STATE OF INDIANA	)	IN THE MARION SUPERIOR COURT
	) SS:	
COUNTY OF MARION	)	CAUSE NO. 49D13-2012-PL-043922

BULLOCK OIL COMPANY, INC.,	)
	)
Petitioner,	)
	)
v.	)
	)
INDIANA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT,	)
	)
Respondent.	)

ORDER DENYING RELIEF ON JUDICIAL REVIEW

This matter came before the Court on Petitioner's Verified Petition for Judicial Review. The Court, having reviewed the petition, the agency record, and briefs submitted by the parties, and having heard oral argument on June 30, 2021, ORDERS as follows:

Findings of Fact:

1. Petitioner, Bullock Oil Company, Inc., owns the underground storage tanks (USTs) located at 1555 State Road #64, New Salisbury, Harrison County, Indiana (the "Site"). Respondent, the Indiana Department of Environmental Management, received a report of a release from the USTs on May 12, 2011.

2. Bullock Oil hired Shield Environmental Associates, which conducted an Initial Site Characterization (ISC) and submitted the results to IDEM on July 20, 2012. On June 9, 2014, IDEM requested a Further Site Investigation (FSI). Shield submitted the FSI on February 25, 2015. IDEM approved the FSI on April 20, 2015, and requested a Corrective Action Plan (CAP).

3. On December 4, 2015, Bullock Oil retained Golars LLC as its successor consultant. Golars did not believe that the Shield ISC adequately delineated the extent of the

contamination, particularly because of the fractured/fissured bedrock lying underneath the Site. Golars submitted a CAP Data Gap Closure Plan (the "Work Plan") to IDEM. IDEM approved the Work Plan on April 12, 2016, and authorized a Limited Site Investigation (LSI). On July 22, 2016, Golars submitted the LSI Report conveying the results of the Work Plan. IDEM reviewed the LSI on October 24, 2016, and requested a Further Site Investigation (FSI).

4. Golars submitted the FSI on March 24, 2017. On May 22, 2017, IDEM reviewed the FSI and requested another FSI. Golars submitted the next FSI on December 15, 2017. IDEM approved the site characterization on April 9, 2018, and required groundwater monitoring for an additional four quarters. IDEM requested that Bullock Oil develop a Conceptual Site Model (CSM) and a draft Environmental Restrictive Covenant at the conclusion of the quarterly monitoring.

5. Bullock Oil submitted several claims for reimbursement of corrective action costs from the Excess Liability Trust Fund (ELTF). Most of the costs were reimbursed.

6. On April 27, 2018, Bullock Oil requested reimbursement for $145,345.48 in corrective action costs. IDEM denied $40,607.38, questioning whether the amount of time spent writing the Work Plan, LSI, and the two FSIs was reasonable and cost effective, and requesting additional information on that point. On January 11, 2019, Bullock Oil submitted a claim for $40,198.27, of which $39,555.08 was for previously denied costs. Golars included a three-page explanation of the time spent writing the reports and requested clarification from IDEM as to what would be considered sufficient. IDEM did not provide further clarification and again denied reimbursement for the costs for the same reasons.

7. Bullock Oil sought administrative review of this denial, and OEA held an evidentiary hearing on October 1, 2020. OEA ordered IDEM to reimburse $3,601.25 in costs

incurred writing the Work Plan. OEA did not order IDEM to reimburse Bullock Oil for the $34,086.89 in costs incurred writing the LSI report, the May 27, 2017 FSI report, or the December 17, 2017 FSI report. Accordingly, at issue on judicial review are those three unreimbursed reports.

8. Bullock Oil filed for judicial review on December 14, 2020.

Conclusions of Law:

A. AOPA standard of review

1. On judicial review, the trial court is bound by the agency's findings of fact if those findings are supported by substantial evidence. See *Ind. Civil Rights Comm'n v. Southern Ind. Gas & Electric Co.*, 648 N.E.2d 674, 679 (Ind. Ct. App. 1995). Because Bullock Oil has not challenged the agency's findings of facts as unsupported by evidence, the Court has adopted the findings of fact from the Final Order and has provided an abridged list of facts in the above section.

2. In a judicial review of an agency determination under the Administrative Orders and Procedures Act (AOPA), "the burden of demonstrating the invalidity of an agency action is on the party to the judicial review proceeding asserting invalidity." IND. CODE § 4-21.5-5-14. The court considers the record "in the light most favorable to the administrative proceedings." *Pendleton v. McCarty*, 747 N.E.2d 56, 61 (Ind. Ct. App. 2001).

3. While a reviewing court is "not bound by the [agency's] conclusions of law, ... '[a]n interpretation of a statute by an administrative agency charged with the duty of enforcing the statute is entitled to great weight, unless this interpretation would be inconsistent with the statute itself.'" *Moriarity v. Ind. Dep't of Nat. Res.*, 113 N.E.3d 614, 619 (Ind. 2019). "In fact, 'if the agency's interpretation is reasonable, we stop our analysis and need not move forward with

any other proposed interpretation.'" *Id.* at 619 (quoting *Jay Classroom Teachers Ass'n v. Jay Sch. Corp.*, 55 N.E.3d 813, 816 (Ind. 2016)).

B. The Final Order was not arbitrary, capricious, or an abuse of discretion

4. Indiana Code section 13-23-7-1(a)(2) establishes the Excess Liability Trust Fund (the ELTF) "to provide a source of money to satisfy liabilities for corrective action." Indiana Code section 13-23-9-1.5(a)(1) states that the administrator of the ELTF "may pay ELTF claims only for costs that: (1) are reasonable and cost effective."

5. "An arbitrary and capricious decision is one which is patently unreasonable. It is made without consideration of the facts and in total disregard of the circumstances and lacks any basis which might lead a reasonable person to the same conclusion." *City of Indianapolis v. Woods*, 703 N.E.2d 1087, 1091 (Ind. Ct. App. 1998). "The challenging party has the burden of proving that an administrative action was arbitrary and capricious." *Id.*

6. The parties do not dispute that IDEM can deny reimbursement of a cost that is not reasonable.

7. Bullock Oil contends that OEA improperly affirmed IDEM's decision to deny reimbursement, relying upon an unpromulgated rule. Bullock Oil argues that in the past, Bullock Oil had submitted reimbursement claims for similar work – writing reports – with the same level of detail (or lack thereof), and IDEM had always approved the reimbursement claims with no questions asked. According to Bullock Oil, IDEM's requests for more information and subsequent denials suggests that IDEM created a new standard or policy without going through the rule promulgation process, and IDEM's reliance on this purportedly unpromulgated standard (and OEA's Final Order affirming IDEM's decision) was arbitrary and capricious.

8. An agency more stringently enforcing a statute in a manner consistent with the statute is not equivalent to the improper creation of a new standard. See *Brown v. Chicago Bd. of Educ.*, 824 F.3d 713, 718 (7th Cir. 2016) (court upholds present enforcement of an existing policy, absent a formal policy not to enforce that existing policy). It would be bad public policy to discourage an agency from seeking to comply with a statutory directive.

9. Furthermore, both "reasonable" and "cost effective" are defined under promulgated rules. IDEM's regulations define "reasonable" to mean that site characterization and corrective actions are appropriate and performed only as necessary to meet the cleanup objectives for the site, and are consistent with other state and federal regulatory requirements. 328 IND. ADMIN. CODE 1-1-8.3.

10. Whether or not the Underground Storage Tank Financial Assurance Board (FAB) was required to promulgate a new regulation defining "reasonable" and "cost effective" is outside the scope of this judicial review. The FAB promulgated this regulation defining reasonable in 2004, and this regulation was most recently amended in 2018. The regulation remains in effect, and OEA appropriately relied on this regulatory definition of "reasonable.

11. OEA agreed with IDEM that on the face of Bullock Oil's reimbursement request, the hours Golars claimed for writing the reports clearly seemed excessive. The Court concludes that IDEM acted within its statutory and regulatory authority to require additional explanation to justify the request. There is no evidence in the record suggesting that IDEM had implemented a new standard for "reasonable" when IDEM requested more information about the reasonableness and cost effectiveness of the claimed costs (given that the costs appeared on their face to not be reasonable or cost effective) and then denied the reimbursement request. The cases cited by Bullock Oil in support of its argument are all distinguishable from the facts of this case because

they either involved evidence of changing policies, the use of the wrong standard, unwritten policies enforced across the board, or no standards whatsoever.

12. Because the regulation defines "reasonable" as appropriate and performed only as necessary to meet the cleanup objectives of the site, it logically follows that any claimant seeking reimbursement from the ELTF is on notice that the claimant must be able to demonstrate that the costs incurred were appropriate and performed only as necessary to meet the cleanup objectives of the site, even if IDEM does not always request additional information to determine whether the costs were reasonable.

13. Bullock Oil focuses on IDEM's alleged lack of an articulable standard, but critically, OEA applied a *de novo* review, expressly stating that it afforded no deference to IDEM's determination. See Pet. Ex. A at 5, ¶ 3; 8, ¶ 19. OEA did not affirm IDEM's denial, but independently denied Bullock Oil's claim for reimbursement. OEA independently concluded after an evidentiary hearing that Bullock Oil had not met its burden to establish that the costs incurred in writing the three reports were reasonable and cost effective as required by Indiana Code section 13-23-9-1.5(a)(1). OEA also independently concluded that Bullock Oil did not provide sufficient evidence for OEA to reach a determination on a dollar amount that could be reimbursed.

14. Furthermore, an administrative order is neither arbitrary nor capricious nor an abuse of discretion when supported by substantial evidence. See *Woods,* 703 N.E.2d at 1091. "Substantial evidence" is evidence that is "more than a scintilla, but something less than a preponderance of the evidence." *Ind. Dep't of Natural Res. v. Prosser,* 132 N.E.3d 397, 401 (Ind. Ct. App. 2019). Substantial evidence has also been defined as "that relevant evidence which a reasonable mind might accept as adequate to support a conclusion." *Winters v. City of*

Evansville, 29 N.E.3d 773, 778 (Ind. Ct. App. 2015) (quoting *City of Indianapolis v. Woods*, 703 N.E.2d 1087, 1091 (Ind. Ct. App. 1998)).

15. As OEA noted in its Final Order, Golars spent (348.37 hours) ***only*** on writing four reports, a period that was more time than ***all*** of the prior consultant's work (241.25 hours), which included ***both*** field work and writing for three reports. OEA determined that the evidence of Golars time attributable to amending the reports following a change in guidance on remediation cleanup levels was insufficient. OEA also found that IDEM had presented evidence that some portion of the reports was duplicative of previous reports. Finally, and most importantly, OEA found that Golars failed to provide firsthand evidence regarding which specific activities the project managers engaged in for any of the hours generally billed for writing the reports or any firsthand information regarding the reasonableness of the hours spent other than a general statement regarding the Site's complexity. All of this could lead a reasonable person to conclude that Bullock Oil did not meet its burden to show that the costs incurred in writing the reports were reasonable and cost effective. Bullock Oil failed to provide enough evidence to allow OEA or IDEM to determine how much to reimburse Bullock Oil.

16. The standard applied by OEA was the regulatory definition of reasonable. OEA did not rely on any unpromulgated standard or policy or rule to deny Bullock Oil's request for reimbursement. OEA's factual finding that Bullock Oil had not provided substantial evidence to meet that regulatory standard is neither arbitrary nor capricious because it is supported by substantial evidence, and this Court must accordingly affirm that finding.

17. Bullock Oil's argument that the Order is an abuse of discretion because it does not follow its own logic is ***not*** well taken. While OEA criticized IDEM in *dicta* for not providing Bullock Oil with more guidance about what information Bullock Oil could submit to show that

the costs were reasonable, OEA properly concluded that IDEM appropriately disallowed the claimed expenses. OEA expressly recognized that definition of "reasonable" in the Indiana Administrative Code applied in this case (Pet. Ex. A at 6–7, ¶¶ 10–11), and did not rely on any unpromulgated standard. OEA, as an adjudicative body with expertise in the environmental field, reasonably interpreted "appropriate and performed only as necessary to meet the cleanup objectives of the site" to mean that Bullock Oil needed to provide specific evidence as to why the amount of time for report writing was reasonable, including what tasks or activities corresponded to the hours claimed for reimbursement with respect to writing the reports.

18. Furthermore, it was not illogical for OEA to conclude that it is logical that some of the costs for the three reports ***should*** be reimbursed without awarding any reimbursement of those costs. Bullock Oil did not provide sufficient reliable evidence that would allow OEA or IDEM to determine how much should be reimbursed. Any OEA order of partial reimbursement of costs would itself have been arbitrary and capricious and in violation of Indiana Code section 13-23-9-1.5(a)(1) due to that lack of sufficient evidence.

19. Because OEA relied on a regulation that defined reasonable, and independently concluded that Bullock Oil did not provide sufficient evidence to show that the costs incurred writing three of the reports were appropriate and performed only as necessary to achieve the cleanup objectives for the site, the Court finds that OEA did not act arbitrarily and capriciously, or abuse its discretion, by denying Bullock Oil's request for reimbursement for the time spent writing three reports.

C. The Final Order was not contrary to law because the regulatory definition of reasonable provides an ascertainable standard

20. Bullock Oil argues that if it is true that IDEM has not adopted an unpromulgated standard or policy that informed its decision to deny Bullock Oil's ELTF reimbursement request,

then that means that the statute requiring costs be "reasonable and cost effective" to be eligible for ELTF reimbursement is unconstitutionally vague. The Court disagrees.

21. Bullock Oil takes issue with IDEM's use of federal case law on the void-for vagueness doctrine as opposed to cases applying Indiana administrative law. Bullock Oil argues that the applicable test for whether an agency standard "can withstand a challenge for vagueness is whether it is so indefinite that persons of common intelligence must necessarily guess at its meaning and differ as to its application." The first case in Indiana to cite that standard is *Midwest Steel v. Comm'nr of Labor*, 482 N.E.2d 1369 (1985). The Court in Midwest directly quoted that test from *Allis-Chalmers Corp. v. OSHA Review Comm'n*, 542 F.2d 27, 30 (7th Cir. 1976), which originated from *U.S. v. Tandaric*, 152 F.2d. 3, 5 (7th Cir. 1945). Consequently, the cases cited by IDEM which apply the void-for-vagueness doctrine and explain that it does not apply to statutes conferring a benefit are at least highly persuasive, if not precedential. Bullock Oil also does not dispute IDEM's argument that Courts have "also expressed greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe." *Vill. of Hoffman Ests. v. Flipside, Hoffman Ests., Inc.*, 455 U.S. 489, 498 (1982).

22. The Court concludes that OEA relied on an ascertainable standard because the regulation puts a claimant on notice they must be able to show that the costs were appropriate and performed only as necessary to meet the cleanup objectives of the site. See *Clarkson v. Dep't of Ins. of State of Ind.*, 425 N.E.2d 203, 207-08 (Ind. Ct. App. 1981) ("standards should be stated with sufficient precision to provide those having contact with the agency fair warning of the criteria by which their petitions will be judged. [Citation omitted] However, where standards are stated with sufficient precision in the statute itself, it is not necessary for the administrative

agency to provide additional clarification and specificity so long as such standards give adequate warning to those having potential contact with the agency").

23. Bullock Oil also asserts that "appropriate and performed only as necessary to meet the cleanup objectives of the site" is as vague as "reasonable." The Court also disagrees with this assertion. A person of common intelligence, especially a professional consultant who had written an LSI or FSI report, would understand that they may be expected to explain with specificity why it took a certain amount of time to write the LSI or FSI report and why that was necessary based on the cleanup objectives of a particular site. Additionally, claimants are charged with understanding the ELTF rules when taking on projects eligible for ELTF reimbursement. See IND. CODE § 13 23-9-2(a) ("ELTF claims must be submitted in accordance with rules adopted by the [FAB].")

24. The ascertainable standards requirement is not meant to unduly constrain administrative action because agencies are "entitled to reasonable latitude in carrying out [their] responsibilities." *State Bd. of Tax Comm'rs v. New Castle Lodge #147, Loyal Order of Moose, Inc.*, 765 N.E.2d 1257, 1264 (Ind. 2002). IDEM must have some flexibility to use its expertise to determine whether a claimed cost was appropriate and performed only as necessary to meet the cleanup objectives of a site before reimbursing the claimed cost. This definition of reasonable also provides a professional consultant with some flexibility to achieve cleanup objectives at a particular site with unique cleanup challenges.

25. The Court finds that the regulation defining "reasonable" provides an ascertainable standard for claimants seeking reimbursement from the ELTF and OEA did not act contrary to law by denying Bullock Oil's request for reimbursement for costs incurred in writing three reports.

Order:

Having reviewed the Petition, agency record, and the parties' briefs, this Court finds that Bullock Oil has not met its burden under AOPA to show that the Office of Environmental Adjudication's Final Order was arbitrary, capricious, and an abuse of discretion, or that the Final Order was contrary to law by affirming IDEM's decision to deny reimbursement for $34,086.89 in claimed costs. Accordingly, this Court DENIES Bullock Oil's request for relief set forth in the Verified Petition for Judicial Review and AFFIRMS the Office of Environmental Adjudication's Final Order.

ENTERED: **September 21, 2021**

James A. Joven, Judge
Marion Superior Court, Civil Division 13

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