Objection to Notice of Excess Liability Trust Fund Reimbursement Suspension, ETLF #199609531 / FID #12211
Former Phillips 66 Station No. 27300
Daleen1, Inc.
Cause No. 18-F-J-4996

OFFICIAL SHORT CITATION NAME: When referring to 2019 OEA 1, cite this case as **Daleen1, Inc. 2019 OEA 1.**

Case name: Objection to Notice of Excess Liability Trust Fund Reimbursement Suspension, ELTF #199609531 / FID #12211, Former Phillips 66 Station No. 27300, Daleen1 Inc.

Cause No. 18-F-J-4996

Topics:

leaking underground storage tanks
Excess Liability Trust Fund
ELTF
Eligibility
I.C. § 13-2-11-62.5
Eligible party
328 IAC 1-3-1
Nunc pro tunc
Summary judgment
Statutory construction

Presiding Environmental Law Judge: Catherine Gibbs

Party representatives:

Counsel for IDEM:	Clark Kirkman
Petitioner:	David Dearing

Order issued: February 27, 2019

Index category: Land

Further case activity: None

STATE OF INDIANA	)	BEFORE THE INDIANA OFFICE
	)	OF ENVIRONMENTAL ADJUDICATION
COUNTY OF MARION	)	

IN THE MATTER OF:	)	
	)	
OBJECTION TO THE NOTICE OF EXCESS	)	
LIABILITY TRUST FUND REIMBURSEMENT	)	CAUSE NO. 18-F-J-4996
SUSPENSION	)	
ELTF #199609531 / FID #12211	)	
FORMER PHILLIPS 66 STATION NO. 27300	)	
DALEEN1, INC.	)	
INDIANAPOLIS, MARION COUNTY, INDIANA	)	

FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL ORDER

The parties have filed for summary judgment. The presiding Environmental Law Judge, having reviewed the record, read the motions, evidence, responses and replies, enters the following findings of fact, conclusions of law and final order.

Findings of Fact

1. Phillips 66[1] owned the underground storage tanks (USTs) at Station No. 27300, located at 6455 West Washington Street, Indianapolis Indiana (the Site). In September 1996, Phillips reported a release of petroleum from the USTs (Incident #199609531, referred to as the Incident). Phillips undertook corrective action to clean up the release.

2. On June 9, 1997, Phillips transferred ownership of the USTs to B&R Oil Co. B&R permanently closed and removed the USTs on July 8, 1997.

3. B&R sold the Site to Prutha, Inc. on December 3, 2007.

4. Daleen1 purchased the Site on September 28, 2011.

5. Phillips continued to perform and remains liable for the corrective action of Incident #199609531.

6. Daleen1, Inc. (Daleen1), the current property owner, revoked Phillips's access to the site and informed Phillips that it would undertake the corrective action.

7. Daleen1 applied for reimbursement for its corrective action costs from the Excess Liability Trust Fund (ELTF). On February 14, 2018, IDEM denied reimbursement and suspended further reimbursement to both Daleen1 and Phillips. IDEM indicated that it would reinstate eligibility when certain issues were resolved. The first issue involved ownership of the

[1] Phillips is not a party to this matter. IDEM's motion to join Phillips was denied on May 15, 2018.

USTs and/or the property. IDEM contends that Daleen1 has not properly registered as either the owner of the property or the USTs. The second issue regards liability for the corrective action. IDEM contends that Phillips, as the owner of the USTs at the time of the release, continues to be responsible for corrective action. To address this issue, IDEM demands that Daleen1 must either enter into an agreement with Phillips or enter into an agreement with IDEM assuming liability for the corrective action.

8. Daleen1 timely filed its petition for review on February 21, 2018.

9. Phillips did not file a petition for review. On April 16, 2018, IDEM filed a Motion to Join Necessary Party seeking to add Phillips as a party. Both Daleen1 and Phillips opposed this motion. On May 15, 2018, the motion was denied as Phillips' participation was not necessary to determine if Daleen1 was eligible for reimbursement.

10. IDEM began requiring transferees to assume liability for corrective action sometime in early 2018 based on its statutory interpretation. IDEM did not promulgate regulations or issue a nonrule policy document regarding this change in process.

11. On May 24, 2018, IDEM notified Phillips and Daleen1 that it was reinstating reimbursement. Further, IDEM reaffirmed its demand to Phillips for corrective action associated with the Incident. IDEM iterated its demand that Daleen1 properly register as the owner of the underground storage tanks currently at the Site.

12. IDEM filed its Motion to Dismiss as Moot on May 24, 2018. Daleen1 filed its Memorandum in Opposition to IDEM's motion on May 29, 2018. This motion was denied on June 25, 2018.

13. Both parties filed motions for summary judgment on December 17, 2018 and thereafter filed responses and replies.

14. The Office of the Attorney General issued an opinion on January 30, 2019in which it stated that "The statute defining "eligible party" is clear that an eligible party includes an owner, an operator, a former owner or operator and a transferee of property. The statutes and rules also make it clear that an eligible party may assign the right to receive payment under the ETLF to another person. Nothing in the statures or the 2018 rules promulgated by the Indiana Department of Environmental Management narrow application of access to the ELTF to fewer than those listed in the statutes." [2]

Conclusions of Law

1. The Office of Environmental Adjudication ("OEA") has jurisdiction over the decisions of the Commissioner of the Indiana Department of Environmental Management ("IDEM") and the parties to this controversy pursuant to Ind. Code § 4-21.5-7, et seq.

[2] Exhibit 11, attached to Reply Memorandum of Petitioner Daleen1, Inc. in Support of Its Motion for Summary Judgment, filed on February 7, 2019.

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. The OEA shall consider a motion for summary judgment "as would a court that is considering a motion for summary judgment filed under Trial Rule 56 of the Indiana Rules of Trial Procedure." I.C. § 4-21.5-3-23. Trial Rule 56 states, "The judgment sought shall be rendered forthwith if the designated evidentiary matter shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." 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).

5. 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) *see also; Five Star Concrete, L.L.C. v. Klink, Inc.*, 693 N.E.2d 583, 585 (Ind. Ct. App. 1998).

6. There are no genuine issues as to the material facts in this case so summary judgment is appropriate. The only issue is whether Daleen1, as a transferee of property, is eligible to receive reimbursement from the ELTF for corrective action of a release for which it is not liable.

7. The ELTF was established by I.C. §13-23-7-1(a)[3], in pertinent part, to (1) assist "owners and operators of underground petroleum storage tanks to establish evidence of financial responsibility as required under IC 13-23-4" and (2) to provide a source of money to satisfy liabilities for corrective action.

8. I.C. § 13-23-8-4(a) states: The administrator shall pay ELTF claims that are:

    (1) for costs related to eligible releases;
    (2) submitted by eligible parties; and

[3] *As added by P.L.1-1996, SEC.13. Amended by P.L.9-1996, SEC.5; P.L.14-2001, SEC.4; P.L.114-2008, SEC.23; P.L.105-2011, SEC.2; P.L.96-2016, SEC.12.*

(3) submitted in accordance with IC 13-23-8 and IC 13-23-9.

9. "Eligible party" is defined by I.C. § 13-2-11-26.5 as follows:

   "Eligible party", as used in IC 13-23, means any of the following:

   (1) An owner, as defined in IC 13-11-2-150.
   (2) An operator, as defined in IC 13-11-2-148(d) and IC 13-11-2-148(e).
   (3) A former owner or operator of a UST.
   (4) A transferee of property upon which a UST is located.
   (5) A transferee of property upon which a UST was located but from which the UST has been removed.

10. I.C. §13-23-13-1 provides that the owner or operator of a UST is liable for corrective action to remediate a release.

11. 328 IAC 1-3-1(a) states that access to ELTF reimbursement is limited to: "eligible parties and those assigned the right of fund access by an eligible party." Further, 328 IAC 1-3-1 provides:

    (c) The administrator may not reimburse costs related to duplicative acts performed by multiple eligible parties. If more than one (1) eligible party submits a claim for reimbursement of costs, the administrator shall determine the appropriate reimbursement based on the:
        (1) applicable remediation objectives; and
        (2) reasonableness and cost effectiveness of the claims.

12. In order to resolve the issue in this case, the presiding ELJ must determine the meaning of the above mentioned statutes by applying the rules of statutory construction. "In statutory construction, our primary goal is to ascertain and give effect to the intent of the legislature. *Gray v. D & G, Inc.*, 938 N.E.2d 256, 259 (Ind. Ct. App. 2010). The first rule is that all words must be given their "plain and ordinary meaning unless otherwise indicated by statute." *Id.* "Furthermore, we presume that the legislature intended statutory language to be applied in a logical manner consistent with the statutes' underlying policies and goals. *Id.* However, we will not interpret a statute which is clear and unambiguous on its face; rather, we will give such a statute its apparent and obvious meaning. *Ind. State Bd. of Health v. Journal-Gazette Co*, 608 N.E.2d. 989, 992 (Ind. Ct. App. 1993), adopted, 619 N.E.2d 273 (Ind. 1993)." *United States Steel Corp., et al v. Northern Indiana Public Service Corp*. 951 N.E.2d 542, 552, (Ind. Ct. App. 2011).[4]

13. However, "It is not a proper function of this court to ignore the clear language of a statute and, in effect, rewrite the statute in order to render it consistent with a particular view of sound public policy." *T.B. v. Indiana Department of Child Services*, 971 N.E.2d 104, 110 (Ind. Ct. App. 2012), trans. denied

[4] *See AK Steel*, 2018 OEA 20.

14. If a court determines that the statute or rule is ambiguous, it may look to the agency's interpretation for evidence of the legislative intent. The Indiana Supreme Court, in *Shell Oil v. Meyer*, 705 N.E.2d 962, 976 (Ind. 1998) held, "However, administrative interpretation may provide a guide to legislative intent. "A long adhered to administrative interpretation dating from the legislative enactment, with no subsequent change having been made in the statute involved, raises a presumption of legislative acquiescence which is strongly persuasive upon the courts." *Board of Sch. Trustees v. Marion Teachers Ass'n*, 530 N.E.2d 309, 311 (Ind. Ct. App. 1988); accord *Baker v. Compton*, 247 Ind. 39, 42, 211 N.E.2d 162, 164 (1965)."

15. "In addition, we will avoid an interpretation that renders any part of the statute meaningless or superfluous." *Cook v. Atlanta, Ind. Town Council*, 956 N.E.2d 1176, 1178, (Ind. Ct. App. 2011).

16. IDEM has a duty to administer the ELTF and, in this case, is concerned that duplicative and excessive costs may be reimbursed. IDEM argues that the only persons eligible to receive reimbursement are "entities liable for corrective action pursuant to a demand issued by IDEM who designated the ELTF as their financial responsibility mechanism, or RPs."[5] IDEM seeks to tie eligibility to liability based on the language in I.C. §13-23-7-1. That is, in order to be considered eligible for ELTF reimbursement, the party seeking reimbursement must also be liable. IDEM asserts that an applicant, who is not statutorily liable, can assume liability by either entering into an agreed order with IDEM or with the RP.

17. Daleen1 argues that the statute is clear and that it is an eligible party to receive ELTF reimbursement as a transferee of property upon which USTs were formerly located but are no longer. Under Daleen1's theory, if there is also an overlying requirement of liability, then ~~I.C. §13-11-2-26.5(5)~~ I.C. §13-11-2-62.5(5) is meaningless because a subsequent purchaser of property from which USTs been removed, is NEVER liable. There is no question that Daleen1 is not liable for the Incident as it was not the owner or operator of the USTs from which the release occurred. Daleen1 can only be considered an eligible party under ~~I.C. § 13-2-11-26.5(5)~~, I.C. §13-11-2-62.5(5), as a transferee of property upon which a UST was located but has been removed.

18. IDEM argues that the requirement that the party conducting corrective action be liable is an incentive to make the corrective action cost effective. However, IDEM has significant control over what costs are reimbursed. Each incident is subject to various regulations that require that corrective action be cost effective[6]; place a cap on reimbursement limits[7]; and, place limits on the rates charged for various tasks[8]. IDEM can deny reimbursement for corrective action if the corrective action is not necessary. For example, if a property owner chose to clean up a site to more stringent residential levels when industrial levels are adequate to protect human health and the environment, then IDEM is under no statutory

[5] Indiana Department of Environmental Management's Motion for Summary Judgment, page 12, filed December 17, 2018.
[6] I.C. §13-23-9-1.5; 328 IAC 1-3-1.3.
[7] I.C. §13-23-8-8(a)(1).
[8] 328 IAC 1-3-5.

obligation to reimburse the higher costs of the more extensive cleanup. These statutes and regulations control reimbursement regardless of whether Daleen1 or Phillips completes the corrective action.

19. Regardless of this decision, Phillips remains liable for the corrective action and IDEM can take enforcement action to require corrective action. IDEM attempted to add Phillips as a necessary party to this action. But both Daleen1 and Phillips resisted this effort. In the end, IDEM's motion was denied. But this is Phillips' problem. Phillips did not wish to participate in this action. Protecting Phillips is not IDEM's duty.

20. IDEM has legitimate concerns about abuse of the ETLF. But ELTF's statutory scheme already allows IDEM to deny costs which are not reasonable or cost effective. Further, IDEM can promulgate specific regulations or issue nonrule policy documents to address the specific concerns IDEM has about certain industry practices. But, IDEM does not have the legal authority to impose conditions upon eligibility that are not spelled out in the applicable statutes, even if, in IDEM's view, those conditions constitute good public policy.

21. Applying the rules of statutory construction, the definition of eligible party is clear. Daleen1 is an eligible party and is not required to be liable in order to receive reimbursement. Any other interpretation would render the language of ~~I.C. § 13-2-11-26.5(5)~~ I.C. §13-11-2-62.5(5) meaningless. Further, IDEM's interpretation is not entitled to any significant weight as (1) it is a relatively recent interpretation and (2) is not found in any regulation or nonrule policy document. 328 IAC 1-3-1(a) bolsters this conclusion. In addition, while not binding, the Attorney General's opinion is consistent with this decision and reinforces the conclusion that I.C. §13-23-7-1 does not impose an additional requirement of liability. While IDEM's goals have merit, this Office must interpret the statutes as written.

Final Order

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED summary judgment is appropriate. Judgment is entered in favor of the Petitioner, Daleen1 Inc. All further proceedings are **VACATED.**

You are further notified that pursuant to provisions of Ind. Code (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 27th day of February, 2019 in Indianapolis, IN.

Hon. Catherine Gibbs
Environmental Law Judge

NUNC PRO TUNC ORDER CORRECTING FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL ORDER

Pursuant to Ind. Code § 4-21.5-3-31(d), the presiding Environmental Law Judge corrects the following clerical errors in the Findings of Fact, Conclusions of Law and Final Order issued in this cause on February 27, 2019.

> 17. Daleen1 argues that the statute is clear and that it is an eligible party to receive ELTF reimbursement as a transferee of property upon which USTs were formerly located but are no longer. Under Daleen1's theory, if there is also an overlying requirement of liability, then I.C. §13-11-2-26.5(5) I.C. §13-11-2-62.5(5) is meaningless because a subsequent purchaser of property from which USTs been removed, is NEVER liable. There is no question that Daleen1 is not liable for the Incident as it was not the owner or operator of the USTs from which the release occurred. Daleen1 can only be considered an eligible party under I.C. § 13-2-11-26.5(5), I.C. §13-11-2-62.5(5), as a transferee of property upon which a UST was located but has been removed.
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IT IS SO ORDERED this 18th day of March, 2019 in Indianapolis, IN.