Objection to Denial of Excess Liability Trust Fund Claim
ELF #9703525, FID #22410
Former Howard Marathon Station
Rosedale, Parke County, Indiana
2010 OEA 157, (07-F-J-3885)

OFFICIAL SHORT CITATION NAME: When referring to 2010 OEA 157 cite this case as ***Former Howard Marathon*, 2010 OEA 157.**

TOPICS:

gas station
Excess Liability Trust Fund Claim (ELTF)
Underground Storage Tank (UST)
tank fees
tank registration
release
consultant
Phase 1
petroleum odor
soil staining
soil sample
total petroleum hydrocarbon (TPH)
contamination
eligibility determination
1997 claim
substantial compliance
Summary Judgment
rules of statutory construction
unambiguous
ribution
P. L. 1-1996
P. L. 67-1996
I.C. § 13-7-20
I.C. § 13-23-8-4
328 IAC 1-1-9
328 IAC 1-3-3
328 IAC 1-3-3(a)(5)
Rowe, 2007 OEA 94

PRESIDING JUDGE:
Mary L. Davidsen

PARTY REPRESENTATIVES:
IDEM: Julie E. Lang, Esq.
Petitioner: Jennifer C. Baker, Esq.; Hunsucker Goodstein & Nelson, PC

ORDER ISSUED:
October 15, 2010

INDEX CATEGORY:
Land

FURTHER CASE ACTIVITY:
[none]

Objection to Denial of Excess Liability Trust Fund Claim
ELF #9703525, FID #22410
Former Howard Marathon Station
Rosedale, Parke County, Indiana
2010 OEA 157, (07-F-J-3885)

STATE OF INDIANA	)	BEFORE THE INDIANA OFFICE OF
	)	ENVIRONMENTAL ADJUDICATION
COUNTY OF MARION	)	
IN THE MATTER OF:	)	
	)	
OBJECTION TO DENIAL OF	)	
EXCESS LIABILITY TRUST FUND CLAIM	)	
ELF #9703525 / FID #22410	)	CAUSE NO. 07-F-J-3885
FORMER HOWARD MARATHON	)	
ROSEDALE, PARKE COUNTY, INDIANA	)	

FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL ORDER GRANTING SUMMARY JUDGMENT to INDIANA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT

This matter is before the Court pursuant to Motions for Summary Judgment filed by Claimant J.T.'s Marathon, Inc. ("J.T."), and by Respondent, Indiana Department of Environmental Management ("IDEM"), for a facility operated as a former Howard Marathon, as to whether any genuine issues of material fact exist as to IDEM's determination that J.T. was not eligible for reimbursement from the Excess Liability Trust Fund for failure to pay tank fees for 1988 through 1990, for J.T.'s payment of remaining tank fees after a release was discovered, and for failure to register the tanks within thirty (30) days when the tanks were first put in to use. The parties fully briefed their positions on summary judgment, but did not participate in oral argument, nor submit proposed findings of fact, conclusions of law and orders. The Chief Environmental Law Judge ("ELJ") having considered the petitions, testimony, evidence, and pleadings of the parties, now finds that judgment may be made upon the record. The Chief ELJ, by substantial evidence, and being duly advised, now makes the following findings of fact and conclusions of law and enters the following Order:

FINDINGS OF FACT

1. Claimant J.T. Marathon, Inc. ("J.T.") owns real estate located at 101 South Main Street, Rosedale, Parke County, Indiana (the "Site"). *Claimant's Motion for Summary Judgment ("Claimant's Motion"), Ex. 1, Declaration of John Thomas Obenchain ("Obenchain Dec."), Ex. 1, ¶¶. 2, 3*. The Site has been operated as a gasoline station since the 1940's. *Id., Ex. 2, Declaration of James Howard ("Howard Dec."), ¶ 2; Ex. 1, Obenchain Dec., ¶ 4*. The Site was assigned federal identification number 22410, and is the location of three underground storage tanks (USTs). *Id., Ex. 1, Obenchain Dec., ¶ 5*. The current underground storage tank ("UST") system was installed in 1987. *IDEM Motion for Summary Judgment ("IDEM Motion"), Ex. A, UST Notification Form*.

2. In January, 1997, James Howard owned the Site, operated as Howard's Marathon. *Id., Ex. 2, Howard Dec., ¶ 1*. In January, 1997, Howard proposed to sell the Site to John Thomas ("J.T.") Obenchain. *Id., Ex. 2, ¶ 3*.

3. In February, 1997, First Parke State Bank hired American Environmental Abatement Co., Inc. ("AEA") to conduct a Phase 1 Environmental Site Assessment ("Phase 1"). *Id., Ex. 3, Declaration of Jeff Watkins ("Watkins Dec."), ¶ 2*. Jim Howard stated that "[i]t is my understanding that, as part of the potential sale" consultant AEA was hired for a Phase 1 Environmental Site Assessment by First Parke State Bank. *Id., Ex. 2, Howard Dec., ¶ 4*. Jim Howard gave permission for site entry but he did not have an agreement with AEA. *Id., Ex. 2, ¶5*. Site soil borings were advanced and received by the laboratory on February 3, 1997. *Id., Ex. 3, ¶¶ 2, 3*. Boring logs from the Phase 1 investigation noted the presence of a petroleum odor and soil staining at various Site locations during the February 3, 1997 limited subsurface investigation. *IDEM Motion, Exs. C -3, C - 4*.

4. The February 6, 1997 analysis by AEA's subcontracted laboratory, American Lead Laboratory, Inc., indicated that one Phase 1 soil sample contained total petroleum hydrocarbon ("TPH") contamination above IDEM action levels. *Claimant's Motion, Ex. 3, Watkins Dec., ¶¶ 5, 6*.

5. Claimant J.T. asserted that AEA would have received the sampling results after the February 6, 1997 test date. *Claimant's Motion, Ex. 3, Watkins Dec., ¶ 5*. Claimant further asserted that AEA's normal business practice was to communicate the Phase 1 Report to First Parke State Bank. *Id., Ex. 3, Watkins Dec., ¶ 7*.

6. On February 26, 1997, Mr. Howard registered the tanks, and paid tank fees for years 1988 through 1997; the parties agree that the tanks were not registered previously. *Id., Howard Dec., ¶ 7; IDEM Motion, Ex. D, Affidavit of Rich Ligman, IDEM Senior Environmental Manager, Excess Liability Trust Fund, Office of Land Quality*.

7. In his affidavit, Mr. Howard declared under oath that he was unaware of the Phase 1 test results, or of any Site contamination when he registered the tanks and paid fees on February 26, 1997, *Claimant's Motion, Ex. 2, Howard Dec.,¶ 8*, but was informed of the release at an unspecified time afterward. *Id., see ¶ 10*.

8. On March 26, 1997, AEA reported the release to IDEM. *IDEM Motion, Ex. B, p. 2, Petitioner's September 26, 2008 Preliminary Witness and Exhibit Lists and Contentions*. The release was assigned incident number 9703525. IDEM's February 22, 2007 determination stated that this release was reported in a timely manner. *Id., Ex. G*. Mr. Howard sold the Site to J.T.'s Marathon in September, 1997. *Claimant's Motion, Ex. 2, Howard Dec., ¶ 9; Ex. 1, Obenchain Dec. ¶ 2*. J.T. fully paid UST tank fees due since 1998. *Id., Ex. 1, Obenchain Dec., ¶ 6*.

9. In November, 2006, J.T. submitted an eligibility determination request to IDEM's Excess Liability Trust Fund ("ELTF") for Site contamination, under Leaking Underground Storage Tank ("LUST") Incident number 9703525. *Id., Ex. 1, Obenchain Dec., ¶ 7.*

10. On February 22, 2007, IDEM issued its determination that a release was timely reported, but determined that J.T. was not eligible for ELTF reimbursement for the following reasons now challenged by Claimant:

    Owner or operator has paid at least 50% of UST registration fees when due:
    The applicant is not in substantial compliance with this requirement. Neither the IDEM or IDOR has record of tank fee payments for years 1988 through 1990. The remaining tank fees were paid on February 26, 1997 which was after the date that the release was discovered.

    Pursuant to 328 IAC 1-3-3(a)(5):
    The applicant is not in substantial compliance with this requirement. The applicant failed to register the tank or tanks within thirty (30) days of the time the tank or tanks were first put to use, even if a release is discovered or confirmed before the tanks were registered. Tanks are considered "in use" when the tank contains or has ever contained a regulated substance and has not been closed under 329 IAC 9-6.

11. J.T. filed its Petition for Review on March 9, 2007.

12. Both parties filed Motions for Summary Judgment on August 13, 2009. IDEM's Response was filed on September 10, 2009; Petitioner's Response was filed on September 11, 2009. The parties filed reply briefs on September 25, 2009. Neither party requested Oral Argument, nor did the parties elect to file Proposed Findings of Fact, Conclusions of Law and Orders.

CONCLUSIONS OF LAW

1. The Indiana Department of Environmental Management ("IDEM") is authorized to implement and enforce specified Indiana environmental laws, and rules promulgated relevant to those laws, per I.C. § 13-13, *et seq*. The Office of Environmental Adjudication ("OEA") has jurisdiction over the decisions of the Commissioner of 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. § 4-21.5-3-27. 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. In determining the facts at issue, 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 Environmental Law Judge ("ELJ"), and deference to the agency's initial factual determination is not allowed. *Id.*; I.C. § 4-21.5-3-27(d). "The ELJ . . . serves as the trier of fact in an administrative hearing and a *de novo* review at that level is necessary. *Indiana Department of Natural Resources v. United Refuse Co., Inc.*, 615 N.E.2d 100, 103 (Ind. 1993). The ELJ does not give deference to the initial determination of the agency." *Indiana-Kentucky Elec. Corp v. Comm'r, Ind. Dep't of Envtl. Mgmt.*, 820 N.E.2d 771 (Ind. Ct. App. 2005). "*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. OEA is required to base its factual findings on substantial evidence. *Huffman v. Office of Envtl. Adjud.*, 811 N.E.2d 806, 809 (Ind., June 30, 2004)(appeal of OEA review of NPDES permit); *see also*, I.C. § 4-21.5-3-27(d). OEA is authorized "to make a determination from the affidavits . . . pleadings or evidence." I.C. § 4-21.5-3-23(b). The applicable standard of proof generally has been described as a continuum with levels ranging from a "preponderance of the evidence test" to a "beyond a reasonable doubt" test. The "clear and convincing evidence" test is the intermediate standard, although many varying descriptions may be associated with the definition of this intermediate test. *Matter of Moore*, 453 N.E.2d 971, 972, n. 2. (Ind. 1983). The "substantial evidence" standard requires a lower burden of proof than the preponderance test, yet more than the scintilla of the evidence test. *Burke v. City of Anderson*, 612 N.E.2d 559, 565, n.1 (Ind. Ct. App. 1993). *GasAmerica #47*, 2004 OEA 123, 129. *See also, Blue River Valley*, 2005 OEA 1, 11-12, *Marathon Point Service and Winamac Service*, 2005 OEA 26, 41, *See also Blue River Valley*, 2005 OEA 1, 11-12.

5. 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 Bldg Comm'n, 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) (*citing Tibbs v. Huber, Hunt & Nichols, Inc.*, 668 N.E.2d 248, 249 (Ind. 1996)). "A genuine issue of material fact exists where facts concerning an issue that would dispose of the litigation are in dispute or where the undisputed facts are capable of supporting conflicting inferences on such an issue." *Laudig v. Marion County Bd. of Voters Registration*, 585 N.E.2d 700, 703 - 704 (Ind. Ct. App. 1992). The moving party bears the

burden of establishing that summary judgment is appropriate. When the moving party sets out a prima facie case in support of the summary judgment, the burden shifts to the non-movant to establish a factual issue.

6. "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." *Id.* In this case, each party has the burden of showing whether the IDEM's determination on J.T.'s ELTF claim either complied with, or was contrary to law or is somehow deficient so as to require revocation, as a matter of law. *In the matter of Objection to the Issuance of Permit Approval No. IN 0061042 Aquasource Services and Technology*, 2002 OEA 41 ("*Aquasource*"). Each movant has the burden of proof, persuasion and of going forward on its motion for summary judgment. I.C. § 4-21.5-3-14(c); I.C. § 4-21.5-3-23. In this case, each claimant has the burden of showing whether there is no genuine issue of material fact that IDEM's ELTF claim determination either complied with, or was contrary to law, as a matter of law.

7. J.T.'s March 9, 2007 Petition for Review objecting to IDEM's February 22, 2007 Determination was filed in a timely manner. The petition raises three (3) issues for consideration. The first is that IDEM erred in determining that neither IDEM nor the Indiana Department of Revenue ("DOR") had record of tank fee payments for years 1988 through 1990. The second is that IDEM erred in determining that payment of remaining tank fees on February 26, 1997 was after the date that the release was discovered. The third is that the tanks were not registered within thirty (30) days of the time when they were first put in to use.

8. Although possibly not available to IDEM when it denied J.T.'s claim, Indiana Department of Revenue records show that Claimant registered the three tanks and paid all of the fees due, for years 1988 through 1997, on February 26, 1997. *Claimant's Motion, Ex. 6*. IDEM virtual file cabinet records agree that the tanks were first registered on February 26, 1997. *IDEM's Motion, Ex. D, Affidavit of Rich Ligman, IDEM Office of Land Quality*. Claimant JT has presented substantial evidence of a lack of a genuine issue of material fact that Claimant's three tanks were registered and fees paid on February 26, 1997. As a matter of law, summary judgment should be denied to IDEM and granted to Claimant on the issue of IDEM's denial for Claimant JT's lack of tank fee payment records for 1988 through 1990.

9. IDEM's February 2, 2007 eligibility denial cited failure to comply with 328 IAC 1-3-3(a)(5) "The applicant is not in substantial compliance with this requirement. The applicant failed to register the tank or tanks within thirty (30) days of the time the tank or tanks were first put to use". 328 IAC 1-3-3(a)(5) cannot form the basis for denial. The regulation did not exist in 1997. Despite IDEM's citation of 328 IAC 1-3-3(a)(5) in a heading of a reason for its claim denial, the determination letter further stated the facts upon which IDEM relied. The Court may recognize the full denial's proper legal basis, and will give it consideration. *See IDEM's*

September 10, 2009 Response, Ex. K, Indiana Department of Environmental Management v. Okun, Cause No. 49F12-0410-PL-003215 (Marion Sup. Ct., April 13, 2005). In its summary judgment briefing, IDEM supports its denial as the February 26, 2007 registration, occurring approximately a decade after the tank registration regulations came into effect, was not substantial compliance in the form of "verifiable actions undertaken sufficiently in advance of a compliance date to provide a reasonable probability of meeting the terms of the statute or regulation's eligibility." However, 328 IAC 1-3-3(b) specifically allowed and addressed late registration and fees, in the form of requiring a percentage calculation to deny payment if the percentage is less than fifty percent (50%), or is discounted by any percentage over fifty percent (50%). Claimant's February 26, 2007 registration and tank fee payment is not analyzed as a lack of substantial compliance under 328 IAC 1-1-9, but as a factor for eligibility amount, if any, under 328 IAC 1-3-3(b). As a matter of law, no genuine issue of material fact exists: Claimant's claim may not be denied for its failure to meet 1988 tank registration requirements within thirty (30) days when they were first put in to use.

10. In this case, the parties dispute which laws govern Claimant's claim for reimbursement from the Excess Liability Trust Fund ("ELTF") for 1997 incident 9703525. To determine whether Claimant is entitled for reimbursement for incident 9703525, the Court must first determine which laws were applicable to Claimant's 1997 claim. Then, the Court will be able to examine the events of February, 1997 to determine whether genuine issues of material fact exist, as a matter of law, as to each party's motion for summary judgment.

11. For purposes of reimbursement from the Excess Liability Trust Fund ("ELTF"), underground storage tank ("UST") owners and operators may be reimbursed for eligible costs arising out of releases of petroleum according to the formula provided in 328 IAC 1-3-3(b)[1] as follows:

    (b) Persons listed in section 1 of this rule shall be eligible to apply to the fund for reimbursement from the fund according to the following formula:
        (1) Determine the number of payments that were owed under I.C. § 13-23-12-1 on all regulated tanks at the facility from which a release occurred, beginning with the date that the fees for each tank first became due under I.C. § 13-23-12 and continuing until the date on which the release occurred.
        (2) Determine the number of payments actually made under I.C. § 13-23-12-1 on all regulated tanks at the facility from which a release occurred, beginning with the date each tank became regulated under I.C. § 13-23 and continuing until the date on which the release occurred. Divide the number of payments actually made by the number of payments due as determined in subdivision (1).
        (3) Determine the amount of money the person would have received from the fund if all payments due on the date the release occurred had been paid when due and multiply the amount by:
            (A) the percentage determined in subdivision (2), if the percentage is fifty percent (50%) or more; or

[1] This rule was authorized by I.C. § 13-23-8-4.5.

(B) zero (0), if the percentage determined in subdivision (2) is less than fifty percent (50%). (emphasis added)

12. The terms stated in 328 IAC 1-3-3(b) were adopted by the Indiana legislature in P.L. 67-1996, effective upon passage on March 21, 1996. I.C. § 13-7-20, *et seq*. (1988). Prior to March 21, 1996, an owner or operator who failed to register tanks and pay all due tank registration fees since April 1, 1988 would receive no reimbursement. *Id*. Effective March 21, 1996, the Indiana legislature modified prior law to allow at least partial payments for claimants were in "substantial compliance" with Indiana law, and who paid at least half of the tank fees due, calculated as a percentage at or above 50%, based on the tank registration fee payments made prior to "the date on which the release occurred" divided by payments due prior to "the date on which the release occurred". P.L. 67-1996, §10, p. 1605, effective upon passage, March 21, 1996. *IDEM's Motion, Ex. H*. This process was in effect from March 21, 1996, expiring on October 1, 1997. *Id*. The terms basing reimbursement upon release occurrence were incorporated into 328 IAC 1-3-3 since February, 1997, prior to the October 1, 1997 expiration date stated in PL 67-1996, §10. *See* 20 Ind. Reg. 1104 (Feb. 1, 1997), *IDEM's Motion, Ex. I*. Although IDEM's February 22, 2007 eligibility denial includes a heading citing 328 IAC 1-3-3(a)(5), the terms stated in P.L. 67-1996 §10 and 328 IAC 1-3-3 do not include 328 IAC 1-3-3(a)(5). *Id*. Claimant's eligibility is determined by the terms stated in 328 IAC 1-3-3, and not 328 IAC 1-3-3(a)(5).

13. Claimant seeks favorable claim resolution as a result of its analysis of multiple versions of I.C. § 13-23-8-4 in effect at various, or overlapping time periods relevant to this cause. *See Claimant's Motion, P.L. 1-1996 and P.L. 67-1996*. One point of analysis centers on one version's specification of tank registration, the other version's omission of the tank registration at a comparable portion of the legislation. Both versions require an analysis of substantial compliance, defined in 328 IAC 1-1-9. Claimant 's conduct of registering the tanks and paying tank fees on the same date limits the applicability of these distinctions to a case which may be resolved by applying the more specific terms stated in a rule relevant to the disputed statute, 328 IAC 1-3-3.

14. At issue is whether Claimant paid tank registration fees "prior to the date on which the release occurred". 328 IAC 1-3-3(b). In order to receive reimbursement from the Excess Liability Trust Fund ("ELTF"), an owner or operator must be in "substantial compliance" with applicable rules and requirements set forth in 328 IAC 1-1-9. I.C. § 13-23-8-4(a) (P.L. 67-1996, §7, approved March 1, 1996, effective July 1, 1996). *See IDEM's Motion, Ex. H*.

15. "Substantial compliance" was defined as "that a time a release was discovered, the tank was registered under IC 13-7-20". 328 IAC 1-1-9 (effective Dec. 1, 1995). *See IDEM's Motion, Ex. J, Ind. Reg. 343 (Dec. 1, 1995).*

16. Claimant's claim for ELTF reimbursement depends on whether the tanks were registered by the time a release was discovered. By substantial evidence, AEA discovered a release on February 3, 1997 during AEA's subsurface investigation, noting the presence of petroleum contamination at the Site. *See IDEM's Motion, Ex. C, ISC at 2, B-6, B-11, C-3, C-4*. By substantial evidence, AEA's contracted laboratory discovered a release during the February 6, 1997 laboratory analysis, concluding that one Phase 1 soil sample contained total petroleum hydrocarbon ("TPH") contamination above IDEM action levels. *Claimant's Motion, Ex. 3, Watkins Dec., ¶¶ 5, 6*. By substantial evidence, Mr. Howard discovered the release at some unspecified time after he registered the tanks and paid fees on February 26, 1997, *Claimant's Motion, Ex. 2, Howard Dec., ¶¶ 8, 10*.

17. The question of reimbursement eligibility then depends on whose discovery is contemplated in the applicable regulations. The terms of the relevant regulation are silent. 328 IAC 1-1-9 of 328 IAC 1-1-9 states as its first requirement for substantial compliance that "at the time a release was discovered, the tank was registered." No particular entity is assigned the duty of registering the tank. The regulation then provides, "and the owner or operator had taken affirmative steps to meet the requirements of . . . I.C. § 13-7-20 . . . [p]roof of substantial compliance includes verifiable actions undertaken sufficiently in advance of a compliance date to provide a reasonable probability of meeting the terms of the statute or regulation". *Id.*

18. The parties analyze this Court's ruling in *Rowe Bros., Inc.*, 2007 OEA 94, to support their contentions as to the relevant point of discovery, and party making that discovery. In *Rowe Bros.*, the owner-operator was selling its gas station facility. *Id.* As part of the transaction, the owner-operator sought a Phase II investigation from the seller's consultant. *Id.* Both the owner-operator and the consultant had small business operations where they were each the only employee with skill and knowledge to interpret investigation results and to evaluate the applicability of regulations in 2003. *Id.* During subsoil investigation, no on-site contamination was discovered; contamination was only detected through sample analysis. *Id.* At the time when the consultant's contracted laboratory transmitted its report, both the owner-operator and the consultant were away from their offices on their respective vacations, returning on the same day. *Id.* On the day of their return, the two conferred, and the owner-operator reported the spill to IDEM. *Id.* The spill-reporting rules in 329 IAC 4 applied to determine whether the spill was reported in a timely fashion. *Id.* Then-applicable 329 IAC 4 specified that discovery could be made by "the owner and operator or another person." "Per the terms of 329 IAC 9-4-1 in 2003, the "owner and operator of a UST system" in this case is Rowe Brothers, and therefore, is responsible for reporting a release under 329 IAC 9-4-1". *Id.* As 329 IAC 4 required reporting by the owner-operator, the Court then conducted a fact-specific analysis of the unique circumstances (individually-staffed owner-operator and consultant discovering the spill via the laboratory report received on the day they each return from individual vacations) to determine that the owner-operator's discovery was germane to determining *whether* the date of reporting substantially complied with applicable regulations. *Id.*

19. *Rowe Brothers* can be distinguished from this cause. Unlike *Rowe Brothers*, the first day of investigation revealed observable contamination. The parties in *Rowe Brothers* clearly identified the relationship among the parties, in that the consultant was acting on the seller owner-operator's orders, at the buyer's request. In this case, JT Obenchain purchased the facility in September, 1997. In February, 1997, owner-operator Jim Howard was trying to sell the property and paid the tank fees on February 26, 1997. Jim Howard did not have a contractual relationship with AEA. On March 26, 1997, AEA reported the release to IDEM, which IDEM's determination stated was timely reported. The 2003 regulations applicable in *Rowe Brother* specified discovery by "the owner and operator or another person" and further assigned the duty to act (report) to the owner or operator. *Rowe Brothers* does not resolve *whose* discovery determines "substantial compliance" in this case.

20. The Court thus applies rules of statutory construction to determine whose discovery determines the substantial compliance of "at the time a release was discovered, the tank was registered". 328 IAC 1-1-9. These terms are unambiguous. "Because the regulation is unambiguous, it is unnecessary and inappropriate to interpret the regulation or consider regulatory intent. *See* Indiana Department of Natural Resources v. Peabody Coal Co., 654 N.E.2d 289, 295 (Ind. Ct. App. 1995) ("when a statute is clear and unambiguous, on its face, the court need not, and indeed must not interpret the statute.")". *Indiana Department of Environmental Management v. KS Research, Inc.*, 2000 OEA 49, 52.

21. 328 IAC 1-1-9 unambiguously does not qualify a determination of "substantial compliance" on who discovers the release. Instead, 328 IAC 1-1-9 qualifies its determination as when the release is discovered. By substantial evidence, the potential for a release was first observed on February 3, 1997, during on-site subsoil investigations by AEA. The release's further characterization was performed on February 3, 1997, and reduced to a laboratory report on February 6, 1997. The tanks were not registered, nor any fees paid, until February 26, 1997. As of the date of discovery, when the laboratory confirmed a release on February 6, 1997, the absence of paid fees, when calculated per 328 IAC 1-3-3(b) is zero. The parties' undisputed facts presented sufficient evidence of a lack of genuine issue of material fact that Claimant J.T.'s Marathon did not substantially comply with then-applicable tank registration requirements, and is ineligible for its claim for reimbursement. As a matter of law, summary judgment should be granted in Respondent IDEM's favor, and denied as to J.T.'s Marathon, Inc.

FINAL ORDER

For all of the foregoing reasons, **IT IS THEREFORE ORDERED, ADJUDGED AND DECREED** that Claimant, J.T. Marathon, Inc.'s Motion for Summary Judgment is **DENIED,** and Respondent, Indiana Department of Environmental Management's Motion for Summary Judgment is **GRANTED,** on the issue that Claimant J.T. Marathon, Inc. did not substantially comply with then-applicable tank registration requirements for J.T. Marathon, Inc's claim for reimbursement eligibility from the Excess Liability Trust Fund for claim number 9703525. This cause is **DISMISSED,** all pending proceedings in this cause are **VACATED.**

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. A party is eligible to seek Judicial Review of this Order as stated in applicable provisions of I.C. § 4-21.5, *et seq*. Pursuant to I.C. § 4-21.5-5-5, a Petition for Judicial Review of this 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 October, 2010 in Indianapolis, IN.

Hon. Mary L. Davidsen
Chief Environmental Law Judge