

Objection to the Issuance of Excess Liability Trust Fund Claim
ELTF # 201211508 / FID #10608
Ceres Solution Cooperative Inc.
2021 OEA 75

Official Short Cite Name:	Ceres Solution Cooperative Inc., 2021 OEA 75
Topics:	Hearing Excess Liability Trust Fund ELTF 328 IAC 1-3-3(a)(4) COVID-19 Executive Order 20-05 Enforcement Discretion Extension of Submission Deadlines Waiver of Specific Regulations Policy
Presiding ELJ:	Catherine Gibbs
Party Representatives:	Julie Lang, IDEM Nick Gahl, Petitioner Mark Menkeld, Petitioner
Order Issued:	July 1, 2021; Modified Order Issued: 7/29/21
Index Category:	Land Quality
OEA Cause No.:	20-F-J-5127
Further Case Activity:	7/29/2021: Judge Mary Davidsen modified the final order.

07.29.21 MD



INDIANA OFFICE OF ENVIRONMENTAL ADJUDICATION

Mary Davidsen
Chief Environmental Law Judge

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STATE OF INDIANA)
)
COUNTY OF MARION)

BEFORE THE INDIANA OFFICE
OF ENVIRONMENTAL ADJUDICATION

IN THE MATTER OF:)
)
OBJECTION TO THE DENIAL OF EXCESS)
LIABILITY TRUST FUND CLAIM)
ELTF #201211508 / FID #10608)
CERES SOLUTION COOPERATIVE INC.)
FOWLER, BENTON COUNTY, INDIANA)

CAUSE NO. 20-F-J-5127

**FINDINGS OF FACT, CONCLUSIONS
OF LAW AND MODIFIED FINAL ORDER**

The parties appeared for a hearing on the merits on June 7, 2021. The presiding Environmental Law Judge (ELJ), having heard the testimony, considered the evidence, and reviewed the record, enters the following findings of fact, conclusions of law and final order, modified on July 29, 2021 in respect to Conclusion of Law, ¶ 6.

Findings of Fact

1. Ceres Solution Cooperative, Inc. (Ceres) is the owner and operator of underground storage tanks (USTs) at 202 South Adeway, Fowler, Benton County Indiana (the Site). 1. Ceres is a farming cooperative that dates back to 1940s and has evolved throughout the years due to the merging of individual county cooperatives.
2. On October 30, 2012, Ceres reported a release of petroleum from the USTs to the Indiana Department of Environmental Management (IDEM). Ceres took corrective action to remediate the release and incurred costs for the corrective action.
3. On September 27, 2019, IDEM approved Ceres' No Further Action Request (NFA). The NFA notification letter included information regarding the deadline for submitting claims for reimbursement from the Excess Liability Trust Fund (ELTF).
4. On December 6, 2019, Ceres applied to the ELTF for eligibility.
5. On January 8, 2020, IDEM notified Ceres that it was eligible for 100% reimbursement of its corrective action costs. IDEM again advised Ceres:

Please note that as required by 328 IAC 1-3-3(a)(4) you have three hundred

sixty-five (365) days to submit all claims for reimbursement of costs from the Excess Liability Trust Fund after the eligible release is granted a status of NFA by the administrator. You therefore have until September 27, 2020 to submit claims for reimbursement of eligible costs associated with this release. In addition, all re-submittals associated with any disallowed cost must be received by the department within three hundred sixty-five (365) days after the denial of the claim.

6. On March 6, 2020, Indiana Governor Eric Holcomb issued the first of several executive orders declaring a public health emergency because of the coronavirus disease 2019 (COVID-19) outbreak. Non-essential businesses were closed, and people were ordered to stay at home to mitigate the spread of the disease.
7. On March 19, 2020, the Governor issued EO 20-05. This executive order included specific directives to certain state agencies regarding the waiver of specific regulations. IDEM was not specifically mentioned. The Governor directed all state agencies as follows:
 - A. Any state agency as defined by Ind. Code §4-2-6-1(a)(2) is hereby granted authority to extend any non-essential deadline of their agency for a period of no longer than 60 days if deemed necessary to respond to the threat of COVID-19.
 - B. The head of any state agency as defined by Ind. Code §4-2-6-1(a)(2) with authority to promulgate rules is authorized to waive, suspend, or modify any existing rule of their agency where the enforcement of which would be detrimental to the public welfare during this emergency, notwithstanding the provisions of the Administrative Orders and Procedures Action (AOPA) or any law to the contrary for the duration of this Executive Order, subject to my prior approval.
 - C. All state agencies as defined by Ind. Code §4-2-6-1(a)(2) shall publish a summary of and guidance for all benefits available or modified related to any and all actions taken by departments and agencies pursuant to this Executive Order. Such publication shall, at a minimum, be posted on the state agency's website.
8. On March 23, 2020, the Indiana Supreme Court issued an Order in the Matter of Administrative Rule 17 Emergency Relief for Indiana Trial Courts Relating to the 2019 Novel Coronavirus (COVID-19), Supreme Court Case No. 20S-CB-123. This Order included the following provision, which was effective through April 6, 2020:

To the extent not already provided by an order granting emergency relief under Administrative Rule 17 to a particular court, the Court hereby tolls all laws, rules, and procedures setting time limits for speedy trials in criminal and juvenile proceedings, public health, mental health, and appellate matters; all judgments, support, and other orders; statutes of limitations; and in all other civil and criminal matters before the Indiana Tax Court and all circuit, superior, and city/town courts ("trial courts") of

the State of Indiana. Further, no interest shall be due or charged during this tolled period. Nothing in this paragraph, however, prohibits any trial court from proceeding with any matter it deems in its discretion to be essential or urgent.

9. On July 27, 2020, IDEM Commissioner Bruno Piggot published the Enforcement Discretion, Extension of Submission Deadlines, and Waiver of Specific Regulations Policy (the IDEM Policy). Pursuant to the authority granted in Executive Order 20-05, Commissioner Piggot announced the following:

- IDEM has not identified any regulatory requirements that should be generally waived as a result of workforce impacts due to COVID-19.
- However, in the instance that noncompliance is unavoidable directly due to impacts from COVID-19, IDEM will exercise enforcement discretion as appropriate.
- Communications about anticipated noncompliance should be sent to appropriate program contacts and include the following:
 - Concise statement describing how the COVID-19 outbreak contributes to the anticipated or ongoing noncompliance
 - Anticipated duration of the noncompliance
 - Citation of rule/permit provision for which enforcement discretion is requested
- Executive Order 20-05 (and its subsequent extensions) also authorizes IDEM “to extend any non-essential deadline of their agency for a period of no longer than 60 days if deemed necessary to respond to the threat of COVID-19. Requests for extensions pursuant to this Order should be sent to appropriate program contacts and include the following:
 - Concise statement describing how the COVID-19 outbreak contributes to the need for an extension
 - Identification of the current deadline and number of additional days requested
 - Citation of rule/permit provision for which the extension is sought

IDEM undertook no actions, other than publication on the website, to inform the regulated community of the issuance of the Policy.

10. On October 22, 2020, Ceres submitted two applications for reimbursement from ELTF for corrective action costs incurred at the Site. Ceres did not request an extension of time in which to file applications for reimbursement prior to this date.

11. On October 29, 2020, the IDEM denied all reimbursement for the following reason:

As noted in 328 IAC 1-3-3, eligible releases that occurred before July 1, 2016 have three hundred sixty-five days from the date the NFA was granted to submit all claims for payment of reimbursable costs. . . . These costs were submitted past the three hundred sixty-five days requirement.

12. Petitioner timely filed its Petition for Administrative Review on November 13, 2020.
13. The parties appeared for a final hearing on June 7, 2021.

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. 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). The ALJ “performs a duty similar to that of a trial judge sitting without a jury.” *United Refuse*, 615 N.E.2d at 104. The ALJ’s requirement under I.C. § 4-21.5-3-27(d) is to independently evaluate evidence through the proceeding and make a judgment based only on the information presented. Therefore, in this situation, a *de novo* standard of review is proper. *Indiana-Kentucky Elec. Corp. v. Comm’r, Indiana Dep’t of Env’tl. Mgmt.*, 820 N.E.2d 771, 781 (Ind. Ct. App. 2005).
4. The OEA and IDEM, as state agencies, only have the authority to take those actions that are granted by the law. “An agency, however, may not by its rules and regulations add to or detract from the law as enacted, nor may it by rule extend its powers beyond those conferred upon it by law.” *Lee Alan Bryant Health Care Facilities, Inc. v. Hamilton*, 788 N.E.2d 495, 500 (Ind. Ct. App. 2003). IDEM can only determine whether a permit should be issued by applying the relevant statutes and regulations and may only consider those factors specified in the applicable regulations in deciding whether to issue a permit. As the ultimate authority for the IDEM, the OEA’s authority is limited by statute (I.C. §4-21.5-7-3) to determining whether the IDEM decision complies with the applicable statutes and regulations. OEA is an impartial litigation forum, not a body which formulates or advises as to public policy or regulatory content.
5. IDEM denied reimbursement based on 328 IAC 1-3-3(a)(4), which states:
 - (4) For eligible releases that occurred before July 1, 2016, or, if the date of occurrence cannot be determined, that were discovered before July 1, 2016, an eligible party shall submit all:
 - (A) claims for payment of reimbursable costs within three hundred sixty-five (365) days after the eligible release is granted a status of

no further action by the administrator; and
(B) resubmittals associated with any disallowed cost within three hundred sixty-five (365) days after the denial of the claim.

6. IDEM acknowledged its ability to exercise discretion to extend deadlines by 60 days during the COVID-19 pandemic in its own publication labeled, "Enforcement Discretion, Extension of Submission Deadlines, and Waiver of Specific Regulations."
7. There is little to no question that COVID-19 has had a huge impact on routine business operations in the State of Indiana. Governor Holcomb has issued several orders directing people to stay at home, work from home (if possible) and closed businesses. Later Executive Orders instituted mitigation strategies related to the pandemic, including the extension of deadlines for driver licenses, vehicle registrations, and taxes and put in place a moratorium on evictions. Businesses were allowed to slowly reopen beginning in the summer of 2020. Chief Justice Rush issued Orders which extended the deadlines for many legal activities, including suspending speedy trials and tolling the statutes of limitations.
8. The Governor and the Supreme Court determined that the pandemic justified the actions that they took, which included the suspension of speedy trials, the extension of deadlines for paying taxes and a moratorium on evictions and mortgage foreclosures. Considering the measures taken by the Governor and the Supreme Court to address the pandemic, IDEM cannot support an argument that granting an extension of time in this instance would be harmful.
9. IDEM issued the Policy in accordance with directives from the Governor. None of the ELTF rules were specifically mentioned. Given the extraordinary circumstances of the last year, IDEM issued a policy which allowed for extensions of sixty (60) days of non-essential deadlines. In this case, Ceres promptly and effectively took all the necessary actions to remediate the UST release. Ceres submitted its application for reimbursement on October 22, 2021. Under a strict application of the rule, Ceres should have submitted the application on or before September 27, 2020, which was one year after Ceres received its NFA. Although Ceres did not request an extension of time beforehand, Ceres did submit the application within the sixty days as allowed by the Policy.
10. The deadline to submit claims within one year of receiving NFA status is a non-essential deadline. There is no evidence that payment of ELTF claims would be detrimental to the public welfare or would pose a threat to human health or the environment.
11. This decision had a severe impact on Petitioner. There is no question that Petitioner is a good actor in this matter. IDEM recognized the need under the circumstances to allow extensions of up to sixty days. IDEM has no valid public policy considerations for denying the claims. Given the extreme circumstances presented by the COVID-19 threat, this situation should not recur. (There is no evidence that any other ELTF claims were denied for late submission.) IDEM had the discretion to extend the deadline for sixty (60) days in accordance with the Policy and abused its discretion in denying the claims. Judgment should be entered in Petitioner's favor

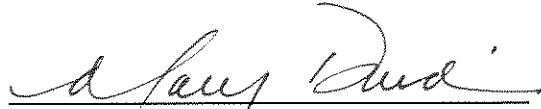
12. IDEM did not review the claims for compliance with the 328 IAC 1-3-5(e) before denying the claims. It is appropriate to allow review the ELTF Submittals on their merits for reimbursement to Ceres.

Final Order

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED judgment is entered in favor of Ceres Solutions Cooperative Inc. All further proceedings are vacated.

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. § 4-21.5-5, *et seq.* Pursuant to I.C. § 4-21.5-5-5, a Petition for Judicial Review of a Final Order is timely only if filed with a civil court of competent jurisdiction within thirty (30) days after the date this notice is served.

IT IS SO ORDERED this 29th day of July, 2021 in Indianapolis, IN.



Hon. Mary L. Davidsen, Esq.
Chief Environmental Law Judge

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