

Objection to the Denial of Excess Liability Trust Fund Claim
Marathon Point Service, ELF#9810570/FID #10544, New Castle, Henry County, Indiana;
Winamac Service, ELF #9609539/FID #14748, Winamac, Pulaski County, Indiana

Hydrotech Consulting & Engineering, Inc.
2005 OEA 26 (04-F-J-3338)

OFFICIAL SHORT CITATION NAME: When referring to 2005 OEA 26, cite this case as
Marathon Point Service and Winamac Service, 2005 OEA 26.

TOPICS:

underground storage tank	miscellaneous costs
gasoline	design costs
Excess Liability Trust Fund	bid
Ind. Code § 13-23	request for proposal
reimbursement	hourly rate
costs	other facilities
reasonable and cost effective	substantial evidence
navigant	Motion to Strike
state highway	Motion to Disqualify
INDOT	transcript
soil vapor extraction	attorney's fees
trench	prejudgment interest

PRESIDING JUDGE:

Dauidsen

PARTY REPRESENTATIVES:

Petitioner: Mark F. Shere, Esq.
IDEM: Robert B. Keene, Esq.

ORDER ISSUED:

May 5, 2005

INDEX CATEGORY:

Land

FURTHER CASE ACTIVITY:

[none]

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3. HydroTech's original submissions for ELTF reimbursement for clean-up work performed for Marathon were \$1,158,670.57, of which \$906,135.19 was approved (including a \$35,000 deductible); IDEM denied a total of \$252,535.38. IDEM Ex. 2.
4. HydroTech's original submissions for ELTF reimbursement for clean-up work performed for Winamac were \$611,247.75, of which \$474,427.90 was approved (including a \$35,000 deductible); IDEM denied a total of \$136,819.85. IDEM Ex. 1.
5. Concerning Marathon, HydroTech resubmitted its requests for denied ELTF submittals 52 and 53 on December 8, 2003, for submittals 54, 55 and 56 on December 15, 2003, and for submittal 57 on January 13, 2004. HydroTech Ex. A. On April 27, 2004, the Indiana Department of Environmental Management ("IDEM") issued notification to HydroTech that IDEM was denying, in total, HydroTech's resubmittal applications for work specified in invoices and other documents. Ex. A. Specifically, the denials addressed ELTF submittal number 52, in the amount of \$54,471.25, ELTF submittal number 53, in the amount of \$43,428.15, ELTF submittal number 54 in the amount of \$9,225.69, ELTF submittal number 56 in the amount of \$2,319.83, and ELTF submittal number 57 in the amount of \$1,253.75. Id. HydroTech received IDEM's notification of the Marathon resubmittal denials on April 28, 2004. In sum, IDEM denied all of the \$121,259.15 in reimbursement claimed by HydroTech for Marathon ELTF claims 52 through 57, inclusive. HydroTech has stipulated that this petitioned amount should be reduced by a further \$10,638.93, making its total claim for Marathon Point \$110,620.22 (Testimony of Ann Baldwin; HydroTech's Hearing Summary, Ex. N).
6. Concerning Winamac, HydroTech resubmitted its requests for denied ELTF submittals 36 through 43, inclusive, on January 13, 2004. HydroTech Ex. A. IDEM issued notification to HydroTech that IDEM was denying resubmittal applications for reimbursement from the ELTF. Ex. A. Specifically, the denials addressed ELTF submittal number 36 in the amount of \$1,237.50, ELTF submittal number 37 in the amount of \$2,463.30, ELTF submittal number 38 in the amount of \$17,549.68, ELTF submittal number 39 in the amount of \$2,276.25, ELTF submittal number 40 in the amount of \$12,566.15, ELTF submittal number 41 in the amount of \$13,161.34, ELTF submittal number 42 in the amount of \$7,378.39, and ELTF submittal number 43 in the amount of \$4,289.84. Ex. A. IDEM's notice of denial of ELTF submittals 36, 37, 38, 39, 40, and 41 were dated April 27, 2004 and received by HydroTech on April 28, 2004. IDEM's notice of denial of ELTF submittals 42 and 43 were dated May 7, 2004 and received by HydroTech on May 10, 2004. Id. In sum, IDEM denied all of the \$60,922.65 in reimbursement claimed by HydroTech for Winamac ELTF claims 36 through 43, inclusive.
7. In each instance of denial, IDEM's notice stated by each invoice comprising each claim number, that the reason for denial was "Per IC 13-23-9-2, the costs have been denied as the work performed is not reasonable or costs [sic] effective." Ex. A.

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8. On May 11, 2004, Petitioner HydroTech, by its counsel Mark E. Shere, Esq., submitted a Petition for Administrative Review (“Petition”) for IDEM’s denial of resubmitted claims for ELTF reimbursement for Marathon and Winamac to the Office of Environmental Adjudication (“OEA”). Ex. A. In its Petition, HydroTech requested review of all aspects of the denials, and stated that the legal issues included the following:

Are the costs submitted by HydroTech reimbursable?

Is IDEM obligated to provide meaningful information as a part of a denial, to let a party know how and why its costs are “not reasonable and costs effective”?

Is IDEM’s decision otherwise incorrect, arbitrary, or contrary to law?

Is HydroTech entitled to prejudgment interest and/or costs associated with obtaining reimbursement?

9. On May 12, 2004, OEA, by Chief Environmental Law Judge Mary L. Davidsen (“ELJ”), assigned the above-stated OEA caption and cause number to HydroTech’s Petition and issued an Order Scheduling Prehearing Conference for June 7, 2004, 10:00 AM, EST.
10. On May 14, 2004, Robert B. Keene, Esq., entered his appearance as counsel of record for IDEM.
11. The June 7, 2004 Prehearing Conference was held as scheduled, and attended by HydroTech by its legal counsel, and by IDEM by its substitute legal counsel Anne M. Patterson, Senior Projects Director Anne Black, and intern David Henderson.
12. At the June 7, 2004 Prehearing Conference, the parties requested a litigation schedule and indicated that they did not expect to file dispositive motions.
13. On June 7, 2004, ELJ Davidsen issued an Order Requesting Status Report by or before September 20, 2004, and Case Management Order culminating in an October 14, 2004 Final Hearing. No formal discovery schedule was established, but the parties conducted discovery.
14. On September 20, 2004, the parties filed a Joint Status Report.
15. Per the June 7, 2004 Case Management Order, the parties were to exchange Stipulations and witness and exhibit lists by September 27, 2004; IDEM filed witness and exhibit lists and a Stipulation indicating that it did not have any proposed stipulations as of the date of filing.
16. The final prehearing conference was held as scheduled on October 4, 2004. All parties were present by counsel of record and by IDEM’s Anne Black.

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17. On October 13, 2004, IDEM filed an opposed emergency motion for continuance of the October 14, 2004 hearing. IDEM's Motion stated that it was opposed by HydroTech's counsel, and was based upon the illness of its main witness, Andrew J. Holdsworth. On October 14, 2004, the ELJ granted IDEM's Motion and reset the Final Hearing for October 21, 2004.
18. On October 18, 2004, IDEM filed a Motion for Continuance of the October 21, 2004 Final Hearing. IDEM's Motion stated that it was opposed by HydroTech's counsel, and was based upon the unavailability of two of its witnesses, Paul Serguta and William Davis, as the two witnesses were "scheduled to travel to Vincennes to on October 21, 2004 to appear before a group of Petroleum Marketing Owners and Operators and other ELTF claimants to explain and resolve questions about the recently amended rules governing payment of claims from ELTF", which meeting had been scheduled about 30 days prior to the resetting of the October 21, 2004 hearing date. On October 18, 2004, the ELJ granted IDEM's Motion and reset the Final Hearing for October 25, 2004.
19. The Final Hearing was held as scheduled on October 25, 2004, and as it had not concluded, the hearing continued and concluded on October 26, 2004. The parties were present by counsel; the final hearing was conducted pursuant to Ind. Code §4-21.5-3. Witnesses were sworn and evidence heard. IDEM's witness was Andrew J. ("A.J.") Holdsworth. HydroTech's witnesses were Ann Baldwin, P. Cory Smith and J. Anthony Rogers. The proceedings were recorded by Court Reporter Lindy Myers from Accurate Reporting Service of Indiana. On October 26, 2004, IDEM's witness Andrew J. Holdsworth presented testimony that he had considered five other facilities in making a determination concerning Winimac and Marathon claims. HydroTech's counsel objected and moved to strike such testimony as contradicting IDEM's discovery responses indicating that no other facilities were referenced for comparison. After examining the hearing exhibits containing IDEM's relevant discovery responses, the ELJ denied the objection, but noted that she would consider a motion to hold the record open for HydroTech to submit further evidence after examining the records denied to it in discovery. As testimony closed, HydroTech indicated that it did not intend to present such testimony. The ELJ ordered that the record be held open until November 5, 2004 for HydroTech to present testimony concerning the five facilities referenced by IDEM's witness Holdsworth, and otherwise closed the record. The parties waived closing argument; the ELJ further ordered that Proposed Findings of Fact, Conclusions of Law and Order were to be submitted by November 30, 2004.
20. On November 4, 2004, HydroTech's counsel filed HydroTech's Supplement to the Record, comprised of the Declaration of P. Cory Smith.

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21. On November 24, 2004, the parties filed a Joint Motion for the November 30, 2004 Continuance of Filing Date for Proposed Findings of Fact, Conclusions of Law and Order, noting that the record had not been transcribed by the court reporter, as the court reporter had indicated that he was ill (diagnoses included Bell's Palsy), and did not expect to file the transcript until November 29 to December 3, 2004. The ELJ granted the parties' joint motion for an extension until January 5, 2005.
22. In November 29, 2004 discussions with the court reporter concerning his health and estimated transcript delivery, the court reporter provided an estimated transcript cost to the ELJ. The ELJ reviewed budget availability, and discovered that no funds were available for a transcript ordered prior to judicial review due to the provisions of Ind. Code § 4-21.5-3-25(g), and so wrote to the parties on November 29, 2004. In the ELJ's November 29, 2004 letter, the ELJ requested the parties to submit a response copied on the other party by December 8, 2004, and to petition for a status conference if counsel felt such would be more conducive to a joint discussion of the matter. The only response received by the ELJ was a phoned response from IDEM concerning payment for the transcript.
23. On December 20, 2004, the ELJ received volume one of the hearing transcript and issued a Notice of Receipt of Partial Transcript. During the afternoon of December 27, 2004, the remaining transcript was received and counsel for the parties were so informed in the ELJ's December 28, 2004 Notice of Receipt of Transcript.
24. On December 29, 2004, the ELJ contacted counsel for the parties; a telephone status conference was held to discuss transcript cost allocation, which was the subject of the ELJ's December 30, 2004 Report of Telephone Status Conference and Order for Allocation of Transcript's Reasonable Costs. The December 30, 2004 Order allocated transcript costs among the parties, but did not require transcript citations in a party's Proposed Findings of Fact, Conclusions of Law and Order.
25. On January 3, 2005, IDEM filed its Motion for Continuance of Filing Date for Proposed upon HydroTech's counsel's perceptions of the ELJ's bias concerning transcript access. The ELJ issued a February 7, 2005 Order Scheduling Response by February 18, 2005; IDEM responded in objection on February 18, 2004. The ELJ denied HydroTech's Motion to Disqualify on May 2, 2005.
26. On February 4, 2005, IDEM filed a cover letter indicating that it inadvertently had not served HydroTech's counsel with its February 3, 2005 filings.
27. On February 9, 2005, HydroTech filed its Motion Findings of Fact and Conclusions of Law until February 3, 2005. IDEM's Motion was based upon lack of opportunity to review the transcript after its receipt, due to the intervening holidays. IDEM's Motion stated that HydroTech's counsel consented to a 15-day extension but not a 30-day extension. The ELJ granted IDEM's Motion for an extension, to February 3, 2005.

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28. On January 18, 2005, HydroTech filed a Public Records Request to inspect the transcript, which the ELJ denied per Ind. Code § 4-21.5-3-25(g) in a January 19, 2005 Order. HydroTech appealed this denial to the Public Access Counselor, and, on April 6, 2005 in Marion Superior Court under cause number 49F12-0504-MI-13154, which action is not a part of the OEA's record in this cause.
29. On February 3, 2005, the parties each filed their respective Proposed Findings of Fact, Conclusions of Law and Orders. IDEM also filed its Response to HydroTech's November 2, 2004 Supplement to the Record, which supplement was comprised of the affidavit of Anne Black, Senior Technical Advisor, Remediations Branch, Office of Land Quality.
30. On February 4, 2005, IDEM filed a cover letter with the Court, indicating that it had inadvertently omitted service of its Proposed Findings (and Response) on HydroTech.
31. On February 9, 2005, HydroTech also filed a Motion to Strike IDEM's February 3, 2005 Response to HydroTech's November 2, 2004 Supplement to the Record, and based its motion on intentional delay tactics done without leave of Court, and for the reason that "IDEM waited to make the Response until the day that proposed findings of fact and conclusions of law were due in this matter, thus ensuring to itself the last word on the supposed merits." IDEM's oppositional response was filed on February 23, 2005; the ELJ granted HydroTech's Motion to Strike on May 3, 2005.
32. On May 4, 2005, HydroTech's Second Motion to Disqualify was filed, based on the ELJ's not issuing a decision within 90 days of receiving the "(much delayed)" findings of fact and conclusions of law on February 3, 2005, in violation of Ind. Code § 5-14-3-8(d) and Ind. Code § 4-21.5-3-10(2), and based on bias from the pending Marion Superior Court matter, for which OEA is represented by a specified Deputy Attorney General. HydroTech's Second Motion to Disqualify sought the Chief ELJ's disqualification in this "and any future matters involving HydroTech", and was the subject of the ELJ's May 5, 2005 Order Denying Second Motion to Disqualify.

FINDINGS OF FACT:
Contested substantive issues

Marathon Point

33. HydroTech testified, without contradiction, that all of the work and materials associated with its ELTF submittals are contained in the invoices included in its Exhibits C and E. Testimony of Ann Baldwin. HydroTech identified specific invoices associated with each submittal in its Hearing Summary (Ex. N).
34. HydroTech testified, without contradiction, that the invoices and work associated with its Petition were as follows, per testimony of Ann Baldwin, HydroTech accountant, P. Cory Smith Project Manager, and Anthony Rogers, HydroTech Principal; Exs. A, C, N:

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Marathon			
<u>IDEM #</u>	<u>Invoice #</u>	<u>Amount</u>	<u>Work Involved</u>
52	021257	\$54,741.25	North and south vapor recovery trenches /S1 through S8 (HydroTech labor), culvert re-installation in s. trench area
53	031022	\$43,428.15	SVE / Sparge drilling and trenching, well box and manhole cover install, surveying and mapping
54	031246	\$9,225.69	Delivery of blowers, shed insulation, SVE / Sparge system plumbing, exhaust fan installation, floor reinforcement
55	031234	\$10,290.48	Materials: Sparge and SVE blowers and components
56	031218	\$2,319.83	Landscape repairs
57	031278	\$1,253.75	Electrical subcontractor oversight, system balancing and adjustments, replacement of defective blower, air effluent sampling
Petition amount		\$121,259.15	
Stipulation		-\$10,638.93	
Total		\$110,620.22	

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Winamac			
<u>IDEM #</u>	<u>Invoice #</u>	<u>Amount</u>	<u>Work Involved</u>
36	031225	\$1,237.50	System material delivery, well gauging and bailing, well purging, trench repair, landscaping
37	031170	\$2,463.30	Mapping of asphalt and concrete repair areas, CAPR development, site resurfacing development
38	031123	\$17,549.68	Site restoration (stone leveling), trenching, drilling, piping, well box installation, survey wells, system shed installation
39	031308	\$2,276.25	Well gauging and bailing, oversee subcontractor (electrical), electrical system check
40	031255	\$12,566.15	SVE / Sparge equipment installation (shed interior), plumbing, insulate shed
41	031194	\$13,161.34	Materials: SVE and Sparge blowers and components; upgraded moisture separator and silencer
42	031075 & 031084	\$7,378.39	Materials / Expenses: SVE / Sparge well vaults; SVE / Sparge system trenching, stockpiling, loading, backfilling, and compaction (excavating contractor), backfill materials, and hauling
43	031146	\$4,289.84	Materials / Expenses: Directional - Horizontal Bore to install SVE / Sparge piping underneath state highway (Horizontal boring contractor)
Total		\$60,922.45	

35. For Marathon, IDEM’s denial of the resubmitted claims as “the work performed is not reasonable and costs [sic] effective” per Ind. Code § 13-23-9-2 was given further specificity to a dispute over the amount of costs reimbursable for the soil vapor extraction (“SVE”) system:

Marathon Point site cost for trenching and installing 8 sparge points was \$86,750. Experience has shown that approximately \$30,000 should be spent on trenching and \$10,000 should be spent on drilling. Even if an allowance of an additional \$10,000 was made for trenches being deeper than average the costs would still be considered not reasonable or cost effective.

IDEM interrogatory response, Ex. G, p. 6.

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36. HydroTech contends that IDEM's interrogatory response, above, reduces the actual amount in dispute by \$50,000 (\$30,000 + \$10,000 + \$10,000) to \$36,750.
37. HydroTech's witnesses presented testimony detailing that the \$86,750 in disputed claims for Marathon was spent for work needed to meet the requirements of the Indiana Department of Transportation ("INDOT") and IDEM, because the work was performed along the right-of-way of two state highways. Specifically, INDOT standards required special requirements for soil backfill and compaction. Testimony of P. Cory Smith and J. Anthony Rogers, undisputed by IDEM.
38. HydroTech witnesses Smith and Rogers testified to having approximately 35 years of combined experience in environmental remediation. Rogers stated that he had been with HydroTech for 19 years. R. at 297 (specific testimony following of witness's testimony about the claims in issue). Smith stated that he was a project manager at HydroTech for close to 14 years. R. at 151 (specific testimony following of witness's testimony about the claims in issue). They described the Marathon site as involving a complex mix of soils, including porous sands, dense clays, and interlaced clean and contaminated materials, which added to the project's complexity. Smith and Rogers further testified that trenching of up to 18 feet was required, thus requiring special shoring equipment to avoid cave-ins.
39. Smith and Rogers' testimony was supported by the responses of three experienced contractors to HydroTech's request for bids on the soil vapor extraction ("SVE") work for Marathon. One contractor responded in writing that the project was "tricky but do-able" and a "difficult job." Exh. C, attachment I (letter from Stottlemeyer Excavating, Inc.). A second contractor declined to bid at all at first, and then disclaimed any liability with respect to the deep trenching adjacent to the state roads. Testimony of Ann Baldwin; Testimony of Cory Smith; Exh. C, attachment I (letter from Industrial Service Group). The third contractor did not characterize the project on the face of his response letter, but he quoted a price higher than the price of the "tricky but do-able" contractor. Exh. C, attachment I (letter from Smith Excavation & Landscaping).
40. Andrew J. Holdsworth, testified that he has worked for Navigant since July, 2001, and had supervised review of several hundred ELFT claims since he began to serve as claims manager in July 2001. R. at 361 (specific testimony following of witness's testimony about the claims in issue). Prior to his Navigant employment, Holdsworth worked at a small consulting firm dealing with leaking underground storage tank sites, since his graduation from college in 1999. R. at 362 Holdsworth stated that he does not have any field experience on SVE projects. Testimony of A.J. Holdsworth. He did not visit the Marathon Point site during the course of the work, nor did anyone else from IDEM or Navigant. IDEM relied entirely on Holdsworth's subjective impression of the project's difficulty and expected costs in making its determination to deny the Marathon claims, and offered no other witnesses or evidence on this issue.

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41. Holdsworth stated, without dispute, that he reviewed the claims in this matter, which were re-submittals of previously denied claims, and recommended that IDEM deny the claims. When Holdsworth was asked about specific components of the soil vapor extraction costs, he testified that he did not know.
42. The parties did not dispute that communication between IDEM/Navigant, via Holdsworth, and HydroTech regarding the Marathon site was spotty, but no evidence was presented that Holdsworth discussed Marathon's soil vapor evacuation system expenses with HydroTech before reaching his conclusion that the costs were excessive. Testimony of Ann Baldwin; Testimony of Cory Smith; Testimony of A.J. Holdsworth.
43. Holdsworth stated that he based his recommendation to deny both the Marathon and Winamac claims upon similar claims for the same type of activity on different sites in determining that HydroTech's costs in the re-submitted claims were not reasonable and cost effective. Holdsworth did not give specific factual points of comparison, except that five other facilities used in comparison involved installation and operation of SVE systems at a lower cost. (R. at 360-390).
44. Through Holdsworth's testimony, IDEM supported its contention that the \$36,750 was excessive based on Holdsworth's experience in supervising review of claims for Navigant, as IDEM's contractor. IDEM did not provide cost data regarding typical costs for soil vapor extraction systems at sites generally, nor did it identify the actual costs of soil vapor extraction at any location other than Marathon and Winamac.
45. IDEM further supported its determination to deny Marathon's resubmitted claims upon IDEM's contention that HydroTech exceeded the low bid amount. Exh. G, p. 6. The testimony agreed that the relevant bid was for \$85,150.00, and that HydroTech was entitled to a 15% mark-up of this amount, which raises it to \$97,922.50. Testimony of Ann Baldwin; Testimony of Cory Smith; Testimony of A.J. Holdsworth. IDEM contends that the total costs HydroTech incurred were \$117,491.00 with respect to the bid work, but the agency does not dispute HydroTech's contention that this amount includes a repeated entry of \$3,786.25 as well as \$5,143.96 in costs that were separately denied and are not included in the petition. Testimony of Ann Baldwin; Testimony of A.J. Holdsworth. HydroTech has stipulated without contest that its original petition should be reduced by \$10,638.93 to reflect this issue ($\$117,491.00 - \$97,922.50 - \$5,143.96 - 3,786.25 = \$10,638.93$). This stipulation resolves the issue on a mathematic basis. After the stipulation, HydroTech's petition for Marathon is for \$110,620.22.
46. During the claim review process described by Navigant, IDEM supported its contention that complexities of the sites were taken into account, (R. at 442), as evidenced by IDEM's determination to reimburse claims for the sites in the amount of \$871,712 for Marathon Point Service and \$455,800 for Winamac Service (IDEM Ex. 7).

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47. IDEM also identified three general issues that concern the overall costs at the sites. but do not call into question any specific portion of HydroTech's petition.
48. First, IDEM contends in its response to interrogatories, "Experience has shown that most sites average non-bid costs to be in the range of 10% of the total bid costs. For the Winamac site non-bid costs are 49% of the bid costs. For the Marathon Point site. . . the non-bid costs were 187% of the bid costs." Exh. G, pp. 5-6. IDEM did not provide any data or other documentation to support the figures in this response, and HydroTech disputes their accuracy. Testimony of Ann Baldwin; Testimony of Cory Smith.
49. HydroTech also specifically discussed with the IDEM's ELF section chief (who did not testify) which costs would be bid and which would not before commencing the work, and received his verbal approval. Testimony of Cory Smith. IDEM's disputing that Holdsworth had such information does not refute this fact.
50. IDEM did not dispute HydroTech's testimony about the problems it encountered at both sites in obtaining bids in response to its requests for proposal (RFPs). IDEM has not claimed that HydroTech failed to send a sufficient number of RFPs or otherwise failed adequately to request bids for these sites or be in noncompliance with regulatory bidding procedures.
51. Second, IDEM contends, and HydroTech agrees, that HydroTech submitted invoices to ELTF at HydroTech's standard billing rates, instead of the lower rates that are eligible for reimbursement pursuant to 328 IAC 1-3-5. IDEM did not identify any dollar amount associated with this issue. Nor did it identify this issue as a reason for denying costs in its interrogatory responses, exh. G, or apparently at any time prior to hearing. HydroTech responds that it does not seek reimbursement of these costs (Testimony of P. Cory Smith, Testimony of J. Anthony Rogers), and points out that its petition seeks only \$110,620.22 out of the \$252,535.38 in total costs that IDEM denied at Marathon Point and \$60,922.45 out of the \$136,819.85 in total costs that IDEM denied at Winamac Service.
52. Third, Holdsworth testified at the hearing that he had compared the Marathon and Winamac sites to five other ELTF sites, and that this comparison supported his conclusion that the "totality" of expenses at Marathon and Winamac were excessive. IDEM did not identify these five sites in its response to HydroTech's interrogatory regarding other sites. Exh. G., p. 7 ("There were no specific projects or facilities used as a baseline or comparison to determine whether work was reasonable or cost effective."). Neither did IDEM supplement its responses prior to the hearing date.
53. Holdsworth did not provide any specific information about these sites in his testimony, nor did he identify specific costs associated with them. He did not identify how these five sites were selected, or how many other sites he might have reviewed to obtain these five.

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54. The Chief Environmental Law Judge allowed HydroTech to supplement the record regarding these five sites after it had an opportunity to review IDEM's file information. Pursuant to the ELJ's instructions, HydroTech filed its Declaration of Cory Smith regarding the sites. He stated in his declaration that three of the five sites had total costs that were essentially the same as those at Winamac Service (one site slightly higher, two slightly lower), and that it did not appear that all of the costs for these other sites had yet been submitted. He also stated in his declaration that three of the five sites had serious operational problems associated with the work -- including one site with an SVE system that was not functioning 90% of the time, another site with an SVE system that pulled contaminated gas into an occupied building, and a third site with inadequate site characterization and planning. He stated that the reason for the 90% down time at the one site was because of the kind of moisture problems that HydroTech believes it avoided at Winamac Service by re-designing the system to reflect the shallow, fluctuating water table. (see paragraph 42 above). His Declaration concludes, "Overall, these five sites struck me as projects that were substantially less difficult than Marathon Point and Winamac."
55. IDEM's Response to HydroTech's supplement of the record with P. Cory Smith's declaration was subject to HydroTech's February 9, 2005 Motion to Strike, which Motion to Strike was granted. A review of IDEM's February 3, 2005 Response to HydroTech's November 2, 2004 Supplement to the Record, comprised of IDEM's Ann Black's affidavit, presents a dispute to the facts stated in Smith's declaration.
56. IDEM did not identify as to how the issues of bid v. non-bid, hourly rates, and comparison to other sites were relevant to any of the specific costs identified in HydroTech's petition. HydroTech adequately explained the reasons that portions of the work were performed without bids. HydroTech also provided specific information comparing Winamac and Marathon Point to the other sites identified by IDEM, in marked contrast to IDEM's belated and vague evidence about these sites.
57. HydroTech documented the basis and reasonableness of the costs for the soil vapor extraction system at Marathon. IDEM provided no objective information on this issue, and the subjective testimony of Holdsworth lacked the specificity and supporting foundation that would be necessary to rebut HydroTech's evidence.

Winamac Service

58. At Winamac Service, IDEM raised two specific issues, which share a threshold defect. First, IDEM contended that "costs associated with design work are considered to be reasonable and cost effective if within a \$10,000 range. . . Costs associated with design work for the Winamac site was \$50,825." Exh. G, p. 5. Second, IDEM contended, "on most sites miscellaneous costs are nominal charges for permits and similar items. On the Winamac site \$72,039 was attributed to miscellaneous costs." Id. The threshold defect is that these design costs and miscellaneous costs are neither pertinent nor relevant to the ELTF submittals that are the subject of HydroTech's petition to this Office.

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59. HydroTech testified that design work is not included in the petition. Testimony of Ann Baldwin; Testimony of Cory Smith. Holdsworth acknowledged that he was unaware of any design costs included in the petition amounts. Testimony of A.J. Holdsworth.
60. Similarly, HydroTech testified that the “miscellaneous” costs are, at most, \$9,122.25. (This amount is based on the \$60,922.45 amount of the petition, less \$44,401.80 in system installation costs covered by the respective invoices, less \$7,398.40 in specific material costs identified in those invoices). Testimony of Ann Baldwin.
61. Holdsworth testified that at least \$5,000 of miscellaneous costs would be reasonable, did not specify at what point he believed they would become excessive, nor provide further method of analysis. Testimony of A.J. Holdsworth.
62. HydroTech testified, without contradiction, that the costs it categorized as “miscellaneous” for Winamac would have been categorized differently if the costs were submitted today. It described these costs as including specific tasks such as project management, report deliveries, work requests, material purchasing, project meetings, mileage, utility fees, postage, permit costs, system components insurance costs, soil disposal development and waste characterization, landscape repair materials, and bonding costs, all of which IDEM originally allowed as miscellaneous items before making internal changes in its claim review procedures. Testimony of Ann Baldwin; Testimony of Cory Smith.
63. The evidence does not show any design costs included as part of HydroTech’s petition or any miscellaneous costs that IDEM would describe as excessive.
64. Regarding the design costs, that HydroTech supported the amount of its costs based on the need to design difficult horizontal boring and piping underneath a state road in the presence of fiber optic and gas utilities. HydroTech testified that five contractors turned down the opportunity to bid on this work due to its difficulty. Testimony of Cory Smith; Testimony of J. Anthony Rogers.
65. HydroTech also testified that it re-designed a portion of the project to take account of the shallow, fluctuating water table at the site. According to HydroTech, it concluded that the original plan was likely to be inadequate based on moisture problems HydroTech encountered at another site. Based on this experience, HydroTech redesigned the Winamac system to include a larger moisture separation system. According to HydroTech, this re-working of the design saved money for ELTF, because it avoided installation and then re-installation of the actual equipment, all of which it contends would have been properly reimbursable. Testimony of Cory Smith; Testimony of J. Anthony Rogers.
66. IDEM did not identify further regulation or non-rule policy documents applicable to the Winamac design costs. IDEM offered no further objective data or actual costs regarding other sites. Holdsworth testified as to applying similar cost and work evaluation methods to the Marathon and Winamac site.

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67. HydroTech documented the basis and reasonableness of the design and miscellaneous costs at Winamac. IDEM provided no objective information on this issue, and the subjective testimony of Holdsworth lacked the specificity and supporting foundation that would be necessary to rebut HydroTech's evidence.
68. HydroTech's has provided evidence that the cost of work performed at Winamac was \$60,922.45.

II. 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. This is a Final Order issued pursuant to Ind. Code § 4-21.5-3-27. 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 Court 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 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). *In re: Objection to Denial of Excess Liability Trust Fund Claim No. 200203501, GasAmerica #47, Greenfield, Hancock County, Indiana, 2004 OEA 123, 126 (02-F-J-2954)*. *See also Objection to the Issuance of 327 IAC Article 3 Const. Permit App. Plans and Specs for Blue River Valley Area San. Sewer and Water Projects, Approval No. 16689, New Castle, Henry Co., Ind., 04-W-J-3414, 2005 OEA 1, 11, 12 (02-F-J-2954)*.¹

¹ HydroTech's counsel relies upon In re Objection to Excess Liability Trust Fund Claim Denial, 5206 West 86th Street LLC, 2004 OEA 77 (03-F-J-3159) for this and other assertions. On April 13, 2005, Judge Keele reversed and remanded OEA's final order in IDEM v. Ed Okun and 5201 West 86th Street LLC, Cause No. 49F12-0410-PL-003215, Marion Superior Court, Civil Division. Therefore, the ELJ will not rely upon the Okun decision in this matter due to the presently uncertain value of the Okun decision.

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4. OEA is required to base its factual findings on substantial evidence. Huffman v. Office of Env'tl. Adjud., 811 N.E.2d 806, 809 (Ind., June 30, 2004)(appeal of OEA review of NPDES permit); *see also* Ind. Code § 4-21.5-3-27(d). While the parties' evidence disputed whether IDEM's determination on the resubmitted claims complied with Ind. Code § 13-23-9-2, OEA is authorized "to make a determination from the affidavits . . . pleadings or evidence." Ind. Code § 4-21.5-3-23(b). "Standard of proof generally has been described as a continuum with levels ranging from a "preponderance of the evidence test" to a "beyond a reasonable doubt" test. The "clear and convincing evidence" test is the intermediate standard, although many varying descriptions may be associated with the definition of this intermediate test." Matter of Moore, 453 N.E.2d 971, 972, n. 2. (Ind. 1983). The "substantial evidence" standard requires a lower burden of proof than the preponderance test, yet more than the scintilla of the evidence test. Burke v. City of Anderson, 612 N.E.2d 559, 565, n.1 (Ind.Ct.App. 1993). GasAmerica #47, 2004 OEA at 129. *See also* Blue River Valley, 2005 OEA at 11, 12.
5. The Excess Liability Trust Fund is a state-administered fund to ensure cleanup of contamination from registered underground storage tanks. Owners of the tanks pay regular fees into the fund. The fund then provides reimbursement for the costs of responding to releases from the tanks if the releases are promptly reported and remediated.
6. The public has a strong interest both in preserving the moneys contained in the Excess Liability Trust Fund and in fully and fairly compensating people who perform eligible work under the fund. This full and fair compensation is integral to the statutory scheme and essential to ensuring that reputable and competent professionals will undertake ELTF work.
7. HydroTech made a prima facie showing of eligibility for reimbursement upon showing that it submitted a corrective action plan and submitted supporting work receipts. IDEM acknowledges that it "has approved Corrective Action Plans (CAPs) for these sites." Exh. G., p. 1. HydroTech also documented its "work receipts," in the form of supporting invoices. Exh. C, E.
8. As Petitioner, HydroTech has the burden of proving, by substantial evidence, that IDEM improperly denied the ELTF claim resubmittals listed in findings of fact 3, 4 and 33. Ind. Code § 13-23-9-2 states in pertinent part:
 - (a) **To receive money from the excess liability trust fund under IC 13-23-8-1(1), a claimant must:**
 - (1) **submit a corrective action plan to the administrator of the excess liability trust fund for the administrator's approval; and**
 - (2) **submit a copy of a work receipt for work that has been performed.**
 - (b) **If, after receiving a corrective action plan and a work receipt under subsection (a), the administrator determines that:**
 - (1) **the corrective action plan may be approved and that the work that has been performed is consistent with the approved corrective action plan;**
 - (2) **the work or part of the work that has been performed is reasonable and cost effective;**

- (3) the work that has been performed concerns the elimination or mitigation of a release of petroleum from an underground storage tank including:**
- (A) release investigation;**
 - (B) mitigation of fire and safety hazards;**
 - (C) tank removal;**
 - (D) soil remediation; or**
 - (E) ground water remediation and monitoring; and**
- (4) the claimant is in compliance with the requirements of this article and the rules adopted under this article;**
the administrator shall approve the request for money to be paid from the excess liability trust fund for work that has been performed.
- (c) The administrator shall develop criteria for determining the cost effectiveness of corrective action. Although not required for payment from the excess liability trust fund, a claimant may seek pre-approval from the administrator stating that the work to be performed is reasonable and cost effective.**
9. Once HydroTech has established its prima facie showing of eligibility for reimbursement, the burden of proof shifts to IDEM to show that it has a basis under the statute and regulations for denying reimbursement.
10. One basis for this denial would be if IDEM determines that the work performed was not “reasonable and cost effective” pursuant to IC 13-23-9-2(b)(2). This is the basis that IDEM relied upon in its denial of the petitions. Exh. A.
11. Pursuant to section 2(b)(2) above, IDEM was mandated to make a determination as to whether the work performed was “reasonable and cost effective.” This required the claim/cost reviewer to make determinations based on the statutory language. “Reasonable and cost effective” is a term not specifically defined in statute or rule as applicable to the claims in dispute in this matter. By statute, the commissioner of IDEM to “shall develop criteria for determining the cost effectiveness of corrective action.” Ind. Code § 13-23-9-2(c). When the word “shall” appears in a statute, it is construed as mandatory unless the context requires a different reading. Hancock Co. R.E.M.C. v. City of Greenfield, 494 N.E.2d 1294 (Ind. App. 1986), *trans. den.*
12. IDEM has developed detailed criteria for determining the cost effectiveness of corrective action for purposes of ELTF reimbursement. See 328 IAC 1-3-5 (for example, detail concerning reasonable expenses specified to dollars per foot for drilling and cost of well covers).
13. The Merriam-Webster Online Dictionary (at www.m-w.com) defines “cost effective” as “economical in terms of tangible benefits produced by money spent.” Also “reasonable” is defined as “not extreme or excessive.”

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14. Section 2(c) above provides in part that a claimant, although not required to do so, may seek pre-approval from the administrator stating that the work to be performed is reasonable and cost effective. There is no evidence in the record of these proceedings that HydroTech sought pre-approval that its work to be performed at Marathon or Winamac was reasonable and cost effective, nor that HydroTech was required to seek pre-approval. Rather, the evidence shows that HydroTech submitted specifications along with three bids during the time of application submission for reimbursement. (R. at 281-282).

15. Under IC 13-23-9-2(d):

The administrator shall notify the claimant of an approval or a denial of a request made under subsection (b) not later than sixty (60) days after receiving the request. Except as provided in subsection (f), the administrator shall notify the claimant of all reasons for a denial or partial denial.

Together, these ELTF provisions create a reimbursement program that includes identifiable criteria for what constitutes cost-effective work, prompt processing of claims for reimbursement within 60 days, and a statement of all reasons for denial at the end of those sixty days.

16. IDEM did not process HydroTech's claims within 60 days. IDEM also failed to state "all reasons" for the denials, beyond the statement repeated for each denial that the expenses were not "reasonable or costs [sic] effective."

17. The evidence presented by IDEM shows that the claim re-submittals were reviewed applying the statutory requirement in IC 23-9-2(a)(2) that the work must be reasonable and cost effective. However, IDEM did not apply criteria while conducting its review under the statutory requirement, which criteria were to required to be developed by the IDEM commissioner. Nor were criteria applied which were otherwise stated in statute, rule, policy or nonpolicy document in reviewing HydroTech's claims stated in its Petition. Nor did IDEM state "all reasons for denial" in its denial.

18. For Marathon, HydroTech documented the basis and reasonableness of the costs for the soil vapor extraction system at Marathon. IDEM's evidence, presented in its exhibits and through Holdsworth's testimony, stated that it was based upon a comparison of the amount of claim to all other claims, and that it exceeded the cost of claims for five similar but less expensive remediation sites. Mr. Holdsworth's testimony lacked the factual comparison debated in Mr. Smith's November 3, 2004 supplement to the record and Ms. Black's stricken February 3, 2005 affidavit. Mr. Holdsworth's testimony demonstrated that he recalled and relied upon more general impressions than those stated in the competing declaration and affidavit, but did constitute the basis upon which he, and thus IDEM, relied to make its determinations on HydroTech's claims. IDEM's claim evaluation and determination lacked sufficient specificity and supporting foundation so as to refute HydroTech's evidence.

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19. IDEM's interrogatory response that it relied upon experience to show that approximately \$30,000 should be spent on trenching and \$10,000 on drilling, with a possible allowance of an additional \$10,000 made for trenches being deeper than average are the only further criteria offered for evaluation of a claim comparable to the Marathon remediation site by IDEM. While such criteria may be useful as a point to conduct further evaluation, they present insufficient evidence to support the contention that it is reasonable to apply them in this instance, and to automatically award such claims to HydroTech. An evaluation of HydroTech's costs in their entirety for Marathon is required.
20. IDEM did not identify as to how the issues of bid v. non-bid, hourly rates, and comparison to other sites respond to any of the specific costs identified in HydroTech's petition.
21. IDEM's evaluation and denial of HydroTech's resubmitted claims for Marathon and Winamac 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. HydroTech presented sufficient evidence to support its burden of proof that substantial evidence demonstrated that the Marathon claims, minus the stipulated \$10,638.93 for inadvertent accounting duplications, were for work performed as reasonable and cost effective.
22. Marathon's total claim allowed under Ind. Code § 13-23-9-2 is \$110,620.22.
23. IDEM's contention regarding excessive design costs at Winamac Service does not relate to submittals included in this petition. Nor did these costs conflict with any criteria of the Commissioner regarding reasonableness and cost effectiveness, especially in light of the difficulty in avoiding moisture problems such as those encountered at one of IDEM's own comparison sites.
24. IDEM's contention regarding miscellaneous costs at Winamac Service does not relate to submittals included in this petition. Nor did these costs conflict with any criteria of the Commissioner regarding reasonableness and cost effectiveness, especially in light of the testimony that these costs would have been categorized in other, reimbursable ways if they were filed today, and in light of the law that de novo review is to be conducted.
25. Winamac's total claim allowed under Ind. Code § 13-23-9-2 is \$60,922.45.
26. These findings and conclusions are not intended to minimize the difficult job that IDEM and its contractor have in reviewing ELTF petitions, with the dual goals of protecting the assets of the fund and of compensating companies that do eligible work. Nor is this Order intended to mandate field inspections or specified field inspection.

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27. This review must be based, however, on criteria of cost effectiveness developed by the IDEM Commissioner pursuant to the Commissioner's statutory obligation and to be available to the public in advance. The review may not be based, as it was here, on criteria never adopted by the Commissioner, disclosed after the petitions were denied, and supported with subjective and nonspecific factual testimony.
28. HydroTech further seeks an award of prejudgment interest and costs, with costs to be awarded per Ind. Tr. R. 54. IDEM provided no direct response to HydroTech's prayer for such an award. HydroTech provides no other legal authority for OEA to grant its request for an award of prejudgment interest and costs. A review of Ind. Code § 4-21.5, et seq., Ind. Code § 13-23, *et seq.*, past contested decisions issued by OEA and Indiana Courts applying such authority, or rules promulgated related to such authority, do not provide legal authority for such an award. HydroTech's prayer for an award of prejudgment interest and costs should be denied.
29. IDEM's determination to deny the Marathon and Winamac claims was not reasonable and not supported by substantial evidence.
30. The court finds that HydroTech has met its burden of proving by substantial evidence that IDEM's decision to deny the claims was arbitrary and capricious and not supported by substantial evidence. Therefore, the substantial evidence presented by the parties to this cause supports entry of a Final Order.

III. FINAL ORDER

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Petition for Administrative Review filed by HydroTech Consulting and Engineering, Inc. is **GRANTED** for ELTF reimbursement at the Marathon Point (ELF #9810570) and Winamac Service (ELF #9609539) facilities.

With respect to Marathon Point, the Commissioner of IDEM is directed to approve for payment to HydroTech \$110,620.22 from the ELTF, to be paid within sixty (60) days of the date of these Findings of Fact, Conclusions of Law, and Order.

With respect to Winamac Service, the Commissioner of IDEM is directed to approve for payment to HydroTech \$60,922.45 from the ELTF, to be paid within sixty (60) days of the date of these Findings of Fact, Conclusions of Law, and Order.

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IT IS FURTHER ORDERED, ADJUDGED AND DECREED that HydroTech's prayer for award of prejudgment interest and costs is DENIED.

You are further advised that, pursuant to Indiana Code § 4-21.5-5, this Final Order is subject to judicial review. Pursuant to Indiana Code § 4-21.5-5, 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 in Indianapolis, Indiana this 5th day of May, 2005.

Hon. Mary L. Davidsen
Chief Environmental Law Judge