

BEFORE THE
ILLINOIS POLLUTION CONTROL BOARD

FREEDOM OIL COMPANY,)
 Petitioner,)
 -vs-) PCB 10-46
 ILLINOIS ENVIRONMENTAL) (UST Appeal)
 PROTECTION AGENCY,)
 Respondent.)

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STATE OF ILLINOIS
Pollution Control Board

Hearing held, pursuant to notice, on Wednesday,
May 9, 2012 at the hour of 10:30 a.m. at 1021 North
Grand Avenue, Springfield, Illinois, before CAROL
WEBB, duly appointed Hearing Officer.

L.A. REPORTING SERVICE
(312) 419-9292

REPORTER: LAUREL A. PATKES, CSR #084-001340

1 APPEARANCES:

2 ROBERT RIFFLE

3 appearing on behalf of
4 Petitioner;

5 JAMES G. RICHARDSON

Special Assistant Attorney General

6 appearing on behalf of
7 Respondent.

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I N D E X

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3	WITNESS	DIRECT	CROSS	REDIRECT	RECROSS
4	ALLAN GREEN				
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EXHIBITS

None

1 HEARING OFFICER WEBB: Good morning.
2 My name is Carol Webb. This is the hearing for PCB
3 10-46, Freedom Oil Company versus IEPA. It is
4 May 9th, and we are beginning at 10:30 a.m.

5 For the record, although the
6 petitioner is located in McLean County, we are
7 holding the hearing in Springfield as there was no
8 known public interest in this case.

9 At issue in this case is respondent's
10 denial of reimbursement for certain costs because
11 the request allegedly lacked supporting
12 documentation and exceeded minimum requirements for
13 activities. The decision deadline in this case is
14 August 16th. The Pollution Control Board members
15 will make the final decision in this case. My
16 purpose is to conduct this hearing in a neutral and
17 orderly manner so that we have a clear record of the
18 proceedings.

19 This hearing was noticed pursuant to
20 the Act in the Board's rules and will be conducted
21 pursuant to Sections 101.600 through 101.632 of the
22 Board's procedural rules.

23 At this time, I'd like to ask the
24 parties to please make their appearances on the

1 record.

2 MR. RIFFLE: Good morning. Robert
3 Riffle on behalf of Freedom Oil Company, and with me
4 today is Allan Green. He is the president of
5 Midwest Environmental, the consultant who worked on
6 behalf of Freedom Oil Company.

7 MR. RICHARDSON: James G. Richardson.
8 I'm a Special Assistant Attorney General. I am also
9 an Illinois EPA Deputy General Counsel on behalf of
10 the respondent, Illinois EPA. With me is Brian
11 Bauer, our intended witness in this matter.

12 HEARING OFFICER WEBB: Okay. Would
13 the petitioner like to make any opening statement
14 today?

15 MR. RIFFLE: Very briefly I would.

16 This case I think is a very simple
17 case and it's a very narrow dispute. There was an
18 adjustment to the invoice that was submitted by
19 Midwest Environmental, and the two key aspects of
20 that reduction that we're here to discuss today are
21 the reduction based on the cubic yards of material
22 that were required to be disposed of and also
23 backfilled and also the square footage of the area
24 where pavement was required to be replaced as an

1 engineered barrier.

2 The EPA took what we believe to be an
3 arbitrary view based on the invoice from Waste
4 Management, they took the number of tons of waste
5 that was disposed of and rejected the unit volume
6 submitted by Freedom Oil and Midwest based solely on
7 their calculation of what they thought the cubic
8 yards would be based off of that tonnage amount.

9 We believe that that was arbitrary.
10 It doesn't take into account the difference in
11 weight and volume of different materials and believe
12 that the IEPA had no valid basis to reduce that
13 submittal as they did.

14 In fact, when you look at the Waste
15 Management invoice, the Waste Management invoice
16 would have indicated a total volume of approximately
17 2,000 cubic yards whereas only 670 cubic yards were
18 submitted by Midwest Environmental, so we think it
19 was arbitrary and capricious for them to simply
20 reduce the volume as requested by Midwest
21 Environmental with no evidence that that was
22 appropriate.

23 And also, there will be testimony
24 that that was unprecedented. In the 26 years or so

1 that Midwest Environmental has been doing this, this
2 is the first and only time that there's ever been
3 what they viewed to be an arbitrary reduction in
4 that amount.

5 Secondly, on the square footage of
6 the pavement that was necessary for the engineered
7 barrier my client has measured and remeasured, there
8 was a very substantial reduction, virtually, a 50
9 percent reduction in the square footage of approved
10 pavement, and again, we think it was arbitrary and
11 capricious to simply reduce that.

12 The fact of the matter is that the
13 pavement was necessary, it was installed, and it was
14 built for and should have been paid.

15 So in our view, it's a very simple,
16 straightforward matter. The testimony on those two
17 issues would be very brief, and we believe that
18 these two items should have been reimbursed and were
19 not, and therefore, that is, in a nutshell, the
20 basis of our view.

21 HEARING OFFICER WEBB: Mr. Richardson,
22 would you like to make any opening statement?

23 MR. RICHARDSON: I have no opening
24 remarks.

1 HEARING OFFICER WEBB: Okay.

2 Mr. Riffle, you may call your first witness.

3 MR. RIFFLE: Yes. Our first witness
4 will be Mr. Allan Green.

5 HEARING OFFICER WEBB: And would the
6 court reporter please swear in the witness?

7 (Whereupon the witness was sworn
8 by the reporter.)
9

10 ALLAN GREEN
11 called as a witness herein, on behalf of Petitioner,
12 having been first duly sworn on his oath, was
13 examined and testified as follows:
14

15 DIRECT EXAMINATION

16 BY MR. RIFFLE:

17 Q. Mr. Green, would you please explain
18 your position as it relates to this case here today?

19 A. We're the environmental consultant
20 contract for Freedom Oil Company regarding the
21 leaking underground storage tank incident at the
22 subject site.

23 Q. And what's the name of your company?

24 A. Midwest Environmental Consulting and

1 Remediation Services.

2 Q. And what's your position with that
3 company?

4 A. The president.

5 Q. And could you give a brief history of
6 that company?

7 A. It was founded in 1991. Basically
8 has been in business since then strictly on
9 environmental consulting basis, and we do between
10 one and three millions dollars worth of work every
11 year from the inception.

12 Q. Do you know approximately how many
13 underground storage tank cases you've closed over
14 that period of time?

15 A. 300 plus.

16 Q. And does your company focus really on
17 the underground storage tank business?

18 A. That's a large percentage of our
19 business.

20 Q. Can you give some estimate of
21 percentage over the years?

22 A. 75 percent.

23 Q. And do you have a particular
24 philosophy or method of dealing with underground

1 storage tank sites?

2 A. It's our opinion that the reason
3 we're in existence is to make sure that these sites,
4 any work that's done is performed as efficiently and
5 economically as possible. That's why the engineer
6 is supposed to sign off on things. Otherwise, there
7 would be no reason for us to be there.

8 Q. And with respect to this site in
9 particular, can you just give a brief overview of
10 Midwest Environmental's work on this particular
11 site?

12 First of all, explain where the site
13 is and just give some general background.

14 A. The site is in Bloomington, Illinois,
15 an existing station that basically they were
16 considering taking out of operation. We went out,
17 checked the sumps around the islands. There was
18 some vapor in the tank sumps so they decided they
19 were going to go ahead and take the site out of
20 operation rather than replace the tanks.

21 We got an incident number for the
22 site with IEMA and proceeded to arrange for the
23 tanks to be removed. The tanks were removed. There
24 was contaminated backfill and soil removed to the

1 extent we thought, based upon field screenings, it
2 was clean. The site was backfilled, and then the
3 entire site was paved at the request of the client
4 because they were going to sell the property so the
5 entire site was paved.

6 Early action report, based upon the
7 lab results that came back, we had one sample that
8 was slightly above the generic cleanup standards
9 remaining in the excavation. Requested closure on
10 the site based upon early action. The project
11 manager denied that based upon the one sample and at
12 the same time remarked that we should not have even
13 called in an incident number. There was no reason
14 for it. It shouldn't even be in the program because
15 there wasn't contamination there.

16 I said, well, there was obviously
17 contamination there because the one sample was above
18 the cleanup standards.

19 So she again insisted that we do a
20 stage 1 investigation in order to close it. We
21 reached an agreement with her that rather than do an
22 entire stage 1, we would go out 20 feet from the
23 sidewall where the one sample was bad, that was
24 above the cleanup standards.

1 We went out there, we did that, and
2 that boring was clean. We then requested closure on
3 the site, and that was granted. The reimbursement
4 for this was sent in based upon the bills for the
5 tank removal, the excavation, disposal of
6 contaminated material, the backfill, and paving of
7 the original area which would be there as an
8 engineered barrier because we did have the one
9 sample that had contamination there.

10 Like I said, we got the closure, but
11 then the reimbursement request came back with the
12 deductions based entirely on the landfill bill.
13 Everything from the paving to the excavation,
14 transportation, disposal was all based upon the tons
15 that were hauled to the landfill, and that's the
16 first time that's ever even come up, and that's
17 basically where we are today.

18 Q. I'm going to draw your attention to
19 the record that's been submitted in this case. This
20 would be starting at page 90 of the record.

21 Do you recognize that document?

22 A. Yes. That's the bill.

23 MR. RIFFLE: Wait just a minute while
24 everybody finds there way to that page.

1 HEARING OFFICER WEBB: 90?

2 MR. RIFFLE: 90, yes.

3 HEARING OFFICER WEBB: Okay.

4 THE WITNESS: That's the bill from
5 the Peoria city/county landfill, Waste Management,
6 for the disposal cost of the soil.

7 Q. BY MR. RIFFLE: And can you explain
8 in some detail exactly what format that is, what
9 we're looking at there in terms of the information
10 that's portrayed?

11 A. It's broken down based upon the
12 trucks that came in over that timeframe from the
13 site, and it's basically based upon the scale
14 tickets.

15 Q. So the tonnage that's on there would
16 be actually accurate to the hundred dressed of a
17 ton, is that correct?

18 A. Yes.

19 Q. And they're weighing that material as
20 it comes in, correct?

21 A. Yes.

22 Q. And what's your understanding of the
23 next entry there where it says yards?

24 A. That's just their generic yardage

1 calculations based upon the tons of material that
2 came in.

3 Q. And if I understand that correctly,
4 they're essentially multiplying the tonnage by three
5 to get the estimated number of yards?

6 A. Yes.

7 Q. And do you know how many tons in
8 total were shipped to the Peoria city/county
9 landfill?

10 A. Slightly over 670 tons.

11 Q. And if you look at page 093, that's
12 somebody's calculation at 607.34 tons, is that
13 correct?

14 A. Yes.

15 Q. Okay. And am I correct in
16 understanding that under Waste Management's formula,
17 they would multiply that by three to get the
18 estimated number of yards of materials disposed of,
19 is that correct?

20 A. Yes. That's their own internal
21 calculation.

22 Q. So the way they're calculating would
23 be three times 670.34?

24 A. Right.

1 Q. And that would be just over 2,000
2 cubic yards?

3 A. Yes.

4 Q. And how many -- well, strike that.
5 I want to turn your attention now to
6 page 75 of the record.

7 How many cubic yards of excavated and
8 disposed material did you bill for?

9 A. 560.

10 Q. And that's indicated in the first
11 section of page 75 of the record, is that correct?

12 A. Yes.

13 Q. And how was that calculated?

14 A. It was based upon the size of the
15 excavation.

16 Q. Okay. And it's an actual calculation
17 of the volume of the excavation itself, correct?

18 A. Right.

19 Q. And how many cubic yards were
20 backfilled?

21 A. 670.

22 Q. And again, that was based on the size
23 of the excavation?

24 A. Right, with the tank volume added in

1 because the tanks were gone.

2 Q. So there's a differential of the
3 amount taken out compared to what's put back in
4 because you net out the volume of the tanks
5 themselves, is that correct?

6 A. Right.

7 Q. And is it your testimony that those
8 are accurate volumes as to the cubic yards of
9 materials excavated and the cubic yards of materials
10 that were backfilled in the excavation?

11 A. Yes.

12 Q. Do you have an understanding of what
13 the EPA did in terms of the reduction of your cubic
14 yard submittals?

15 A. They basically took the landfill
16 bill, number of tons, divided it by 1.5, and then
17 basically generically applied that to each section
18 of the individual subcontractor bills.

19 Q. And if you look at page 93, the
20 calculation towards the bottom of page 93, is that
21 essentially a numerical depiction of what you've
22 just described?

23 A. Yes.

24 Q. It would be converted as 670 tons off

1 of the Waste Management invoice, divided that by 1.5
2 to get 446.89 cubic yards?

3 A. Yes.

4 Q. And that 446.89 cubic yards, if you
5 look back at page 75, it looks like that's been
6 rounded to 447 yards?

7 A. Yes.

8 Q. And is that what your understanding
9 of what they've actually agreed to pay is based on?

10 A. Yes.

11 Q. In the years that you've been doing
12 this, has this ever occurred before where your cubic
13 yard claims have been reduced based on that formula?

14 A. On budgets and estimates, yes, but
15 never on the actual billing.

16 Q. I understand this was an early action
17 site, is that correct?

18 A. Yes.

19 Q. And what is an early action site?

20 A. It's basically the period prior to
21 the investigation phase of the site where in this
22 case would involve the tank removal, removal of
23 contaminated material within three feet of the tanks
24 themselves, and an attempt to remove the

1 contaminated material and hopefully get closure
2 based upon that, and it's a period where we can do
3 the work without prior approvals of plans and
4 budgets on the site at the time the tanks are
5 removed.

6 Q. And is there any limitation on how
7 many cubic yards of material you can remove under
8 early action?

9 A. Yes.

10 Q. And what's the formula -- let me
11 strike that.

12 At the time this project was
13 completed, what was the formula as to the maximum
14 cubic yards you could have removed under early
15 action?

16 A. It's based upon the size of the tanks
17 and what we call the three foot rule where you can
18 go three feet in all directions from the tanks
19 themselves as a maximum.

20 Q. And as of the time of this project,
21 do you know how many cubic yards of material you
22 could have removed under early action for this site?

23 A. I would have to calculate it out. We
24 were below the maximum amount.

1 Q. So you could have actually removed
2 more under that early action than you actually did
3 in this particular case?

4 A. Yes.

5 Q. And again, before we leave this
6 topic, the numbers that you submitted as depicted on
7 page 75, the 560 cubic yards of excavated material
8 and the 670 cubic yards of backfilled material, do
9 you have any doubt that those are legitimate actual
10 reasonable cubic yardage figures for this particular
11 project?

12 A. No.

13 Q. Turning now to page 77 of the
14 administrative record, this, as I understand it, is
15 the calculation of the asphalt replacement claim?

16 A. Yes.

17 Q. And how many square feet of asphalt
18 did you submit a claim for on this particular
19 project?

20 A. 945.

21 Q. What was the original submittal?

22 A. 1,711.

23 Q. And what was that 1,711 based on?

24 A. Based upon the calculated area of

1 what was removed for the tank removal and then
2 replaced as an area of the engineered barrier.

3 Q. Did you actually physically calculate
4 that area that was necessary?

5 A. Yes.

6 Q. And did you do that on more than one
7 occasion?

8 A. Yes.

9 Q. And is it your testimony that the
10 1,711 square feet was actually reasonably necessary
11 to complete this project within the IEPA guidelines?

12 A. Yes.

13 Q. And it appears to me, if I'm
14 understanding this correctly, that the \$3.36 per
15 foot rate was actually approved, is that right?

16 A. Yes.

17 Q. As well as the six-inch thickness?

18 A. Yes.

19 Q. Those checkmarks next to it
20 essentially say that that's approved?

21 A. I would assume. Those are made not
22 by us.

23 Q. Okay. And at the end of the day, is
24 it your understanding that out of the 1,711 square

1 feet claimed that 945 square feet were actually
2 approved?

3 A. Yes.

4 Q. And you testify as to what the
5 original claimed dollar amount was for the other
6 1,711 square feet of pavement?

7 A. It was \$5,750.

8 Q. And as a result of the reduction in
9 the square footage, what was the resulting
10 reduction? What was the final number approved for
11 the asphalt?

12 A. 3,175.

13 Q. And am I correct in assuming that
14 number next to it, that \$2,574.80 number, is the
15 reduction in the amount for the pavement?

16 A. Yes.

17 Q. And then I forgot to ask you when we
18 were back on page 75 but what's the total amount of
19 reduction based on the reduction in the approved
20 cubic yards? What was the net effect of the
21 reduction in the allowances of the cubic yards that
22 you submitted?

23 A. I would have to look at the numbers.

24 Q. Why don't you do it individually on

1 the excavation first.

2 A. It went from 34,810 down to 27,785,
3 and the backfill was 14,612 down to 10,893.

4 Q. And then if you look at page 12, my
5 understanding is this would sum up all those
6 numbers, is that correct?

7 A. Yes.

8 Q. And what was the overall reduction?

9 HEARING OFFICER WEBB: Page 76 of the
10 record.

11 MR. RIFFLE: I'm sorry. Page 76.

12 Q. What was the overall reduction as a
13 result of the disapproval of your square yardage
14 volumes on page 75?

15 A. Went from 49,423 down to 38,668.

16 Q. Again on page 77, the reduction on
17 the pavement was \$2,574.80, is that correct?

18 A. Yes.

19 Q. Have all of the subcontractors
20 utilized on this project been paid?

21 A. Yes.

22 MR. RIFFLE: That's all the questions
23 I have.

24 HEARING OFFICER WEBB: Okay.

1 Mr. Richardson?

2 MR. RICHARDSON: Thank you.

3

4 CROSS-EXAMINATION

5 BY MR. RICHARDSON:

6 Q. Mr. Green, I wanted to look at pages
7 90 through 93 of the record. Those are the weight
8 ticket inventory for the site, and I don't have a
9 calculator but clearly, if you look at Waste
10 Management's calculation of cubic yards, that is a
11 fairly significant number probably, 1,500 to 2,000,
12 correct?

13 A. Yes.

14 Q. And you only sought 560 cubic yards.
15 I mean, if this was the invoice for
16 this project, why did you seek the 1,500 to 2,000
17 cubic yards?

18 A. Because we only excavated 560 cubic
19 yards. We based that on the size of the excavation,
20 the extent, and the depth of the excavation. That's
21 how we based the cubic yards. Waste Management was
22 just giving, kind of like the EPA uses a generic 1.5
23 percent or 1.5 tons per yard, in this case, Waste
24 Management is using 3, so it's basically doubling

1 what the EPA estimate would be.

2 Part of the problem here is
3 everything that you get from the landfill is all
4 based in tons, actual tons, and everything on the
5 EPA reimbursement side is in cubic yards, so the
6 only way we have to get accurate measurement of that
7 is measuring the excavation.

8 Q. Okay. So you're looking at the
9 dimensions of the pit to come up with that
10 calculation?

11 A. Right.

12 Q. But you do agree that when a low dose
13 of the landfill is going onto a scale, the tonnage
14 rate is the actual weight of the load minus the
15 weight of the vehicle which they account for?

16 A. Right.

17 MR. RICHARDSON: I have no other
18 questions.

19 HEARING OFFICER WEBB: Mr. Riffle?

20 MR. RIFFLE: Yes.

21

22 REDIRECT EXAMINATION

23 BY MR. RIFFLE:

24 Q. Mr. Green, could you explain just in

1 general the correlation between tonnage and cubic
2 yards of material and how it might differ?

3 A. Well, it's going to differ based upon
4 the density of the material, the weight. You know,
5 there's a difference between sand, pea gravel, clay,
6 fly ash, you know, whatever you're dealing with.

7 One of the big problems we come up
8 with with weight differences in soils is moisture
9 content. Obviously, a wet saturated soil is going
10 to be a lot heavier than a dry material is, so it
11 will vary based on the types of materials and the
12 moisture content.

13 Q. And I want to make sure I understand
14 this correctly and I think the best way to do this
15 would be to look again at page 93 of the record.

16 If I understand correctly, the IEPA
17 is reducing the tonnages by dividing by 1.5, is that
18 correct?

19 A. Yes. They're calculating their
20 estimate of the number of yards based on the
21 tonnage.

22 Q. And the Waste Management estimate is
23 actually three times the number of tons, is that
24 correct?

1 A. Yes.

2 Q. So it's really not even just double.
3 It's even more dramatic than that, is that correct?

4 A. Yes.

5 Q. And to be honest, in this case, it's
6 probably unrealistic to go three. I mean, that's
7 their bookkeeping. That's how they do that. Like I
8 said, we base it all upon the excavation extents.
9 That's the accurate way to do it.

10 MR. RIFFLE: No further questions.

11 MR. RICHARDSON: I have no follow-up.

12 HEARING OFFICER WEBB: Okay.

13 Mr. Riffle, do you have anything further you'd like
14 to present?

15 MR. RIFFLE: We don't. That's our
16 case.

17 HEARING OFFICER WEBB: Okay.

18 Mr. Richardson, you may call your witness.

19 MR. RICHARDSON: We call Brian Bauer
20 to the stand.

21 HEARING OFFICER WEBB: All right.

22 Will the court reporter please swear the witness?

23 (Whereupon the witness was sworn
24 by the reporter.)

1

BRIAN BAUER

2

called as a witness herein, on behalf of Respondent,

3

having been first duly sworn on his oath, was

4

examined and testified as follows:

5

6

DIRECT EXAMINATION

7

BY MR. RICHARDSON:

8

Q. Could you please state your name?

9

A. Brian Bauer.

10

Q. And could you briefly tell us what,

11

if any, higher education degrees you've attained?

12

A. I have a bachelor's in biology at

13

Northland College, and I have a master's in

14

environmental studies from UIS.

15

Q. And what's your current occupation?

16

A. I'm a project manager with the

17

Illinois Environmental Protection Agency.

18

Q. How long have you been with the

19

Illinois EPA?

20

A. Since 1992.

21

Q. And have all those years been in the

22

Agency's leaking underground storage tank program?

23

A. Yes, they have.

24

Q. And could you currently describe what

1 your duties are today?

2 A. Presently I process and kind of run
3 the reimbursement program for the underground
4 storage tank section. I pseudo manage I guess the
5 claims as they come in the door. I assign the
6 claims to project managers after I review them and
7 then sign, well, stamp the letters as they go out.

8 Q. Basically approval the letters as
9 they go out?

10 A. Correct.

11 Q. Okay. And when we talk about claims
12 and that, we're talking about like the accounting
13 claims where people are requesting reimbursement for
14 amounts they have expended, and then the Agency
15 reviews them to see if they're in compliance with
16 the Act and the regs?

17 A. Correct.

18 Q. And do you know how many claim
19 applications you supervise, oversee in a given month
20 or year?

21 A. I think we get about 110 a month.

22 Q. And in the particular case here, were
23 you involved with a re-review of a reimbursement
24 application for the Freedom Oil site that Illinois

1 EPA first decided on September 1, 2009?

2 A. Yes, I was.

3 Q. And what prompted a re-review of that
4 September 1, '09 decision?

5 A. I believe it was an e-mail from
6 Mr. Green asking for us to relook at the original
7 decision that was made.

8 Q. And am I correct that in that
9 original reimbursement application decided on
10 September 1 that it was a claim for \$84,652.35 and
11 that that decision did not reimburse any of the
12 claimed amounts?

13 A. Yeah. The original decision did not
14 reimburse anything, correct.

15 Q. Now, once you agreed to have a
16 re-review performed, did you receive additional
17 information from Mr. Green concerning this site?

18 A. Yes, we did.

19 Q. And do you remember what kind of
20 documents those might have been?

21 A. I think we got an invoice for asphalt
22 that was missed in the original case and some
23 additional, maybe one additional like lien waiver,
24 something like that.

1 Q. A lien waiver from a subcontractor?

2 A. Correct.

3 Q. Okay. And the decision which appears
4 on page 1 of the record, it's not dated but the
5 certified green card indicates it was mailed on
6 November 19, '09, in that re-review decision, we did
7 approve \$65,057.50 for reimbursement, correct?

8 A. That's correct.

9 Q. And the actual approval was less
10 because there was a \$10,000 deductible in this
11 matter?

12 A. That is correct.

13 Q. But there still was \$19,594.85 that
14 was denied payment?

15 A. That is correct.

16 Q. Now, item 1 in that re-review
17 decision for \$10,754.35 concerned deductions for
18 remediation and disposal costs lacking supporting
19 documentation?

20 A. That's correct.

21 Q. And of that amount, \$7,024.84 was for
22 excavation, transportation and disposal activities?

23 A. Correct.

24 Q. And could you just briefly describe

1 what that activity, ETD, basically covers?

2 A. It covers the excavation of the soil
3 and placement into a dump truck, and the
4 transportation is the transportation of that soil to
5 the landfill, and then the disposal cost is the
6 actual landfill bill from, in this case, Waste
7 Management.

8 Q. Okay. I want to show you some pages
9 from the record, and those pages would be page 75
10 and pages 88 to 93, and could you just tell us what
11 page 75 concerns?

12 A. Page 75 is the Agency's budget form
13 that concerns the number of cubic yards that they
14 requested for excavation transportation disposal.

15 Q. And pages 88 through 93, what are
16 those pages?

17 A. That is the copy of the Waste
18 Management invoice documenting how much soil went to
19 the landfill.

20 Q. And what information on these pages
21 lead you to make this deduction of this application?

22 MR. RIFFLE: Objection. Foundation.

23 MR. RICHARDSON: It's the record,
24 and, I mean, I've got it in front of him, and I just

1 want to find out the basis, what he found here that
2 lead to his calculation.

3 HEARING OFFICER WEBB: Go ahead.

4 THE WITNESS: We were looking at the
5 tons of soil that were disposed at the landfill.

6 MR. RIFFLE: I apologize for
7 interposing here.

8 HEARING OFFICER WEBB: That's okay.

9 MR. RIFFLE: I just want to know who
10 actually did that calculation, whether it was him or
11 someone else.

12 HEARING OFFICER WEBB: Okay. Address
13 that.

14 Q. BY MR. RICHARDSON: Who made that
15 calculation, Mr. Bauer?

16 A. I believe on the written -- this is
17 not my writing. This was Sue Brock's writing.

18 (Pause)

19 A. I think I used her number.

20 Q. Okay. And who is Sue Brock?

21 A. Sue Brock was an account technician
22 that was reviewing the claims at the time.

23 Q. And she was the reviewer that made or
24 provided the information for the September 1st

1 decision, correct?

2 A. That's correct.

3 Q. And then she was also involved in the
4 re-review?

5 A. Yes. She wrote the letter based upon
6 my recommendations.

7 Q. Okay. So you were making
8 recommendations. She wrote the letter, and as you
9 always do with claims, you reviewed that letter for
10 approval to be mailed out?

11 MR. RIFFLE: Object to the form.

12 HEARING OFFICER WEBB: Pardon me?

13 MR. RIFFLE: Object to the form of
14 that question. Leading and compound. He's
15 essentially testifying for the witness.

16 MR. RICHARDSON: Well, I think it's
17 mainly foundational matters of the process.

18 HEARING OFFICER WEBB: I don't know
19 that he was leading him, but please try not to lead
20 the witness or testify for the witness.

21 MR. RICHARDSON: Sure.

22 MR. RIFFLE: Well, he essentially
23 said as you always do. That was what I was
24 objecting to.

1 HEARING OFFICER WEBB: I'm sorry. I
2 guess I didn't catch it. Please watch the way
3 you...

4 MR. RICHARDSON: Oh, sure;
5 definitely.

6 Q. Based upon your notes, you reviewed
7 her work in this matter?

8 A. That's correct.

9 Q. And now, what was, I mean, what did
10 the Agency base these deductions on, this deduction
11 on?

12 A. We based it upon the total tons that
13 went to the landfill. We added up the tons, and we
14 did divide by 1.5 tons per cubic yard and came up
15 with the cubic yardage of 447 cubic yards, and we
16 paid the maximum rate allowed in subpart (h) at the
17 time.

18 Q. All right. And this calculation of
19 this 1.5 division there, what's the basis for that?

20 A. It's in the regulations. It's in
21 734, Appendix C. There is a table of how much soil
22 you can take. At the bottom of the table, the
23 regulations indicate that all cubic yardage will be
24 based upon 1.5 tons per cubic yard.

1 Q. And Mr. Green I believe testified
2 that he had never seen this calculation performed by
3 the Agency before.

4 Is this atypical for the Agency to do
5 a calculation in one of its reviews?

6 A. No. We do it all the time.

7 Q. I want to go to the second component
8 of that first deducted item which is a reduction of
9 backfilled cubic yards of \$3,729.51.

10 Now, in a LUST remediation, what is
11 backfill for?

12 A. Backfill is to fill the void from the
13 excavation in the tank.

14 Q. And I want to show you pages 75 and
15 63 of the record, and what information on those
16 pages resulted in this deduction being made?

17 A. On page 75 of the record from the
18 backfilling excavation shows that we reduced the 670
19 cubic yards requested to 499. We reimbursed the 499
20 at the maximum rate of subpart (h) at the time,
21 \$21.81.

22 Then on page 63 of the record is the
23 invoice from Illinois Oil Marketing Equipment. On
24 that page, there's an indication of gravel where

1 they give two different tonnages of 592.56 tons of
2 CA-16 gravel and 155.71 tons of gravel. They are
3 added up for a total tonnage of 748.27 tons. Again,
4 they were divided by 1.5 tons per cubic yard, and we
5 came up with 498.8 cubic yards of backfill.

6 Q. Now, on to Item 2 which was a
7 deduction for asphalt replacement exceeding minimum
8 requirements, \$2,574.80, but now, during early
9 action, what asphalt does the Agency provide
10 reimbursement for?

11 A. We provide for the reimbursement of
12 asphalt, what was removed, the tanks and the four
13 feet of material.

14 Q. At early action, are we paying for
15 asphalt to serve as a barrier?

16 A. No, early action is considered at
17 that time for replacement. It's not part of the
18 barrier. We're not considering it a barrier at that
19 time. That's a corrective action down the road.

20 Q. And if an owner-operator decides that
21 they want the asphalt to go beyond the excavation
22 area, do we entertain payment of that?

23 A. Under early action.

24 Q. Well, do the regs let an

1 owner-operator decide how much asphalt they can put
2 down on the site?

3 A. We contend that if they put on during
4 early action, if they put more asphalt down than is
5 necessary, it exceeds the minimum requirements.

6 Q. Now I want to show you pages 77, 25,
7 and 20 of the record, and again, I ask you to look
8 at those pages and what information from those pages
9 lead to this deduction being made.

10 A. Again, page 77 of the record is the
11 Agency's form completed for asphalt replacement. We
12 reduced the requested 1,711 square feet of asphalt
13 at a six-inch thickness to 945 square feet, and we
14 did that based upon the map that was provided on
15 page 20 of the record. It was submitted I believe
16 with the site investigation report.

17 This was taken out. This is my
18 handwriting on there, and we measured, based upon
19 the scale of the map, we measured the excavation
20 distance, and we came up with, 45 feet by 21 feet is
21 945 feet, and I thought we'd indicated that they had
22 excavated, because those are the limits, where they
23 had taken collective samples from, and the 21 times
24 45 is 945 square feet.

1 Q. And those numbers there are the
2 length and width measurements that were made of the
3 excavation pit?

4 A. That's correct.

5 Q. And page 25, what is that page?

6 A. Page 25 is some of the additional
7 information we received on the re-review, the
8 invoice for what they indicated was the asphalt
9 replacement.

10 Q. Now, the last item is item 3,
11 \$6,265.70, handling charges for subcontractor cost
12 where the contractor has not submitted proof of
13 payment for those costs.

14 What types of proof of payment for
15 subcontractor cost does the Agency accept?

16 A. There's three forms -- a cancelled
17 check, an affidavit from the subcontractor
18 indicating that they've been paid, or a lien waiver.

19 Q. I want to show you pages 23, 81 and
20 87 of the record, and can you please tell me what
21 information from those pages lead to this particular
22 deduction?

23 A. Page 81 of the record is our form for
24 the calculation of handling charge based upon the

1 sliding scale, and they request it based upon their
2 subcontractors \$6,265.70 in handling charge.

3 Page 87 of the record is an affidavit
4 from TMI Analytical Services which is the second
5 consultant, second subcontractor listed on the
6 handling charge found at page 81. This one was not
7 accepted because there was no date on the notary.

8 The only other affidavit or
9 subcontractor we received was for -- we did not
10 receive one for the landfill and we didn't receive
11 one for road construction.

12 We did receive this one from Illinois
13 Oil Marketing, but the wording of the lien waiver
14 indicates acknowledgement that the payment agreement
15 has been made to the satisfaction of the
16 subcontractor.

17 So they didn't really make payment.
18 We didn't feel that it was strong enough that they
19 didn't make payment; that they just made an
20 agreement to make payment, and the regulations were
21 established for the proof of payment so that they
22 actually made payment because we were, prior to
23 this, we were always receiving complaints from
24 subcontractors.

1 Q. So prior to this re-review decision,
2 these two documents were the only proof of payment
3 you received from the petitioner?

4 A. That's correct.

5 Q. And you say that they were an
6 adequate proof of payment for the handling charges
7 to be authorized?

8 A. That's correct.

9 MR. RICHARDSON: Those are all my
10 questions.

11 HEARING OFFICER WEBB: Okay.

12 MR. RIFFLE: Thank you.

13

14 CROSS-EXAMINATION

15 BY MR. RIFFLE:

16 Q. Sir, do you know how deep the
17 excavation was in this particular case?

18 A. Not without looking.

19 Q. And the same with respect to the
20 length?

21 A. Based upon the map that we looked at,
22 21 by 45.

23 Q. Did you ever calculate the volume of
24 the excavation?

1 A. No.

2 Q. You relied entirely upon the formula
3 to determine the number of cubic yards, is that
4 correct?

5 A. That's correct.

6 Q. Do you have a -- I understand you've
7 got a couple of different degrees. Do you have a
8 technical background?

9 A. Yes. I have a biology degree.

10 Q. And isn't it true the different
11 materials are going to have different weights?

12 A. Yes.

13 Q. I want to draw your attention to page
14 63 of the record. I think you looked at that
15 earlier.

16 A. Okay.

17 Q. This is an invoice for a variety of
18 things including gravel, is that correct?

19 A. That's correct.

20 Q. And you've included the cubic yards
21 of the gravel based on that 1.5 to 1 formula,
22 correct?

23 A. Yes.

24 Q. And you use that same formula for

1 material coming out of an excavation and delivered
2 to a landfill, is that correct?

3 A. That's correct.

4 Q. Would the relative weight and volume
5 of gravel differ from the relative weight and volume
6 of the disposed soil?

7 A. I think that they're similar.

8 Q. In what respect?

9 A. Well, I would think that when we
10 established the 1.5 rate during the hearings when we
11 established the rules, we concluded that they were
12 similar, similar value.

13 Q. Were you actually personally involved
14 in that process?

15 A. Yes.

16 Q. And what was your input into that
17 process?

18 A. I helped write regulations that we
19 proposed to the Board.

20 Q. Isn't it true that if you have very
21 light dry soil that it would have larger volume per
22 done than a heavier weather soil?

23 A. Sure.

24 Q. So you're going to use some variation

1 from site to site on what the actual volume is
2 compared to the tonnage, correct?

3 A. Correct.

4 Q. And what about with respect to fill
5 materials, are you going to have a variation with
6 respect to that?

7 Sometimes you fill it with gravel,
8 correct?

9 A. Yes.

10 Q. And sometimes you fill it with drier
11 soils?

12 A. Most of the time we see it, it's all
13 CA-16 gravel.

14 Q. But again, you didn't calculate any
15 volume with respect to this particular excavation,
16 is that correct?

17 A. That's correct.

18 Q. Do you know how far behind the state
19 was in making payments back in the 2008 timeframe?

20 MR. RICHARDSON: I'm going to object.
21 That's irrelevant, and it's beyond the scope of my
22 direct.

23 HEARING OFFICER WEBB: It is beyond
24 the scope.

1 Are you asking him in relation to any
2 of his testimony?

3 MR. RIFFLE: I am. He talked about
4 that particular statement as to arrangements for
5 payment with the total petroleum bill. It ties in
6 with that.

7 May I proceed?

8 HEARING OFFICER WEBB: Yes.

9 Q. BY MR. RIFFLE: Do you know
10 approximately how far behind they were in that 2008
11 period?

12 THE WITNESS: You want me to answer
13 that? I'm waiting for you.

14 HEARING OFFICER WEBB: I mean, I'm
15 not really sure how it's relevant. He has testified
16 as to the form of the payment that the EPA receives,
17 is that correct?

18 MR. RICHARDSON: The point was it
19 didn't say the bill had actually been paid and said
20 that there had been arrangements for payments to be
21 made in that lien waiver, and I'm just objecting
22 because I was showing it was deficient, but I think
23 Mr. Riffle wants to go into matters beyond how
24 quickly things were being paid at that time.

1 HEARING OFFICER WEBB: Well, why
2 don't you ask with respect to this case, payment
3 with respect to this case.

4 MR. RIFFLE: Sure.

5 Q. With respect to this case, do you
6 know approximately how far behind the state was in
7 making payments to contractors with respect to the
8 LUST Fund?

9 MR. RICHARDSON: And if I can just
10 show an objection.

11 HEARING OFFICER WEBB: Okay.
12 Go ahead.

13 THE WITNESS: At the time, I think
14 they were probably 12 to 18 months behind making
15 payments from the time submittal was received.

16 Q. BY MR. RIFFLE: And you testified I
17 believe that you were receiving complaints that
18 subcontractors weren't being paid?

19 A. Yes.

20 Q. And how does that relate to this
21 case?

22 A. For the establishment of why we
23 proposed that particular regulation to the Board.

24 Q. Which regulation was that?

1 A. The requirement of proof of payment
2 of subcontractors for handling charges.

3 Q. And did you ever hear a complaint
4 that Midwest Environmental wasn't paying its
5 subcontractors?

6 A. No.

7 MR. RIFFLE: That's all the
8 questions. I do thank you.

9 HEARING OFFICER WEBB: Anything else?

10 MR. RICHARDSON: I just had one
11 follow-up.

12

13 REDIRECT EXAMINATION

14 BY MR. RICHARDSON:

15 Q. So following up on that last question
16 about regulation, the complaints were from
17 subcontractors saying that contractors were not
18 paying them, correct?

19 A. That's correct.

20 Q. And that could or could not have been
21 tied to the state's payment of application funds, of
22 reimbursement funds?

23 MR. RIFFLE: Objection. Lack of
24 foundation. Speculation.

1 MR. RICHARDSON: I think he opened
2 the door on the area.

3 MR. RIFFLE: It's still speculation.
4 I don't think the witness would have any idea about
5 that.

6 HEARING OFFICER WEBB: You can give
7 your opinion if you have one.

8 Q. BY MR. RICHARDSON: Do you have an
9 opinion on that point?

10 A. Sure. I believe that it probably had
11 something to do with the delay in payments.

12 Q. Okay. And delays in the state being
13 able to reimburse funds, was that just at this time
14 period or has that been a historical problem?

15 A. It's been a historical problem.

16 MR. RICHARDSON: I have no more
17 questions.

18 HEARING OFFICER WEBB: Mr. Riffle,
19 anything else?

20 MR. RIFFLE: No.

21 HEARING OFFICER WEBB: Okay.
22 Mr. Richardson, do you have anything else you'd like
23 to present?

24 MR. RICHARDSON: No.

1 HEARING OFFICER WEBB: Okay. Then
2 let's go off the record for a few minutes and
3 discuss a briefing schedule.

4 MR. RIFFLE: I apologize. I did want
5 to call Mr. Green back.

6 HEARING OFFICER WEBB: Oh, I'm sorry.
7 I apologize. Mr. Riffle wanted to call Mr. Green
8 back to the stand.

9 Mr. Green, you are still under oath.

10 MR. RIFFLE: I'll try to be very
11 brief.

12 ALLAN GREEN
13 recalled as a witness herein, on behalf of Freedom
14 Oil, having been previously sworn on his oath, was
15 examined and testified as follows:

16
17 DIRECT EXAMINATION

18 BY MR. RIFFLE: (ON REBUTTAL)

19 Q. Mr. Green, there was an exhibit that
20 was used earlier, page 20 of the record. Do you
21 recognize that document?

22 A. Yes.

23 Q. Does that depict the extent of the
24 excavation that occurred?

1 A. No. That basically shows the tank
2 pit. It doesn't include the island in that which
3 was immediately adjacent which was excavated as part
4 of that group.

5 Q. So you submitted a request for 1,711
6 square feet of pavement, is that correct?

7 A. Yes.

8 Q. And the EPA has apparently taken page
9 20 and calculated what they thought the extent of
10 the excavation was?

11 A. Yes.

12 Q. And is it your testimony that the
13 excavation was significantly larger than the
14 depiction on page 20?

15 A. It wasn't significantly larger but it
16 was squared off. I mean, you can't take little
17 pieces of asphalt out and just patch. I mean, it
18 basically was squared off to the minimum amount and
19 then replaced.

20 And the only reason we mention it as
21 an engineered barrier -- it wasn't installed as part
22 of an engineered barrier because the client
23 eventually paved the entire lot -- is that we used
24 that to help get closure on the site because it was

1 paved. We just agreed to use that as an engineered
2 barrier and with the project manager's consent drew
3 the extent of the engineered barrier that we would
4 put on the closure documents.

5 Q. We talked a bit earlier about this
6 1.5 to 1 ratio.

7 If you had a site at which your tons
8 divided by the 1.5 ratio would yield a larger
9 volume, would you submit based on that volume?

10 A. Yes, and, like I said, the only
11 time -- we've never seen this all based upon the
12 landfill bill. We deal with the 1.5 all the time on
13 budgets, plans where here's the extent of the
14 excavation; this is what we propose to do. We're
15 basing those budgets on the 1.5.

16 That doesn't mean that's what's going
17 to be the actual. Sometimes it will turn out a
18 little above. Sometimes it might turn out below,
19 but we bill the actual cost, the actual volumes, you
20 know, based upon that.

21 Q. I see.

22 So you would put your budget together
23 based upon the 1.5 ratio, correct?

24 A. Yes.

1 Q. But then when you actually go to
2 bill, how do you determine how much to bill, how
3 many cubic yards of excavation and backfill to bill?

4 A. It's all based upon the excavation
5 extents, the size of the excavation.

6 Q. So if I understand your testimony
7 correctly, you're using the 1.5 ratio of doing your
8 estimates and budgets, correct?

9 A. Yes.

10 Q. But when you go to actually bill the
11 EPA for what you've actually done, it's based on the
12 actual volumes that you've taken out and put back
13 in?

14 MR. RICHARDSON: That's leading. I'm
15 going to object.

16 HEARING OFFICER WEBB: That's the
17 same thing you objected to him for.

18 MR. RICHARDSON: That's why I
19 objected.

20 HEARING OFFICER WEBB: But let's
21 speed things along. Can you just make your -- I
22 think we're going to need to if we want to make your
23 point.

24 MR. RIFFLE: I think that was my

1 final question, but I will do my best to ask it a
2 different way.

3 HEARING OFFICER WEBB: Go ahead.

4 Q. BY MR. RIFFLE: Explain again how you
5 do your budgets and estimates.

6 A. The budgets and estimates are based
7 upon the estimated extent of the excavation, and we
8 use, for the budget forms, we use the 1.5 criteria
9 from the EPA on the budgets and the plans, but on
10 the actual submittals, it's all based on actual
11 costs and yardage.

12 We're fortunate in that a lot of
13 times we won't exceed that anyway, but the actual
14 costs are based upon excavation size. When we give
15 the closure reports and final reimbursements, that's
16 the actual measurements.

17 Q. Are there ever times when that 1.5
18 ratio, if you just used that and applied it, would
19 give you more volume than you actually had?

20 A. Yes.

21 Q. And in those circumstances, what is
22 your actual bill based on?

23 A. It's based upon the actual costs and
24 the actual excavation.

1 Q. Even though you used that 1.5 ratio,
2 you could bill for more?

3 A. Yes.

4 Q. And the reason is because you didn't
5 actually remove that much volume?

6 A. Right.

7 MR. RIFFLE: No further questions.

8 MR. RICHARDSON: I just have one or
9 two follow-ups.

10

11 CROSS-EXAMINATION

12 BY MR. RICHARDSON:

13 Q. You were looking at the map. I think
14 is that page 20 of the record? Am I correct on
15 that?

16 MR. RIFFLE: It is.

17 Q. And you said that it does not -- that
18 you went beyond what is depicted there as the
19 excavation for your asphalt work, is that right?

20 A. Only because the pumps, the lines,
21 the islands and that were right alongside of the
22 tanks, but that was all removed. The pavement was
23 removed in order to get the lines, the pumps,
24 everything out, and you can't have little patches.

1 We just had to take that and square it off.

2 Q. But you never submitted a map of the
3 asphalt removal to the Illinois EPA in that record,
4 did you?

5 A. Not of the asphalt removal because it
6 was all shown on the excavation extents. In the
7 corrective action, the completion report and the
8 early action report, there's actual excavation
9 extents there, and that's what we repaved was just
10 what was excavated or that's what we requested.

11 The entire lot was paved. We only
12 took the excavation extents and requested that
13 amount for reimbursement, separated it from the
14 entire lot.

15 One of the bills that was there
16 showed the entire bill for the whole lot, and we had
17 them separate that out so it would make it easier
18 for them to separate.

19 Q. But there's no map that defines the
20 asphalt that was removed? That's yes or no.

21 A. I would have to look at the reports,
22 but the excavation extents is what was shown and
23 what we paved.

24 Q. But you can't point to a document in

1 that record that indicates that?

2 A. No, no.

3 MR. RICHARDSON: I have no further
4 questions.

5 MR. RIFFLE: Nothing further here
6 either.

7 HEARING OFFICER WEBB: Nothing
8 further for anyone to present today? Okay.

9 Now we'll go off the record to
10 discuss a briefing schedule.

11 (Whereupon an off-the-record
12 discussion transpired at this
13 time.)

14 HEARING OFFICER WEBB: Okay. We're
15 back on the record.

16 The transcript is due by May 21st and
17 will be posted on the Board's website. Public
18 comment deadline is May 23rd. Public comment must
19 be filed in accordance with Section 101.628 of the
20 Board's procedural rules.

21 Petitioner's brief is due by
22 June 11th, and respondent's brief is due by
23 July 2nd. The mailbox rule will not apply, and if
24 parties file electronically, briefs must be filed by

1 4:30 p.m. on the due date.

2 Mr. Riffle, would you like to make
3 any closing argument?

4 MR. RIFFLE: No. We'll leave it to
5 the brief.

6 HEARING OFFICER WEBB: Okay.
7 Mr. Richardson?

8 MR. RICHARDSON: I have none either.

9 HEARING OFFICER WEBB: Okay. There
10 are no members of the public present, so at this
11 time I will conclude the proceedings.

12 We stand adjourned, and I thank you
13 all for your participation.

14 (Adjournment at 11:34 a.m.)

15

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CERTIFICATE

I further certify that I am in no way associated with or related to any of the parties or attorneys involved herein, nor am I financially interested in this action.

Lurel Parthen
Certified Shorthand Reporter

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