Objection to the Denial of Excess Liability Trust Fund Claim
ELTF #199602116-2 / FID #9655
Sun Chemical Corporation
Frankfort, Clinton County, Indiana
2013 OEA 78, (13-S-J-4656)

OFFICIAL SHORT CITATION NAME: When referring to 2013 OEA 78 cite this case as ***Sun Chemical Corporation*, 2013 OEA 78.**

TOPICS:
NFA
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intent
retroactive
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summary judgment
corrective action costs
underground storage tanks
Excess Liability Trust Fund (ELTF)
I.C. 13-23-8-7(a)
328 IAC 1-3-1(d)

PRESIDING LAW JUDGE:
Catherine Gibbs

PARTY REPRESENTATIVES:
IDEM: Julie Lang, Esq.
Petitioners: E. Sean Griggs, Esq., David R. Gillay, Esq., Jennifer C. Baker, Esq.; Barnes & Thornburg

ORDER ISSUED:
December 3, 2013

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	)	CAUSE NO. 13-F-J-4656
ELTF #199602116-2 / FID #9655	)	
SUN CHEMICAL CORPORATION	)	
FRANKFORT, CLINTON COUNTY, INDIANA	)	

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 Sun Chemical Corporation's motions for summary judgment. The presiding Environmental Law Judge (the ELJ), 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

This matter revolves around the denial of Sun Chemical Corporation's (Sun) application for ELTF reimbursement because of Sun's failure to comply with the deadline in 328 IAC 1-3-1(d). Sun moves for summary judgment on the basis that the Indiana Department of Environmental Management (the IDEM) (1) improperly applied 328 IAC 1-3-1(d) retroactively especially in light of Sun's vested right to ELTF reimbursement; and (2) the rule exceeds the scope of its legislative authority. The IDEM moves for summary judgment on the basis that reimbursement was properly denied for Sun's failure to comply with the rule. The ELJ finds in favor of the IDEM.

FINDINGS OF FACT

1. Sun owned or operated the underground storage tanks (USTs) located at 2642 West State Road 28, Frankfort Indiana (the Facility). The Facility is approved to receive reimbursement from the Excess Liability Trust Fund (the ELTF).

2. Sun reported a release from the USTs to the IDEM in February 1996 and proceeded to conduct site investigation and corrective action.

3. The IDEM approved Sun's request for No Further Action (NFA) status on November 15, 2010.

4. The Financial Assurance Board (the FAB) adopted a final rule amending Title 328 of the Indiana Administrative Code (IAC) (the 2011 Amendment), including 328 IAC 1-3-1(d).

5. The 2011 Amendment was filed with the Legislative Services Agency in February 2011.

6. The rule's effective date was March 26, 2011.

7. In accordance with the 2011 Amendment, the deadline for submitting ELTF applications for facilities with NFA status as of March 26, 2011, was December 26, 2011.

8. Sun applied for reimbursement of $114,930.36 in costs associated with the corrective action on December 28, 2012. All of these corrective action costs were incurred by Sun prior to March 26, 2011.

9. The IDEM notified Sun that the application was denied in full on May 3, 2013 for the reason that Sun had not submitted the costs for reimbursement before the December 26, 2011 deadline established by 328 IAC 1-3-1(d).

10. Sun filed its petition for administrative review on May 17, 2013.

11. Both parties filed motions for summary judgment on August 16, 2013; responses were filed on September 16, 2013; and replies were filed on October 1, 2013.

Applicable Law

The OEA 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).

The OEA may enter summary 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 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).

Each party has requested summary judgment in this matter. "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." *Laudig v. Marion County Bd. of Voters Registration,* 585 N.E.2d 700, 703-704, (Ind. Ct. App. 1992). A genuine issue exists if the trial court would be required to resolve disputed facts. *Jones v. City of Logansport*, 436 N.E.2d 1138, 1143(Ind. App. 1982). Summary judgment is likewise inappropriate if conflicting inferences arise from the facts. *McKenna v. City of Fort Wayne*, 429 N.E.2d 662, 664 (Ind. App. 1981), *Lawson v. Howmet Aluminum Corp.*, 449 N.E.2d 1172, 1175 (Ind. App. 1983).

328 IAC 1-3-1(d), effective date March 26, 2011, states:

> All occurrences with an existing status of NFA as of the effective date of the 2011 Amendment to this article will have:
> (1) nine (9) months from the effective date of the 2011 Amendment to this article to submit any remaining costs; and
> (2) an additional twelve (12) months to resubmit any denied costs.

Sun argues that 328 IAC 1-3-1(d) was impermissibly applied retroactively. It is a generally accepted rule that statutes cannot be applied retroactively without an express statement of the legislature's intent to do so. *Indiana Dep't of Envtl. Management v. Chemical Waste Management*, 604 N.E.2d 1199, 1992 Ind. App. LEXIS 1797 (Ind. Ct. App. 1992). "Regulations, like statutes, cannot be applied retroactively without express direction to do so." *Haelfing v. United Parcel Service*, 169 F.3d 494, *certiorari den*., 120 S. Ct. 64, 528 U.S. 820, 145 L.Ed.2d 55 (2000). See *GasAmerica #47*, 2004 OEA 123 at 127.

I.C. § 13-23-8-7(a) states (in pertinent part), ". . ., a claimant does not have an enforceable right to the payment of a claim under this chapter."

Sun also argues that 328 IAC 1-3-1(d) exceeds the legislative authority given to the FAB to promulgate rules. "An administrative board may not make rules and regulations inconsistent with the statute it is administering." *Varner v. Ind. Parole Bd.*, 922 N.E.2d 610, 612, 2010 Ind. LEXIS 153 (Ind. 2010). "Rules and regulations promulgated by administrative boards must be reasonable and reasonably adapted to carry out the purpose or object for which these boards were created. Boards cannot enlarge or vary, by the operation of such rules, the powers conferred upon them by the Legislature, or create a rule out of harmony with the statute. *Ponder, supra.* If the rules are in conflict with the state's organic law, or antagonistic to the general law of the state or "opposed to the fundamental principles of justice, or inconsistent with the powers confer[r]ed upon such boards," they are invalid." *Potts v. Review Bd. of Indiana Employment Sec. Div*., 438 N.E.2d 1012, 1015-1016, 1982 Ind. App. LEXIS 1358 (Ind. Ct. App. 1982). (citations omitted)

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 Ind. Code § 13-13, *et seq.* The 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.

3. The OEA 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).

4. The IDEM has not asserted that Sun failed to comply with any other regulation other than 328 IAC 1-3-1(d). Sun would have received reimbursement for some, if not all, of these costs if Sun had applied for these costs in the time frame set by 328 IAC 1-3-1(d). Sun argues that the IDEM improperly applied the rule retroactively. However, 328 IAC 1-3-1(d) expressly provides for retroactive application. Subsection (d) establishes a nine months deadline to apply for reimbursement for all remaining corrective action costs for *"All occurrences with an existing status of NFA as of the effective date of the 2011 Amendment to this article."* Subsection (c) of this rule sets out the deadline for facilities that had not attained NFA status prior to the effective date of the rule. By specifically referencing both situations (that is, facilities that had NFA status and those that didn't), it is clear that the FAB, in promulgating this rule, intended to apply this rule to all facilities that had NFA status prior to the rule's effective date. If the rule had not provided some amount of time in which to apply for reimbursement but, instead, had cut off an applicant's ability to apply for reimbursement upon the rule's effective date, then Sun's argument that this was an impermissible retroactive application would be persuasive. However, as the rule expressly provided time to apply, then Sun's argument is not persuasive as to this issue.

5. Sun's argument that it has a vested right to ELTF reimbursement is also unconvincing. The statutory authority is quite clear that "a claimant does not have an enforceable right to the payment of a claim under this chapter." I.C. §13-23-8-7(a). Sun has not presented any argument that equitable estoppel should apply and the IDEM should be estopped from denying reimbursement.

6. Sun also argues that the IDEM has exceeded the scope of its legislative authority in creating this deadline for filing applications. Sun cites to *Skrundz v. Review Board of the Indiana Employment Sec.*, 444 N.E.2d 1217 (Ind. Ct. App. 1983). The court, in *Skrundz,* did find that the Review Board had exceeded its authority in establishing a deadline for filing claims, but only because the deadline was in direct contradiction to federal law. Therefore, *Skrundz* can be distinguished from this case.

7. The FAB did not exceed its authority in promulgating this rule. I.C. § 13-23 *et seq*. gives the IDEM broad authority to administer the ELTF program, including the authority to deny reimbursement for many different reasons. The mere fact that the FAB promulgated a deadline for filing claims does not in and of itself exceed the authority to administer the ELTF. No allegations have been made that the FAB failed to follow proper rulemaking procedure.

8. Sun failed to present sufficient evidence to support a finding of summary judgment.

9. The IDEM has met its burden for summary judgment. There are no disputed facts and summary judgment in the IDEM's favor is appropriate.

FINAL ORDER

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that summary judgment is entered in favor of the Indiana Department of Environmental Management.

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 3rd day of December, 2013 in Indianapolis, IN.

Hon. Catherine Gibbs
Environmental Law Judge