

**Objection to the Issuance of No Further Action Determination for
State Cleanup Site #000-00-208 for
City of Indianapolis
Indianapolis, Marion County, Indiana
2017 OEA 29, (12-S-J-4635)**

OFFICIAL SHORT CITATION NAME: When referring to 2017 OEA 29 cite this case as
City of Indianapolis, 2017 OEA 29.

TOPICS:

I.C. § 13-12-3-2	stable plume
I.C. § 13-25-5-8.5	vapor intrusion
RISC	vapor extraction
RCG	default
TCE	non-default
PCE	State Cleanup
no further action	non-rule policy documents
remediation	Remediation Closure Guide
remedial goals	environmental restrictive ordinances
ground water	potential exposure concentration (PEC)
aggrieved	<i>Moran Elec. Serv., Inc. v. Comm'r, Ind.</i>
adversely affected	<i>Dep't of Env'tl. Mgmt., 13 N.E.3d 906</i>

PRESIDING ENVIRONMENTAL LAW JUDGE:

Catherine Gibbs

PARTY REPRESENTATIVES:

IDEM: April Lashbrook, Esq.
Petitioner: Glenn Bowman, Esq.; Marc Menkveld, Esq.; Bamberger, Foreman, Oswald, Hahn
Permittee: Alexander Will, Esq.; Frost Brown Todd
Sheila Kinney, Esq.

ORDER ISSUED:

April 7, 2017

INDEX CATEGORY:

Land

FURTHER CASE ACTIVITY:

Judicial Review

**Objection to the Issuance of No Further Action Determination for
State Cleanup Site #000-00-208 for
City of Indianapolis
Indianapolis, Marion County, Indiana
2017 OEA 29, (12-S-J-4635)**

may examine whether the NFA was properly issued but may not decide that IDEM improperly refused to revoke the NFA. Judgment is entered in favor of IDEM and the City for the following reasons.

Procedural History

1. Moran filed its Petition for Review on January 29, 2013. Moran's requested relief is "IDEM should revoke the NFA status for the Site and require that responsible party to investigate and remediate, if necessary, the impacts its contamination is causing on downgradient properties."³
2. On April 20, 2013, Threaded Rod Company, Inc.'s motion to intervene was granted. Threaded Rod owns property near the Ertel Site.
3. On March 26, 2014, the ELJ denied Respondents' motion to dismiss and determined that the Petition was timely filed and that Moran is the real party in interest.
4. The Respondents filed a Motion in Limine and to Close Discovery on June 20, 2016, seeking to restrict introduction of data collected after the NFA Letter was issued. On July 5, 2016, the OEA entered stipulations that "Additional Data", as defined in the July 5 Order, was relevant and the parties retained their rights to introduce the data as evidence and their rights to object to such data.
5. On September 30, 2016, Threaded Rod was dismissed as a party to this cause.
6. The final hearing was held on October 24, 25, 26 and 27, 2016. The parties filed proposed Findings of Fact, Conclusions of Law and Orders on February 17, 2017.

FINDINGS OF FACT⁴

1. On November 19, 2012, IDEM issued its approval of the City's request for NFA status at the Former Ertel Manufacturing site, located at 2045 Dr. Andrew J. Brown Avenue, Indianapolis Indiana ("Ertel Site").
2. Moran filed its Petition for Review on January 29, 2013. Moran alleges that contamination from the Ertel Site is migrating onto its property which is located downgradient of the Ertel Site. As relief, Moran requested that OEA revoke the NFA letter.

³ Petition for Administrative Review, filed on January 29, 2013, page 7.

⁴ Some of the parties' proposed findings of fact are adopted in this decision, as they accurately state the Court's determination.

**Objection to the Issuance of No Further Action Determination for
State Cleanup Site #000-00-208 for
City of Indianapolis
Indianapolis, Marion County, Indiana
2017 OEA 29, (12-S-J-4635)**

3. Ertel Manufacturing Corporation ("Ertel") conducted manufacturing operations at the former Ertel Site and such operations led to the release of hazardous substances, including chlorinated solvents, into the soil and groundwater at the former Ertel site and surrounding properties. Hr'g Tr. 61-69, Oct. 24, 2017 (Groves Testimony); Hr'g Tr. 219 (Vijay Testimony); Hr'g Tr. Oct. 25, 2017, 724-726 (Vedder Testimony) (reference to map Vedder prepared showing areas of shallow impact); Exhibit 146, IDEM Map of PCE impacts, former Ertel Site; Hr'g Tr. Oct. 26, 2017 p. 818 (Anderson Testimony; Exhibit 8, Soil Remediation Completion Report, QEPI; Exhibit 53, Soil Excavation and Remediation Scope of Work, QEPI, September 7, 2007.
4. The Ertel site consists of three parcels of land in a P-shape with frontage along Dr. Andrew J. Brown Drive. Ex. 84; *See also* Ex. H. The City owned all three parcels of land making up the Ertel site.
5. Directly contiguous to the south and to the east of the Ertel site, (i.e., sitting inside the "crook" of the P-shaped parcels), is a parcel of land formerly owned by Zimmer Paper Products, Inc. This parcel is known as the "Zimmer parcel" and was never owned by the City, but was later purchased by another company, Major Tool & Machine, Inc.⁵. The Zimmer Parcel is not a part of this cause.
6. The former Moran Electric Services, Inc. operated on a site located directly south of the Ertel site that is now also owned by Major Tool & Machine ("Moran site"). Ex. H. Chlorinated solvent impacts, including both TCE⁶ and PCE⁷, were found in both the shallow and deep groundwater at the Moran site. Hr'g Tr. 251 (Vijay Testimony). Moran Electric used TCE until plant closure in 1995. IDEM considers Moran Electric a responsible party with regard to the Moran site. Hr'g Tr. 393-396 (Groves Testimony).
7. Von Duprin, LLC and Threaded Rod Corporation operated on a site located at 1929 Columbia Avenue, west of Dr. Andrew J. Brown and located to the southwest of the Ertel site ("Threaded Rod site"). Hr'g Tr. 389-390 (Groves Testimony). Chlorinated solvent impacts, including TCE and PCE, were found in both the shallow and deep groundwater at the Threaded Rod site. Exs. 88, 90, 102, 110.
8. The NFA Letter is based on the following:
 - a. In late 2005, IDEM discovered drums and other containers of hazardous waste on the Ertel Site. In 2006 through 2007, the United States Environmental Protection Agency (US EPA) conducted a removal action at the site.

⁵ Major Tool and Machine is not a party to this proceeding.

⁶ Trichloroethylene.

⁷ Tetrachloroethylene.

**Objection to the Issuance of No Further Action Determination for
State Cleanup Site #000-00-208 for
City of Indianapolis
Indianapolis, Marion County, Indiana
2017 OEA 29, (12-S-J-4635)**

- b. In early 2007, the City removed 37,000 tons of soil contaminated with metals, PCBs, chlorinated hydrocarbons and petroleum hydrocarbons.
 - c. In 2008⁸, Major Tool and Machine Inc. constructed a new facility on the Site. The building included a sub-slab vapor extraction mitigation system. This system was operated actively from 2008 to 2010 and has been operated passively since that time.
 - d. Ground water monitoring occurred between 2008 through April 2012. IDEM concluded that the exposure pathways for ground water (both ingestion and inhalation) were incomplete.
 - e. Exposure pathways for vapor intrusion were also deemed incomplete because of the removal of the source of the contamination (the soil); the Site was capped through the construction of a concrete cap (the Major Tool facility) and a vapor mitigation system was installed.
 - f. Downgradient properties (Moran and Threaded Rod) were excluded because each had a shallow source of contamination.
 - g. The Site is not in a municipal wellhead protection area.
 - h. An environmental restrictive covenant was recorded on the Site prohibiting residential use, the installation of potable wells for ground water extraction and consumption and excavation of soil without IDEM approval. The covenant also requires the continued operation of the sub-slab vapor mitigation system and other restrictions.
9. The Ertel Site is the subject of other pending litigation. An action is currently pending in Marion Superior Court brought by the City and IDEM to recover the costs incurred for the cleanup. On or about July 8, 2011, the City, IDEM, Ertel, and Hartford Fire Insurance Company and Hartford Insurance Company ("Hartford"), as an insurer for Ertel, entered into a Settlement and Release Agreement as well as simultaneously executed an Agreed Order (AO). Exhibit 82, Settlement and Release Agreement with Agreed Order attached; Exhibit 83, Agreed Order.

⁸ The Ertel buildings had been previously demolished.

**Objection to the Issuance of No Further Action Determination for
State Cleanup Site #000-00-208 for
City of Indianapolis
Indianapolis, Marion County, Indiana
2017 OEA 29, (12-S-J-4635)**

10. The AO provides for the reimbursement of past costs and future costs associated with corrective action at the Site. The AO granted certain parties contribution protection under CERCLA 42 U.S.C. §§ 9613(f)(2). Ertel as well as Hartford received a “complete release, contribution protection and finality for all past, current and future remedial or removal actions at or in connection with” the former Ertel Site. Exhibit 82, Agreed Order, Introductory Paragraph. This broad release is in exchange for Hartford agreeing to fund, within the terms of the settlement, the payments provided in the Agreed Order.

11. The AO set out the remedial goals⁹ for the Ertel Site:

The remedial goals will be: (1) reducing the on-site Contaminants of Concern to industrial default RISC cleanup levels; and (2) reducing Contaminants of concern flowing off-site in the groundwater to at or below MCLs or to a site specific risk level, as defined by IDEM RISC guidance, to be protective of human health and the environment and of the City’s water supply.

12. IDEM used RISC and RCG to evaluate the Ertel Site to determine if NFA was appropriate. The RCG was effective March 22, 2012. The RCG was a revision of the then-existing closure guide, the Risk Integrated System of Closure (“RISC”). Hr’g Tr. Oct. 27, 2017, 1250-1252 (Anderson Testimony).

13. A significant change in the RCG was that it made nondefault means of site closure and an evaluation of risk of exposure the primary means of closing sites. Hr’g Tr. 416-418 (Groves Testimony). But, under both the RCG and the RISC guidance documents, IDEM permitted nondefault means of closure of sites.

14. The RISC Guidance document did not include vapor intrusion testing criteria, so there was no way to use the RISC guidance to properly evaluate human health risks from vapor migration exposure potentially posed by residual contamination from the Ertel site in groundwater, using the RISC guidance. Hr’g Tr. 921-922 (Anderson Testimony).

15. IDEM used portions of the RCG when evaluating the City’s request for closure, specifically those portions related to vapor intrusion, drinking water exposure pathways, and whether characterization to residential closure standards was necessary if there is no potential for drinking water exposure. Hr’g Tr. 425-426 (Groves Testimony).

16. The contaminants of concern in this cause are tetrachloroethylene (PCE) and trichloroethylene (TCE), both of which are dense non-aqueous phase liquids (DNAPLs).

⁹ Exhibit 83, Agreed Order, page 8.

**Objection to the Issuance of No Further Action Determination for
State Cleanup Site #000-00-208 for
City of Indianapolis
Indianapolis, Marion County, Indiana
2017 OEA 29, (12-S-J-4635)**

17. The groundwater underneath the sites (the Ertel site, the Zimmer parcel, the Moran site and the Threaded Rod site) flows generally in a southwesterly direction. Hr’g Tr. 181 (Groves Testimony); Hr’g Tr. 288-289 (Vijay Testimony); Hr’g Tr. 861-862 (Anderson Testimony); Hr’g Tr. 1107 (Irvin Testimony); *see also* Ex. 11 at Figs. 3A, 3B; Ex. 51 at Fig. 2.
18. This general flow of groundwater in the area is described at a “macro” or overall level. At a “micro” level, groundwater may move differently depending upon a number of factors, such as geology and soil composition. Hr’g Tr. 285-286 (Vijay Testimony); Hr’g Tr. 1105-1106 (Irvin Testimony).
19. Along the former 20th street alley at the property line between the Ertel site and the Moran site, the shallow groundwater flow is southerly; Hr’g Tr. 212-219, 295-296 (Vijay Testimony); and the deeper groundwater flow has a more westerly direction of flow. Hr’g Tr. 181, 193-194 (Groves Testimony); Hr’g Tr. 291-294 (Vijay Testimony); Hr’g Tr. 1280 (Anderson Testimony); *see also* Ex. 11 at Figs. 3A, 3B; Ex. 51 at Fig. 2.
20. Further, soil boring data shows a subsurface clay grade or “knob” directly beneath source areas at the Moran Site. *See* Ex. 12 at Figs. 7, 9A; *see also* Ex. 2 at Fig. 2. This higher elevation and non-permeability of clay compared to more-permeable subsurface sand units at the same elevation contributes to a more westerly flow of groundwater around the “knob.” Hr’g Tr. 447-456 (Groves Testimony); Ex. 11 at Fig. 3B.
21. Also, as chlorinated solvent contaminants migrate vertically through the subsurface sandy units toward the basal clay layers, gravity acting in conjunction with the contours of the clay “knob” causes a “downhill” flow of chlorinated solvent releases from Moran north towards the 20th street alley area. Hr’g Tr. 447-456 (Groves Testimony).
22. Excavation of approximately 37,000 tons of impacted soil of a depth of up to 17 feet took place from August to October 2007. The soil removal was conducted by Quality Environmental Professionals, Inc. (QEPI) on behalf of the City. Those excavations include two large excavations on the north and south end of the property (Excavations D and E). Excavation D was conducted on the south end of the Ertel site, straddled the border of the Ertel site and the Zimmer parcel and went all the way to the southern border of both properties. Ex. 8 at Fig. 3. Excavation E was on the northern half of the property. Ex. 8 at Fig. 3.
23. Excavations D and E removed contaminated soil to 15 feet, a depth below the surface of the water table. Ex. 8 at 6, Figs. 6C, 6E. Thus, any elevated levels of contaminants in samples taken from the bottom of these excavations at the time the excavations occurred (i.e. “bottom samples”) were “below the initially encountered saturation unit” and “impacts were likely smear zone impacts” which are more indicative of groundwater contamination than soil contamination. Ex. 8 at 10.

**Objection to the Issuance of No Further Action Determination for
State Cleanup Site #000-00-208 for
City of Indianapolis
Indianapolis, Marion County, Indiana
2017 OEA 29, (12-S-J-4635)**

24. The City also did sidewall testing of the soil in the excavations. Ex. 8 at 6. Most of these side wall samplings in Excavation E, the north end excavation, were below the RISC Industrial Default Closure Levels (“IDCLs”); however, some of the samples were above RISC IDCLs. Ex. 8 at Fig. 7A. All of the side wall samplings in Excavation D, closest to Moran’s site, were below IDCLs. Ex. 8 at 7D.
25. Soil samples taken by QEPI before and even after soil removal on the former Ertel Site show impacts of TCE and PCE in unsaturated soil and groundwater above Industrial Default RISC Cleanup Levels. Exhibit 8, Soil Remediation Completion Report, QEPI; Exhibit 53, Soil Excavation and Remediation Scope of Work, QEPI, September 7, 2007; Hr’g Tr. 235 (Vijay Testimony); Hr’g Tr. 69-80, 86, line 20 to 87, line 11 (Groves Testimony).
26. In Exhibit 8, the Soil Completion Report, QEPI reports a confirmatory sidewall soil sample for E-SW-19 taken from the former Ertel Site with 28,700 ppb of PCE in soil left on the former Ertel Site after excavation. See Figure 7A, Soil Excavation Confirmation Analytical Results; see also Hr’g Tr. 79 (Groves Testimony); Hr’g Tr. 235 (Vijay Testimony).
27. The City’s consultant, Nivas Vijay, used the results of soil samples collected from the sidewalls of the excavations it completed at the Ertel site to calculate a Potential Exposure Concentration (“PEC”) calculation, which led to the conclusion that, to a “95% upper confidence threshold,” the on-site sources had been reduced to below IDCLs. Ex. 8 at 10; Hr’g Tr. 526-528 (Groves Testimony); Hr’g Tr. 772-776 (Vedder Testimony). More directly stated, Vijay concluded from the side wall testing: “[A] PEC was calculated for comparison to IDEM RISC IDCLs. Based upon these calculations, PCE, TCE and lead concentrations at the site [were] below RISC IDCLs.” Ex. 8.
28. PEC calculations are, and have been for some time, a nondefault method for resolving individual soil concentrations that are above the IDCL’s and are an appropriate line of evidence for closure under RISC. Hr’g Tr. 1078-1080 (Irvin Testimony).
29. Based upon the PEC calculation, the City believed that any remaining contaminants of concern in the soil at the Ertel site were below RISC IDCLs, and the City’s May 29, 2008 Soil Remediation Completion Report stated that the Ertel Site met “the requirements for surface and subsurface soil closure under RISC default guidance.” Ex. 8.
30. Following technical review of the City’s Soil Remediation Completion Report, IDEM sent a letter on September 16, 2008 agreeing with the City’s conclusions and stating that the “PEC concentrations calculated by [the City’s contractor], reviewed by IDEM technical staff, are below respective RISC IDCLs.” Ex. 39 at 2; *see also* Hr’g Tr. 357-359 (Vijay Testimony).
31. The groundwater analysis conducted by Heartland in April 2012 measured the highest levels of trichloroethylene (“TCE”) in groundwater emanating from the Ertel site at MW-1 at the southwest corner of the site at 267 micrograms/L ($\mu\text{g/L}$ or ppb). Ex. 87 at Fig. 3.

**Objection to the Issuance of No Further Action Determination for
State Cleanup Site #000-00-208 for
City of Indianapolis
Indianapolis, Marion County, Indiana
2017 OEA 29, (12-S-J-4635)**

32. The industrial default closure level under the Risk Integrated System of Closure (RISC) Nonrule Policy guidance document for trichloroethylene was 31 ppb.
33. Similarly, the same groundwater analysis by Heartland in April 2012 measured the highest levels of tetrachloroethylene (“PCE”) in groundwater emanating from the Ertel site at MW-105 along the western property border (north of MW-1) at 271 micrograms/L (µg/L or ppb). Ex. 87 at Fig. 3.
34. The City’s consultant also noted that “[n]o evidence of dense non-aqueous phase liquids (DNAPLs) has been encountered at the site in these wells or in soil borings advanced in the footprint of the former site building.” Ex. 87 at 3.
35. The City recorded an Environmental Restrictive Covenant on the Ertel Site to supplement risk management as part of the remedy. Hr’g Tr. 431-432 (Groves Testimony), Exhibit F.
36. The City and IDEM both noted that “there [were] no public or private potable water wells in the direct vicinity of the site” or “within one-mile of the Site” eliminating the risk of use of the groundwater for drinking water. Ex. 87 at 3; Ex. 84 at 2.
37. IDEM considered whether the sewers on and around the Ertel Site could be potential pathways for the migration of contamination and concluded that the sewers did not suggest a sewer migration pathway. Hr’g tr. 774-775 (Vedder Testimony).
38. IDEM determined that the Ertel site qualified for No Further Action status based upon an assessment of the exposure pathways at the Site. Hr’g Tr. 1219-1220 (Anderson Testimony).
39. Specifically, the Ertel Site presented no completed exposure pathways, including the inhalation pathway, soil direct contact pathway, stability of the groundwater plume and no potential consumption of the groundwater. Hr’g Tr. 1220 (Anderson Testimony).
40. Further, IDEM was aware that a commingled plume of TCE and PCE existed in the area, where the same contaminants originating from different source areas were passing through groundwater, and that it was difficult to discern which molecules of TCE or PCE come from each source. Hr’g Tr. 900-903 (Anderson Testimony).
41. At the time IDEM issued the Ertel NFA, IDEM was also aware that Moran had its own on-site sources of TCE that it needed to remediate. Hr’g Tr. 470 (Groves Testimony).
42. IDEM concluded that any residual contaminants migrating off of the Ertel site would be remediated or contained by other responsible parties without additional cost to them, when those responsible parties remediated or contained their own contributions to the co-mingled plume. Hr’g Tr. 505-507 (Groves Testimony).

**Objection to the Issuance of No Further Action Determination for
State Cleanup Site #000-00-208 for
City of Indianapolis
Indianapolis, Marion County, Indiana
2017 OEA 29, (12-S-J-4635)**

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 (I.C.) § 13-13, *et seq.* The Office of Environmental Adjudication (“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. 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). “*De novo* review” means that “all issues 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. Pursuant to I.C. § 4-21.5-3-14(c), the Petitioner, as the person requesting that IDEM revoke the NFA Letter, has the burden of persuasion and the burden of going forward with the evidence supporting their request.
5. There are two preliminary matters raised by the Respondents in their Post-hearing Brief that should be resolved. The first issue concerns the scope of the OEA proceeding. The appellate court, on rehearing, stated:

IDEM's action in issuing a NFA letter was an agency action that was subject to administrative review by the OEA; however, the trial court had statutory authority to control the recovery of damages. Thus, we concluded that the trial court should retain jurisdiction over the entire case until the OEA reaches a final decision on Threaded Rod's and Moran's pending administrative petitions regarding the NFA letter. Then, the trial court should make a decision regarding the disbursement to the City of the remaining escrowed funds. *Moran Elec. Serv., Inc. v. Comm'r, Ind. Dep't of Env'tl. Mgmt.*, 13 N.E.3d 906, 907, 2014 Ind. App. LEXIS 326, *2-3 (Ind. Ct. App. 2014).

7. IDEM and the City argue that revocation of the NFA Letter and a review of the terms of the AO are beyond the scope of OEA’s review. Moran formally requested that IDEM revoke the NFA Letter on November 3, 2016 based upon data collected after the NFA Letter was issued. This request was denied on December 15, 2016. Moran filed its appeal of this decision with OEA on December 30, 2016. This was assigned Cause No. 16-S-J-4935.

**Objection to the Issuance of No Further Action Determination for
State Cleanup Site #000-00-208 for
City of Indianapolis
Indianapolis, Marion County, Indiana
2017 OEA 29, (12-S-J-4635)**

8. While the second appeal addresses Moran's formal request to revoke the NFA, Moran seeks revocation of the NFA Letter as relief in this cause. The Respondents have presented no persuasive argument that revocation is not an appropriate remedy. Revocation of the IDEM decision might be one of the appropriate remedies in this matter.
9. Under the appellate court's decision in *Moran*, 13 N.E.3d 906, there is no question that the OEA has jurisdiction over the NFA Letter and the Marion Superior Court has jurisdiction over the AO. The OEA cannot and should not enforce the AO, but the remedial goals set out in the AO are relevant to a determination of whether the NFA Letter was properly issued. Thus, the OEA may (1) revoke the NFA if that is the appropriate remedy and (2) may consider the remedial goals.
10. The second matter is the Respondents' argument that Moran is not aggrieved or adversely affected.¹⁰ The Respondents base this on evidence presented at the hearing. They argue that since the evidence shows that Moran suffered no harm, it is not aggrieved or adversely affected. Initially, it should be pointed out that a determination that a party is aggrieved or adversely affected is the threshold for filing a petition for review. If a party fails to support its claims, it will lose, but this doesn't affect whether it was actually aggrieved or adversely affected. Moran asserts that it is aggrieved or adversely affected as the prior owner of a property downgradient and adjacent to the Ertel Site and that the Ertel Site is the source of contamination migrating onto the Moran Site. Moran may no longer own the property, but it continues to be potentially liable as a responsible party under I.C. § 13-25. IDEM has notified Moran of its liability. If and when Moran undertakes remedial action, the status of adjacent properties can affect which remedial action is selected. Given that Moran is potentially liable and that the AO provides contribution protection which may prevent Moran from seeking contribution for cleanup from Ertel, Moran certainly is aggrieved or adversely affected. The evidence presented at the hearing may prove that the NFA Letter was properly issued, but this does not have any bearing on Moran's status as aggrieved or adversely affected.
11. The Respondents assert that the NFA Letter was appropriate under a risk based approach and cite to I.C. § 13-12-3-2 and I.C. § 13-25-5-8.5 as support. I.C. § 13-12-3-2 states:
 - (a) The remediation and closure goals, objectives, and standards for all remediation projects conducted under I.C. § 13-22, I.C. § 13-23, I.C. § 13-24, and I.C. § 13-25-4 shall be consistent with the remediation objectives set forth in I.C. § 13-25-5-8.5, regardless of whether the remediation project begins before July 1, 2009, or after June 30, 2009.

¹⁰ The ELJ had previously determined that Moran is the real party in interest and Respondents are correct in stating that this does not establish standing.

**Objection to the Issuance of No Further Action Determination for
State Cleanup Site #000-00-208 for
City of Indianapolis
Indianapolis, Marion County, Indiana
2017 OEA 29, (12-S-J-4635)**

- (b) The groundwater quality standards adopted under I.C. § 13-18-17-5 shall allow, as appropriate, groundwater remediations to be consistent with the remediation objectives set forth in I.C. § 13-25-5-8.5.

12. I.C. § 13-25-5-8.5 states:

- (a) A voluntary remediation work plan must specify the remediation objectives for the site. Subsections (b) through (e) apply to a site regardless of whether the site was entered into the voluntary remediation program before July 1, 2009, or after June 30, 2009.
- (b) The remediation objectives for each hazardous substance and any petroleum on the site shall be based on:
 - (1) background levels of hazardous substances and petroleum that occur naturally on the site; or
 - (2) an assessment of the risks pursuant to subsection (d) posed by the hazardous substance or petroleum presently found on the site taking into consideration the following:
 - (A) Expected future use of the site.
 - (B) Measurable risks to human health, natural resources, or the environment based on the:
 - (i) activities that take place; and
 - (ii) environmental impact; on the site.
- (c) . . .
- (d) Risk based remediation objectives shall be based on one (1) of the following:
 - (1) Levels of hazardous substances and petroleum calculated by the department using standard equations and default values for particular hazardous substances or petroleum.
 - (2) Levels of hazardous substances and petroleum calculated using site specific data for the default values in the department's standard equations.
 - (3) Levels of hazardous substances and petroleum developed based on site specific risk assessments that take into account site specific factors, including remedial measures, restrictive covenants, and environmental restrictive ordinances that:
 - (A) manage risk; and
 - (B) control completed or potential exposure pathways.
- (e) The department shall consider and give effect to restrictive covenants and environmental restrictive ordinances in evaluating risk based remediation proposals.
- (f) . . .

**Objection to the Issuance of No Further Action Determination for
State Cleanup Site #000-00-208 for
City of Indianapolis
Indianapolis, Marion County, Indiana
2017 OEA 29, (12-S-J-4635)**

13. 329 IAC 7.1-2-9 (2012)¹¹ defines “no further action letter” as:

"No further action letter" means a letter stating one (1) of the following:

- (1) IDEM determines the site:
 - (A) meets RISC closure levels for soil or ground water, or both, appropriate for land use based on all the information available to the department; or
 - (B) does not meet RISC closure levels appropriate for the land use and an environmental restrictive covenant is placed on the site and recorded with the appropriate county office of the recorder; and no further action is warranted or necessary.
- (2) Remediation has been completed so that no further action is warranted or currently necessary at the site.

14. IDEM relied on RISC and RCG to determine if the Ertel Site qualified for no further action status. Petitioner argues that the use of the RCG was improper as the Settlement Agreement and the AO indicated that the NFA should be issued using the RISC guidance. However, the RCG guidance was in effect when the NFA Letter was issued and at the time IDEM was analyzing whether NFA was appropriate. The AO contemplated that the Site could be closed using RISC. This would necessitate using the RCG. Also, both RISC and RCG are non-rule policy documents and do not have the force of law. Further, the use of RCG is consistent with the statutory authority, specifically, I.C. § 13-12-3-2 and I.C. § 13-25-5-8.5, both of which were in effect when the NFA Letter was issued. So, the applicable statutes and rules would clearly have precedent in this instance.

The NFA was properly issued for on-site contaminants of concern.

15. The AO states that the first remedial goal is “reducing the on-site Contaminants of Concern to industrial default RISC cleanup levels”. The Respondents assert that this goal applies only to the soil and not to ground water. An agreed order, such as the one at issue herein, is a “contract-for agreed judgment, like any contract” and must be “evaluated using contract principles.” *State ex rel. Prosser v. Ind. Waste Sys., Inc.*, 603 N.E.2d 181, 186 (Ind. Ct. App. 1992); *but see Indiana Dep’t of Env’tl. Mgmt. v. Raybestos Prod. Co.*, 897 N.E.2d 469, 474 (Ind. 2008), *opinion corrected on reh’g*, 903 N.E.2d 471 (Ind. 2009) (noting that agreed orders are not subject to claims for damages for breach of contract). One must determine and effectuate the intent of the parties. *Ingolia v. Fogelson Cos.*, 530 N.E.2d 1190, 1200 (Ind. Ct. App. 1988). If the language of the agreement is unambiguous and the intent of the parties is discernible from the written contract, the court must give effect to the terms of the contract. *Id.* “A contract is ambiguous if a reasonable person would find the contract subject to more than one interpretation.” *Id.* (internal citations omitted). Words used in a contract are to be

¹¹ This is the rule that was in effect at the time the NFA Letter was issued. This rule was modified after the petition for review was filed.

**Objection to the Issuance of No Further Action Determination for
State Cleanup Site #000-00-208 for
City of Indianapolis
Indianapolis, Marion County, Indiana
2017 OEA 29, (12-S-J-4635)**

given their usual and common meaning unless, from the contract and the subject matter thereof, it is clear that some other meaning was intended. *Exide Corp. v. Millwright Riggers, Inc.*, 727 N.E.2d 473, 478–79 (Ind. Ct. App. 2000). Moreover, “[w]ords, phrases, sentences, paragraphs, and sections of a contract cannot be read alone. The entire contract must be read together and given meaning, if possible.” *Id.* (internal citations omitted). Using these principles, the Respondents’ argument is persuasive.

16. After the excavation, there were some individual sidewall and bottom samples that exceeded the IDCLs. Some of the bottom samples were taken from the smear zone. As many of the witnesses stated, samples from the smear zone may be indicative of ground water contamination, not soil contamination. When the entire site was analyzed using PEC calculation, IDEM concluded that the Ertel Site met the IDCLs and the Respondents presented sufficient evidence to support the conclusion that this was proper.
17. Moran did not present any evidence that the PEC was improperly calculated so Moran relies solely on its argument that the AO mandates a default approach and because the PEC analysis is a non-default approach, the NFA should not have been issued. Moran overlooks the following facts: (1) Moran is not a party to the AO and is not in a position to enforce the terms; (2) the OEA is not the appropriate forum to enforce the terms of the AO; (3) use of PEC was consistent with the guidance documents (RISC and RCG) and most importantly, (4) use of PEC was consistent with the law (I.C. § 13-12-3-2 and I.C. § 13-25-5-8.5) which allowed the person conducting the remediation to select the remediation objectives. Even more specifically, the law allowed the person conducting the remediation to use risk based remediation objectives. Further, while Moran presented evidence that it was possible that TCE and PCE remained on the Ertel Site, the weight of the evidence shows that remedial goal #1 was met.

The NFA Letter was properly issued for
contaminants of concern flowing off-site.

18. The AO also states that the other remedial goal is “reducing Contaminants of concern flowing off-site in the groundwater to at or below MCLs or to a site specific risk level, as defined by IDEM RISC guidance, to be protective of human health and the environment and of the City’s water supply.” The NFA Letter was properly issued for contaminants of concern flowing off-site for the following reasons.
19. At the time IDEM decided that NFA on Ertel was appropriate, there was sufficient evidence to support IDEM’s conclusion that there had been historic releases on both the Moran site and Threaded Rod site; that both were sources of TCE contamination; and that the ground water plume from Ertel commingled with the ground water from these sites. In fact, several witnesses testified that the ground water contamination downgradient of the Moran and Threaded Rod sites were orders of magnitude above the amount of ground water

**Objection to the Issuance of No Further Action Determination for
State Cleanup Site #000-00-208 for
City of Indianapolis
Indianapolis, Marion County, Indiana
2017 OEA 29, (12-S-J-4635)**

contamination migrating from the upgradient Ertel Site onto the Moran and Threaded Rod sites.

20. This supports IDEM's conclusion that vapor intrusion issues downgradient of the Ertel/Threaded Rod/Moran sites were caused by releases at Threaded Rod and Moran and that Ertel's contribution was minimal.
21. As to the possibility that sewer lines served as contaminant conduits, IDEM noted at the hearing that, when contamination migrates using the sewer lines or backfill around sewer lines, the patterns of contamination are linear. The data at the Ertel site, however, did not support the sewer systems providing a mechanism for contaminant transport because there were no linear patterns of migration along the sewer lines. In fact, at the Ertel site, the data showed source areas and groundwater contamination associated with the features of the building and historic operations at Ertel, not with the sewer lines. As a result sewer lines were ruled out as a migration pathway.
22. Moran presented evidence that the ground water contamination was not sufficiently delineated. TCE and PCE, as DNAPLs, could pool above the confining layer (the basal clay) and continue to be a source of ground water contamination. However, the samples taken by Moran in 2015 are not sufficient to prove that IDEM's determination, that no further action was needed, was flawed. The 2015 data was not available to IDEM when the NFA Letter was issued. There is no question that Moran is a source of contamination. These samples were taken through vertical aquifer profiling, which is not as accurate as monitoring well sampling. Moreover, the geology of the area in which the samples were taken supports the conclusion that Moran could be the source of the ground water contamination. The evidence that ground water contamination downgradient of Moran and Threaded Rod was much higher than the contamination coming from Ertel supports the conclusion that Moran and Threaded Rod sites are a source of contamination and that the plume from Ertel commingled with the Moran and Threaded Rod plumes.
23. IDEM properly determined that the ground water plume coming from Ertel was stable; that the exposure pathways for ground water were incomplete; and that the levels emanating from the Ertel site are at an acceptable site-specific risk level. Therefore, there was sufficient evidence to show that the NFA as it relates to ground water was appropriate.
24. The weight of the evidence favors a determination that IDEM was consistent in how it applied RISC and RCG and the law and that the Ertel Site qualified for NFA status. Further, the NFA Letter was properly issued using the data available at the time of issuance.

FINAL ORDER

**Objection to the Issuance of No Further Action Determination for
State Cleanup Site #000-00-208 for
City of Indianapolis
Indianapolis, Marion County, Indiana
2017 OEA 29, (12-S-J-4635)**

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED judgment is entered in favor of the Respondents, Indiana Department of Environmental Management and the City of Indianapolis.

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. 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 7th day of April 2017 in Indianapolis, IN.

Hon. Catherine Gibbs
Environmental Law Judge