Objection to the Denial of Excess Liability
Trust Fund Claim, ELTF #200810211, FID #12463
Romney Food Mart
2019 OEA 80 (19-F-J-5057)

OFFICIAL SHORT CITATION NAME: When referring to 2019 OEA 80, cite this case as ***Romney Food Mart,* 2019 OEA 80**

Topics:
Summary judgment
Excess Liability Trust Fund
ELTF
I.C. §13-23-9-1.5(a)(1)
Reasonable
Cost effective
328 IAC 1-1-8.3
328 IAC 1-5-1(a)
Marathon Point Service and Winamac Service, 2005 OEA 26
Rules
Gorka v. Sullivan, 671 N.E.2d 122, 129 (Ind. Ct. App. 1996), trans. denied
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Moriarity v. Ind. Dep't of Natural Res., 113 N.E.3d 614, 621 (Ind. 2019)

Presiding Environmental Law Judge: Catherine Gibbs

Party representatives:

Counsel for IDEM:	Julie Lang
Petitioner:	David Dearing

Order issued: September 30, 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 DENIAL OF EXCESS	)	
LIABILITY TRUST FUND CLAIM	)	CAUSE NO. 19-F-J-5057
ELTF #200810211 / FID #12463	)	
ROMNEY FOOD MART	)	
ROMNEY, TIPPECANOE COUNTY, INDIANA	)	

FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL ORDER

The Petitioner, Romney Petroleum Inc. filed a Motion for Summary Judgment on June 19, 2019. The Indiana Department of Environmental Management (IDEM) filed its Cross-Motion for Summary Judgment on July 11, 2019. Responsive pleadings were filed in accordance with the case management order. The presiding Environmental Law Judge (ELJ), having reviewed the record, read the motions, evidence, responses and replies and heard oral argument, enters the following findings of fact, conclusions of law and final order.

Findings of Fact

1. Romney Petroleum, Inc. (the Petitioner) owns the underground storage tanks (USTs) at 20 Seuman Street, Brownsburg Indiana (the Site). Corrective action has been taking place since 2009 to address the release of petroleum from the USTs located at the Site. The release was assigned incident number 200810211. The corrective action requires sampling and analysis of the monitoring wells on a quarterly schedule. The results of such sampling shall be reported to IDEM every quarter in the Quarterly Monitoring Report (the QMR).

2. On January 31, 2019, Golars LLC (the Petitioner's consultant), submitted 2 applications (Invoice numbers 200810211-49 and 200810211-50) for reimbursement of certain costs associated with the corrective action at the Site.

3. On April 4, 2019, IDEM notified Prasad Sanka of Golars LLC that it was delaying reimbursement of specific costs in each invoice until additional information regarding the costs could be submitted. The reason for the denial in Invoice 200810211-49[1] was:

> As noted in IC 13-23-9-1.5(a)(1), costs for which ELTF claims may be paid

1 The reason for denial was the same in Invoice 200810211-50, except the number of hours cited in this invoice was 90 hours.

must be reasonable and cost effective. Please provide documentation or a demonstration regarding the reasonableness and cost effectiveness of 58 hours for preparation of a Q3 QMR[2].

4. IDEM had previously reimbursed the costs associated with the preparation of QMRs. But after Golars became the consultant for this Site sometime in 2017, Golars requested reimbursement for a substantial increase in the number of hours claimed and in the hourly rate charged for the preparation of quarterly monitoring reports.

5. Petitioner filed a Motion for Summary Judgment on June 19, 2019. The IDEM filed its Response to Petitioner's Motion for Summary Judgment and Cross Motion for Summary Judgment on July 11, 2019. Petitioner filed a response to IDEM's cross motion and a reply in support of its motion on August 11, 2019. IDEM filed its reply in support of its cross-motion on August 27, 2019. Oral argument was heard on September 26, 2019.

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).

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. Ind. 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).

[2] This is a reference to the Quarterly Monitoring Report for the third quarter of the calendar year.

5. The Excess Liability Trust Fund (the ELTF) was established by I.C. §13-23-7-1(a)(2)[3], in pertinent part, "to provide a source of money to satisfy liabilities for corrective action." I.C. §13-23-9-1.5(a)(1)[4] states that the administrator of ELTF "may pay ELTF claims only for costs that: (1) are reasonable and cost effective;" In furtherance of these goals, the Financial Assurance Board has promulgated regulations under Title 328 of the Indiana Administrative Code.

6. 328 IAC 1-1-8.3 defines "Reasonable" as:

> "Reasonable" means that the site characterization and corrective action are:
> (1) appropriate and performed only as necessary to meet the cleanup objectives for the site; and
> (2) consistent with the requirements of:
> (A) 329 IAC 9;
> (B) 328 IAC 1-3-5(b) through 328 IAC 1-3-5(e); and
> (C) other applicable state and federal laws and regulations

7. Under the authority in 328 IAC 1-5-1(a):

> (a) Claim applications for reimbursement must be submitted on forms approved by the administrator. Applicants shall itemize all reimbursable costs as required by the application package. Documentation of reimbursable costs as required by the administrator must be submitted as part of the application. The administrator may request additional information and records to substantiate claims submitted including the following:
> (1) A copy of original employee time sheets.
> (2) Invoices relating to purchase or other acquisition of equipment and supplies used for corrective action.
> (3) Copies of requests for bids for work specified in the CAP.

8. It is expected that applicants will file numerous applications for reimbursement over the life of a project. Under the ELTF program, each individual application is reviewed to ensure compliance with the rules. IDEM frequently requests additional supporting documentation. In the event costs are denied, applicants have the option to (1) reapply for reimbursement of the previously denied costs[5] or (2) file a petition for review with OEA.

9. Petitioner contends that "(1) Golars has already made a prima facie case showing that all

[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.*
[4] *As added by P.L.96-2016, SEC.33. Amended by P.L.200-2017, SEC.15.*
[5] Applicants may reapply for reimbursement three times. 328 IAC 1-5-1(d).

costs associated with QMRs were reasonable and necessary, (2) that IDEM failed to rebut that showing; and (3) that IDEM's refusals to reimburse the costs of QMR preparation are arbitrary, capricious and not supported by substantial evidence."[6]

10. IDEM delayed payment of these costs until it was able to review additional information in support of the costs. Although the costs associated with this particular activity had been previously paid, IDEM contends that, due to a significant increase in the number of hours and the hourly rate charged in preparing the QMRs, further information was needed to determine whether the additional costs were reasonable.

11. Petitioner points to a previous case decided by Chief ELJ Davidsen, *Marathon Point Service and Winamac Service,* 2005 OEA 26. In *Marathon,* IDEM denied payment of the disputed costs, preemptively finding that the costs were not reasonable or cost effective. After a hearing on the matter, Chief ELJ Davidsen found that IDEM failed to present sufficient evidence to rebut Marathon's prima facie case that the costs were reasonable and cost effective.

12. There are factual distinctions between this case and *Marathon.* In *Marathon,* IDEM had outright denied the costs because they were "not reasonable or costs [sic] effective." There was no request for additional information. And, in fact, after hearing all of the evidence, which included IDEM's rationale for denying the costs, Chief ELJ Davidsen concluded that IDEM had not conducted a thorough evaluation of Marathon's costs, saying "IDEM's evaluation and denial of HydroTech's resubmitted claims for Marathon and Winimac demonstrate that while IDEM correctly began its evaluation of whether the work performed was not reasonable and cost effective, after determining that the cost exceeded unpromulgated standards and relative cost comparisons, *IDEM did not sufficiently evaluate the work's reasonableness and cost effectiveness.*" (emphasis added) *Marathon Point Service and Winamac Service*, 2005 OEA 26, 44.

13. In this case, IDEM delayed reimbursement until additional information to show the costs are reasonable could be provided. In other words, IDEM is seeking the information necessary to "sufficiently evaluate the work's reasonableness and cost effectiveness." *Id.* at 44. In *Marathon,* IDEM failed to take the extra step of requesting and scrutinizing additional information before determining that the costs were not reasonable or cost effective. Here, Petitioner wants to skip the step where they must justify those expenditures which may reasonably be questioned. Petitioner asserts that IDEM, once it has paid a certain cost, can never deny those costs. This is plainly irrational. IDEM has the duty and authority to administer the ELTF and has the discretion to question whether the costs are legitimate. Petitioner attempts to apply the ruling in *Marathon* across the board when the decision in *Marathon* (that IDEM failed to support the denial of those specific costs) is clearly specific to the facts in that case.

[6] Petitioner's Motion for Summary Judgment, page 2.

14. Further, 328 IAC 1-5-1(a) allows the IDEM to request additional information. Petitioner argues that that information is limited to the listed examples. However, the rule states that IDEM may ask for additional information, "*including the following. . ."* This clearly does not limit what the IDEM can ask for to only those examples listed. "A general principle of statutory construction is that the term "include" signals that the list that follows is meant to be illustrative rather than exhaustive." *State v. Cook (In re Order for the Payment of Atty. Fees & Reimbursement of Expenses),* 7 N.E.3d 289, 293, (2014 Ind. App.).

15. In this instance, IDEM is requesting additional justification for the amount of time spent preparing a quarterly monitoring report. In this matter, while there are rules for how much *money* a consultant can charge for an activity, there are no rules for how much *time* a consultant can spend on an activity. However, it is not necessarily fatal to IDEM's case that there are no rules. Courts have found that agencies do not need to establish rules for every possibility. "Additionally, this court has observed that not every bit of agency policy needs to be placed in a published rule, where there is no legislative requirement to do so. See *Gorka v. Sullivan*, 671 N.E.2d 122, 129 (Ind. Ct. App. 1996), trans. denied (Medicaid reimbursement rates need not be published as rules)." *Dennistar Environmental Inc. v. Ind. Dept of Envtl Mgmt,* 741 N.E.2d 1284, 1288 (Ind. Ct. App. 2001). As the Indiana Supreme Court recently noted in *Moriarity v. Ind. Dep't of Natural Res*., 113 N.E.3d 614, 621 (Ind. 2019), "[a]dministrative decisions must . . . be based on ascertainable standards in order to be fair and consistent rather than arbitrary and capricious*." State Bd. of Tax Comm'rs v. New Castle Lodge #147, Loyal Order of Moose, Inc.*, 765 N.E.2d 1257, 1264 (Ind. 2002). These standards "give fair warning as to what the agency will consider in making its decision." *Id.* (citation omitted). However, this ascertainable standards requirement is not meant to unduly constrain administrative action because agencies are "entitled to reasonable latitude in carrying out [their] responsibilities." *Id.* at 1264 n.13 (citing *State Bd. of Tax Comm'rs v. Garcia*, 766 N.E.2d 341 (Ind. 2002))." The definition of "reasonable" contained in 328 IAC 1-3-8.3 provides an ascertainable standard. In addition, IDEM has the discretion to rely on its staff's expertise and experience to make a determination of whether the amount of time spent on a specific activity is consistent with previous activity at a specific facility and/or industry standard practice and is therefore "appropriate and performed only as necessary to meet the cleanup objectives for the site"[7], or, in other words, is reasonable and cost effective.

16. IDEM presented evidence to show a significant difference between the amount of time previously claimed for the preparation of QMRs and the amount of time claimed by Golars. Petitioner argues that IDEM has arbitrarily and capriciously used the prior consultant's costs as the "gold standard"[8]. This might be persuasive if IDEM used the costs associated with this activity from a dissimilar site. However, IDEM compared the costs for the *same activity on the same site*. This appears to be reasonable and the opposite of arbitrary and

[7] 328 IAC 1-1-8.3(1).
[8] Reply Memorandum In Support of Petitioner's Motion for Summary Judgment and In Opposition to the Indiana Department of Environmental Management's Cross-motion for Summary Judgment, filed August 12, 2019, page 6.

capricious. This evidence is sufficient to rebut Petitioner's presumption that *all* costs associated with the preparation of the QMRs were reasonable and cost effective.

17. In its cross-motion for summary judgment, IDEM points to the increase in the number of hours and hourly rate as the rationale for requesting additional information. Petitioner argues that IDEM's rationalization is barred by the post hoc rule as it was not presented until summary judgment. However, in a review of Indiana case law, "it is the reviewing court, and not the administrative agency, that is barred from considering post hoc rationalizations." *Development Services Alternatives, Inc. v. Indiana Family and Social Services Administration*, 915 N.E.2d 169, 184 (Ind. Ct. App. 2009). Thus, the rule prohibiting post hoc rationalizations does not apply to administrative agencies during their decision making process (*Id*. at 189), but does apply to the reviewing court. Post hoc rationalizations can be articulated contemporaneously with an agency's final decision, but not in review. *Word of His Grace Fellowship, Inc. v. State Board of Tax Commissioners,* 711 N.E.2d 875, 879 (Ind. T.C. 1999). As the OEA is the ultimate authority for IDEM and is a part of the administrative review, post hoc rationalizations can be considered.

18. In response to IDEM's rationale, Petitioner points to Golars' level of experience, the number of persons employed by Golars and the change in the information that must be in the QMR as justification for the costs submitted for reimbursement. This would be the type of information that Golars might submit to IDEM to justify the time spent on the QMRs. However, the ELJ is not determining whether the costs were reasonable, only whether IDEM had the authority and sufficient reason to ask for additional information. This information is irrelevant to that question.

19. The question before the OEA is not whether the costs were reasonable, but whether IDEM had the authority and grounds to request additional information. There is no question that IDEM has the authority to request additional information. There is also no question of fact that there has been a significant change in the amount of time and the hourly rate charged for the time spent on preparing the QMRs. Therefore, IDEM had both the authority and sufficient reason to delay the reimbursement of the costs pending a further examination of the supporting documentation provided by Petitioner. Summary judgment should be entered in IDEM's favor.

Final Order

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED summary judgment is appropriate. Petitioner's motion for summary judgment is **DENIED.** IDEM's cross motion for summary judgment is **GRANTED** and judgment is entered in favor of the Indiana Department of Environmental Management. 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 30th day of September 2019 in Indianapolis, IN.

Hon. Catherine Gibbs
Environmental Law Judge