STATE OF INDIANA	)	MARION COUNTY SUPERIOR COURT
	) SS:	
COUNTY OF MARION	)	CAUSE NO. 49F12-1105-PL-17120

PILOT TRAVEL CENTERS LLC,

Petitioner,

v.

THE INDIANA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT

Respondent.

FILED

JUN 25 2012 (232)

Elizabeth A White
CLERK OF THE MARION CIRCUIT COURT

FINDINGS OF FACT,
CONCLUSIONS OF LAW AND JUDGMENT

This case is before the Court on the Verified Petition for Judicial Review that Pilot Travel Centers LLC ("Pilot") filed to challenge Findings of Fact, Conclusions of Law and Final Order issued by the Office of Environmental Adjudication ("OEA") on April 4, 2011 (the "OEA Final Order"). OEA final orders are administrative decisions of the Indiana Department of Environmental Management ("IDEM"), and are thus subject to judicial review. The Court, having considered the submissions of Pilot and IDEM, now enters its Findings of Fact, Conclusions of Law and Judgment.

I.
FINDINGS OF FACT

A. The Parties

1. Pilot is a limited liability company that owns and operates a service station at 1851 West 400 North, Shelbyville, Indiana 46176 (the "Site").

2. IDEM is an agency of the State of Indiana that is statutorily charged with various duties and responsibilities related to Indiana's environmental laws, including the administration of the Excess Liability Trust Fund ("ELTF").

3. The ELTF was established to provide a source of money to satisfy the liabilities of underground storage tank ("UST") owners and operators in the event that a corrective action became necessary due to an accidental discharge from a UST.

4. Sources of money for the ELTF include annual UST registration fees, penalties, inspection fees and appropriations from the Indiana General Assembly.

5. The Commissioner of IDEM, or the Commissioner's designee, serves as the administrator of the ELTF (the "Administrator").

6. The final authority for IDEM's agency actions, including its decisions whether to grant or deny ELTF reimbursement applications, is the OEA, which employs Environmental Law Judges ("ELJs") to hear administrative reviews of the Administrator's ELTF determinations.

B. <u>The Release of Diesel Fuel at the Site</u>

7. On May 8, 2007, a Pilot employee discovered a release of diesel fuel at the Site.

8. Pilot notified IDEM of the spill, and personnel from IDEM's Emergency Response Unit responded to the report, traveled to the Site and supervised the emergency response and subsequent cleanup.

9. Jason McCain of Pilot, Jason Denlinger of Pangean (Pilot's Environmental Consultant), and Dave Daugherty of IDEM's Emergency Response Unit were present at the Site on May 8, 2007, during the initial spill response.

10. A dewatering system, which includes a French drain system, a retention pond, a retention trench, and a lift station, exists at the Site. The lift station pumps water to a creek behind the site.

11. When the spill was first discovered, Pilot turned off the lift station.

12. During the emergency response, representatives of IDEM, Pilot, Pangean and Pilot's environmental contractor, Pettit Environmental, discussed the threat of damage to the Site if the dewatering system was disabled, and came to the consensus that the lift station should be turned on and the progress of the spill should be monitored while remediation efforts went forward.

13. The possibility of the contamination getting to the lift station and being pumped off-site was discussed on the date of release discovery.

14. Pilot's McCain told IDEM's Daugherty the lift station had to remain operational because if it was off when there was a rain event, there could be damage to the site caused by rising groundwater levels.

15. In light of Pilot's concerns regarding the site flooding, it was determined that 24-hour-a-day vacuum recovery from an observation well close to the UST pit, and twice-a-day monitoring of the lift station were reasonable actions to monitor and address the release, and to catch contamination before it got off-site.

16. Daugherty specifically told Pilot to keep the contamination out of the creek.

17. Pilot informed Daugherty that only 1,800 gallons of fuel had been released.

18. Vacuuming of the observation well recovered both groundwater and fuel product in the following days, with 2,346 gallons of product recovered as of May 14, 2007.

19. On May 14 and 15, 2007, monitoring wells that had been drilled between the observation well at the UST pit and the retention pond, trench, and lift station revealed the presence of free product in those wells.

20. On May 15, 2007, a Pangean employee took samples of water from the lift station. He neither saw nor smelled diesel fuel in the lift station at that time, and laboratory tests

showed no diesel fuel in the sample taken from the lift station on that date. Based upon field observations and lab results, fuel contamination had not yet reached the lift station as of May 15, 2007.

21. Pilot did not check the lift station, retention trench or retention pond for the presence of contamination from May 16 through May 18, 2007, as IDEM required.

22. On May 18, 2007, IDEM's Daugherty performed a site visit as a routine check. Daugherty inspected the lift station, found free product in the station, and further found that free product was being discharged into the creek.

23. On May 18, 2007, after finding fuel was being pumped off-site into the creek, Daugherty learned that 7,500 gallons (not 1,800 gallons, as Pilot had informed him on May 8, 2007) had been released.

24. Pilot immediately conducted an emergency cleanup of the off-site contamination, and then returned to the remediation of the on-site contamination.

25. The operation of the lift station and the subsequent discharge of free product contaminated the creek several miles downstream and caused documented harm to the environment.

26. Pangean's Denlinger testified the fuel contamination reached the lift station quicker than expected due to the elaborate French drain system and the gravel fill at the site.

27. Denlinger testified he did not know of the elaborate nature of the French drain system or the true nature of the soil at the site until the contamination had already been pumped off-site.

28. Pilot's Mulligan, however, testified that both he and Jason McCain, Pilot's environmental manager for that area, knew of the French drain system and the soil lithology of the site at the time of the release.

29. Mulligan agreed that the lift station could have been turned off to prevent possible contamination and then turned on again if it rained heavily.

C. **Pilot's ELTF Claims**

30. On May 31, 2007, Pilot submitted a zero-dollar ELTF claim for the purpose of establishing Site eligibility. The Administrator accepted the claim and found that the Site was eligible for ELTF reimbursement upon proper cost submissions.

31. On November 1, 2007, Pilot submitted a request for reimbursement from the ELTF for emergency response costs at the Site. Initially, the Administrator denied this request on the grounds that no site characterization or corrective action plan had yet been approved. On March 31, 2008, the Administrator issued a letter to Pilot granting conditional site characterization approval and made an "internal resubmission" of Pilot's November 1, 2007, request for reimbursement ("Claim 1").

32. On September 4, 2008, the Administrator issued a letter denying Claim 1. The letter stated:

> These costs are not eligible for reimbursement from the ELTF because they did not comply with 329 IAC 9-5-2(2) and (4). Please provide additional information on which costs are attributable to the initial spill and those attributable to the off-site contamination resulting from the failure to contain the spill on-site. Other costs under 328 IAC 1-3-5(d)(15) are not eligible for reimbursement.

The regulation at 329 IAC 9-5-2 is commonly referred to as the "Initial Response Rules."

33. On November 13, 2008, Pilot submitted an additional request for ELTF reimbursement ("Claim 2"). On February 9, 2009, the Administrator issued a letter allowing

reimbursement of a portion of Pilot's costs, but denying a majority of those costs submitted by Pilot in Claim 2. As with Claim 1, the Administrator denied certain costs, asserting that Pilot failed to comply with 329 IAC 9-5-2(2) and (4). Specifically, the Administrator noted that Pilot's claim exceeded allowable rates, lacked justification or backup documentation, allotted too many mark-ups, duplicated costs or had discrepancies between invoices covering the same activity or item. The Administrator also requested that Pilot submit additional information needed to distinguish between on-site and off-site costs, and, for certain entries, denied claimed expenses due to the claims exceeding the reasonable cost guidelines of 328 IAC 1-3-5.

D. Pilot's Administrative Challenge Before the OEA

34. On September 18, 2008, Pilot appealed the Administrator's denial of Claim 1 by filing its Petition for Adjudicatory Hearing and Administrative Review and Request for Stay of Effectiveness of ELTF Determination.

35. On February 26, 2009, Pilot appealed the Administrator's denial of Claim 2 by filing a second Petition for Adjudicatory Hearing and Administrative Review and Request for Stay of Effectiveness of ELTF Determination.

36. At Pilot's request, the two appeals were consolidated on February 27, 2009.

37. During the course of the administrative proceedings, Pilot submitted an accounting that segregated the costs it incurred as a result of the escape of diesel fuel into the lift station and beyond Pilot's property ("Off-Site Costs") from those costs that would have been incurred by Pilot even if diesel fuel had never reached the lift station ("On-site Costs").

38. Pilot's accounting showed that its unpaid Off-Site Costs were $235,786.27 and its unpaid On-site Costs were $590,503.45, for a total of $826,289.72. Generally, these amounts

and this allocation of Pilot's costs were accepted by IDEM and the OEA for purposes of administrative review.

39. On May 25 2010, the ELJ granted partial summary judgment to Pilot, finding that Pilot was entitled to ELTF reimbursement for its On-site Costs. However, the ELJ allowed IDEM time to reexamine Pilot's On-site Costs under the cost limits found at 328 IAC 1-3-5. Ultimately, IDEM reduced Pilot's On-site Costs by $24,102.57 on these grounds.

40. Also, during the course of the administrative appeal, IDEM determined that one of the five USTs at the Site had two internal compartments. The OEA held that a dual-compartment tank is a "combination of tanks" under Ind. Code § 13-23-12-1(c). The ELJ judge granted partial summary judgment in favor of IDEM on this issue, and found that Pilot had failed to properly pay a tank registration fee on one of its tanks. As a result, the Administrator reduced all awards by 1/6th, or 17%, and only reimbursed Pilot 83% of its amounts claimed.

41. IDEM made an interim payment to Pilot in the amount of $456,764.35 pursuant to the ELJ's partial summary judgment order. This amount included a reduction of 17% (as a result of the ELJ's finding regarding the tank registration issue) and a reduction of $24,102.57 as a result of the Administrator's finding that Pilot had failed to comply with the reasonable cost guidelines of 328 IAC 1-3-5.

42. On July 14, 2010, the ELJ conducted a hearing that was limited to the issue of whether Pilot's "Off-Site Costs" were reimbursable under the ELTF statutes and regulations. On September 8, 2010, the ELJ found that Pilot was not in "substantial compliance" with ELTF regulations because of its "failure to take reasonable steps to prevent the release" and therefore was not entitled to ELTF reimbursement for its Off-Site Costs.

44. On April 4, 2011, after additional motions to reconsider, the judge entered OEA's final order, in which all previous orders were made final.

E. **Procedural Prerequisites for Judicial Review**

45. The agency action at issue here is the Final Order dated April 4, 2011 (the "Final Order"). That Order constitutes "final agency action" as that term is defined by Ind. Code § 4-21.5-1-6.

46. Pilot has standing to bring this petition because it is the entity at which agency action was specifically directed, it participated in the underlying administrative proceedings and it was aggrieved by IDEM's determinations as well as the OEA's orders, including the Final Order.

47. Pilot has exhausted its administrative remedies prior to seeking judicial review. The OEA fully adjudicated Pilot's petitions seeking administrative review of the two ELTF denials.

48. Pilot's Verified Petition for Judicial Review was timely filed within the statutory 30-day period, in accordance with Ind. Code § 4-21.5-5-5.

49. Venue in this Court is proper because Marion County is the County where the principal office of the agency taking the agency action (IDEM) is located pursuant to Ind. Code § 4-21.5-5-6(a)(3).

II.
CONCLUSIONS OF LAW

1. The Indiana Administrative Orders and Procedures Act ("AOPA") sets forth a court's scope of review of an agency's administrative order.

2. AOPA places the burden of demonstrating the invalidity of an agency action on the party that is challenging the agency action, and permits the court to grant relief when the

moving party demonstrates that the action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; contrary to constitutional right, power, privilege, or immunity; in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; without observance of procedure required by law; or unsupported by substantial evidence." Ind. Code § 4-21.5-5-14.

3. The reviewing court must look at the evidence most favorable to the party that prevailed in the administrative process to determine whether there exists substantial evidence supporting the findings and decision of the agency. *Martin County Nursing Center, Inc. v. Medco Centers, Inc.*, 441 N.E.2d 964, 968 (Ind. Ct. App. 1982).

4. "Substantial evidence" is more than a scintilla, but less than a preponderance, of the evidence. *Crooked Creek Conservation and Gun Club, Inc. v. Hamilton County North Bd. of Zoning Appeals,* 677 N.E.2d 544, 549 (Ind. Ct. App. 1997).

5. The court may not reweigh conflicting evidence or judge the credibility of the witnesses, nor may the court substitute its judgment for that of the agency. *Indiana Alcoholic Beverage Comm'n v. River Road Lounge, Inc.*, 590 N.E.2d 656, 658 (Ind. Ct. App. 1992).

6. The court is bound by the agency's findings of fact if those findings are supported by evidence. *Hamilton County Dep't of Public Welfare v. Smith*, 567 N.E.2d 165, 168 (Ind. Ct. App. 1991). The reviewing court may not substitute its judgment of factual matters for that of the agency. I.C. § 4-21.5-5-11; *Indiana Dep't of Natural Resources v. Krantz Brothers Construction Corp.*, 581 N.E.2d 935, 940-41 (Ind. Ct. App. 1991).

7. A reviewing court is not required to accept erroneous conclusions of law made by administrative agencies. *Indiana Dep't of Public Welfare v. Payne*, 622 N.E.2d 461, 465 (Ind. 1993).

8. An interpretation of statutes and regulations by an administrative agency charged with enforcing those regulations and statutes is entitled to great weight, unless this interpretation would be inconsistent with the law itself. *See LTV Steel Co v. Griffin.,* 730 N.E.2d 1251, 1257 (Ind. 2000); *see also Indiana Wholesale Wine and Liquor Co., Inc. v. State ex rel. Indiana Alcoholic Beverage Commission,* 695 N.E.2d 99, 105 n. 16 (Ind. 1998).

9. "When a court is faced with two reasonable interpretations of a statute, one of which is supplied by an administrative agency charged with enforcing the statute, the court should defer to the agency." *Shaffer v. State*, 795 N.E.2d 1072, 1076 (Ind. Ct. App. 2003) (citing *Sullivan v. Day,* 681 N.E.2d 713, 716 (Ind.1997)). "When a court determines that an administrative agency's interpretation is reasonable, it should 'terminate its analysis' and not address the reasonableness of the other party's interpretation." *Id.* at 1076-1077 (citing *Ind. Wholesale Wine,* 695 N.E.2d at 105). "Terminating the analysis recognizes 'the general policies of acknowledging the expertise of agencies empowered to interpret and enforce statutes and increasing public reliance on agency interpretations.'" *Id.* at 1077 (citing *Ind. Wholesale Wine,* 695 N.E.2d at 105).

10. To qualify for reimbursement of corrective action costs from the ELTF, the owner or operator must show, among other things, that all required registration fees have been paid, that the corrective action costs at issue were incurred, and that the owner or operator was in "substantial compliance" with applicable environmental statutes and regulations. Ind. Code § 13-23-8-4.

11. Once a request for reimbursement is received, the Administrator is required to notify the owner of its approval or denial of the request within 60 days. In the event of a denial,

IDEM must provide the owner notice of "all reasons for a denial or partial denial." Ind. Code § 13-23-9-2(d).

12. Once the Administrator issues an ELTF determination letter denying a request for reimbursement, the owner must appeal the denial within 30 days or waive its right to administrative review. Ind. Code § 13-23-9-2(g).

13. Administrative review of IDEM's determination is conducted before the OEA. Ind. Code § 13-23-9-4. The function of the OEA is to review IDEM actions under AOPA.

14. When an agency intends to assert an affirmative defense, it must disclose that defense to the petitioner. Ind. Code § 4-21.5-3-14(c). If a prehearing conference is held, the agency must disclose its affirmative defenses at that time. *Id.*

15. When an ELJ provides notice of a hearing, the notice must include a statement of the issues involved and, to the extent known to the ELJ, a statement of the matters asserted by the parties. Ind. Code § 4-21.5-3-20(c)(7).

16. In the course of a hearing, the ELJ is required to give all parties a full opportunity to present evidence and arguments, and to rebut the evidence and arguments of that party's opponent, to ensure full disclosure of all relevant facts and issues. Ind. Code § 4-21.5-3-25(b).

A. <u>The Initial Response</u>

17. The ELTF exists to assist UST owners and operators with the costs of cleaning up petroleum related releases. I.C. § 13-23-7-1.

18. To receive money from the ELTF, owners and operators must have paid the necessary registration fees and be in "substantial compliance" with applicable UST requirements. I.C. § 13-23-8-4(a).

19. The definition of "substantial compliance" applicable in this case is as follows:

(a) "Substantial compliance" means that, at the time a release was first discovered or confirmed:

(1) the owner or operator has met the requirements of IC 13-23-8-4(a), with the exception of minor violations of:

(A) statutory deadlines;

(B) regulatory deadlines; or

(C) regulatory requirements;

that do not cause harm or threaten to harm human health or the environment; and

(2) registration fees have been paid as required under IC 13-23-12 and 328 IAC 1-3-3.

328 Ind. Admin. Code 1-1-9(a)(1).[1]

20. UST requirements related to initial response state:

Upon confirmation of a release in accordance with 329 IAC 9-4-3 or after a release from the UST system is identified in any other manner, the owner and operator shall perform the following initial response actions within twenty-four (24) hours of a release:

(1) Report the release to the agency:

(A) by telephone at (317) 232-8900 or after hours or holidays at (317) 233-7745;

(B) by fax at (317) 234-0428; or

(C) at LeakingUST@dem.state.in.us for electronic mail.

(2) Take immediate action to prevent any further release of the regulated substance into the environment.

(3) Identify and mitigate fire, explosion, and vapor hazards.

(4) Mitigate to the extent practicable adverse effects to human health and the environment.

329 IAC 9-5-2.

21. An applicant can receive ELTF reimbursement if the applicant is in "substantial compliance" with applicable requirements. Ind. Code § 13-23-8-4(a).

22. Here, the record shows that Pilot initially withheld the actual number of gallons released at the time of the incident, informing IDEM's Daugherty that only 1,800 gallons had been released when Pilot knew at that time some 7,500 gallons actually had been released.

23. The record also shows that Pilot knew of the existence of the drainage system and the gravel-like lithology of the soil at the site, which allowed the contamination to move more

[1] The definition of "substantial compliance" was revised in 2011. However, the definition in place at the time of the release in 2007 applies to this case, as the release occurred in 2007.

quickly than expected, yet Pilot never shared this information IDEM or Pilot's remediation consultant until after the off-site release.

24. Pilot failed to comply with IDEM's specific instructions to prevent the release from migrating off-site.

25. Although the record reveals that Pilot took steps to address the release within 24 hours of discovery, Pilot did not take actions "to the extent practicable" to mitigate the effects of the release.

26. This failure to comply with the Initial Response Rule requirement to mitigate impacts led to documented environmental harm in the form of several miles of contaminated creek and fish and wildlife damages to both state and federal agencies.

27. For the foregoing reasons, Pilot failed to comply with the requirement to mitigate adverse effects to human health and the environment as required by 329 IAC 9-5-2. Pilot is not in "substantial compliance" as defined in 328 IAC 1-1-9 regarding the Off-Site costs, and those costs are not reimbursable from the ELTF.

28. The ELTF Administrator and IDEM properly denied Pilot's reimbursement claim for off-site corrective actions costs submitted under Claim 1 or Claim 2 on the grounds that Pilot failed to comply with the Initial Response Rules.

B. Purported Due Process Violations

29. Pilot asserts that the OEA improperly allowed IDEM to assert grounds for denying Pilot's submitted claims that were not provided to Pilot when IDEM initially denied the claims. The Court concludes that Pilot's assertions are incorrect.

30. The ELTF requires that "the administrator ***shall*** notify the claimant of all reasons for a denial or partial denial." Ind. Code § 13-23-9-2(d) (emphasis added).

31. The ELTF regulations specify what costs will be reimbursed and the approved rates of reimbursement for those costs. 328 IAC 1-3-5.

32. ELTF applicants are on notice via ELTF regulations that every cost must be itemized and that costs will be reimbursed according to rule rates. 328 IAC 1-3-5.

33. Pilot has known by virtue of published rules that costs will only be allowed according to rule rates. If costs exceed the amount allowed by rule, then the applicant has no expectation of receiving the excess amount.

34. Further, a claimant must submit adequate justification and backup documentation prior to approval of a claim. 328 IAC 1-5-1(a).

35. IDEM's letters denying Claims 1 and 2 state that those costs related to failures to comply with the Initial Response Rules were being denied eligibility for reimbursement and that IDEM required additional information to substantiate and clarify Pilot's claims for reimbursement.

36. IDEM has the authority to request additional information related to claims and the costs submitted to substantiate those costs. Pilot had not differentiated which costs were on-site and off-site. IDEM properly required Pilot to submit additional documentation to make that determination.

37. Pilot has also known from the moment it began incurring charges that sufficient backup documentation must be maintained to substantiate such costs. Pilot cannot now argue that it has been denied due process because OEA ordered IDEM to reimburse costs according to rule rates, including denying those costs for which sufficient documentation was not provided.

38. The ELTF regulations are also structured to provide an applicant numerous opportunities to provide all required documentation. When an ELTF applicant has been denied

reimbursement of costs, the applicant can do one of two things to address that denial: 1) appeal the denial; or 2) resubmit the claim with further back-up documentation. 328 IAC 1-5-1(d); 328 IAC 1-5-2(b). As such, the rule is structured to be very lenient and flexible to allow claims to be resubmitted.

39. OEA recognized this and dismissed Pilot's On-Site costs claim without prejudice so Pilot could resubmit at a future date.

40. Pilot further argues that OEA's mention of 329 IAC 9-5-3.2 (the "Abatement Rules") was improper because it was not asserted previously as a reason for denying Pilot's ELTF claims. This argument is unfounded, as the ELJ merely cited to the Abatement Rules to support the proposition that an ELTF's obligations under the Initial Response Rules may extend beyond 24 hours. The ELJ specifically found the Off-Site costs were ineligible for reimbursement due to Pilot's failure to comply with the Initial Response Rules, not with any failure to comply with the Abatement Rules.

C. Non-payment of UST Fees

41. Pilot argues that OEA's interpretation that a fee is due for each separate compartment of a single UST is not supported by the language of the statute. The Court agrees with Pilot on this point.

42. The underground storage tank fee statute requires a fee to be paid for each underground storage tank and further states that "if an underground storage tank consists of a combination of tanks, a separate fee shall be paid for each tank." Ind. Code § 13-23-12-1(a) & (c).

43. The percentage of approved costs that may be reimbursed by the ELTF is calculated by dividing the number of tank fees due for a particular site by the number of tank fees actually paid for that site prior to the date on which a release occurred. 328 IAC 1-3-3(b).

44. The first step in interpreting a statute is to determine whether it is clear and unambiguous regarding the point at issue. *St. Vincent Hosp. & Health Care Ctr., Inc. v. Steele,* 766 N.E.2d 699, 703–704 (Ind. 2002). If the statute is unambiguous, the court must give the statute its clear and plain meaning. *Bolin v. Wingert, 764 N.E.2d 201, 204 (Ind. 2002).*

45. The plain language of applicable rules defines a "tank" as "a stationary device designed to contain an accumulation of regulated substances and constructed of nonearthen materials that may include any: (1) concrete; (2) steel; or (3) plastic; that provides structural support." 329 IAC 9-1-45.

46. An underground storage tank is "one (1) tank or a combination of tanks, including underground pipes connected to the tank or combination of tanks: (1) that is used to contain an accumulation of regulated substances; and (2) the volume of which, including the volume of the underground connected pipes, is at least ten percent (10%) beneath the surface of the ground." Ind. Code § 13-11-2-241(a).

47. A "combination" is "something that results from combining two or more things." Websters II New Riverside University Dictionary (1995).

48. The OEA's interpretation of Ind. Code § 13-23-12-1(c) is contrary to the plain meaning of the statute. A "combination" results from combining two things into one.

49. Applying the plain meaning of the statute, the division of an underground storage tank into two internal compartments is not a "combination" of tanks – it is a subdivision of one

tank. As such, Pilot was not required to pay a second registration fee for the second compartment of the tank in question.

50. Because Pilot operated only one tank with two compartments, not multiple tanks, the Administrator's 17% reduction of Pilot's approved ELTF reimbursement claims was erroneous, and the OEA's Final Order, as applied to this issue, was contrary to law.

JUDGMENT

Based upon the foregoing Findings of Fact and Conclusions of Law, and insofar as the OEA denied Pilot's claims for Off-Site Costs, Pilot has failed to show OEA's Final Order is arbitrary or capricious, an abuse of discretion, in excess of statutory authority, not in accordance with law or unsupported by substantial evidence. Pilot was not in substantial compliance with law because it failed to prevent further release and failed to mitigate to the extent practicable the harm from its on-site release when Pilot allowed the release to migrate off-site and cause documented environmental harm. With regard to the payment of Off-Site Costs due to non-compliance with the Initial Release Rules, OEA's Final Order is **AFFIRMED**. Any denial of an On-Site cost based upon lack of information or documentation is also **AFFIRMED**. Pilot is allowed by rule to resubmit such denied costs for reimbursement if such information or documentation comes available.

OEA's interpretation of the tank fee statute, however, is not supported by the plain meaning of the language in Ind. Code § 13-23-12-1. Pilot was not required to pay a registration fee for each compartment in its compartmentalized tank. The 17% reduction for

failure to pay a tank fee and any reduction to rule-based reimbursement is **REVERSED**. The reduction of Pilot's approved claims was in error because Pilot paid all registration fees that were due.

SO ORDERED this 25th day of June, 2012.

Marion Superior Court
Environmental Division

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RECOMMENDED FOR APPROVAL

MASTER COMMISSIONER

APPROVED AND ORDERED

JUDGE