INDIANA OFFICE OF ENVIRONMENTAL ADJUDICATION

Mary Davidsen
Chief Environmental Law Judge

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STATE OF INDIANA	)	BEFORE THE INDIANA OFFICE OF
	)	ENVIRONMENTAL ADJUDICATION
COUNTY OF MARION	)	
IN THE MATTER OF:	)	
	)	
OBJECTIONS TO DENIAL OF EXCESS	)	
LIABILITY TRUST FUND CLAIM	)	
NO. 200401501-3, CRYSTAL FLASH #28	)	CAUSE NO. 07-F-J-3884
CRYSTAL FLASH PETROLEUM, LLC	)	
INDIANAPOLIS, INDIANA	)	

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

This matter having come before the Court for the final hearing held on January 14, 2009; and the Court, being duly advised and having read and considered the petition, record, the prefiled testimony submitted by Crystal Flash Petroleum LLC (the Petitioner), the prefiled testimony submitted by the Indiana Department of Environmental Management (the IDEM), evidence presented at the final hearing, pleadings and briefs of the parties finds that judgment may be made upon the record, now makes the following findings of fact and conclusions of law and enters the following Order:

FINDINGS OF FACT

1. At all times pertinent to this matter, Crystal Flash Petroleum LLC (the Petitioner) owned and operated a gasoline station located at 311 N. Main St., Salem, Indiana (the "Site"). This station included underground storage tanks (USTs): two 8,000-gallon gasoline tanks, one 8,000-gallon diesel tank, and one 4,000-gallon kerosene tank (hereinafter referred to as the "Tanks"). The gasoline and diesel tanks were located in the eastern half of the Site. The kerosene tank was located in the southwestern portion of the Site. The location of the Tanks is more particularly described on page 22 of Exhibit 1 of Jeff Turley's pre-filed testimony.

2. Crystal Flash reported the discovery of a release at the Site to the IDEM on January 8, 2004.

3. From March 22, 2004 through April 6, 2004, the Petitioner removed the Tanks and performed other remedial action, including the excavation and disposal of 3255 tons of soil.

4. On June 25, 2004, the Petitioner submitted an Initial Site Characterization (the "ISC") to IDEM. At the same time, the Petitioner submitted a Corrective Action Plan (the "CAP") to the IDEM. The CAP consisted of the removal of the Tanks and the soil excavation.
5. On July 14, 2004, the IDEM directed the Petitioner to perform a Further Site Investigation (the "FSI") to further delineate the nature and extent of the contamination.

6. The Petitioner submitted the FSI on January 6, 2005.

7. The CAP and FSI were approved on January 20, 2005.

8. The letter notifying the Petitioner of the approval contains this statement "IDEM's approval of the CAP does not guarantee that the Applicant or the implemented remedial actions are eligible for reimbursement from the ELTF and does not constitute approval of costs under I.C. § 13-23-9-2."

9. On October 31, 2006, the Petitioner, through its consultant, Pinnacle Environmental, Inc., submitted a claim for reimbursement of $162,752.53 from the Excess Liability Trust Fund (the ELTF).

10. On February 20, 2007, the IDEM issued a notice allowing reimbursement of $72,879.22. The remaining $89,873.31 was disallowed.

11. The Petitioner appealed the denial of these costs to the Office of Environmental Adjudication on March 9, 2007.

12. The denied costs fall into three (3) general categories: (1) the costs associated with the removal of the Tanks; (2) the costs associated with the excavation and disposal of 3255 tons of soil; and (3) costs associated with the preparation of the corrective action plan.

13. The Petitioner incurred $26,743.31 in removal of the Tanks, as described in Item Nos. 1, 2, 3-1a, and 3-3 in the Cost Summary attached to the February 20, 2007 ELTF Claim Response. The IDEM's ELTF Claim Response indicates that these costs were denied for the reason "Per the "Closure by Removal of Four (4) Underground Storage Tanks" report submitted on July 8, 2004, all leak detectors were functioning and all tanks passed monthly statistical inventory reconciliation for calendar year 2003. This coupled with the relatively low amount of soil and groundwater contamination at this facility indicates that these tanks did not need to be removed as part of the corrective action."

14. The costs for the soil excavation and disposal that were attributable to 1500 tons were reimbursed. However, the Petitioner incurred $57,692.16 in costs attributable to excavating more than 1500 tons of soil, as described in Items 3-1b, 3-1c, 3-4, 3-5, 3-6 and 6 in the Cost Summary attached to the February 20, 2007 ELTF Claim Response. IDEM denied these additional costs pursuant to 328 IAC 1-3-5.[1]

[1] The parties stipulated to the facts contained in Findings of Fact 1, 2, 3, 4, 5, 6, 7, 9, 10, 11, 12, 13 and 14 in Stipulations of Fact and Exhibits and Request for Judicial Notice of Certain Regulations filed on January 7, 2009.

15. The costs associated with the preparation of the corrective action plan were denied because "the remedial activity was already complete at the time the CAP was proposed."

16. The denied costs that were appealed are:

Item No.	Amount denied	Activity
1	$ 887.00	UST removal costs
2	$13,053.15	UST removal costs
3-1a	$ 2,022.57	UST removal costs
3-1b	$ 630.00	UST removal costs/soil excavation costs
3-1c	$ 1,925.00	UST removal costs/soil excavation costs
3-3	$10,771.59	UST removal costs
3-4	$12,966.51	soil excavation costs
3-5	$ 5,358.81	soil excavation costs
3-6	$36,320.84	soil excavation costs
6	$ 491.84	soil excavation costs
7	$ 1,715.00	CAP preparation costs
8	$ 2,541.00	CAP preparation costs
9	$ 983.50	CAP preparation costs
Total:	$89,666.81[2]	

17. The IDEM has agreed to reimburse the costs under Items No. 7, 8, and 9 (the CAP preparation costs). These costs are no longer an issue in this matter. The total amount at issue in this matter is $84,427.31.

18. There are no water wells within one mile of the Site. In addition, the town of Salem does not utilize groundwater for its water needs, but receives water from two out-of-town surface water bodies. The Site is not within a wellhead protection area nor is it located in a geologically, socially or ecologically sensitive area. The Site is considered to be "non-residential/commercial".

19. Soils beneath the Site consist of stiff silty clays.

20. Tests performed on the USTs indicate that the tanks were not leaking.

21. A Phase II Subsurface Investigation was performed at the Site in December of 2003 and January 2004. Soil samples were taken by Geoprobe and analyzed for TPH-GRO/DRO[3], BTEX[4] or MTBE[5]. Ground water samples were analyzed for BTEX and MTBE.[6] The

[2] The Petitioner did not appeal the denial of all of the costs. This amount represents the denied costs that were appealed to the OEA.
[3] Total petroleum hydrocarbons-gasoline range organics/diesel range organics
[4] Benzene, toluene, ethylbenzene, xylenes
[5] Methyl-tertiary-butyl-ether
[6] Samples were analyzed for other contaminants of concern, but TPH, BTEX and MTBE were of primary emphasis in this decision.

analysis was compared to RISC[7] cleanup levels. One soil sample (P-5) taken on the Site revealed levels above IDEM cleanup guidelines for TPH. Two samples (P-5, P-6) revealed contamination above IDEM cleanup guidelines for benzene and MTBE. Sample P-5 also showed levels above residential closure levels for naphthalene. Ground water collected and analyzed from sample points P-1, P-2, P-3, P-4, P-5, P-8 and P-11 showed levels above either residential or industrial closure levels for benzene and MTBE.

22. The extent of excavation in March and April 2004 was determined through the use of field screening for the presence of photoionizable vapors. The project manager on site also utilized visual/olfactory indications of contamination.

23. Free product was discovered during the excavation and removal of the kerosene UST. Exhibit G to Pre-filed Testimony of Greg Heuer, filed September 26, 2008.

24. Pursuant to 315 IAC 1-3-1(a)(10) and with the agreement of the parties, testimony was pre-filed as follows: the Petitioner pre-filed testimony on September 26, 2008; the IDEM pre-filed testimony on October 30, 2008; the Petitioner pre-filed rebuttal testimony on December 1, 2008.

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 an 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 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 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. This work was performed in March and April of 2004.[8] The parties requested that the Court take judicial notice of the regulations in effect at this time. Copies of the applicable

[7] Risk Integrated System of Closure, IDEM Nonrule Policy Document #W0046, date originally effective February 15, 2001.

[8] The rules were changed substantially in the fall of 2004. The amendments became effective October 1, 2004.

regulations were filed on January 7, 2009. The Court **GRANTS** the motion to take judicial notice of these regulations. All references to statutes or regulations in this Order are to those filed with this Court on January 7, 2009.

Tank Removal

5. In March and April of 2004, the pertinent portions of Ind. Code § 13-23-9-2 read:

   (a) To receive money from the excess liability trust fund under IC 13-23-8-1(1), a claimant must:
      (1) submit a corrective action plan to the administrator of the excess liability trust fund for the administrator's approval; and
      (2) submit a copy of a work receipt for work that has been performed.
   (b) If, after receiving a corrective action plan and a work receipt under subsection (a), the administrator determines that:
      (1) the corrective action plan may be approved and that the work that has been performed is consistent with the approved corrective action plan;
      (2) the work or part of the work that has been performed is reasonable and cost effective;
      (3) the work that has been performed concerns the elimination or mitigation of a release of petroleum from an underground storage tank including:
         (A) release investigation;
         (B) litigation of fire and safety hazards;
         (C) tank removal;
         (D) soil remediation; or
         (E) ground water remediation and monitoring; and
      (4) the claimant is in compliance with the requirements of this article and the rules adopted under this article; the administrator shall approve the request for money to be paid from the excess liability trust fund for work that has been performed.

6. 328 IAC 1-3-5[9] provides, "Tank removal, decommissioning, cutting, and disposal are not eligible for reimbursement unless necessary as part of corrective action."

7. Free product was discovered in the kerosene tank excavation. IDEM guidance required the Petitioner to remove the free product. The fact that the Petitioner made the decision to remove the tank prior to the discovery of the free product is not relevant; it was necessary to remove the tank to address the free product. All costs associated with the kerosene tank removal, decommissioning, cutting and disposal should be reimbursed. All costs associated with the removal of the free product, including soil removal and disposal, shall be reimbursed if such costs were not included in the costs paid to the Petitioner to date.

8. The testimony was that "sheen" was observed during the soil removal from the gasoline/diesel tank pit. However, the Petitioner did not feel compelled to file a 20 Day Abatement Report or a Free Product Removal Report. Sheen may or may not constitute free product, but the Petitioner did not present sufficient evidence to support a finding that free

[9] No amendments were made to this portion of the rule in October of 2004.

product was present. The removal of the gasoline/diesel tanks were not necessary to the corrective action and the costs associated with their removal was properly denied.

Soil Excavation

9. 328 IAC 1-3-5(d)(14)[10] states that certain costs are not reimbursable, including the following:

> Any costs related to the excavation and disposal of more than one thousand five hundred (1,500) tons of soil unless:
>
> (A) alternative remediation techniques have been considered;
> (B) excavation and disposal was shown to be the most cost effective remediation option; and
> (C) the soil removal is part of a CAP approved or deemed approved by the commissioner.

10. The Petitioner has the burden of showing that the IDEM was incorrect in denying reimbursement of the costs of excavation and disposal under 328 IAC 1-3-5(d)(14). The Petitioner must address all three (3) elements of this subsection. The IDEM approved the use of excavation and disposal as the CAP at this Site, satisfying the requirement under subsection (C). Therefore, the Petitioner had the burden of showing that alternative techniques were considered and that excavation and disposal was the most cost effective remediation option.

11. The Petitioner presented evidence that it considered other techniques – dual phase extraction and thermal desorption. The IDEM did not present sufficient evidence that these techniques were wholly inappropriate for the Site and should not have been considered. Rather, the IDEM's argument seems to be that monitored natural attenuation (MNA) and/or the use of a restrictive covenant should have been considered as well.

12. The Site was not heavily contaminated as shown in the Phase II Subsurface Investigation. The contamination was concentrated in the area of the kerosene tank and, to a lesser degree, around the other tanks. The use of field screening was not sufficiently reliable grounds upon which to base the excavation of soils beyond the scope of contamination established in the Phase II or beyond the limits for soil excavation contained in 328 IAC 1-3-5(d)(14).

13. In accordance with the MNA policy, given the relatively low levels of contamination found at the Site, MNA was an option at this Site. MNA is allowed even if free product is discovered. However, MNA was not considered as a viable alternative corrective action in the CAP. No cost comparison was done of MNA against excavation and disposal or the other alternatives.

14. The Petitioner failed to present sufficient evidence that (1) it considered the more viable options for corrective action (i.e. MNA or a restrictive covenant) and (2) that excavation and disposal were the most cost effective option.

[10] The only change made to this portion of the rule was to change "commissioner" to "administrator".

15. The parties did not submit sufficient information to enable the Court to determine the costs associated with the kerosene tank removal. Therefore, this is not a final order. Upon a determination of the costs that should be reimbursed, this Court will finalize this matter.

ORDER

AND THE COURT, being duly advised, hereby **ORDERS, ADJUDGES AND DECREES** that:

1. All costs associated with the kerosene tank removal, decommissioning, cutting and disposal should be reimbursed. All costs associated with the removal of the free product, including soil removal and disposal, shall be reimbursed if such costs were not included in the costs reimbursed as of the effective date of this Order.
2. The IDEM was correct in denying the costs of excavation and disposal of soils above 1500 tons, except for those costs associated with the removal and disposal of free product and soil as allowed in paragraph 1 above.

Further, the parties shall consult with each other to determine if an agreement regarding the additional costs referenced in paragraph 1 above can be reached. In the event an agreement is reached, the parties shall inform the Court and this Order shall be finalized. In lieu of such an agreement, the parties are **ORDERED** to appear before the Court on **March 3, 2009 at 9:00 a.m. EST** in the Office of Environmental Adjudication, Indiana Government Center North, 100 N. Senate Ave., Room N501, Indianapolis, Indiana. Each party shall present evidence of the costs attributable to the kerosene tank, free product and soil removal.

You are 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 administrative review of decisions of the Commissioner of the Indiana Department of Environmental Management.

IT IS SO ORDERED this 2nd day of February, 2009 in Indianapolis, IN.

Hon. Catherine Gibbs
Environmental Law Judge