Objection to the Denial of Excess Liability Trust Fund Claim
ELTF #200807504 / FID #7121
Former Wake-up Oil Company #119
Anderson, Madison County, Indiana
2011 OEA 21, (09-F-J-4273)

OFFICIAL SHORT CITATION NAME: When referring to 2011 OEA 21 cite this case as ***Former Wake-up Oil Co.*, 2011 OEA 21.**

TOPICS:
Summary Judgment
April 1988
328 IAC 1-3-5(d)(1)

PRESIGING JUDGE:
Catherine Gibbs

PARTY REPRESENTATIVES:
IDEM: Julie Lang, Esq.
Petitioner: Glenn D. Bowman, Esq.; Nicholas K. Gahl, Esq.; Stewart & Irwin

ORDER ISSUED:
February 18, 2011

INDEX CATEGORY:
Land

FURTHER CASE ACTIVITY:
[none]

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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 ##200807504 / FID #7121	)	CAUSE NO. 09-F-J-4273
FORMER WAKE-UP OIL COMPANY #119	)	
ANDERSON, MADISON COUNTY, INDIANA	)	

FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL ORDER

This matter came before the Office of Environmental Adjudication (the "Court" or "OEA") on the parties motions for summary judgment, which pleadings are parts of the Court's record; and the Court, having read the motions, responses, replies and evidence now enters the following findings of fact, conclusions of law and order:

Summary of Decision

Each party in this matter filed a motion for summary judgment. The Indiana Department of Environmental Management (IDEM) argues that Douglas and Mary Lawson (the Petitioners) are not eligible to receive reimbursement from the Excess Liability Trust Fund (the ELTF) because the underground storage tanks (hereafter referred to as "USTs" or the "tanks") at their facility were taken out of service prior to April 1, 1988. The Petitioners argue that the USTs were usable until such time as they were removed from the ground, allegedly in December of 1988. The question is not when the tanks were closed but whether the release occurred prior to April 1, 1988. The presiding ELJ concludes that there is no question of material fact that the tanks, by the owner's own admission, were empty as of 1986 and that the release occurred prior to April 1, 1988. The Petitioners are not eligible for reimbursement from the ELTF pursuant to 328 IAC 1-3-5(d)(1).

FINDINGS OF FACT

1. Douglas and Mary Lawson (the Petitioners) own the property located at 7240 Dr. Martin Luther King Jr. Boulevard, Anderson, Madison County, Indiana (the Site).

2. On May 6, 1986, Wake Up Oil Company, Inc., the previous owner, notified the IDEM that there were five (5) USTs at the Site. Further, the notification states that the USTs were empty, temporarily out of use and had last been used in December of 1979.

3. On December 28, 1988[1], Wake Up Oil Company, Inc. notified the IDEM that the USTs at the Site had been removed. No information was provided as to when the USTs were removed.

4. The IDEM's public records are incorporated into a database known as ULCERS[2]. These records indicate that the tanks at this facility were open on April 1, 1988; the owner was billed for 5 USTs in 1988; and that this bill was paid in June of 1989.

5. On June 4, 2009, the Petitioners were notified that their application for reimbursement from the Excess Liability Trust Fund (the ELTF) had been denied because "the underground storage tanks at this site were last used in December, 1979. Because the USTs have not been used since 1979, the release appears to have occurred prior to 1988. Releases occurring before April 1, 1988 are not eligible for reimbursement from the ELTF."[3] The Petitioners timely filed their petition for review of this decision on June 15, 2009.

6. The Petitioners filed their motion for summary judgment on September 16, 2010. The IDEM filed its motion for summary judgment on September 17, 2010. The IDEM filed its Response to Petitioners' Motion for Summary Judgment on October 18, 2010 and filed a Reply In Support of Its Motion for Summary Judgment on November 5, 2010. The Petitioners did not file a response or reply.

Applicable Law

The Office of Environmental Adjudication ("OEA") has jurisdiction over the decisions of the Commissioner of the IDEM and the parties to this controversy pursuant to I.C. § 4-21.5-7-3.

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). Further, OEA is required to base its factual findings on substantial evidence. *Huffman v. Office of Envtl. Adjud.*, 811 N.E.2d 806, 809 (Ind. 2004) (appeal of OEA review of NPDES permit); *see also* I.C. § 4-21.5-3-14; I.C. § 4-21.5-3-27(d).

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,*

[1] Both the IDEM and the Petitioner attached a copy of the notification to their motions (IDEM's Exhibit B and Petitioners' Designation Item 8). The year that the notification was signed is illegible.
[2] Underground Leaking Storage Tank, Community Right-to-Know and Emergency Response System.
[3] Exhibit C, Ind. Dept. of Environmental Management's Motion for Summary Judgment, filed September 17, 2010.

et al., 725 N.E.2d 949 (Ind. Ct. App. 2000). The Court in *Laudig v. Marion County Bd. of Voters Registration*, 585 N.E.2d 700, Ind. Ct. App. 1992 at 703-704 held, "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. *Fisher v. Kaylor* (1969), 145 Ind. App. 148, 250 N.E.2d 19."

The owners or operators of USTs were required to notify the state of the existence of the USTs pursuant to 40 CFR 280.22(a). Corrective action costs attributable to releases that occurred prior to April 1, 1988 are not eligible for reimbursement from the ELTF. 328 IAC 1-3-5(d)(1).

CONCLUSIONS OF LAW

1. The OEA has subject matter jurisdiction to hear the petitions for review as the petitions for review request review of a decision made by the IDEM Commissioner. Further, the Court concludes that the petitions were timely filed.

2. 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). Further, OEA is required to base its factual findings on substantial evidence. *Huffman v. Office of Envtl. Adjud.*, 811 N.E.2d 806, 809 (Ind. 2004) (appeal of OEA review of NPDES permit); *see also* I.C. § 4-21.5-3-14; I.C. § 4-21.5-3-27(d).

3. 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).

4. "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. *Fisher v. Kaylor* (1969), 145 Ind. App. 148, 250 N.E.2d 19." *Laudig v. Marion County Bd. of Voters Registration*, 585 N.E.2d 700, 703-704 (Ind. Ct. App. 1992).

5. The only undisputed facts in this case are that (1) the tanks were last used in 1979; (2) the tanks were empty as of May 6, 1986; and (3) the IDEM was informed that the tanks had been

removed on or about December 28, 1988. No evidence appears to exist that indicates when the USTs were actually removed.

6. The owners and operators of USTs, who are in the best position to have reliable information, have a statutory duty to report the status of the USTs to the IDEM. The IDEM may rely on the information provided by the owners and operators until such time as that information is disproved by credible and reliable evidence. The fact that the IDEM billed the owner for tank fees in 1988 or that, according to ULCERS, the USTs were considered "open" in December 1988 are not conclusive as to whether the release occurred prior to April 1, 1988. The ULCERS entries were based on information supplied by the owner of the USTs in 1986, Wake Up Oil Company, Inc.[4]

7. The undisputed facts, as reported by the owner of this Facility, show that the tanks had not been used since 1979 and were empty as of 1986. The fact that the tanks *could have* been used does not negate these facts. The Petitioners rely only on speculation and failed to produce any substantial, credible or reliable evidence that the tanks were in fact used or contained regulated substances at any time after 1986.

8. Based on the undisputed facts, the release must have occurred prior to April 1, 1988. There is no question of material fact and summary judgment should be entered in favor of the IDEM. The Petitioners are not eligible for reimbursement from the ELTF pursuant to 328 IAC 1-3-5(d)(1).

FINAL ORDER

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that summary judgment is entered for the Indiana Department of Environmental Management. The Petition for Review filed by Douglas and Mary Lawson (the Petitioners) is **DISMISSED**.

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 18th day of February, 2011 in Indianapolis, IN.

Hon. Catherine Gibbs
Environmental Law Judge

[4] It does not appear that the Petitioners ever owned the USTs as these were removed prior to the Petitioners taking ownership of the property.