May 29, 2009 Hearing is incorporated herein. The parties stipulated that the only costs in dispute were the allowable costs[2] of $2.15 per square foot for asphalt for the Disputed Area.

8. The excavation of the Approved Area required the use of heavy excavating equipment with steel tracks to excavate the area and the use of tri-axle trucks to remove the excavated material. The pavement beyond the Approved Area was damaged by the exposure to the equipment and trucks. The Petitioner attempted to mitigate damage by limiting access to certain egress and ingress points at the Site. Further, standard engineering practice required that a larger area than the Approved Area be excavated. These practices included cutting the pavement in straight lines, not arced, and that excavation should occur on existing joints to minimize potential damage, etc. Subsidence around the excavated area also necessitated resurfacing.

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 I.C. § 4-21.5-7-3.

2. 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.

[1] The resurfacing was done in concrete although the Site was originally paved with asphalt.
[2] Allowable costs per unit are specified in 328 IAC 1-3-5(e).

3. This office 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). 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 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).

4. The Petitioner has the burden to produce substantial and reliable evidence to prove that the IDEM has erred in denying its claim for reimbursement from the ELTF.

5. The applicable rules are contained in 328 IAC 1-3-5 and the pertinent portions state:

   (a) Reimbursable costs, excluding third party liability claims, are actual monetary amounts paid or incurred for work performed:
   (1) consistent with an approved or deemed approved CAP or under one (1) or more of the provisions of I.C. § 13-23-8-4(b);
   (d) The following costs are not reimbursable from the fund:
   (7) The cost of cosmetic improvements, including the repair or replacement of blacktop or concrete, unless directly associated with corrective action. . .
   (15) Any other cost not directly related to site characterization, corrective action, or third party liability or otherwise determined not to be reimbursable under this rule as a result of a financial or technical review.

6. The Petitioner has presented substantial and reliable evidence that the pavement in the Disputed Area at the Site was damaged as a result of the corrective action activities. The damage was more than cosmetic; the resurfacing was necessary.

7. No IDEM personnel observed the damage and so, the IDEM was not able to contradict the evidence presented by the Petitioner that the damage was more than cosmetic.

8. 328 IAC 1-3-5(d)(7) is applicable to the fact situation. As the damage was not cosmetic and was the result of the corrective action, the costs for resurfacing the Disputed Area were improperly denied.

9. However, the Petitioner failed to present sufficient evidence regarding the miscellaneous costs requested. The only evidence was that these costs included costs associated with cutting the asphalt, but the costs were not broken down into unit price, nor was there evidence as to what other costs, if any, were included in the miscellaneous costs. Reimbursement of the miscellaneous costs of $3,541.93 is denied.

10. The Petitioner requested reimbursement for 10,423 square feet. IDEM reimbursed for 5800 square feet (the Approved Area). The difference was 4,623 square feet (the Disputed Area). The approved cost per square foot of asphalt[3] is $2.15. Therefore, $2.15 x 4,623 square feet = $9,938.45. The rules allow for 10% markup[4] ($993.94) bringing the total reimbursement to $10,933.39.

FINAL ORDER

AND THE COURT, being duly advised, **ORDERS, ADJUDGES AND DECREES** that the Petitioner has presented sufficient evidence in support of its Petition for Review. The IDEM erred in denying reimbursement and is **ORDERED** to pay the Petitioner $10,933.39 no later than thirty (30) days after the effective date of this Order.

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 4th day of June, 2009 in Indianapolis, IN.

Hon. Catherine Gibbs
Environmental Law Judge

[3] The parties stipulated to the application of the asphalt unit price rather than the cost applicable for concrete.
[4] Neither of the parties argues that markup does not apply.