OBJECTION TO THE DENIAL OF EXCESS LIABILITY TRUST FUND ("ELTF") CLAIM
ELTF #199402512-46 / FID #15410
D&G OIL - SUPERIOR ENVIRONMENTAL REMEDIATION, INC.
2022 OEA 100, CAUSE NO. 21-F-J-5159

Official Short Cite Name:	**D&G OIL RECONSIDERATION, 2022 OEA 100**
OEA Cause No.:	21-F-J-5159
Topics/Keywords:	Excess Liability Trust Fund (ELTF) "reasonableness"
	Corrective Action
	IC 4-21.5-3-27(a) and (d)
	IC 4-21.5-3-14(c)
	IC 13-23-7-1(a)(1) and (2)
	IC 13-23-9-1.5(a)(1)
	IC 25-39-3-1
	329 IAC 9
	328 IAC 1-3-5(b) - (e)
	312 IAC 13-2-1
	312 IAC 13-10-2(c)
	328 IAC 1-1-8.3
	328 IAC 1-5-1(d)
	Reconsideration
Presiding ELJ:	LORI KYLE ENDRIS
Party Representatives:	JULIE LANG, ESQ., IDEM
	SAMMY H. SIRHAN, RESPONDENT
Order Issued:	AUGUST 17, 2022
Index Category:	EXCESS LIABILITY TRUST FUND ("ELTF")
Further Case Activity:	This order replaces the original Final Order issued July 18, 2022, **D&G OIL, 2022 OEA 084.**

INDIANA OFFICE OF ENVIRONMENTAL ADJUDICATION

Mary L. Davidsen, *Chief Environmental Law Judge*
Lori Kyle Endris, *Environmental Law Judge*
Sara C. Blainbridge, *Legal Administrator*

INDIANA GOVERNMENT CENTER NORTH
100 NORTH SENATE AVENUE, SUITE N103
INDIANAPOLIS, INDIANA 46204-2273
FRONTDESK@OEA.IN.GOV
(317) 233-0850

STATE OF INDIANA)	BEFORE THE INDIANA OFFICE OF
)	ENVIRONMENTAL ADJUDICATION
COUNTY OF MARION)	
)	CAUSE NO. 21-F-J-5159
IN THE MATTER OF:)	

OBJECTION TO THE DENIAL OF)
EXCESS LIABILITY TRUST FUND ("ELTF") CLAIM)
ELTF #199402512-46 / FID #15410)
D&G OIL)
SUPERIOR ENVIRONMENTAL REMEDIATION, INC.)
MISHAWAKA, ELKHART COUNTY, INDIANA.)

FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL ORDER UPON RECONSIDERATION

The parties appeared for a final hearing in this matter on March 23, 2022. Respondent, the Indiana Department of Environmental Management (IDEM) appeared by counsel, Julie Lang, Esq., and Petitioner Environmental Remediation90, Inc. appeared by owner, Sammy Sirhan, *pro se* (collectively Petitioner). The presiding Environmental Law Judge, having heard the testimony and examined the evidence, now enters the following findings of fact, conclusions of law and order:

FINDINGS OF FACT

1. Petitioner owns an environmental consulting company and undertook corrective action for a leaking underground storage tank, incident number 199402512, (Incident) at facility ID no. 15410, located at 305 U.S. Hwy 30, Wanatah, IN 46390. Petition for Administrative Review (Petition), p. 1.

2. On April 18, 2019, Petitioner filed an Excess Liability Trust Fund (ELTF) application, submittal number 44, and claimed $29,264.80 of which $21,949.80 was reimbursed. IDEM Determination, VFC No. 82810403, pp. 1 – 5.

3. On September 17, 2019, Petitioner filed a subsequent and resubmitted application, submittal number 45, and claimed $34,769.60 of which $8,451.60 was reimbursed. IDEM Exhibit (Ex) BB, VFC No. 8200945, pp. 1 – 6.

4. On January 13, 2021, Petitioner filed a subsequent and resubmitted application, submittal number 46, and claimed $49,698.00, zero of which was reimbursed. Petition, pp. 2 –

5. On June 17, 2019, IDEM denied $5,791.50 for sampling under EPA Method 8270 for 2Q18, 3Q18 and 4Q18 for submittal number 44. This amount was resubmitted with submittal number 45.

6. On January 24, 2020, IDEM denied the following amounts for resubmittal 44 and submittal number 45:

- $5,791.50 for sampling under EPA Method 8270 for 2Q18, 3Q18 and 4Q18.
- $4,992.50 for the 51.50 hours spent in preparation of the 1Q19 report.
- $2,266.00 for the separate analysis of 8270 SVOC lab analysis for samples collected March 20, 2019.
- $4,316.50 for the 43.50 hours spent in preparation of the 2Q19 report.
- $3,388.00 for EPA Method 8270 SVOC lab analysis for samples collected August 12, 2019.
- $2,266.00 for the EPA Method 8270 SVOC lab analysis for samples collected May 23, 2019.
- $3,477.50 for the 32.50 hours spent in preparation of the 3Q19 report.

IDEM Ex. BB, pp. 1 - 6.

7. On January 13, 2021, Petitioner applied for reimbursement for submittal number 46 and claimed $23,380.00 for closure costs in addition to the amounts denied in submittal numbers 44/45. IDEM Ex. DD, VFC No. 8309583, pp. 1 - 2. On August 20, 2021, IDEM denied submittal number 46 in its entirety. Petition, pp. 2 - 7.

8. Petitioner timely filed a Petition for Administrative Review on September 3, 2021.

9. Petitioner appeals the denial of costs related to

A. Semi-volatile organic compound (SVOC) analysis of groundwater samples taken during quarterly monitoring;

B. Preparation of quarterly monitoring reports (QMR); and

C. Closure costs.

Petitioner Case Narrative, pp. 1 – 3.

10. The final hearing was held March 23, 2022. On April 29, 2022, the parties filed Proposed Findings of Fact and Conclusions of Law.

11. On July 18, 2022, the presiding ELJ entered Findings of Fact, Conclusions of Law and Final Order.

12. On July 27, 2022, IDEM filed a Motion to Reconsider Monitoring Well Abandonment Costs (Motion to Reconsider). On July 28, 2022, the Court issued an Order Concerning Response to IDEM setting the date for Petitioner to respond on August 16, 2022. IDEM requested the Court revise the abandonment costs due to its interpretation of statutes and regulations pertaining to the proper closure of abandoned wells.[1]

13. On August 16, 2022, Petitioner filed a response to IDEM's Motion to Reconsider.

CONCLUSIONS OF LAW

1. IDEM is authorized to implement and enforce Indiana environmental statutes and rules promulgated relevant to those statutes. Ind. Code § 13-13 (I.C.) *et seq.* and I.C. § 13-14-1-11.5. OEA has jurisdiction over the decisions of the Commissioner of IDEM pursuant to I.C. 4-21.5-7, *et seq.*

2. This is an Order issued pursuant to I.C. § 4-21.5-3-23. 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. The OEA 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 the hearing and independent of any previous findings." *Grisell v. Consol. City of Indianapolis,* 425 N.E.2d 247, 253 (Ind. Ct. App. 1981).

4. OEA is required to base its factual findings on substantial evidence. *Huffman v. Office of Envtl. Adjud.*, 811 N.E.2d 806 (Ind. 2004). The "substantial evidence" standard requires a lower burden of proof than the preponderance test, yet more than the scintilla of the evidence test. *GasAmerica #47*, 2004 OEA 123, 129.

5. The Petitioner has the burden of proof in this matter. Pursuant to I.C. § 4-21.5-3-14(c) and § I.C. 4-21.5-3-27(d), the person seeking review has the burden of persuasion by presenting substantial and credible evidence proving that IDEM improperly denied reimbursement.

---

[1] IDEM's interpretation in its Motion to Reconsider is based, in part, on regulations that were not part of its Proposed Findings of Fact, Conclusions of Law and Final Order, including 312 IAC 13-1-2, I.C. § 25-39-2-2, I.C. § 25-39-4-2, or I.C. § 25-39-3-4(b). Notwithstanding, these citations are necessary for interpreting "abandonment" as it applies to the proper closure of wells at the Site.

6. The Excess Liability Trust Fund (the ELTF) was established under I.C. § 13-23-7-1(a)(2) "to provide a source of money to satisfy liabilities for corrective action." Pursuant to I.C. § 13-23-9-1.5(a)(1), the administrator of ELTF "may pay ELTF claims only for costs that are reasonable and cost effective."

7. I.C. § 13-23-11-7(a)(1)(c) requires the Financial Assurance Board to "[e]stablish standards for determining the reasonableness and cost effectiveness of corrective action for purposes of reimbursement from the ELTF under IC 13-23-9-1.5(a)(1)." Under Title 328 of the Indiana Administrative Code, rules set the hourly rate a consultant can charge for specified activities. However, there are no rules for how much time is considered reasonable for specified activities.

8. Under 328 IAC 1-1-8.3 "reasonable" means that

> the site characterization and corrective action are appropriate and performed only as necessary to meet the cleanup objectives for the site and are consistent with the requirements of 329 IAC 9, 328 IAC 1-3-5(b) – (e) and other applicable state and federal laws and regulations.

9. The OEA recognizes that [t]he public has a strong interest both in preserving the monies in the ELTF and fully and fairly compensating people who perform eligible work. *Bullock*, 2020 OEA 74. OEA has found that denials on the basis of reasonableness and cost effectiveness may be upheld and that IDEM has the authority to request further information to justify the reasonableness and cost effectiveness of submitted costs. *Romney Food Mart*, 2019 OEA 80, p. 6.

A. SVOC Costs

10. In his direct testimony, Petitioner testified that the 1994 UST Closure Guidance and the 2008 Corrective Action Plan (CAP)[2] required SVOC sampling and that subsequent letters from the IDEM Project Manager justified the SVOC analysis of all wells. Tr. pp. 9 – 10. Petitioner also testified that he was denied the entire cost for SVOC sampling under Claims 44, 45 and 46. Hearing Transcript (Tr.) p. 9. Actually, Petitioner received partial payment of $2244.00 for SVOC EPA 8270 by SIM method sampling. IDEM Ex. BB,[3] pp. 24 – 25.

11. The approved February 18, 2009 Corrective Action Plan (CAP) for this incident states:

[2] IDEM never approved the 2008 CAP. Instead, the agency requested and approved a revised CAP in 2009. *See* IDEM Ex. C.

[3] IDEM did not renumber or bate stamp their Exhibits some of which contained parts of several documents bearing non-consecutive page numbers. For the purpose of citation within this document, the Exhibits' page numbers were counted and renumbered sequentially by hand.

> All groundwater samples will be analyzed for the presence of BTEX/MTBE and SVOC via the appropriate analytical methods (U.S. EPA methods 8021 and 8270, respectively) as indicated within the 1994 Underground Storage Tank Branch Guidance Manual *unless directed to do otherwise by the IDEM Project Manager assigned to the Site.* (Emphasis added).

IDEM Ex. C, VFC No. 44224808, p. 50.

12. By letter dated July 26, 2010, IDEM Senior Environmental Project Manager Jeff Turley (PM Turley) notified Petitioner that SVOC sampling be discontinued for all wells except MW-2, MW-7 and MW-10, and quarterly sampling for MW-5 be discontinued completely. IDEM Ex. F, VFC No. 5708806, p. 1. Petitioner's sampling records reflect that Petitioner complied with the July 26, 2010, letter directing limited sampling until he resumed sampling as originally required by the 2009 CAP on June 13, 2017. IDEM Ex. P, VFC No. 80572168, p. 8.

13. Under cross-examination, Petitioner testified that the CAP Addendum dated February 20, 2015 directed him to resume SVOC sampling of the entire network. *Id.*, pp. 27 – 29. The February 2015 Corrective Action Plan Implementation Approval contained no language directing Petitioner to resume the sampling required by the 2009 CAP, and the Approval did not direct him to resume SVOC sampling of the entire network or MW-5. IDEM Ex. K, VFC No. 80018255, pp. 1 – 2. As Petitioner did not resume SVOC sampling of the entire network including MW-5 in 2015, it is unclear why he testified it was the 2015 CAP Addendum which directed him to resume sampling. Petitioner's testimony was not credible.

Petitioner also testified he complied with IDEM's request to limit sampling until he received subsequent IDEM letters[4] he alleged instructed him to resume SVOC sampling of the entire network. Tr. pp. 21 – 23, 26 – 28. Petitioner's submitted letters either directed Petitioner to "continue the quarterly groundwater monitoring and sampling of the groundwater monitoring wells at this Site" or "submit Quarterly Monitoring Reports (QMRs) in accordance with the approved CAP." Petitioner Ex. 1,[5] pp. 25 – 30. During the hearing, Petitioner admitted that none of IDEM's subsequent letters specifically directed the SVOC sampling to resume but continued to insist that he resumed sampling because of those letters. Tr. pp. 28 – 29. Petitioner's arguments for resuming sampling were not supported by the evidence.

14. IDEM's testimony supported the fact that the agency did not direct Petitioner to resume SVOC sampling of the entire network or quarterly sampling of MW-5. Specifically, PM Turley testified that while SVOC analysis is initially required for diesel releases under the 1994 UST Guidance, it was not unusual to modify such sampling requirements based upon trends and historical results. Tr. p. 92. PM Turley did not recall ever requesting Petitioner to resume SVOC

[4] The letters referenced are IDEM Approval of Corrective Action Plan Addendum Implementation (February 20, 2015), IDEM Request for Revised Corrective Action Plan Addendum (September 6, 2016), and Corrective Action Plan Implementation Approval (February 14, 2018). Petitioner Ex. 1, pp. 25 – 30. None of the submitted letters bore a 2017 date, the year that Petitioner resumed sampling.

[5] Petitioner's Exhibit 1 had exhibits attached to it which he lettered alphabetically. Citations to Petitioner's exhibits to Exhibit 1 were cited to the page number(s) of Exhibit 1 and not alphabetically.

sampling for the entire network or MW-5 and further indicated that IDEM would have sent such an instruction via letter or email as a written record. *Id.*, p. 90. PM Turley testified that he reviewed his email pertaining to the Site and found no request or approval of SVOC sampling for the entire network or for MW-5. *Id.*, pp. 91 - 92. IDEM properly denied SVOC reimbursement for all wells except MW-2, MW-7, MW-10 and quarterly sampling for MW-5 after July 26, 2010.

15. With respect to certain denied charges, Petitioner contends that SVOC analysis was necessary due to the presence of naphthalene. Petitioner Case Narrative, p. 1. Petitioner's laboratory invoices included two different SVOC Method 8270 charges for each well: "EPA 8270 by SIM" Method at $50/sample and "EPA 8270" Method at $135/sample. IDEM Ex. JJ, VFC No. 82857064, pp. 24 - 25.

Senior Environmental Project Manager Jill Berry (SPM Berry) testified the method that included the analysis for naphthalene was "EPA 8270 by SIM," and it represented the most reasonable and cost-effective choice. Tr., p. 101. Petitioner also testified that the "8270 by SIM" method was the appropriate method to test for naphthalene but did not explain why he took two samples with two different methods at each well and submitted the results to IDEM for reimbursement. Tr. pp. 40 – 42. IDEM properly denied reimbursement for sampling via EPA Method 8270 at $135/sample.

16. Notwithstanding the properly denied EPA 8270 Method charges, IDEM improperly denied some SVOC costs. SPM Berry testified that in addition to the three approved monitoring well samples, there would also exist MS/MSD[6] samples, for a total of four (4) samples each quarter that should have been approved for sampling under the 1994 Guidance and sampling plan. *Id.*, pp. 99 – 100. The denied sampling costs occurred over the course of six (6) quarters, from 2nd quarter 2018 through 3rd quarter 2019. IDEM Ex. DD, pp. 48-49, 56-57. For the MS/MSD sampling, Petitioner is to be reimbursed $1320.00. Tr., p. 100. Petitioner originally sought, $4136.60 via submitted claims 44, 45 and 46. Pursuant to 328 IAC 1-5-1(d), Petitioner may not resubmit a claim for the difference, $572.50, remaining after reimbursement for the MS/MSD sampling.[7]

B. Quarterly Monitoring Report Preparation Costs

17. IDEM denied $12,576.50 in QMR preparation costs for three QMRs spanning quarters 1 – 3, 2019, pending an explanation regarding specific activities and the personnel and time spent working the activities. IDEM Ex. BB, pp. 4 - 6.

---

[6] A Matrix Spike and Spike Duplicate (MS/MSD) are representative but randomly chosen client samples that have known concentrations of analytes of interest added to samples prior to sample preparation and analysis. The purpose of the MS/MSD is to document the accuracy and precision of the method for that specific sample.

[7] The calculation is as follows: $572.50 = $4136.60 – $2244.00 already reimbursed under Invoice 7594 -- $1320.00 to be reimbursed for improperly denied MS/MSD samples.

18. Petitioner asserts that IDEM inappropriately used Non-Rule Policy Document Waste-0078-NPD (NPD) effective February 26, 2022 in denying his costs for QMR writing. Tr. pp. 10 – 11. *See also*, Petitioner Case Narrative, p. 2. Under cross-examination, Petitioner stated that "IDEM refers back to the nonrule policy for the guidance" and "IDEM said that we will reimburse a fixed amount for the quarterly monitoring" but provided neither documentary evidence nor cogent argument to support his assertion. Tr. pp. 10 – 11. Petitioner submitted an email from IDEM's counsel containing an offer of resolution dated March 22, 2022. The offer in relevant part stated,

> You have appealed the denial of $12,606.50 in QMR preparation costs. We have a newly effective NPD which can be used for reimbursement purposes for certain basic tasks and QMR preparation is one of them. Since we actually did receive the QMRs that included new information relative to the previous QMRs, we are willing to reimburse the NPD rate of $1,600 for each of the QMRs at issue which amounts to $4,800.

Petitioner Ex. 6. ELTF Section Chief, Katie Blackburn testified that the recently issued NPD was not used to deny QMR writing costs. Tr. pp. 109 – 110. While Petitioner is correct that it would not have been appropriate for IDEM to rely upon a NPD that had not yet become effective at the time he submitted his claims, Petitioner's sole reliance upon the offer of resolution is insufficient to prove IDEM used the NPD to deny his original QMR claims.

First Quarter 2019 Report (1Q19 Report)

19. For the "Preparation of 1Q19 Report," Petitioner claims the total number of hours IDEM denied was 51.5, 17 of which were allotted to field time (including travel) related to well sampling. Petitioner Ex. 1, p. 37. Petitioner's invoice related to this time period reflects different field/report times with report preparation of 23 hours in addition to the 51.5 hours. IDEM Ex. DD, pp. 48 - 49. Petitioner gave no testimony regarding the inconsistency between his Justification of Denied Costs[8] and his invoice.

20. With respect to the 17 allotted field hours, SC Blackburn testified that all field time for each quarter in 2019 had already been reimbursed in previous claims and that only actual QMR writing costs had been denied. Tr. pp. 110 – 116; IDEM Ex. BB, p. 24. SC Blackburn's testimony is substantiated when comparing the denied amounts in IDEM's ELTF Determination Case Review Summary to the relevant line items in Petitioner's submitted invoice No. 7594. *See* Petition, p. 5 and IDEM Ex. DD, p. 48. IDEM properly denied the 17 hours Petitioner resubmitted as an unpaid claim to IDEM.

21. Of the 51.5 hours, Petitioner allotted 10 hours to "report prep with lab data review, mapping, distribution and all the technical aspects." Petitioner Ex. 1, p. 37. IDEM did not object to Petitioner's 10 hours for "report prep with lab data review, mapping, distribution and all the technical aspects;" therefore, Petitioner is to be reimbursed for 10 hours at the invoiced rate of $107.00/hour in the amount of $1070.00.

---

[8] *See* Petitioner Ex. 1, p. 37.

22. Petitioner allotted 17.5 hours "to perform a Historic Review of 'all' available Groundwater Data (38 quarters) and Soil Data (15 samples for 10 analytes each) and prepare a Closure Plan and Recommendation." Petitioner Ex. 1, p. 37. In his Justification of Denied Costs, Petitioner indicated the Closure Plan/Recommendation was submitted under separate cover, to comply with IDEM's request. *Id.* Under cross-examination, Petitioner admitted that he does not have a copy of the document. Tr. p. 58. Moreover, Project Manager Turley testified he never received a document titled "Closure Plan and Recommendation" during 2019. Tr. p. 93.

Petitioner's 1Q19 invoice[9] line items do not reference preparing a Closure Plan and Recommendation. IDEM Ex. DD, pp. 48 – 49. Even though Petitioner invoiced 17.5 hours, he admitted under cross-examination that his Closure Plan and Recommendation was incorporated into the conclusion of the 2nd quarter 2019 QMR. Tr. pp. 77 – 78. There exists no reference to or incorporation within the 2nd quarter 2019 QMR of a Closure Plan and Recommendation. The 17.5 hours Petitioner allotted to this activity are not supported by the evidence, and thus, were properly denied by IDEM.

23. Petitioner allotted 7 hours for review of all documents. Petitioner Ex. 1, p. 37. Under cross-examination, Petitioner stated that the 7 hours was completed for the 2Q19 Report. *Id.* at p. 78. IDEM's denial of the 7 hours for the 1Q19 Report was proper.

Second Quarter 2019 Report (2Q19 Report)

24. In Petitioner's Justification of Denied Costs, Petitioner did not allot hours spent on each activity for the 2Q19 Report. Petitioner Ex. 1, p. 38. Petitioner testified that the 10 hours he allotted to the report preparation with lab data review, mapping, distribution in the 1Q19 Report would also apply for the 2Q19 Report. IDEM did not object or counter. Tr. p. 79. Petitioner is to be reimbursed for 10 hours at the invoiced rate of $107/hour in the amount of $1,070.00.

25. In both his Justification of Denied Costs and through his testimony, Petitioner provided information with respect to an air permit --- what he referred to as "extras." Tr. p. 79. *See also,* Petitioner Ex. 1, p 38. In his Justification of Denied Costs, Petitioner described the "extras" as meeting an IDEM Air Quality inspector at the Site and preparation and submission of a "final Permit Revocation Letter." *Id.* Under cross-examination, Petitioner testified he spent 1.5 hours creating the Permit Revocation Letter. Tr. p. 80. The cover letter contained 2 sentences, and the accompanying 2-page fillable .pdf Air Permit Cover Sheet form required Petitioner to check 8 boxes.[10]

Petitioner's invoice related to this time period has no entry for meeting with an IDEM OAQ inspector on Site, travel time to the Site for a meeting or creating the permit revocation letter.

---

[9] One invoice line item indicates Petitioner spent 8 hours on the task "Prepare IDEM Letter Response, Finalize and submit QMR". IDEM Ex. DD, pp. 48 - 49. Petitioner did not proffer any evidence reflecting how many of the 8 hours was allotted to the Letter Response and how much was allotted to the QMR. Moreover, the line item for the 8 hours is not reflected in Petitioner's Justification of Denied Costs. Petitioner Ex. 1, p. 37.

[10] The form, State Form 50639 (R4/10), Air Permit Application Cover Sheet.

IDEM Ex. DD, pp. 48 – 49. In IDEM's Second Request for Admissions, Petitioner admitted that he did not meet an IDEM air inspector on October 3, 2019. Petitioner Ex. 2, p. 5. Each invoice non-field line item indicates office work preparation of the 2Q19 QMR. *Id.* The hours Petitioner allotted to these "extra" activities is not supported by the evidence, and thus, were properly denied by IDEM.

Third Quarter 2019 Report (3Q19 Report)

26. Petitioner's Justification of Denied Costs for the 3Q19 QMR allotted 17 hours in field time,[11] 6 hours for "preparation of the IDEM-required ERC[12] including Property Tax Card Search, reviewing local Groundwater Ordinance," 8 hours for QMR preparation, and 1.5 hours for report review. Petitioner Ex. 1, p. 38. SC Blackburn testified that all field time for each quarter in 2019 was already reimbursed through previous claims. Tr. pp. 113 – 116. Petitioner presented no evidence to refute IDEM's previous reimbursement. IDEM properly denied the 17 hours of field time.

With respect to the 6 hours of denied time allotted to preparation of the ERC, property tax card search, reviewing local ordinance, Petitioner had previously submitted the Ordinance with his 2Q19 QMR; thus, it is unclear why Petitioner resubmitted it in his 3Q19.[13] Further, under cross-examination, Petitioner's testimony was equivocal as to whether he submitted a draft ERC to IDEM. Tr. pp. 81 – 82. PM Turley testified he had not received a draft or any emails regarding the ERC for the Site from Petitioner. Tr. p. 93. IDEM properly denied the 6 hours for the ERC.

Petitioner testified as to 8 hours for report preparation and 1.5 hours for report review without IDEM objection. Tr. p. 81. Petitioner is to be reimbursed for the 9.5 hours at the invoiced rate of $107.00/hour in the amount of $1,016.50.

C. <u>Closure Costs for System Removal and Well Abandonment</u>

27. Petitioner claimed $23,380.00 in costs related to system removal and well abandonment:

- $1,155.00 for project manager time related to "estimate and analysis of bids" and "preparation for remedial system closure;"
- $3,000.00 for carbon removal and disposal;
- $15,650.00 for monitoring well and horizontal well closure; and
- $3,575.00 for 65 man-hours in system dismantling and removal.

[11] Sampling activity and travel time are considered field work.

[12] ERCs or Environmental Restrictive Covenants are institutional controls which are enforceable legal instruments used to protect human health at contaminated sites by restricting property activity, use, and access. I.C. § 13-11-2-193.5.

[13] Petitioner Exhibit 1, p. 38. *See also*, IDEM Ex. FF, VFC No. 82615785, p. 16.

IDEM Ex. DD, p. 12.

Project Manager Time and Carbon Removal/Disposal

28. The amounts claimed for project manager time and carbon removal and disposal, were not raised during the hearing. As IDEM presented no evidence on the record or elicited testimony from witnesses to dispute the reasonableness of the bids, Petitioner is to be reimbursed $1,155.00 for project manager time and $3,000.00 for carbon removal and disposal.

Well Closure

29. Petitioner provided the lowest bid to address the abandonment and closing of 11 monitoring wells and 7 horizontal wells. IDEM Ex. DD, pp. 20 – 22. In his October 26, 2020, Request for Fixed Cost Remedial Closure Activities (Request for Fixed Cost) sent to potential bidders, Petitioner mandated that "well abandonment must adhere to IDNR rules and regulations (312 IAC 13 Rule 10)." Petitioner Ex. 4, p. 2. During discovery, Petitioner described the process of closing an abandoned well and utilized IDNR Record of Water Well abandonment logs[14] to record the well closures. Petitioner Ex 1, pp. 11 – 12.

In his Case Narrative Petitioner stated,

> Just recently the [IDEM] Reviewer is asking for a Well Driller License for wells that were installed in 2009 in order to approve and/or review the claimed costs. However, at the time of well installation, Lisa Doan (employee Doan), our Licensed Well Driller (2175WD) oversaw this activity in 2009. Further, Well Abandonment only requires the Contractor's Name and Signature (which I signed the Well Closure Logs). It is clear, the [IDEM] Reviewer is adamant in pursuing obstacles to avoid reimbursing SER90 for such cost.

Petitioner Case Narrative, p. 3.

In his Justification of Denied Costs, Petitioner stated that at the time of well installation, employee Doan oversaw the activity and had a well driller's license. Petitioner Case Narrative, p. 3. Petitioner signed the logs as Contractor and employee Doan completed the well closure as Operator. IDEM Ex. DD, pp. 24 – 41. On each log, the "License Number of Operator" box was marked "NA". *Id.* Petitioner admitted under cross-examination that neither he nor employee Doan had water well driller's licenses at the time of well abandonment. Tr. p. 84.

In its Motion to Reconsider IDEM contends that because the wells at issue are subject to IDNR regulation and neither Petitioner nor employee Doan was licensed, IDEM rightfully denied reimbursing the amount for removing the vertical monitoring and horizontal remedial abandoned wells.[15] In his Response to IDEM's Motion to Consider, Petitioner contends that he

[14] State Form 35880 (R5/9-04).

[15] IDEM Motion to Reconsider.

adhered "to the abandonment procedures established by 312 IAC 13-1-2[16] in a manner and fashion protective of the groundwater resources."

I.C. § 25-39-3-1(a) states that "an individual may not be a water well driller or water well pump installer without a license." 312 IAC 13-10-2(c) requires that "a well abandoned after December 31, 1987, shall be plugged by a water well driller or water well pump installer. . ." Pursuant to 312 IAC 13-12-3(a), IDNR may refuse to issue a license to anyone who has "acted as a water well driller or water pump installer without a license. . ."

As part of the remedial activities required at the Site, the monitoring wells required proper "abandonment" by an IDNR licensed water driller, but neither Petitioner nor his employee Doan were IDNR licensed water drillers. Because the work was performed in violation of 312 IAC 13-10-2(c), the work was not "reasonable" under 328 IAC 1-1-8.3[17] and cannot be reimbursed with funds from the ELTF per I.C. § 13-23-9-1.5(a)(1). Petitioner's request to "dismiss the *Respondent's* Motion" is denied. (Emphasis original).

Notwithstanding the lack of reasonableness, IDEM stated in its Motion to Reconsider that it "is willing to reimburse the costs of the horizontal wells at $7840.00 since it is unclear as to whether those wells qualify as 'monitoring wells' under IDNR jurisdiction."

System Dismantling and Removal

30. Regarding the bid item for system dismantling and removal, Petitioner claimed[18] the sixty-five (65) hours he allotted to this activity consisted of the following:

- 23 hours "in removing the SVE[19] and Air Sparge System with all associated motors, pumps and Holding Tanks;"
- 15 hours for lockout/tagout "of all motors at the Main Control Panel and in the connection;"
- 9 hours "in disconnecting, isolating, and removing the Main Control Panel;" and
- 18 hours "in removing all items off-site and travel to and from the Site on trailers and company vehicles."

Petitioner Ex. 1, p. 13.

---

[16] Pursuant to 312 IAC 13-1-2 "abandon" for purposes of proper closing means "to terminate operations of a well for water supply, monitoring, dewatering, or geothermal purposes and to restore the site of the well in a manner that will protect groundwater resources from contamination."

[17] "Reasonable" means that the site characterization and corrective action are appropriate and performed only as necessary to meet the cleanup objectives for the site and are consistent with the requirements of 329 IAC 9, 328 IAC 1-3-5(b) – (e) and other applicable state and federal laws and regulations. 328 IAC 1-1-8.3.

[18] Petitioner's Answer to Interrogatory #25.

[19] Both soil vapor extraction, or "SVE," and air sparging extract contaminant vapors from below ground for treatment above ground. These separate units make up the remediation system at this Site.

31. With respect to the 23 hours allotted for the SVE and Air Sparge System removal, Petitioner's 4th quarter 2018 QMR, dated January 25, 2019, documented that

> the Air sparge blower has ceased repair of blower mechanical seals, bearings and couplers requirement replacement for proper operation. The air sparge *unit* will be removed and transported to an authorized dealer in Fort Wayne, Isaacs Fluid Power.

(Emphasis added). IDEM Ex. GG, VFC No. 82682620, p. 10. On February 28, 2019, IDEM issued a Determination of Readiness for Reasonable and Cost-Effective Closure letter that stated the Site may be closed reasonably and cost-effectively with the recording of an ERC. The letter stated, "[T]**he air sparging and soil vapor extraction system should be shut down as soon as possible.**" (Emphasis original). IDEM Ex. T, p. 1, VFC No. 82750430.

In his next quarterly report,[20] dated April 25, 2019, Petitioner stated, "[t]he air sparge unit has been removed and transported to an authorized dealer in Fort Wayne, Isaacs Fluid Power, or repairs."[21] Petitioner also testified that the air sparge unit was no longer at the Site as of April 2019. Tr. p. 47.

Under cross-examination, counsel for IDEM asked Petitioner, "[so] as of April 2019 the air sparge unit was gone from the site, correct?" to which Petitioner responded "Yes." *Id.* After acknowledging that the removal of the air sparge unit was included in his October 26, 2020, Request for Fixed Cost,[22] Petitioner contradicted his testimony and stated, "[t]he air sparge that's been transported is the motor itself. This is the motor, yes." *Id.* Counsel for IDEM then asked, "[b]ut you didn't bring the air sparge motor back and hook it all up again, did you?" Tr. p. 48. Petitioner responded, ". . .the entire unit is still there except for the motor, the drive motor" even though he submitted the cost of its removal for reimbursement. Tr. p. 48.

IDEM, in its Interrogatory 25, asked Petitioner to "explain how the SER90 estimated cost of $3575 for system dismantling and removal was calculated and what that cost was based on." Petitioner Ex. 1, p. 12. Petitioner answered, "[w]e spent 23 hours (two-man crew) in removing the SVE and Air Sparge System with all associated motors, pumps and Holding Tanks." *Id.* p. 13. Petitioner's use of the plural "motors" in his response to Interrogatory #25 does not corroborate his testimony at the hearing that only the air sparge unit's motor was sent to Ft. Wayne for repair. Further, Petitioner's testimony is not corroborated by the QMRs.

Lastly, according to his Response to IDEM's Request for Admission #2, Petitioner did not remove the SVE in its entirety. Petitioner Ex. 1, p. 4. Petitioner provided neither itemization of how the twenty-three (23) hours spent removing the SVE and Air Sparge System was allotted nor credible testimony that the hours spent on system dismantling and removal were reasonable, cost effective and necessary. IDEM did not provide analysis of what number of

---

[20] IDEM Ex. HH, VFC No.82763858, p. 10.

[21] It is unclear why Petitioner sent the air sparge unit to be repaired after IDEM directed Petitioner to shut down both the SVE and the air sparge unit.

[22] See Petitioner Ex. 4, pp. 1 – 2.

hours would have been considered reasonable for the partial removal of the SVE. Once Petitioner completes the removal of the SVE, he may resubmit a claim for dismantling and removal of the SVE to IDEM for reimbursement pursuant to 328 IAC 1-5-1(d).

32. Petitioner claimed 15 hours for lockout/tagout. Under cross-examination, counsel for IDEM asked, "Do you have to do lock out/tag out if the electricity has already been cut off?" Petitioner responded,

> Yes, because once the electricity is retired and the service, okay, then you don't have to, meaning that everything is cut off right there at the pump, but when you have a disconnection, it could come back at any time meaning that when you ask the power company to disconnect the electricity, the electricity is still there but the only thing that's being removed is the meter base, okay?

T. p. 54. When asked, "didn't you submit some electrical bills where it indicates that the service was actually shut off in December of 2019?" Petitioner responded, "[o]nce again, it is disconnected, yes." Tr. p. 55. In IDEM's follow-up question, "[o]kay which means that you didn't have to do a lock out/tag out?" Petitioner responded, "[n]o, but per safety, yes, you have to." *Id.* OSHA's lockout/tagout standard applies to the control of energy during servicing and/or maintenance of machines and equipment. 1910.147(a)(2)(i). It does not apply when retiring electrical service. Petitioner's testimony regarding the necessity of the lockout/tagout was not credible. IDEM properly denied these hours.

33. With respect to the 9 hours for the Main Control Panel, counsel for IDEM asked, "[d]o you have a main control box there?" Tr. p. 54. Petitioner testified that there existed "two [sic] many control boxes over there according to the local code, yes." *Id.* In response to Interrogatory No. 25, Petitioner stated that there was only one Main Control Panel. Petitioner Ex. 1, p. 13. In his Justification of Denied Costs, Petitioner indicated there were "associated electrical panels that had to be removed for public safety." Id., p 39. Petitioner's testimony conflicted with submitted documentation and thus was not credible. IDEM properly denied these hours.

34. With respect to the 18 hours for removing *all items* off-site, Petitioner took photographs[23] that revealed a carbon vessel, a shed and miscellaneous piping remained at the Site. (Emphasis added]. Petitioner admitted that the vessel had been included in his Request for Fixed Cost related to system closure. Tr. p. 52. After acknowledging the carbon vessel was still at the Site, Petitioner contradicted his testimony and said the vessel was *not* included, and the "cost that was submitted for removal of carbon, ok, the spent carbon."[24] *Id.*, p. 53.

---

[23] Petitioner Ex. 1, pp. 20 – 21.

[24] Petitioner did submit a separate claim for carbon removal and disposal; however, the vessel did not fall under that claim. The vessel fell under either "removing all items offsite" or "removing the SVE and Air Sparge System with all associated motors, pumps and Holding Tanks."

In his October 26, 2020, Request for Fixed Cost, Petitioner referenced the safe dismantle of remedial equipment and tanks in addition to the removal and proper disposal of 2,000 pounds of spent vapor-phase carbon media. Petitioner Ex. 4, p. 1. Similarly, in his Justification of Denied Costs, Petitioner stated, "[t]here were multiple rusty remedial components, pumps, tanks, vessels and associated electrical panels that had to be removed for public safety." Petitioner Ex. 1, p. 39. Lastly, as the carbon vessel was part of the SVE system, it appears that Petitioner was seeking reimbursement twice: (1) "in removing the SVE and Air Sparge System with all associated motors, pumps and Holding Tanks," and (2) "there were multiple rusty remedial components, pumps, tanks, vessels and associated electrical panels that had to be removed for public safety." Petitioner Ex. 1, p. 13 and p. 39. Petitioner's testimony conflicted with submitted documentation and thus was not credible.

Under cross-examination, IDEM asked Petitioner "[w]hy 18 hours? Why so long?" Petitioner stated,

> Well, the site is almost like about an hour and 15 minutes away from us, ok? There is a lot of trash and a lot of plastic and you have got to remember, you know, you cannot leave stuff behind us. First of all, for the public safety, and second, the owner is elderly, you know. We don't want her to start kind of walking around with trash piles and stuff like that in there. So [sic] removing all that stuff, it takes time. It takes time.

Tr. p. 56. In response to IDEM Interrogatory 2, Petitioner stated, "[t]he Owner / Operator, Mrs. Weekley, lives at 404 North Lincoln Street (next door to the Site in question). Petitioner Ex. 1, p. 4. Petitioner submitted the ELF Assignment of Rights and Power of Attorney, and the Owner signed her address as 219 East Street, Middlebourne, WV 26149. IDEM Ex. DD, p. 10.

In response to the follow-up question, "And [the two guys] spent a whole day picking up trash off the site?" Petitioner responded, "[t]he well covers and plastic and trash and PVC, yes." Tr. p. 57. Petitioner provided no documentary evidence showing what had to be removed, what had been removed, or landfill receipts. By his own photographs, Petitioner revealed that there remained a large carbon vessel, miscellaneous piping and shed at the Site. *Id.,* p. 52.

After removing the remaining items at the Site, Petitioner may resubmit a claim for system dismantling and removal pursuant to 328 IAC 1-5-1(d).

FINAL ORDER

For the foregoing reasons, it is **ORDERED, ADJUDGED AND DECREED** that judgment is entered in favor of Petitioner in the following amounts:

• MS/MSD sampling	$1,320.00
• 1Q19 QMR report preparation and data review	$1,070.00
• 2Q19 QMR report preparation and data review	$1,070.00
• 3Q19 QMR report preparation and data review	$1,016.50
• Project Manager time	$1,155.00
• Carbon removal/disposal	$3,000.00
• Well removal	$7,840.00

for a total reimbursement of **$16, 471.50** to be paid within sixty (60) days after Petitioner removes the items still remaining at the Site and provides IDEM with documentation of the removal, including landfill receipts. IDEM's Determinations are **AFFIRMED** in all other respects. Petitioner's request that IDEM's Motion to Reconsider Monitoring Well Abandonment Costs be dismissed is **DENIED**.

You are further notified that pursuant to provisions of I.C. § 4-21.5-7-5, OEA 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 17th day of August, 2022, in Indianapolis, IN.

Hon. Lori Kyle Endris
Environmental Law Judge