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## Client Alert

### Environmental Court Holds That A UST Owner Is Entitled To Reimbursement

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The Marion Superior Court, Hon. Michael Keele, recently affirmed the Office of Environmental Adjudication (OEA) and held that an underground storage tank (UST) owner was in substantial compliance with the environmental laws and therefore entitled to receive reimbursement from Indiana's excess liability trust fund (ELTF). The case *Indiana Department of Environmental Management vs. Rowe Brothers, Inc.*, 49F12-0707-PL-031388 (January 20, 2009), 2009 WL 2010688, contains four important holdings:

1. The UST owner, Rowe Brothers, Inc., did not discover a release of petroleum until Rowe Brothers' consultant told Rowe Brothers about the laboratory results showing that a release had occurred.
2. Even if Rowe Brothers reported the petroleum release 31 days late, Rowe Brothers was still entitled to ELTF reimbursement pursuant to Ind. Code § 13-23-8-4. This statute allows ELTF reimbursement when a UST owner is in partial or "substantial compliance" with the UST regulations.
3. Pursuant to Ind. Code § 13-23-9-2(d), IDEM is required to notify Rowe Brothers of all the reasons for the denial of its ELTF claim in the initial denial letter. IDEM may not later develop additional reasons to deny Rowe Brothers' ELTF claim.
4. Rowe Brothers did not receive IDEM's first letter denying its ELTF claim. IDEM bears the burden of proving Rowe Brothers received IDEM's first determination letter and IDEM failed to meet its burden. Even if IDEM had met its burden, Rowe Brothers is still permitted to proceed with its ELTF claim because the claim contains new information not contained in its first ELTF claim.

#### I. Discovery of the Petroleum Release

Rowe Brothers owned a gasoline service station in Indianapolis. In 2003 Rowe Brothers planned to sell the property and requested that its environmental consultant, Capital Environmental Enterprises, complete a phase II environmental investigation. Capital conducted a site visit and collected soil and groundwater samples at the site on July 28, 2003. During Capital's initial site visit no free product, vapor, petroleum sheen, or other reportable petroleum release was discovered. In addition, there were no unusual operating conditions related to the petroleum dispensing equipment.

Capital did not receive the laboratory results for the July 28, 2003 soil and groundwater samples until after August 14, 2003 when Capital's secretary received the laboratory results in the mail.



Capital's secretary initially receiving the lab results was not trained or qualified to interpret the lab results and did not know whether the lab results showed a reportable release of petroleum. Capital's president, Davies H. Batterton ("Batterton"), was the Capital employee responsible for reviewing and interpreting the lab results. Batterton had over sixteen years experience as an environmental consultant and was able to interpret the lab results.

Rowe Brothers was a small family company and Vern Rowe, the President of Rowe Brothers, was the only Rowe Brothers' employee authorized to receive the lab results from Capital. During the late summer of 2003 Rowe and Batterton left Indianapolis for their respective family vacations. Batterton and Rowe did not discuss the lab results for the site until Monday, September 15, 2003 when Rowe returned to work from his vacation in Nevada.

Rowe Brothers submitted an initial ELTF claim ("First ELTF Claim") to IDEM on October 27, 2003. During 2003 through 2005 Rowe Brothers never received a response from IDEM. On November 22, 2005 Rowe Brothers submitted a second claim to the ELTF ("Second ELTF Claim") in the amount of \$73,352.75. This Second ELTF Claim contained new and additional information that was not contained in the First ELTF claim.

On December 7, 2005 IDEM sent a letter to Rowe Brothers denying Rowe Brothers' second claim for reimbursement of remediation expenses in the amount of \$73,352.75. In 2006, as part of the litigation, IDEM alleged for the first time that IDEM sent Rowe Brothers a letter in 2003 that denied Rowe Brothers' ELTF claim. Rowe Brothers did not receive IDEM's first determination letter. Unlike IDEM's second determination letter, IDEM's first determination letter was not dated, was not signed, and was not sent via certified mail.

## **II. Conclusions of Law**

### **A. The Discovery Of A Petroleum Release Occurs When The Consultant Conveys The Release Information To The UST Owner**

IDEM denied Rowe Brothers ELTF claim alleging that Rowe Brothers reported the petroleum release 31 days late. 329 IAC 9-4 requires that a UST owner report to IDEM the *discovery* of a release of petroleum within 24 hours. Judge Keele found Rowe Brothers received the results of contamination on September 15, 2003 when its consultant discussed the laboratory results with Vern Rowe.

The Court rejected IDEM's claim that Rowe Brothers learned on the contamination on August 14, 2003 when the consultant first received the lab results in the mail. No evidence was presented that timing of delivery of this information to Rowe Brothers could have been reasonably delivered more promptly. Upon discovery of the release, Rowe Brothers promptly reported the release to IDEM within 24 hours on September 15, 2003.

### **B. Rowe Brothers Was In "Substantial Compliance" With The ELTF Laws**

Indiana law requires only "substantial compliance," not complete compliance, with the requirements of Ind. Code ' 13-23 to obtain ELTF reimbursement. *See*, Ind. Code ' 13-23-8-4. The applicable statute, Ind. Code 13-23-8-4, states:



An owner or operator may receive money from the excess liability trust fund under section 1 of this chapter only if the owner or operator is in *substantial compliance* (as defined in 328 IAC 1-1-9) with Ind. Code § 13-23 . . .

In 2003 “*substantial compliance*” was defined in 328 IAC 1-1-9 to mean “that, at the time a release was discovered, the owner or operator *had taken affirmative steps* to comply with the requirements of IC 13-23-8-4.”<sup>[1][1]</sup>

In *Johnson Oil*, the OEA found that a 11 month delay in reporting a release to IDEM did not prevent Johnson Oil from receiving full ELTF reimbursement because Johnson Oil was in substantial compliance with the existing regulations. *Johnson Oil Company*, Cause No. 03-F-J-3279 (OEA 2005). In *Speedway*, the OEA found that a 42 day delay in reporting a release of petroleum did not prevent Speedway from receiving ELTF reimbursement. *Speedway SuperAmerica LLC*, Cause No. 05-F-J-3564 (OEA 2006). An owner or operator of a UST demonstrates “substantial compliance” by showing that it was in compliance with the majority of the applicable regulations. *Id.*

At most Rowe Brothers reported its release of petroleum 31 days late. Rowe Brothers presented evidence that it had taken affirmative steps to comply with the regulations and that it was in substantial compliance with the regulations. This evidence of substantial compliance included a showing that Rowe Brothers: (1) registered its USTs; (2) paid annual tank fees; (3) conducted monthly tank tightness tests with its Veeder Root TLS 350; (4) conducted annual cathodic protection tests on its tanks; (5) reported the release of petroleum as soon as it was discovered; (6) retained Environmental Petroleum Services to confirm the tanks were “tight” and not leaking; (7) retained its environmental consultant, Capital, to investigate the release; (8) completed several site characterization reports which IDEM approved; (9) completed a corrective action plan which IDEM approved. The Court found that Rowe Brothers was in substantial compliance with the UST regulations and therefore Rowe Brothers was entitled to ELTF reimbursement.

### **C. Rowe Brothers Never Received IDEM’s First Determination Letter And Thus Rowe Brothers’ Time To Appeal Did Not Expire**

IDEM also alleged that Rowe Brothers waived its right to appeal the ELTF determination because Rowe Brothers failed to appeal a first ELTF determination letter within fifteen (15) days. As an initial matter, IDEM in its denial letter gave only one reason (violation of a release reporting rule) to deny Rowe Brothers’ ELTF claim. The Court found that pursuant to Ind. Code § 13-23-9-2, IDEM is required to notify Rowe Brothers of all the reasons for the denial of its ELTF claim in the initial denial letter. IDEM may not develop additional reasons to deny Rowe Brothers’ ELTF claim.

Rowe Brothers presented uncontested evidence showing that Rowe Brothers did not receive IDEM’s first determination letter until its counsel received a copy in 2006 as part of the litigation. The Court held that IDEM may not deprive Rowe Brothers of its ELTF reimbursement until it shows that Rowe Brothers received actual notice of IDEM’s first ELTF determination letter. IDEM’s own determination letter stated: “you may appeal this determination by filing a written request for review with the Indiana Office of Environmental Adjudication not later than fifteen (15) days after receiving notice of the determination.”



The Court found that IDEM must provide the best possible notice to Rowe Brothers before IDEM may waive Rowe Brothers' ELTF appeal rights. Other cases, require IDEM and other public agencies to give the best possible notice to citizens before it deprives them of their rights and money. *Wayne Metal Products Co., Inc. v. IDEM*, 721 N.E.2d 316, 318 (Ind. Ct. App. 1999); *Indiana Department of Highways v. Dixon*, 541 N.E.2d 877, 880 (Ind. 1989).

The Court noted that IDEM sent the second ELTF determination letter via certified mail and currently sends all ELTF determination letters via certified mail. Had IDEM sent the first determination letter by certified mail IDEM would have evidence to meet its burden of showing the ELTF claimant received the determination letter. See *Dixon*, 541 N.E.2d at 880. It is fundamental that in order for an agency – or any government entity for that matter – to take action against an individual, that the individual must have notice of the action. *Abdirizak v. Review Bd. of Indiana Dep't of Workforce Dev.*, 826 N.E.2d 148, 150 (Ind. Ct. App. 2005); *Mullane v. Central Hanover Bank*, 339 U.S. 306, 314-315 (1950).

IDEM's first determination letter gave Rowe Brothers "15 days after receiving notice" to file its petition for review. The uncontested evidence showed that Rowe Brothers did not receive IDEM's first determination letter. Pursuant to *Wayne Metals*, and *Dixon*, the Court found that due process requires that Rowe Brothers must be allowed to proceed with its ELTF appeal. *Wayne Metals*, 721 N.E.2d at 318; *Dixon*, 541 N.E.2d at 880.

### Conclusion

The *Rowe Brothers* case provides UST owners with important holdings to overcome IDEM's improper denial of ELTF claims. These holdings include the Court's conclusion that the discovery of a petroleum release occurred when the consultant conveyed the release information to the UST owner and not when the consultant first learned of the release. Rowe Brothers reported the release to IDEM the same day it learned about the release and therefore it was entitled to ELTF reimbursement.

Even if Rowe Brothers had reported the release 31 days late, Rowe Brothers was still entitled to ELTF reimbursement pursuant to Ind. Code § 13-23-8-4. This statute allows ELTF reimbursement when a UST owner is in partial or "substantial compliance" with the UST regulations. Pursuant to Ind. Code § 13-23-9-2, IDEM was required to notify Rowe Brothers of all the reasons for the denial of the ELTF claim in IDEM's initial determination letter and IDEM was not permitted to develop additional reasons to deny the claim.

Pursuant to *Wayne Metals*, 721 N.E.2d at 318 and *Dixon*, 541 N.E.2d at 880, IDEM bears the burden of proving Rowe Brothers received IDEM's first determination letter and IDEM failed to meet its burden. Even if IDEM had met its burden, Rowe Brothers was still permitted to proceed with its second ELTF claim because it contained new information not contained in its first ELTF claim.

The regulation defining substantial compliance, 328 I.A.C. 1-1-9, has changed and now requires the UST owner to report a release of petroleum within 7 days.