STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

PANHANDLE INDUSTRIES, INC.,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 98-3640
	)	
DEPARTMENT OF ENVIRONMENTAL PROTECTION,	)	
	)	
Respondent.	)	
_____	)	

RECOMMENDED ORDER

Pursuant to notice, the Division of Administrative Hearings, by its duly designated Administrative Law Judge, William J. Kendrick, held a formal hearing in the above-styled case on December 8, 1998, in Tallahassee, Florida.

APPEARANCES

For Petitioner: George M. Hidle, President
Panhandle Industries, Inc.
Post Office Box 11983
Fort Lauderdale, Florida 33339-1983

For Respondent: J. A. Spejenkowski, Esquire
Department of Environmental Protection
3900 Commonwealth Boulevard
Mail Station 35
Tallahassee, Florida 32399-3000

STATEMENT OF THE ISSUES

At issue in this proceeding is the reasonable cost to be reimbursed Petitioner, under the provisions of Section 376.3071(12), Florida Statutes, for the development of a Monitoring Only Plan (MOP) program for the Dagam Oil Company

(DEP Facility No. 138504146), at 331 23rd Street, Miami Beach, Florida.

PRELIMINARY STATEMENT

In August 1994, Petitioner, Panhandle Industries, Inc., submitted an application to the Respondent, Department of Environmental Protection (Department), which sought reimbursement for costs associated with the development of a Monitoring Only Plan (MOP) under the provisions of Section 376.3071, Florida Statutes.

Following review, the Department ultimately issued an Order of Determination of Reimbursement on June 27, 1996, which approved for reimbursement $13,198.70 of the total of $39,412.66 requested by Petitioner.[1]

Respondent elected to dispute the Department's decision and filed a petition for formal hearing pursuant to Sections 120.569 and 120.57, Florida Statutes. On August 12, 1998, the Department referred the matter to the Division of Administrative Hearings for the assignment of an administrative law judge to conduct the formal hearing Petitioner had requested.

At hearing, Petitioner called George Hidle as a witness, and Petitioner's Exhibits 1 through 15 and 23 through 25 were received into evidence.[2] The Department called as witnesses Diane Pickette, Brian King, Charles Williams, and Jeffrey Priddle, and the Department's (Respondent's) Exhibits 1 through 5 and 7 were received into evidence.[3]

The hearing transcript was filed on December 28, 1998, and the parties were accorded 10 days from that date to file proposed recommended orders or proposed findings of fact. The parties

elected to submit such proposals and they have been duly considered.

FINDINGS OF FACT

Background

1. Petitioner, Panhandle Industries, Inc., is a Florida corporation engaged in the business of consulting, engineering and construction. George M. Hidle, a professional geologist licensed in the State of Florida, is the president and sole owner of the Petitioner corporation.

2. In September 1992, Dagam Oil Company, doing business as Sierra Fina, employed Petitioner to do environmental assessment work and prepare a Contamination Assessment Report (CAR) under the then existing Rule 17-770.630, Florida Administrative Code, for a site located at 331 23rd Street, Miami Beach, Florida (DEP Facility No. 138504146).[4] That CAR was submitted to DERM (Metropolitan Dade County, Department of Environmental Resources Management) July 13, 1993. (Petitioner's Exhibit 1.)

3. Pertinent to this case, the CAR provides the following background or historical information:

> . . . PHYSICAL SETTING
>
> . . . Sierra Fina is located at 331 23rd Street in Miami Beach, Florida . . . The facility is bordered to the north by Collins Canal, to the east by the light commercial properties, and to the south/southeast by property that once contained Chevron and Fina service stations. . . .
>
> * * *

. . . FACILITY HISTORY AND OPERATION

Sierra Fina was built in 1963. The station originally operated as a Sunoco service station with a 3 bay garage. Dagam Oil Company purchased the facility in March 1981 from Charles Rosenblatt. At the time the station had five underground fuel tanks. . . .

* * *

. . . PREVIOUS INVESTIGATIONS

Dagam Oil Company contracted with another environmental company in November 1988 to collect groundwater samples from . . . five monitoring wells at the facility. Groundwater samples were collected on November 9, 1988 and analyzed by EPA Method 602. Monitoring well MW-3 was also analyzed by EPA Method 610. All five of the wells had hydrocarbon contaminant concentrations in excess of state guidelines. . . .

A discharge notification form was mailed to the DER and DERM on December 9, 1988, the date of receipt of the analytical results from the November 9, 1988 groundwater sampling event. . . .

* * *

. . . INITIAL REMEDIAL ACTIONS [IRA]

[The F]ive underground storage tanks [and associated piping] were removed from the facility during March and April 1989 [, and replaced with four new cathodically protected underground petroleum storage tanks]. Approximately 400 cubic yards of contaminated soil was also removed at that time. On March 31, 1989 a composite sample of the soil was collected for analysis . . . Because of limited space at the station, the contaminated soil was hauled to a Metro Trucking Inc. storage yard located at 112th Avenue and 143 Street in Miami. The contaminated soil was landfarmed at this Metro Trucking facility for a period of seven months, during which time the soil was spread

> onto visqueen and tilled on a regular basis. On November 21, 1989 the soil was resampled and analyzed . . . Results of this second round of analyses met clean fill criteria.
>
> Also at the time of tank replacement, a sheen of free floating hydrocarbons was observed on water in the tank pit. A vac truck was used to skim this product from the pit prior to tank replacement. Approximately 2100 gallons of oily water were removed, transported, and disposed of by Cliff Berry, Inc. . . .

Other than these IRA activities, no other assessment or remediation work had been performed at the facility until Petitioner was employed in September 1992.

4. Petitioner's CAR concluded that:

> Soil and groundwater at Sierra Fina are contaminated with gasoline and diesel hydrocarbons. Excessively contaminated soil is confined to an area at the western end of the station building that is approximately 20 feet in width by 30 feet in length, extending down to a water table of between 6 and 8 feet below land surface. No free phase floating product is present on the groundwater underlying this facility. However, dissolved hydrocarbon contamination is present in the groundwater. A dissolved hydrocarbon plume is present in the western half of the site. This plume measures 80 feet in length by 60 feet in width and extends to a depth of less than 22 feet below land surface, yielding approximately 134,640 gallons of hydrocarbon contaminated water. Volume calculations are based on an average depth to groundwater of 7 feet below land surface and an effective soil porosity of 25%. The highest benzene (53.3 ppb) and total napthalenes (752 ppb) concentrations were detected in MW-12.
>
> * * *
>
> Groundwater within the Biscayne Aquifer beneath Sierra Fina is nonpotable because of

> salt water intrusion from the Atlantic Ocean. For this reason there are no private or public potable wells in the area. Contamination at Sierra Fina is limited onsite to the western half of the station, and poses no threats to sensitive receptors in the area, with the possible exception of Collins Canal. The cause of hydrocarbon contamination was never determined; however, the most probable source, i.e. previous petroleum tanks and lines, were removed in March and April of 1989. Based on these findings and the data presented about or elsewhere in this report, it is known that soil and groundwater contamination does exist at this facility in concentrations that exceed guidelines specified in Section 17-770.730(5)FAC; however, the levels of contamination may not warrant the need for any extensive remediation activities at this site.

5. Petitioner's CAR was approved by DERM on October 8, 1993, and Petitioner was directed to submit a Remedial Action Plan (RAP) within 60 days.[5]

6. At the time, Mr. Hidle (Petitioner) was aware that the levels of contamination were low or near target levels, and that it was likely that the contamination levels would decrease naturally over time. Consequently, Petitioner elected to seek approval of a Monitor Only Plan (MOP), as opposed to a RAP. Such choice was favored based on the nature and location of the contaminants. In this regard, it was observed that the soil contamination consisted of both gasoline and diesel fuel, with much of the contaminated soil abutting or underneath the building. Excavation and removal of the soil was not an alternative because it would undermine the structural integrity

of the building. Moreover, given the fuel mix, vapor extraction was not a viable option.

7. Given Petitioner's choice to pursue approval of a MOP, it gave notice to the Department and DERM on October 18, 1993, as well as November 12, 1993, and December 2, 1993, of its intention to undertake groundwater sampling and soil sampling on the site.

8. Groundwater sampling was undertaken by Mr. Hidle between 1:30 p.m., November 30, 1993, and 2:30 a.m., December 1, 1993,[6] at which time he drew water samples for laboratory analysis from 10 monitor wells (MW) and one deep well (DW). A duplicate sample was also retrieved at MWs 12R and 14, and equipment blanks were also obtained for laboratory analysis.

9. Between 8:25 p.m., December 4, 1993, and 3:40 a.m. December 5, 1993,[7] Mr. Hidle and a senior technician (Martin Hidle) augured 6 soil borings for use in preparing the MOP and collected one soil sample for laboratory analysis.

10. Petitioner delivered the water samples to the laboratory (Envirodyne, Inc.) on December 2, 1993, and the soil sample on December 6, 1993, for analysis. The laboratory completed its analysis of the water samples on December 13, 1993, and of the soil sample on December 14, 1993, and rendered its written reports (analysis) to Petitioner.[8]

11. Upon receipt of the laboratory data, Mr. Hidle completed his preparation of the MOP. (Petitioner's Exhibit 4.) That MOP contained the following conclusions and recommendations:

The initial dissolved hydrocarbon plume dimensions were based on data from groundwater sampling events of January and February 1993. Laboratory results from a more recent sampling event (11/30/93) indicate that plume size and hydrocarbon compound concentrations therein have decreased substantially (Table 4-2). Maximum groundwater contaminant concentrations decreased as follows: benzene from 53.3 ppb to 11.1 ppb; BTEX from 111.7 ppb to 20.6 ppb; total naphthalenes from 752 ppb to 246.1 ppb.

During the contamination assessment program task a small area of contaminated soil was found to be abutting the western end of the station building (CAR, Fig. 3-1, p. 35). Because of the presence of diesel compounds in the groundwater, it was assumed during preparation of the CAR that the soil too was contaminated with diesel.

In early December 1993 PI Environmental personnel installed six additional soil borings (Figure 3-1, SB-16 through SB-21) and collected one soil sample for laboratory analyses. The soil borings were augered in the immediate area of the previously defined contaminated soil plume, and soil samples were analyzed in the field by using a Foxboro OVA 128. Soil samples were collected vertically every two feet, beginning at one foot below ground surface and continuing until the water table was encountered.

A soil sample was collected from boring SB-17 at a depth of six feet below land surface. A net OVA reading of 160 ppm was observed from a duplicate sample taken from the same depth. The soil sample was tested by EPA Methods 3540/8100 (diesel compounds) and 9073 (TRPH). Laboratory results indicated that all diesel compounds were below laboratory detection limits, and the TRPH concentration was below normal background readings.

Soil contamination was reclassified as being gasoline in origin, because no diesel compounds were detected in the soil sample from SB-17. Section 17-770.200(2) Florida Administrative Code defines excessively contaminated soil, associated with gasoline contamination, as those that have a net

> OVA/FID reading equal to or greater than 500 ppm.
>
> From December 1993 sampling event, a maximum net OVA/FID reading of 316 ppm was obtained from a sample that was collected at five fee below land surface in SB-17. Based on these results, no excessively contaminated soil was found during the most recent sampling event.
>
> It is the recommendation of PI Environmental Inc. that a Monitoring Only Plan be implemented at Sierra Fina. This recommendation is based on the following findings: 1) Absence in the study area of any potable water wells within the Biscayne Aquifer because of salt water intrusion from the Atlantic Ocean 2) Absence of free phase hydrocarbons 3) Absence of excessively contaminated soil 4) Substantial decrease in concentrations of dissolved hydrocarbon compounds within the groundwater during the last year, and 5) relatively low levels of hydrocarbon contamination in the groundwater, i.e., based on the November 30, 1993 sampling event, maximum benzene of 11.1 ppb, maximum BTEX of 20.6 ppb, and maximum total naphthalenes of 246.1 ppb.
>
> It is our recommendation that groundwater from monitoring wells MW-8, MW-12R, MW-6, and MW-17 be sampled on a quarterly basis. Groundwater from the source area wells, MW-8 and MW-12R, should be analyzed quarterly by EPA Methods 602 and 610. Groundwater from the perimeter wells, MW-6 and MW-17, should be analyzed quarterly by EPB Method 602 and semiannually by EPA Methods 602 and 610.

Petitioner submitted the MOP to DERM on January 24, 1994.

12. Pertinent to this case, it is observed that the MOP was a brief document, consisting of only 13 pages of textual material, much of which was a restatement of material contained in the CAR. The balance of the report consisted of 5 "Figures" (three of which were contained in the CAR and one of which is an updated version of a CAR Figure); 2 "Tables" (an update of the

Water Table Elevation table contained in the CAR to include the November 30, 1993, data, and an update of the Summary of Groundwater Analyses contained in the CAR to include the November 30, 1993, and December 1, 1993, data); 6 "Geologic Log[s]" (a restating of the soil boring results noted in the field notes for December 4 and 5, 1993); copies of the laboratory (Envirodyne, Inc.'s) reports of groundwater analysis; and the laboratory's report on the soil analysis. In all, while apparently adequate and nicely presented, the MOP does not address a complex or unique issue, and does not evidence the expenditure, or need to expend, an inordinate amount of effort to produce.

13. Petitioner's MOP was disapproved by DERM on May 11, 1994, for the following reasons:

> 1. A complete round of groundwater analyses, no greater than six months old, is required. Therefore, all wells at this site must be sampled for EPA Method 418.1, and monitoring wells numbered MW-6, MW-9, MW-10, MW-11, MW-13, MW-16, and MW-17 must be sampled for EPA Method 610.
> 2. Because diesel contamination is present at this site, soil OVA readings above 50 ppm are considered to indicate excessively contaminated soil. Based on this OVA readings obtained for your Contamination Assessment Report (CAR) and this MOP, excessively contaminated soil does exist at this site. Since this coil could be a continuing source of contamination, it must be removed prior to the approval of a MOP.

Consequently, Petitioner was directed to submit an addendum to the MOP to address those issues.

14. On June 1, 1994, Petitioner gave notice to the Department and DERM of its intent to collect groundwater samples to address issues raised by DERM's MOP review letter. These samples were collected by Mr. Hidle and a technician (Leo Iannone) between 1:15 p.m. and 10:00 p.m., June 15, 1994.[9]

15. Petitioner delivered the water samples to the laboratory (Envirodyne, Inc.) on June 16, 1994. The laboratory completed its analysis and delivered its written reports to Petitioner on or about June 23, 1994.

16. Upon receipt of the laboratory data, Mr. Hidle completed the Monitoring Only Plan Addendum (Petitioner's Exhibit 8), and submitted it to DERM on July 5, 1994. The addendum addressed the additional groundwater analysis that was performed,

and with regard to the diesel contamination it observed, as follows:

> Soil analytical results (MOP, Page 62) are below laboratory detection limits for EPA 610 compounds; however, because groundwater at this facility is contaminated with both gasoline and diesel, we are concurring with DERM by reclassifying excessively contaminated soil as any soil that exhibits net OVA/FID readings of 50 ppm or greater, per Chapter 17-770 FAC.
>
> OVA/FID soil analyses were performed in accordance to Panhandle Industries, Inc. approved Comp QAP. Net OVA/FID soil results obtained during the CAR program task are shown in Figure 1-5. A maximum net OVA/FID reading of 887 ppm was obtained during CAR soil assessment activities which ended on November 29, 1992. Figure 1-6 shows net OVA/FID results obtained during the MOP program task. These MOP analyses are current through December 5, 1993. A maximum net OVA/FID of 316 ppm was obtained during this latter event. As is shown in comparison of Figures 1-5 and 1-6, it can be seen that the size of the soil contaminant plume and OVA/FID net soil readings therein have decreased significantly since initiation of the CAR. Also, by observing Figure 1-6, which has a scale of 1" = 20', it is evident that very little soil, if any can be excavated without jeopardizing the structural integrity of the station building. Furthermore, there exist the possibility that some soil contamination may underlie the building itself; therefore, soil excavation would most likely result in only partial removal of the contaminated soil plume.

The addendum concluded by recommending that the MOP be implemented as originally proposed, but with additional monitoring to assure a continuing decline in contamination.

17. The addendum, like the MOP, was a brief document and contains only 6 pages of textual material. The balance of the

addendum contains 6 "Figures" (all of which appeared in the CAR or MOP); 2 "Tables" (an update of the Water Table Elevations table contained in the MOP to include June 15, 1994, data, and an update of the Summary of Groundwater Analyses contained in the MOP to include the June 15, 1994, data); and the laboratory reports of groundwater analyses. As with the MOP, the addendum did not appear to address any complex or unique issues, and did not evidence the expenditure, or need to expend, an inordinate amount of time to produce.

18. On August 16, 1994, and August 26, 1994, DERM and the Department, respectively, approved the "monitoring only" proposal.

The request for reimbursement

19. Petitioner submitted its reimbursement application on or about August 23, 1994, and it was apparently complete on or about April 18, 1996. (Petitioner's Exhibit 11). That application sought recovery of the following sums for the items noted:

> 6. REMEDIAL ACTION PLAN [MOP and MOP Addendum] PREPARATION . . .
>
> | | | |
> |---|---|---|
> | a. | Personnel | 31442.55 |
> | b. | Capital Expense Items | |
> | c. | Rentals | 1127.45 |
> | d. | Mileage | 68.05 |
> | e. | Shipping | 35.00 |
> | f. | Well Drilling | |
> | g. | Permits | |
> | h. | Analysis | 3680.00 |
> | i. | Miscellaneous | 1601.25 |
>
> REMEDIAL ACTION PLAN

PREPARATION TOTAL	37954.30

* * *

13. REIMBURSEMENT APPLICATION PREPARATION
Supplementary Forms

a.	Personnel	795.00
b.	Capital Expense Items	
c.	Rentals	15.00
d.	Mileage	.80
e.	Shipping	86.81
f.	Well Drilling	
g.	Permits	
h.	Analysis	
i.	Miscellaneous	60.75
	APPLICATION PREPARATION TOTAL	958.36
	CERTIFIED PUBLIC ACCOUNTANT REVIEW FEE	500.00
	APPLICATION GRAND TOTAL	39412.66

19. By letter (Order of Determination of Reimbursement) of June 27, 1996, the Department responded to Petitioner's reimbursement request as follows:

> We have completed review of your Reimbursement Application for expenses incurred during the Remedial Action Plan/Monitoring Only Plan program task at this site and have determined that $13,198.70 of the total $39,412.66 requested is allowable for reimbursement. This amount will be paid to the person responsible for conducting site rehabilitation when processing is completed by the Comptroller's Office.
>
> Some adjustments to the amount of reimbursement requested have been made. The following list details these adjustments. Citations refer to the specific sections of the enclosed Reimbursement Application Summary Sheets:
>
> 1. $24,766.25 in Section 6A, $259.95 in Section 6C, $28.20 in Section 6D and $63.25 in Section 6I were deducted because the total personnel hours (413.15 hours) and the total cost of $39,412.66 claimed for performing a limited scope of

work consisting of 78.34 hours of field activities, two rounds of analyses (59 samples) and two letter reports have been determined to be excessive. However, actual field activities (including a reasonable amount of preparation), two rounds of analyses and a reasonable amount of personnel time to prepare two letter reports have been allowed.

2. $162.50 in Section 6A, $9.00 in Section 6E and $331.15 in Section 6I were deducted for costs associated with providing backup for the Contamination Assessment reimbursement application. These costs are not reimbursable in this application which is for the Remedial Action Plan/Monitoring Only Plan program task.

3. $184.80 in Section 6A and $394.56 in Section 6I were deducted for field supplies, ice, conducting database modifications and purchasing office supplies, which are considered to be overhead. These costs are not justified in addition to the loaded personnel rates which already include overhead and profit.

4. $11.76 in Section 6I was deducted because the rate for reproduction ($0.99 per page) has been determined to be excessive. However, $0.15 (per page) has been allowed based on the predominant rate claimed in other reimbursement applications for similar rates.

5. $19.56 in Section 13E was deducted for costs added to the application preparation claimed as a markup. Reimbursement for application preparation is limited to actual costs only.

6. $17.02 was added to the application grand total to cover the cost of reproducing the reimbursement application and invoices and shipping the replacements to the Department.

(Petitioner's Exhibit 12.)

20. Petitioner filed a timely challenge to contest the Department's decision. That challenge disputed the Department's action, as set forth in paragraphs numbered 1 through 4 of the letter, but Petitioner did not then, or at hearing, dispute the Department's action with regard to the matters contained in paragraphs numbered 5 and 6 of the Department's letter. (Petitioner's Exhibit 13). Subsequently, at hearing, Petitioner withdrew its request for reimbursement regarding the items contained in paragraph 3 of the Department's letter. (Transcript, page 101).

The claim for the cost of preparing the reimbursement application

21. Petitioner's claim for the cost of preparation of the reimbursement application totalled $1,458.36 (including the certified public accountant review fee). The Department proposed to deduct $19.56 (in Section 13E), and to add $17.02 to cover certain costs, as noted in the Department's letter. (Petitioner's Exhibits 12 and 13). Petitioner offered no objection to the Department's decision and, therefore, Petitioner should be awarded $1,455.82, without the need for further discussion, as the cost of preparing the reimbursement application.

The claim for the cost of preparation of the MOP and MOP Addendum

22. Petitioner's application for reimbursement claimed

413.15 personnel hours ($31,442.55) were dedicated to the development of the MOP (329.42 hours/$25,500.95) and the MOP Addendum (83.73 hours/$5,941.60). (Respondent's Exhibit 7, and Transcript, pages 188-190).

23. In its initial review, the Department approved 55.67 hours ($3,790.45) for the MOP and 41.92 hours ($2,538.55) for the MOP Addendum, for a total award of $6,329.00. Subsequently, the Department resolved to accept as reasonable, 89 hours ($6,308.00) for the MOP and 83.73 hours ($5,941.60) for the MOP Addendum, for a total award of $12,249.60 for personnel costs.[10]

24. The 83.73 hours ($5,941.60) agreed to by the Department for the MOP Addendum was the precise amount Petitioner requested in its reimbursement application; however, the 89 hours ($6,308.00) accepted by the Department for the MOP is clearly less than the 329.42 hours ($25,500.95) Petitioner had requested. With regard to the difference, the Department views the request as excessive. In contrast, Petitioner contends the time requested was reasonable. Here, the Department's view has merit.

25. To support the reasonableness of the hours (labor) claimed, Petitioner pointed to the "Daily Time Log[s]" which were contained within the reimbursement application, and which it contended contain an accurate recording of the hours worked and the task performed. (Petitioner's Exhibits 11, and Transcript, pages 29 through 31). According to Mr. Hidle, all employees of

the company were required to keep a notepad on which they were to record the job (customer), hours worked, and task performed. At some future date, perhaps up to a week or more, those entries were ostensibly transferred to the "Daily Time Log." (Transcript, pages 29 through 31, and page 84). Consequently, Mr. Hidle contends Petitioner's "Daily Time Log[s]" may be relied upon to accurately reflect the hours actually worked, and that those hours were reasonably expended.

26. Here, considering the record, Mr. Hidle's testimony is rejected as not credible or, stated otherwise, inherently improbable and unworthy of belief. In so concluding, it is observed that there is nothing of record, either in the exhibits or testimony offered at hearing, that could possibly explain the dichotomy between the number of hours claimed for development of the MOP (329.42) and the number of hours claimed for development of the MOP Addendum (83.73). Notably, neither project was particularly complex, and the tasks performed were reasonably alike. Similarly, it is inherently improbable, given the limited field work and the product produced (the MOP), that production of the MOP could require 329.42 hours or, stated differently, eight and one-quarter weeks, at 40 hours per week. Finally, most of the entries for which substantial blocks of time are assigned contain only vague or general terms to describe the task, such as "literature review," "MOP/RAP preparation," "file review," and "schedule/plan/coordinate RAP/MOP." Such practice renders it

impossible to determine what work was actually done, whether the work was duplicative, and whether the time was actually expended or reasonable.

27. Given the record, it must be concluded that the proof offered by Petitioner to support the number of hours claimed for development of the MOP is not credible or persuasive, and that it would be pure speculation to attempt to derive any calculation or meaningful estimate based on such proof. In the end, Petitioner must bear the responsibility for such failure.

28. While Petitioner's proof offers no credible basis upon which to derive the number of hours dedicated to the MOP and their reasonableness, Petitioner obviously dedicated time to the MOP, and to the extent the record provides a reasonable basis on which to predicate an award, it is appropriate to do so. Here, given the lack of credibility of Petitioner's "Daily time Log[s]," as well as the testimony of Mr. Hidle, to provide a basis on which to derive the number of hours actually worked, and then test those hours against the standard of reasonableness, the only option is to award the 89 hours or $6,308.00, which the Department agrees were reasonably expended.

29. Finally, with regard to the miscellaneous cost items, as opposed to personnel hours, rejected by the Department's letter of June 27, 1996, it must be resolved that Petitioner failed to offer, at hearing, any compelling proof that the items rejected by the Department were reasonable expenditures incurred in development of the monitor only program. Consequently, the following sections of Petitioner's reimbursement application have been reduced by the sums stated: $295.95 deducted from Section 6C; $28.20 deducted from Section 6D; $9.00 deducted from Section 6E; and $800.72 deducted from Section 6I.

The award for reimbursement

30. Given the proof, Petitioner should be awarded the following sums, for the items indicated, as reimbursement for preparation of the MOP and MOP Addendum:

a.	Personnel	$12,249.60
b.	Capital Expense Items	
c.	Rentals	867.50
d.	Mileage	39.85
e.	Shipping	26.00
f.	Well Drilling	
g.	Permits	
h.	Analysis	3680.00
i.	Miscellaneous	800.53
	TOTAL	17,663.48

For expenses involved in preparation of the reimbursement application, Petitioner should be awarded the following sums for the items indicated:

a.	Personnel	$ 795.00
b.	Capital Expense Items	
c.	Rentals	15.00
d.	Mileage	.80
e.	Shipping	67.25
f.	Well Drilling	
g.	Permits	
h.	Analysis	
i.	Miscellaneous	77.77
	APPLICATION PREPARATION TOTAL	955.82
	CERTIFIED PUBLIC ACCOUNTANT REVIEW FEE	500.00
	TOTAL FOR APPLICATION PREPARATION	1,455.82

In all, Petitioner should be accorded a total reimbursement of $19,119.30.

CONCLUSIONS OF LAW

31. The Division of Administrative Hearings has jurisdiction over the parties to, and the subject matter of, these proceedings. Sections 120.569 and 120.57(1), Florida Statutes.

32. Pertinent to this case, Section 376.3071, Florida Statutes, provides for the reimbursement of a party who has incurred costs for site cleanup. More particularly, Section 376.3071(12), Florida Statutes, provides:

> (b) Conditions.–
> 1. The owner, operator, or his or her designee of a site which is eligible for restoration funding assistance in the EDI, PLRIP, or ATRP programs shall be reimbursed from the Inland Protection Trust Fund of allowable costs at reasonable rates incurred on or after January 1, 1985, for completed program tasks as identified in the department rule promulgated pursuant to paragraph (5)(b) . . .
>
> (d) Amount of reimbursement.– The department shall reimburse actual and reasonable costs for site rehabilitation. The department shall not reimburse interest on the amount of reimbursable costs for any reimbursement application. However, nothing herein shall affect the department's authority to pay interest authorized under prior law.

33. Also pertinent to this case, Chapter 62-773, Florida Administrative Code, includes the following rule provisions:

> 62-773.200 Definitions.
>
> * * *
>
> (11) "Integral" means costs essential to completion of site rehabilitation.
>
> * * *
>
> (14) "Reimbursement" means payment of money from the Inland Protection Trust Fund to the person responsible for conducting site rehabilitation for allowable costs incurred.
>
> * * *

62-773.700 Application for Reimbursement.

Upon completion of one or more program tasks at sites with an eligible discharge, the person responsible for conducting site rehabilitation may apply for reimbursement of allowable costs actually incurred in conducting site rehabilitation. Pursuant to Section 376.3071(12), F.S., payment shall be made in the order in which the Department receives completed applications provided sufficient information has been provided to determine the allowability and reasonableness of all costs claimed.

34. Here, Petitioner has requested reimbursement under the provisions of Section 376.3071(12), Florida Statutes. As the claimant, the burden rests on Petitioner to demonstrate entitlement to compensation. Balino v. Department of Health and Rehabilitative Services, 348 So. 2d 349, 350 (Fla. 1st DCA 1977) ("[T]he burden of proof, apart from statute, is on the party asserting the affirmative issue before an administrative tribunal.") See also Florida Department of Transportation v. J.W.C. Co., Inc., 396 So. 2d 778 (Fla. 1st DCA 1981).

35. As noted in the findings of fact, Petitioner failed to present credible evidence to demonstrate the number of hours dedicated to the MOP or from which the number of hours reasonably expended could be derived. When such proof is not forthcoming, such failure is generally fatal to the claim. See e.g. Mercy Hospital, Inc. v. Johnson, 431 So. 2d 687 (Fla. 3d DCA 1983), and Miller v. First American Bank and Trust, 607 So. 2d 483 (Fla. 4th DCA 1992). However, the Department conceded 89 hours ($6,308), as reasonably incurred in the development of the MOP. Given the

record, the alternative offered by the Department's concession is preferable to denying any reimbursement, and 89 hours ($6,308) are accepted as reasonable for development of the MOP.

36. In all, the record supports the conclusion that Petitioner has demonstrated entitlement to the expenses enumerated in paragraph 30, supra.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that a final order be entered which awards Petitioner the sum of $19,119.30, as reimbursable costs.

DONE AND ENTERED this 22nd day of February, 1999, in Tallahassee, Leon County, Florida.

WILLIAM J. KENDRICK
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 22nd day of February, 1999.

ENDNOTES

1/ Prior to hearing, the Department approved an additional $5,920.60 for reimbursement and, at hearing, Petitioner withdrew its request for reimbursement for the costs ($579.36) noted in item 3 of the Order of Determination of Reimbursement (Petitioner's Exhibit 12).

2/ Petitioner also had marked for identification Petitioner's Exhibits 16 through 18, 21, 26, and 27; however, they were not accepted into evidence.

3/ The Department also had marked for identification its (Respondent's) Exhibit 6; however, it was not accepted into evidence.

4/ There are often several phases to the remediation of a site contaminated by petroleum products. An early phase is the contamination assessment, which assesses the severity and extent of petroleum contamination in the soil and groundwater. The results of this assessment are presented in the CAR. The next stage in remediation may be the development of a Remedial Action Plan (RAP), which proposes a design or system to remediate the groundwater or soil contamination. All RAPs must contain projections on the cost to remediate, the cost of the system, the cost of operating the system, the duration of time the system will run, and the projected life of the system. Additionally, a RAP must compare the selected action against other options, regarding overall cost and effectiveness. However, if sampling results during the containment assessment indicate that the levels of contamination are low or near target levels, such as in the instant case, a RAP system may not be required and a Monitoring Only Plan (MOP) may be approved. Such a plan involves monitoring over time to assess whether, as expected, the levels of contamination are decreasing.

5/ Petitioner has previously been reimbursed by the Department for all expenses associated with developing the CAR and those expenses are not at issue in this case.

6/ Mr. Hidle's field notes (Petitioner's Exhibit 5) reflect that he left the office at 11:30 a.m., November 30, 1993; arrived at the job at 1:30 p.m.; departed the job at 2:30 a.m., December 1, 1993; and, arrived at the office at 3:15 a.m.

7/ Mr. Hidle's field notes (Petitioner's Exhibit 5) reflect that he and the technician left the office at 7:45 p.m., December 4, 1993; arrived at the job site at 8:25 p.m.; departed the job site at 3:40 a.m., December 5, 1993; and arrived at the office at 4:30 a.m.

8/ Each water sample was analyzed in accordance with EPA Method 602 and some of the samples, but not all, were tested in accordance with EPA Methods 610 and 418.1, as well as for lead.

9/ Mr. Hidle's field notes (Petitioner's Exhibit 5) reflect that he left the office (to load equipment) at 10:00 a.m., June 15,

1994, arrived at the job site at 1:15 p.m., departed the job site at 10:00 p.m., and arrived at the office at 11:00 p.m., where unloading was completed at 11:30 p.m. The notes reflect the technician arrived separately (at the job-site) at 1:15 p.m. and departed at 10:00 p.m.

10/ The Department's concession may have been generous; however, it is accepted.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.