

BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

MIDWEST PETROLEUM COMPANY,))	
Petitioner,))	
vs.))	PCB No. 06-28
)	(UST Appeal)
ILLINOIS ENVIRONMENTAL))	
PROTECTION AGENCY,))	
Respondent.))	

NOTICE

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board
State of Illinois Center
100 West Randolph Street
Suite 11-500

East

Chicago, IL 60601

Carol Webb
Hearing Officer
Illinois Pollution Control Board
1021 North Grand Avenue East
P.O. Box 19274
Springfield, IL 62794

John J. Kim
Assistant Counsel
Special Assistant Attorney General
Division of Legal Counsel
1021 North Grand Avenue,

P.O. Box 19276
Springfield, IL 62794-9276

PLEASE TAKE NOTICE that I have today filed with the office of the Clerk of the Pollution Control Board a Brief of Petitioner, a copy of which is herewith served upon you.

Curtis W. Martin
IL ARDC No. 06201592
SHAW & MARTIN, P.C.
Attorneys at Law
P.O. Box 1789
Mt. Vernon, Illinois 62864
Telephone (618) 244-1788

By /s/ Curtis W. Martin
Curtis W. Martin, Attorney for
Midwest Petroleum Company,
Petitioner

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BRIEF OF PETITIONER

Petitioner, Midwest Petroleum Company ("Midwest") by its attorneys,
Shaw & Martin, P.C., for its Brief in this cause, states as follows:

FACTS

Midwest is the Owner/Operator of a leaking underground petroleum storage tank facility located at 529 Maple Street, Shiloh, St. Clair County, Illinois with an Illinois Emergency Management Agency Incident No. 982804. (AR, p. 104)¹

United Science Industries, Inc. ("USI"), located in Woodlawn, Illinois, is the environmental consultant performing the remediation activities at Midwest's facility. (AR, p. 104; TR, p. 7) As part of the remediation process for Midwest, USI submitted to the Environmental Protection Agency ("Agency") an Amended Corrective Action Plan under cover letter dated August 13, 2004 ("Amended CAP"). (AR, p. 101) The Amended CAP proposed an area of soil excavation, transportation

¹Citation to the administrative record will hereinafter be made as “AR, p. _____” and citation to the transcript of the hearing of October 7, 2005 will hereinafter be made as “TR, p. _____”.

and disposal, traditionally known as a “dig and haul” project. (AR, p. 123, TR, p. 15) Unlike a typical dig and haul project, however, the Midwest project also involved the excavation of a substantial volume of clean overburden for use as backfill to replace contaminated soil removed during the remediation activities. (AR, p. 123; TR, p. 134, 152) The “clean overburden” is recognized as soil that is not required to be removed during remediation, whereas contaminated soil is required to be removed. (TR, p. 15-16, 95-96)

The Amended CAP proposed excavation and removal of contaminated soil simultaneously with the backfilling of clean overburden. (AR, p. 118) The segregation of clean overburden from contaminated soil was to be determined by the screening of samples taken from the excavation walls and floor using a thermal environmental photo-ionization detector (“PID”) and more precise laboratory analysis. (AR, p. 123-24; TR, p. 95-96) The PID soil screening and sampling is performed by a USI employee known as an environmental technician, who is on site during the entire excavation process. (TR, p. 98, 102-03) The environmental technician’s data collection and communication are essential to the proper advancement of the excavation, removal and backfilling and were required to be performed as approved by the Agency in the Amended CAP. (TR, p. 102-103)

From the data gathered during the site investigation at the Midwest site, Robert Pulfrey, a veteran in the professional and environmental geology fields

with experience as a United States Environmental Protection Agency corrective action project manager, and the project manager for USI, prepared the Amended CAP and Budget. (TR, p. 93-94) He estimated 270 hours for the environmental technician to perform “[e]xcavation & overburden screening, manifesting, sampling, surveying, [and] sample shipment.” (AR, p. 320) The Amended CAP further proposed that simultaneous soil removal and backfilling would require a total of 25 days to complete, and that the excavation would occur in the second quarter of 2005. (AR, p. 118, 122; TR, p. 106) Mr. Pulfrey testified that the 270 hours of environmental technician services equated to 27 days at 10 hours per day. (TR, p. 96) Mr. Pulfrey further acknowledged that a plausible implication derived from the reference to 25 days to complete the simultaneous soil removal and backfilling and the 27 days of total environmental technician time was that two (2) days would remain for the handling of the clean overburden. (TR, p. 97)

The Amended CAP and associated Budget was conditionally approved by the Agency by letter dated September 1, 2004 under signature of Harry A. Chappell, an Agency Unit Manager of the Leaking Underground Storage Tank Section. (AR, p. 61-63) Mr. Chappell testified that although he signed the September 1, 2004 letter, it was Mindy Weller who actually reviewed the Amended CAP and associated Budget. (TR, p. 8-9) Ms. Weller did consult with Mr. Chappell. (TR, p. 8-9) The conditional Agency approval dealt with matters not directly related to this appeal. (AR, p. 61-62)

Upon the Agency's approval of the Amended CAP, excavation activities at the Midwest site began on October 1, 2004. (TR, p. 62) The focus of the initial stages of the excavation was the removal of the contaminated soil, which ultimately took 28 days and was performed during the months of October and November, 2004 and January, 2005. (AR, p. 25, TR, p. 106-08) During this first phase of excavation, 12,460 cubic yards of contaminated soil was addressed. (AR, p. 25) The map of the excavation is depicted in Petitioner's Exhibit 2. (TR, p. 108) At the conclusion of the first phase of excavation, Mr. Pulfrey, in the process of reviewing the entire project, discovered he had erred in the estimation of time associated with the complete excavation necessary for the project. (TR, p. 109) Excavation of overburden was yet to be completed and Mr. Pulfrey made a decision to complete that excavation and then submit the additional information in an amendment request to the Agency. (TR, p. 109)

The remaining excavation was completed during February and March, 2005 and took 15 days. (AR, p. 25) During this time, 5,327 cubic yards of clean overburden and 1,540 cubic yards of additional contaminated soil were handled. (AR, p. 25; TR, p. 111) Once the entire excavation was completed, Mr. Pulfrey submitted a request for approval of additional personnel costs by an amended budget dated March 29, 2005 ("Amended Budget"). The Amended Budget sought approval of time for activities associated with excavation over an additional 16 days consisting of one additional day during the first phase of excavation (28 days actual versus 27 days estimated) and 15 additional days

during the second phase of excavation. (AR, p. 138, 142; TR, p. 35-37) Like the first phase of excavation, the services of the environmental technician during the second phase of excavation made it possible for the distinction between clean overburden and contaminated soil. (TR, p. 111-12)

The Amended Budget sought an additional 160 hours of environmental technician time, consisting of 16 days at 10 hours per day, along with a few additional hours for tasks performed by other USI employees including the professional engineer, the project manager, the environmental specialist, and clerical staff. (AR, p. 24, TR, p. 115-117) The hourly rates associated with the additional time requested in the Amended Budget are the same as the rates approved by the Agency on September 1, 2004. (AR, p. 24, 319-20) The total additional personnel costs sought to be approved amounted to \$13,555.00. (AR, p. 23)

Included with the Amended Budget was a Justification prepared by Mr. Pulfrey and the professional engineer on the Midwest project, Barry Sink. (AR, p. 25; TR, p. 110) The Justification indicated that there was an underestimation of the time required to excavate the clean overburden, and Mr. Pulfrey testified that the approved Amended CAP should not have included reference to the environmental technician's tasks involving overburden. (AR, p. 320, TR, p. 98) More specifically, Mr. Pulfrey described that at the time he had prepared the Amended CAP he had forgotten about the handling of the overburden and by the time the first phase of the excavation was completed, he had underestimated the time it would take to address it. (TR, p. 127) The

Justification also compared the daily production rate of cubic yard excavation during the 28 day phase with that of the 15 day phase in an effort to explain the necessity and reasonableness of the additional excavation associated hours for which approval was requested. (AR, p. 25-26) Midwest also included in the Justification information regarding a substantially greater than average amount of rainfall during the initial phase of the excavation which negatively impacted the production rate. (AR, p. 25-26)

By letter dated July 18, 2005, the Agency rejected the proposed Amended Budget for seeking costs that are not reasonable. (AR, p. 1) The letter asserts that the amount of time to excavate, transport, dispose and backfill contaminated soils proposed in the Amended Budget extends over a span of approximately five (5) months but the approved plan (referencing the Amended CAP approved September 1, 2004) does not include approval for soil remediation to include such span of time. (AR, p. 1, TR, p. 14-15, 16-17)

Mr. Chappell, the lone witness for the Agency, testified that the only basis for the Agency's consideration of reasonableness as it applied to the proposed Amended Budget was the information provided by Midwest in the Amended CAP. (TR, p. 33, 35, 39-40, 52) He confirmed that the basis for the rejection was the additional personnel costs deemed to be unreasonable over a five (5) month period of time. (TR, p. 18, 26) Mr. Chappell recognized, however, that the Amended CAP did not reference the excavation of clean overburden. (TR, p. 27, AR, p. 118) He also did not dispute the assumption

that the approved Amended CAP provided for 27 days of environmental technician time at 10 hours per day. (TR, p. 28-29) Mr. Chappell further had no quarrel with Midwest's representation of the volume of contaminated soil excavated and removed during the 28 day period, nor with the additional volume of contaminated soil excavated and removed and the volume of clean overburden excavated during the subsequent 15 day period. (TR, p. 29-31) Mr. Chappell also recognized the basis for Midwest's proposed Amended Budget was an underestimation of the time devoted for the environmental technician and others' duties to provide services related to the additional excavation of both contaminated soil and overburden. (TR, p. 32) Finally, Mr. Chappell testified that the Agency can consider and approve amendments when underestimations in budgets occur. (TR, p. 33)

ARGUMENT

The Agency deemed the additional costs requested by Midwest in the Amended Budget to be unreasonable as submitted because the Amended Budget "indicates that the amount of time to excavate, transport, dispose and backfill contaminated soils from this site continued over a span of approximately five (5) months" and the Amended CAP approved by the Agency September 1, 2004 does not include approval for soil remediation to include a span of such time. (AR, p. 1)

Midwest has the burden of proof in addressing the Agency's denial of the additional personnel time in this matter. 35 Ill. Adm. Code 102.112(a). Contrary to the Agency's assertion, however, the Amended CAP established a

10 month span of time within which the dig and haul would be completed. (AR, p. 122) In fact, the entire dig and haul was completed ahead of schedule. (TR, p. 23) When questioned further about the Agency's basis for the unreasonableness determination, Mr. Chappell could not provide specifics, but rather only his supposition, which was only the Agency's reliance upon the information provided by Midwest in the Amended CAP. (TR, p. 33, 35) In fact, Mr. Chappell did not review the Amended CAP prior to its approval. (TR, p. 8-9)

Midwest is permitted to request additional personnel costs under both the Illinois Environmental Protection Act and the regulations promulgated thereunder. Section 57.8(a)(5) of the Act, 415 ILCS 5/57.8(a)(5), provides, in part, as follows:

In the event that costs are or will be incurred in addition to those approved by the Agency, or after payment, the owner or operator may submit successive plans containing amended budgets.

In addition, Section 732.405(e) of the Regulations, 35 Ill. Adm. Code 732.405(e), provides as follows:

If, following approval of any groundwater monitoring plan, corrective action plan or associated budget plan, an owner or operator determines that revised procedures or cost estimates are necessary in order to comply with the minimum required activities for the site, the owner or operator shall submit, as applicable, an amended groundwater monitoring plan, corrective action plan or associated budget plan for review by the Agency. The Agency shall review and approve, object or require modifications of the amended plan in accordance with the procedures contained in Subpart E of this Part.

The applicable Subpart E procedure for the Agency's review of the Amended Budget submitted by Midwest in this case is governed by Section 732.505(c) of the regulations, which provides that:

A full financial review shall consist of a detailed review of the costs associated with each element necessary to accomplish the goals of the plan as required pursuant to the Act and regulations. Items to be reviewed shall include, but not be limited to, costs associated with any materials, activities or services that are included in the budget plan. The overall goal of the financial review shall be to assure that costs associated with materials, activities and services shall be reasonable, shall be consistent with the associated technical plan, shall be incurred in the performance of corrective action activities, and shall not be used for corrective action activities in excess of those necessary to meet the minimum requirements of the Act and regulations.

Despite Midwest's request in accordance with the Act and regulations, the Agency essentially refused to consider the justification for the additional personnel costs proffered by Midwest. The Agency's determination of unreasonableness was completely devoid of any standard upon which to make such determination.

(TR, p. 35) If this Board is to believe the Agency's determination was based solely upon the information provided by Midwest in the Amended CAP, then it follows that had Midwest submitted a personnel budget of twice, three times or more for the same activities such budget would have been approved. Common sense dictates that not to be the case, but it begs the question that was never answered by Mr. Chappell—on what standard was the Agency's determination of unreasonableness based? In the absence of any standard provided by the Agency, as a matter of good engineering practice Midwest proffered an objective

standard. Midwest further demonstrated that the additional costs were consistent with that standard and the associated technical plan, were incurred in the performance of corrective action activities, and were not in excess of those necessary to meet the minimum requirements of the Act and regulations. (TR, p. 157)

The Agency approved the Amended CAP's corrective action activities of excavation, transportation, disposal and backfilling along with the associated services. These associated services included the environmental technician's screening, manifesting, sampling, surveying and sample shipment, the environmental specialist's tracking weight tickets and manifests for excavated, transported and disposed contaminated soil, the senior project manager's professional oversight, the professional engineer's supervision, review and certification of the Amended CAP, and the clerical work in preparation of the documentation presented to the Agency. (AR, p. 319-320, 61) The Agency also determined reasonable the hours and hourly charges for the above services. (AR, p. 319-320, 61)

In light of the Agency approval of the Amended CAP's corrective action activities, the related hours of service, and hourly charges therefore, Midwest offered an objective standard of daily production by which reasonableness of the time for the activities could be gauged. Barry Sink, a licensed professional engineer of 24 years and the professional engineer for the Midwest project, testified that in his experience with the Agency, a production rate of 500 cubic yards per day has been deemed reasonable. (TR, p. 165) The undisputed

evidence is that within 28 days 12,460 cubic yards of contaminated soil was excavated, transported and disposed, which is an average daily production rate of 445 cubic yards. (AR, p. 25, TR, p. 36-37) Given that the Agency approved 27 days of the environmental technician's services, it follows that a rate of production ranging from 445 to 500 cubic yards of excavation activities should be deemed reasonable. Not to be forgotten is the excess rain during the period of time of the initial 28 days of excavation to which Mr. Pulfrey and Mr. Sink testified adversely effected production of excavation, but which Mr. Chappell dismissed out of hand.

(TR, p. 35, 114, 153)

It should be emphasized that the additional 16 days of excavation activities for which Midwest seeks approval dealt primarily with overburden that had been overlooked at the time the Amended CAP was presented to the Agency. Further, the reference in the Amended CAP to simultaneous overburden handling and contaminated soil disposal was error, a fact not contested by the Agency. (TR, p. 32-33, 97-98, 149-50) There are no different corrective action activities proposed in the Amended Budget than those contained within the Amended CAP already approved by the Agency. (AR, p. 24) The gravity of the error and need for the Amended Budget are illustrated by considering the volume of additional excavation following the initial 28 days. During the additional 15 days of excavation, 6,867 cubic yards of soil, both contaminated and clean overburden, were addressed. (AR, p. 25-26) Requiring Midwest to address an additional 6,867 cubic yards of soil in the two (2)

remaining days provided for in the Amended CAP, or over 3,400 cubic yards per day, is absurd. (TR, p. 139-40, 151) Yet, that is the standard to which the Agency seeks to hold Midwest, despite its justification for additional hours and compensation to cover the additional volume of soil addressed. Therein lies the arbitrary and capricious nature of the Agency's July 18, 2005 decision.

The additional hours requested for the activities are set forth in the G-1 page of the Amended Budget. (AR, p. 24) The majority of the hours are associated with the environmental technician, being 160 hours consisting of 16 days at 10 hours per day for screening overburden with the PID, sampling the overburden stock piles, surveying and collecting wall and floor samples, and shipping of samples.

(AR, p. 24) Additional hours are also requested for the environmental specialist consisting of one hour per day for 16 days associated with additional tracking of weight tickets for additional excavated, transported and disposed contaminated soil. (AR, p. 24) Additional senior project manager hours are requested for additional professional oversight during 18 additional days, as explained by Mr. Pulfrey, and for preparation of the Amended Budget and justification submitted to the Agency on March 29, 2005. (AR, p. 24, TR, p. 117) Finally, one additional hour of professional engineer time is requested for certification of the Amended Budget. (AR, p. 24) The hourly rates requested for the additional hours associated with the above activities is the same as previously approved by the Agency. (AR, p. 24, 318-20) Mr. Pulfrey and Mr.

Sink both testified that based on their experience and training the additional personnel time sought for approval was reasonable. (TR, p. 119, 153)

Focusing once again upon the rate of production, this time for the second 15 days of excavation, reveals 5,327 cubic yards of overburden and an additional 1,540 cubic yards of contaminated soil, for a total of 6,867 cubic yards. This equates to an average daily production rate of 458 cubic yards, a more productive rate than realized during the first phase of excavation and well within what could independently objectively be deemed reasonable. (AR, p. 26)

The un rebutted testimony of both Mr. Pulfrey and Jeff Schwartz, the manager of field operations at the Midwest site, indicates that the environmental technician's services, which comprise the bulk of the additional costs sought to be approved, were necessary to determine the respective volumes of contaminated soil and clean overburden to be used as backfill and were required services under the approved Amended CAP. (TR, p. 58-59, 111-12)

The reasonableness of the objective production rate proposed by Midwest can be confirmed by reference to this Board's opinion and Order of February 17, 2005 entitled "In the Matter of: Proposed Amendments to: Regulation of Petroleum Leaking Underground Storage Tanks (35 Ill. Adm. Code 732)" in which this Board provided the first notice of proposed rules regarding maximum payment amounts. In this first notice, the Board notes the payment amounts are proposed by the Agency "in most cases." One such proposed rule is Section 734.845 entitled "Professional Consulting Services," which includes

field work. In particular, proposed Rule 734.845(c)(2)(A) provides a maximum payment for field work as follows:

For conventional technology, a total of \$390.00 per half-day, not to exceed one half-day for each 225 cubic yards, or fraction thereof, of soil removed and disposed, plus travel costs in accordance with subsection (e) of this Section.

Thus, although not a final rule, proposed Section 734.845(c)(2)(A) provides insight that the Agency deems a range from 226 to 450 cubic yards per day to be a justification for a maximum payment of \$780.00 per day for conventional technology, i.e. dig and haul activities such as in the Midwest project.

Measured by this proposed standard of reasonableness, and/or Midwest's proposed production rate, in the vacuum of no other standard provided by the Agency, Midwest demonstrated that the services and costs incurred were necessary to address the additional soil excavation and to meet the minimum requirements of the Act and regulations and should be approved. The Agency's denial of the additional personnel costs was therefore arbitrary and capricious.

CONCLUSION

Based upon the foregoing facts and the applicable sections of the Act and regulations promulgated thereunder, Midwest has met its burden of proof that the additional personnel costs sought to be approved in its Amended Budget of March 29, 2005 are associated with the corrective action activities and services, are reasonable, are consistent with the associated technical plan, and were not used for corrective action activities in excess of those necessary to meet the minimum requirements of the Act and the regulations promulgated

thereunder. Accordingly, Midwest requests that this Board reverse the Agency's decision of July 18, 2005 and determine that its Amended Budget of March 29, 2005 be approved as reasonable, justifiable, necessary, consistent with generally accepted engineering practices and eligible for reimbursement from the Underground Storage Tank Fund. Midwest further requests the opportunity to petition this Board for the recovery of its attorney's fees and costs incurred in this cause, pursuant to 415 ILCS 5/57.8(l) and 35 Ill. Adm. Code 732.606(g), in the event this Board rules in Midwest's favor.

Respectfully submitted,

SHAW & MARTIN, P.C.

BY /s/ Curtis W.

Martin_____

Curtis W. Martin, Attorney for
Midwest Petroleum Company,
Petitioner

Curtis W. Martin
IL ARDC No. 06201592
SHAW & MARTIN, P.C.

Attorneys at Law
123 S. 10th Street, Suite 302
P.O. Box 1789
Mt. Vernon, Illinois 62864
Telephone (618) 244-1788

CERTIFICATE OF SERVICE

I, the undersigned attorney at law, hereby certify that on October 28, 2005, I served true and correct copy of a Brief by electronically filing to the following person:

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board
State of Illinois Center
100 West Randolph Street
Suite 11-500
Chicago, IL 60601

and by placing true and correct copies in properly sealed and addressed envelopes and by depositing said sealed envelopes in a U.S. mail drop box located within Mt. Vernon, Illinois, with sufficient postage affixed thereto, upon the following named persons:

Carol Webb
Hearing Officer
Illinois Pollution Control Board
1021 North Grand Avenue East
P.O. Box 19274
Springfield, IL 62794

John J. Kim
Assistant Counsel
Special Assistant
Attorney General
Division of Legal Counsel
1021 North Grand Avenue, East
P.O. Box 19276
Springfield, IL 62794-9276

/s/ Curtis W. Martin
Curtis W. Martin, Attorney for
Petitioner, Midwest Petroleum Company