Objection to Denial of Excess Liability Trust Fund
Claim No. 200308514, Facility ID No. 9387
Fast Max / Sunoco #152
Lee & Ryan Environmental Consulting, Inc.
Monticello, White County
2012 OEA 19, (10-F-J-4428)

OFFICIAL SHORT CITATION NAME: When referring to 2012 OEA 19 cite as ***Fast Max / Sunoco #152,* 2012 OEA 19.**

TOPICS:
328 IAC 1-3-5 (e)
Corrective Action Plan (CAP)
demonstration
dual phase extraction (DPE)
Excess Liability Trust Fund (ELTF)
lower cost
Monitored Natural Attenuation (MNA)
natural process
non-rule policy document W0054-WASTE
possible or practical
remediation
Soil Vapor Extraction (SVE)
Summary Judgment
three bids
well installation

PRESIDING JUDGE:
Mary L. Davidsen

PARTY REPRESENTATIVES:
IDEM: Julie E. Lang, Esq.
Petitioner: David L. Hatchett, Esq., Thomas W. Baker, Esq.; Hatchett & Hauck

ORDER ISSUED:
March 12, 2012

INDEX CATEGORY:
Land

PREVIOUS CASE ACTIVITY:
Findings of Fact, Conclusions of Law and Final Order issued February 29, 2012.

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	)	
NO. 200308514 / FID #9387	)	CAUSE NO. 10-F-J-4428
FAST MAX / SUNOCO #152	)	
LEE & RYAN ENVIRONMENTAL CONSULTING, INC.	)	
MONTICELLO, WHITE COUNTY, INDIANA	)	

MODIFIED FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL ORDER

This matter came before the Office of Environmental Adjudication (the "OEA" or the "Court") on the Indiana Department of Environmental Management's and Lee & Ryan Environmental Consulting, Inc.'s motions for summary judgment. And the Court, being duly advised and having read the record, motions, responses, reply and evidence, now enters the following findings of fact, conclusions of law and final order.

Summary of Decision

Both parties request summary judgment in their favor on the issue of whether the denial of corrective action costs associated with drilling extraction wells on the site in question was proper. The Indiana Department of Environmental Management ("IDEM") argues that Lee & Ryan did not comply with the rule's required submission of three bids for the well drilling aspect of a corrective action system. In its claim for reimbursement to IDEM, Lee & Ryan did not submit three bids, nor did it submit a demonstration that lower costs were not possible or practical. Lee & Ryan Environmental Consulting, Inc. (Lee & Ryan) argues that three bids are not necessary for work when IDEM has promulgated a rule specifying a unit cost rate. While Lee & Ryan failed to submit the requisite 3 bids stated in the rule, on summary judgment, Lee & Ryan established that lower costs for the specified work were not possible or practical. As a matter of law, Lee & Ryan fulfilled the requirements of 328 IAC 1-3-5(e), which OEA is permitted to consider under *de novo* review.

FINDINGS OF FACT

Objection to Denial of Excess Liability Trust Fund
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1. Lee & Ryan performed corrective action work at the property known as Fast Max/Sunoco #152 located at 1510 North Main, Monticello, Indiana (the Site). The Site's facility identification number is 9387. The IDEM assigned Incident #200308514 to the underground storage tank release which required the corrective action taken. Lee & Ryan's submitted its Revised Corrective Action Plan ("CAP") to IDEM on January 26, 2007.

2. IDEM approved the CAP's use of dual phase extraction (DPE) as the appropriate corrective action for this Site on April 2, 2007. "The basic principle of DPE is to apply sufficient vacuum to extraction wells screened in the contaminated interval to simultaneously extract groundwater, free product (if present) and petroleum vapors from unsaturated soil."[1]

3. On or about September 15, 2010, Lee & Ryan submitted a claim to IDEM for reimbursement from the Excess Liability Trust Fund (ELTF) in the amount of $6,316.20. Lee & Ryan's claim did not include three bids for installation of the wells. Nor did Lee & Ryan submit a demonstration that lower costs for the specified work were not possible or practical

4. On November 3, 2010, the IDEM denied $5,644.10[2] of Lee & Ryan's claim on the basis that "reimbursement for costs incurred for the technology employed in remediation activities requires a submission of 3 bids. The claimant did not submit the minimum number of required bids for the installation of the SVE[3] wells."[4]

5. The denied costs were incurred for the installation of subsurface wells used as a part of the corrective action system at the Site. IDEM reimbursed Lee & Ryan for the costs related to the system itself; however, IDEM denied reimbursement for the costs associated with the installation of the extraction wells because Lee & Ryan did not submit 3 bids for these costs. The extraction wells were installed by a licensed well driller subcontracted by Lee & Ryan. This subcontractor billed Lee & Ryan for the installation costs based on unit costs stated in the ELTF rules concerning well installation. *328 IAC 1-3-5(e) regarding Site Characterization.*

6. Lee & Ryan filed its petition for review of IDEM's ELTF claim denial on November 17, 2010.

[1] Ex. A, Revised Corrective Action Plan, Incident #200308514, FID #9387, page 14, incorporated into IDEM's Motion for Summary Judgment.
[2] Lee & Ryan does not dispute the denial of $672.10.
[3] Soil vapor extraction
[4] Ex. A, Affidavit of Monique Boykin, Ex. 1, IDEM's Nov. 3, 2010 Determination on Lee & Ryan's ELTF Submittal, incorporated into Lee & Ryan's Motion for Summary Judgment, filed on February 17, 2011.

7. Both parties filed Motions for Summary Judgment on February 17, 2011. Both parties filed responses on March 21, 2011. Lee & Ryan filed its reply on April 15, 2011. Both parties filed Proposed Findings of Fact, Conclusions of Law and Order on April 29, 2011. The parties participated in a Status Conference on December 7, 2011.

8. In support of its Motion for Summary Judgment, Lee & Ryan presented substantial evidence that had the extraction wells been bid out to well drillers, the well drillers would have charged more for installation of the extraction wells than ELTF rates would have provided, ranging from $8,000 to $12,000.[5]

9. On February 29, 2012, the Court issued Findings of Fact, Conclusions of Law and Final Order. At a March 12, 2012 telephonic status conference, the Court, the parties' consented to IDEM's March 2, 2012 Motion to Modify Final Order as to Conclusion of Law ¶ 11 and to (now, former) ¶ 13. The Court granted IDEM's Motion to Modify the February 29, 2012 Final Order, which modifications are reflected in the following Conclusions of Law as to paragraphs 11, and to the deletion of the February 29, 2012 version of ¶ 13.

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 this controversy pursuant to I.C. § 4-21.5-7-3.

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). When the moving party sets out a prima facie case in support of the summary judgment, the burden shifts to the non-movant to

[5] Ex. B, Affidavit of Shannon Andrews, Lee & Ryan's Motion for Summary Judgment, filed on February 17, 2011.

establish a factual issue. 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).

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." *Id.* 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 the matter of Objection to the Issuance of Permit Approval No. IN 0061042 Aquasource Services and Technology*, 2002 OEA 41 ("*Aquasource*").

5. The ELJ is not permitted to weigh the evidence or judge credibility when deciding whether to grant summary judgment. "Summary judgment must be denied if the resolution hinges upon state of mind, credibility of the witnesses, or the weight of the testimony. Mere improbability of recovery at trial does not justify the entry of summary judgment against" a party. *Best Homes, Inc. v. Rainwater*, 714 N.E.2d 702, 706 (Ind. Ct. App. 1999).

6. The rule applicable to Lee and Ryan's claim for ELTF reimbursement, 328 IAC 1-3-5(e), states:

> The maximum costs for the work done for corrective action, except excavation, will be allowed on the basis of the lowest of three (3) comparable, competitive bids for the work specified in the corrective action plan. Bids for the work specified in the CAP must include bids for installation and labor. Copies of the request for proposal (RFP) for implementation of CAP that was sent to each vendor must be submitted. The administrator can approve costs based on less than three (3) bids if a demonstration is provided to the administrator that lower costs for the specified work is not possible or practical.

7. Lee & Ryan admits that it did not submit 3 bids. Instead, Lee & Ryan argues that IDEM applies the 3 bid rule inconsistently and points to the fact that IDEM does not require 3 bids for monitored natural attenuation (MNA) or excavation. Further, Lee & Ryan points out the following response made by IDEM to a comment that IDEM has applied unit rates instead of reimbursing the lowest bid: "Soil excavation and disposal is an approved technology that has unit rates, therefore bids are not required or necessary." 27 IR 952, at 6 (Dec. 1, 2003). Lee & Ryan argues and provides substantial evidence in support of its motion for summary judgment that the work was cost effective and bidding this work would result in higher costs. Although not provided to the administrator as contemplated in the rule, evidence of higher costs demonstrates that lower costs for the specified work was not possible or practical. Lee & Ryan recognizes that 3 bids are necessary for corrective action in most instances, saying

"IDEM's ELTF reimbursement rules appropriately require three bids for corrective action systems as the rules cannot adequately address the wide range of corrective action technologies that are employed at leaking tank cleanup sites. The purpose of the three bids is to provide market based incentives for cost effective remediation approaches at cleanup sites. However, bids are not necessary in the case of installation of wells (including in this case), as IDEM rules already specify the amount that IDEM will reimburse for installing wells."[6]

8. IDEM argues that the rule is clear that 3 bids are required for any corrective action technology. The rule specifically excludes excavation from the 3 bid requirement. Further, IDEM asserts that because MNA is a "natural" process and not technology based, it is "impossible to bid upon such a process"[7]. MNA costs are also addressed in a Non-Rule Policy document.[8] For these reasons, the costs for laboratory samples taken and analyzed as part of MNA are reimbursed based on the unit rates set out in the rules.

9. The express language of 328 IAC 1-3-5(e) is determinative of the parties' conflicting interpretations. The intent of the legislature is to give effect to the ordinary and plain meaning of *Management LLC v. State of Indiana*, 831 N.E.2d 104 (Ind. 2005); *see In the Matter of: Commissioner, Indiana Department of Environmental Management v. Charles Hungler,* 2008 OEA 1, 5. Rules of statutory construction apply to rules, such as 327 IAC 5-2, *et seq*. *Miller Brewing Co. v. Bartholomew County Beverage Cos., Inc.*, 674 N.E.2d 193 (Ind. Ct. App. 1996); *see In the Matter of Objection to Issuance of Part 70 Operating Permit No. T-137-6928-00011 for Joseph E. Seagrams & Sons, Inc.*, 2004 OEA 58, 61.

10. The rule is clear that a claimant will be reimbursed the lowest of "three (3) comparable, competitive bids for the work specified in the corrective action plan." Further, the rule clearly states that "[t]he administrator can approve costs based on less than three (3) bids if a demonstration is provided to the administrator that lower costs for the specified work is not possible or practical". The OEA, on *de novo* review as the IDEM's ultimate authority, may determine whether the Lee & Ryan demonstrated that lower costs for the specified work is not possible or practical.

11. In this case, on summary judgment, Lee & Ryan's claim may be approved without submission of three bids because Lee & Ryan has demonstrated that it properly elected to use rule-based unit rates because lower costs for the work was not possible or practical. IDEM, by promulgating the rules found at 328 IAC 1-3-5 (e), implicitly made a determination that the unit rates are reasonable and cost effective. Further, the rules were amended and in certain circumstances now allow the use of unit rates in place of bids where such rates have

[6] Lee & Ryan Environmental Consulting, Inc's Motion for Summary Judgment, filed February 17, 2011, page 5.
[7] IDEM's Response to Lee & Ryan's Motion for Summary Judgment, filed March 21, 2011, page 2.
[8] W0054-WASTE, 27 IR 7 at 2364, 2366 (April 1, 2004, adopted March 18, 2004).

been promulgated.[9] And, Lee & Ryan presented uncontroverted evidence that bids for this work would probably be higher than the costs based on the promulgated rates. No genuine issue of material fact exists that bids would exceed the promulgated rates.

12. IDEM's partial motion for summary judgment is defeated by the plain language terms of 328 IAC 1-3-5(e). While Lee & Ryan failed to submit the requisite 3 bids stated in the rule, on summary judgment, Lee & Ryan established that lower costs for the specified work were not possible or practical. As a matter of law, Lee & Ryan fulfilled the requirements of 328 IAC 1-3-5(e), which this forum is permitted to consider under *de novo* review.

13. (deleted from February 29, 2012 Final Order).

14. There is no genuine dispute as to any material facts. Summary judgment is appropriate and should be granted in Lee & Ryan's favor and denied as to IDEM.

FINAL ORDER

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that summary judgment is **GRANTED** in favor of Claimant, Lee and Ryan Environmental Consulting, Inc. The Indiana Department of Environmental Management's Motion for Partial Summary Judgment is **DENIED**. IDEM shall provide reimbursement of Lee & Ryan's claim in the amount of $5,644.10.

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 12th day of March, 2012 in Indianapolis, IN.

Hon. Mary Davidsen
Chief Environmental Law Judge

[9] For example, 328 IAC 1-3-5(3) states "TRANSPORTATION Activities in accordance with an approved CAP will be considered for reimbursement based upon the submittal of three (3) bids as defined under CORRECTIVE ACTION TECHNOLOGIES or the following unit rates".