BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

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

NOTICE

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PLEASE TAKE NOTICE that I have today filed with the office of the Clerk of the Pollution Control Board a RESPONSE TO PETITIONER'S BRIEF, copies of which are herewith served upon you.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,
Respondent

_____

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Dated: November 14, 2005

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

RESPONSE TO PETITIONER'S BRIEF

NOW COMES the Respondent, the Illinois Environmental Protection Agency ("Illinois EPA"), by one of its attorneys, John J. Kim, Assistant Counsel and Special Assistant Attorney General, and hereby submits its Response to the Petitioner's Brief to the Illinois Pollution Control Board ("Board").

I. BURDEN OF PROOF

Section 105.112(a) of the Board's procedural rules (35 Ill. Adm. Code 105.112(a)) provides that the burden of proof shall be on the petitioner. In reimbursement appeals, the on the applicant for reimbursement has the burden to demonstrate that costs are related to corrective action, properly accounted for, and reasonable. Rezmar Corporation v. Illinois EPA, PCB 02-91 (April 17, 2003), p. 9. Here, the owner or operator of a leaking underground storage tank must prepare and submit a corrective action plan designed to mitigate any threat to human health, human safety or the environment resulting from the underground storage tank release. 415 ILCS 5/57.7(b)(2). Further, the owner or operator must submit a corrective action plan budget that includes, but is not limited to, an accounting of all costs associated with the implementation and completion of the corrective action plan. 415 ILCS 5/57.7(b)(3).

The primary focus of the Board must remain on the adequacy of the permit application (or, as is the case here, the amended budget) and the information submitted by the applicant to

the Illinois EPA. John Sexton Contractors Company v. Illinois EPA, PCB 88-139 (February 23, 1989), p. 5. Further, the ultimate burden of proof remains on the party initiating an appeal of an Illinois EPA final decision. John Sexton Contractors Company v. Illinois Pollution Control Board, 201 Ill. App. 3d 415, 425-426, 558 N.E.2d 1222, 1229 (1st Dist. 1990).

Thus Midwest Petroleum Company ("Midwest") must demonstrate to the Board that it has satisfied its burden before the Board can enter an order reversing or modifying the Illinois EPA's decision under review.

II. STANDARD OF REVIEW

Section 57.8(i) of the Environmental Protection Act ("Act") grants an individual the right to appeal a determination of the Illinois EPA to the Board pursuant to Section 40 of the Act (415 ILCS 5/57.8(i)). Section 40 of the Act (415 ILCS 5/40) is the general appeal section for permits and has been used by the legislature as the basis for this type of appeal to the Board. When reviewing an Illinois EPA decision on a submitted corrective action plan and/or budget, the Board must decide whether or not the proposals, as submitted to the Illinois EPA, demonstrate compliance with the Act and Board regulations. Broderick Teaming Company v. Illinois EPA, PCB 00-187 (December 7, 2000).

The Board will not consider new information not before the Illinois EPA prior to its determination on appeal. The Illinois EPA's final decision frames the issues on appeal. Todd's Service Station v. Illinois EPA, PCB 03-2 (January 22, 2004), p. 4. In deciding whether the Illinois EPA's decision under appeal here was appropriate, the Board must therefore look to the documents within the Administrative Record ("Record"), along with relevant and appropriate testimony provided at the hearing held on October 7, 2005, in this matter.[1] Based on the

[1] Citations to the Administrative Record will hereinafter be made as, "AR, p. ___." References to the transcript of the hearing will be made as, "TR, p. ___."

information within the Record and the testimony, along with the relevant law, the Illinois EPA respectfully requests that the Board enter an order affirming the Illinois EPA's decision.

III. INTRODUCTION

The information submitted to the Illinois EPA by Midwest that led to the issuance of the final decision under appeal fully supports the content and conclusion of the final decision, in that the Petitioner failed to demonstrate that the costs that were the subject of the proposed amended budget were reasonable. The failure of the Petitioner at hearing to present consistent, coherent and rationale reasons for the submission of the amended budget to begin with further confirm the correctness of the Illinois EPA's decision. The Board's review of the Record documents, as well as the hearing transcript, should yield the same conclusion as that reached by the Illinois EPA.

IV. STATEMENT OF FACTS

This site has had a long history in terms of technical plan and/or budget submissions to the Illinois EPA. For purposes of this appeal, the best starting point in the history of the site is with the amended corrective action plan and budget submitted by Midwest to the Illinois EPA on August 13, 2004 ("August 2004 CAP" and "August 2004 budget"). AR, pp. 101-328.

The August 2004 CAP includes a history of the site as well as information regarding the proposed excavation of contaminated soil and clean overburden[2] at the site. The August 2004 CAP states that it is assumed that the simultaneous soil removal and backfilling will require a total of 25 days to complete. AR, p. 118.

The August 2004 CAP also contains several references to the manner in which clean overburden at the site will be addressed. For example, Midwest's consultant, United Science Industries ("USI"), proposed that a photo-ionization detector ("PID") would be used to segregate

[2] The parties are in agreement that "clean overburden" or "overburden" as used in conjunction with the subject site refers to soil found above the contaminated soil at the site, such that the clean overburden would not need to be disposed of off-site and would be available for use as backfill material.

clean overburden, which would be placed into 200 cubic yard stockpiles. The clean overburden was estimated to be 5,544 cubic yards. AR, p. 121. Further, a review of soil borehole data indicated that clean soil overlay the contaminated soil averaging nine feet in thickness over an estimated area of 16,697 square feet. The estimated amount of clean soil overburden was 5,575 cubic yards. Subtracting the clean overburden from the total estimated amount of 20,713 cubic yards of excavated soil would result in approximately 15,148 cubic yards of in place contaminated soil being excavated for disposal. AR, p. 123.

In the August 2004 budget, there are specific references to work that will be done by a Senior Project Engineer (calculate overburden) and Environmental Technician (excavation and overburden screening) related to the overburden at the site. AR, pp. 319-320.

On September 1, 2004, the Illinois EPA issued a final decision that conditionally approved the August 2004 CAP and budget. There were no modifications or conditions in the final decision that altered the proposed time periods for excavation of contaminated soil or clean overburden. AR, pp. 61-66.

On November 18, 2004, USI sent a proposed budget amendment to the Illinois EPA ("November 2004 budget"). AR, pp. 51-60. The proposed amendment contained a justification statement, stating that an increase in the unit rate allowed for excavation, transportation and disposal was justified based on the Illinois EPA's previous decision to reduce the amount of contaminated soil approved for disposal. AR, p. 53.

On January 6, 2005, the Illinois EPA issued a final decision rejecting the November 2004 budget on the bases that there was no supporting documentation for the request and the request did not appear reasonable as proposed. AR, pp. 46-48.

On February 17, 2005, USI sent a proposed budget amendment to the Illinois EPA ("February 2005 budget"). AR, pp. 33-45. The proposed budget amendment contained a justification statement seeking an increase in the rate for unit of production based on the Illinois EPA's previous modification of the swell factor. AR, p. 35.

On March 14, 2005, the Illinois EPA issued a final decision, rejecting the February 2005 budget. AR, pp. 28-30. However, the parties later reached a settlement on issues regarding the February 2005 budget and the March 2005 final decision. AR, pp. 12-18.

On March 29, 2005, another proposed budget amendment was sent to the Illinois EPA ("March 2005 budget"). AR, pp. 19-27. This budget is the subject of the present appeal. The budget sought additional costs related to personnel activities in the removal of clean overburden at the site, as set forth in the justification statement in the budget. AR, pp. 25-26. The rationale for the request for approval of additional personnel costs was that the budget estimate for the project had underestimated the time needed for the Environmental Technician to perform tasks of excavation and overburden screening, manifesting, sampling, surveying and sample shipment. The Environmental Technician required work for 43 days as compared to the original estimate of 27 days. Further, there reference made to weather conditions at the site being much wetter than normal. AR, p. 25.

The justification statement also acknowledged that the August 2004 plan and budget, when read together, estimated that it would take 25 days for the excavation, transportation, disposal and backfilling of contaminated soil, and an additional two days for excavation and replacement of clean overburden. AR, p. 25.

The justification statement also noted that the original August 2004 budget significantly underestimated the amount of time required to complete the simultaneous overburden handling

and contaminated soil disposal, as evidenced by the fact that the technician time required for the clean overburden tasks was not provided in the original budget. AR, p. 26. The justification goes on to provide that the March 2005 budget provided evidence that production rates during excavation activities were reasonable when considering the adverse weather conditions. AR, p. 26.

On July 18, 2005, the Illinois EPA issued the final decision now under appeal ("July 2005 final decision"). AR, pp. 1-3. In the final decision, the Illinois EPA stated that the budget was rejected. The final decision stated that the budget included costs that were not reasonable as submitted, although additional information and/or supporting documentation may be provided to demonstrate the costs were reasonable. AR, p. 1.

The final decision also provided:

> "The 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. The approved plan does not include approval for soil remediation to include a span of approximately 5 months. Therefore, the request for additional personnel costs to remediate the contaminated soils from this LUST site is not reasonable." AR, p. 1.

This appeal followed.

V. THE AUGUST 2004 CAP AND BUDGET TERMS ARE APPLICABLE

The key argument raised by Midwest was that the terms, dates and costs in the August 2004 CAP and budget were somehow not binding on them such that a claim could later be made that there was sufficient gray area to allow for the approval of additional personnel costs. Quite the contrary, the August 2004 CAP and budget were very clear in scope, description and specificity.

The August 2004 CAP explicitly states that the time needed for excavation of contaminated soil at the site is 25 days. AR, p. 118. The Illinois EPA's approval of the August

2004 CAP did not contain any condition or modification changing the 25 day period set forth in the CAP. Thus, the time period was binding upon the Petitioner. The Petitioner argues that the August 2004 CAP also contained language regarding the span of time in which the excavation would be completed, and that looking to that span the work was actually completed ahead of schedule. Petitioner's brief, p. 7. While that may be true, it is of little consequence as the basis for the amended budget was not that the Petitioner completed the work before the stated end date as found in the August 2004 CAP; rather, the Petitioner filed the March 2005 budget since it did not complete the work within the time otherwise committed to in the CAP, i.e., the 25 days. Completing the work before an anticipated end date does not result in the need for a budget amendment, since the variable of concern is not the date by which the work was completed but rather the time needed to complete the work.

Suppose that on January 1, 2006, a contractor agrees to build a home taking 90 days of construction, and that he anticipates the home will be completed by August 2006. If the contractor in fact takes 120 days of construction time, it will not matter from a monetary standpoint that he possibly finished by July 2006. The start and stop date are not of importance when compared to the actual time spent on the job, given that the work performed (both in the hypothetical and in the present site condition) is charged on a daily or hourly basis.

Furthermore, the Petitioner's argument that the notion of addressing the clean overburden at the site was either overlooked or underestimated is not supported by the content of the August 2004 CAP and budget. In both the CAP and budget, there are specific and numerous references to how the clean overburden will be addressed, how much clean overburden would be removed, and the time needed for personnel to handle overburden-related tasks. To claim that there was a dearth of information in the August 2004 CAP and budget on that point is wholly inconsistent

with the actual content of those documents. The Illinois EPA, in its role as the reviewer of the documents submitted by Midwest, would have no reason to believe there was any error or mistake on the part of either Midwest or its consultant in the preparation and finalization of the CAP or budget.

The CAP clearly states that 25 days will be taken to perform removal and disposal of contaminated soil, and the budget clearly provides that an environmental technician will require 270 hours (or 27 days at 10 hours per day) for work related to the overburden at the site.

Lest there be any question that the CAP and budget contemplated a scenario in which 25 days would be taken for contaminated soil removal and an additional two day would be used for clean overburden activities, the justification statement in the March 2005 budget confirms those time allocations. Bob Pulfrey, the Project Manager for the site as assigned by USI, Midwest's consultant, testified that the August 2004 CAP and budget, when read together, set forth the 25 days/two days framework. TR, p. 97. Barry Sink, the Professional Engineer employed by USI for the site, agreed with those time periods. TR, p. 149. Messrs. Pulfrey and Sink were the parties responsible for drafting and submitting the August 2004 CAP and budget. TR, pp. 94, 148.

At hearing, however, Mr. Pulfrey went on to testify that it was unreasonable to think it would take only two days for overburden activities. TR, p. 98. It should be repeated that at the time of the preparation of the August 2004 CAP and budget, both Mr. Pulfrey and Mr. Sink were aware of the amounts of overburden involved at the site, and both testified that the amount was quite large, larger than any amount either had experienced previously. TR, pp. 134, 152. Yet, despite what must clearly be described as a large red flag in terms of factoring in site-specific

conditions in the preparation of a corrective action plan and budget, both men testified at hearing that the time they committed to in the August 2004 CAP and budget was unreasonable.

That testimony is more than offset by the testimony of Jeffrey Schwartz, the Manager of Field Operations for USI. Mr. Schwartz testified that it is his role in a site such as the Midwest site to, among other things, assist the project manager in the calculation of the time periods needed to perform excavation related activities. TR, pp. 71, 73-74. Mr. Pulfrey himself testified that in this situation, he simply inputted the days for excavation work as provided by Mr. Schwartz to him when preparing the CAP. Mr. Pulfrey says he then forgot about the handling of the overburden. TR, p. 98.

This testimony is itself puzzling, since Mr. Schwartz testified that he did not have any involvement in the site until sometime after August 2004, the time of submission of the August 2004 CAP and budget. TR, p. 72. So it is unclear exactly where Mr. Pulfrey received his information. However, Mr. Schwartz also testified that if he had been involved in the site at the time the corrective action plan and budget were prepared, he would have likely assisted in determining how much time would be needed for work activities. He also testified that (without the hindsight of the rain conditions, which will be addressed below) if he had been associated with the site at the time of preparing the corrective action plan, he would have said the time periods in the CAP were reasonable. TR, pp. 73-74.

Thus, on the one hand, you have Mr. Pulfrey, the project engineer (responsible for drafting the corrective action plan and budget), stating that he put figures received from Mr. Schwartz, the manager of field operations, into the corrective action plan and budget. Then you have Mr. Pulfrey stating that aside from the numerous references to clean overburden, the calculations regarding clean overburden, and the time allotted for an environmental technician to

perform work related to clean overburden, he either overlooked or underestimated the time needed to perform clean overburden work.[3] Next, you have Mr. Schwartz testifying that in fact he did not provide those days to Mr. Pulfrey as Mr. Pulfrey believed. Finally, you have Mr. Schwartz's testimony that his lack of involvement at that state aside, the time period in the August 2004 CAP and budget is reasonable (without taking into account the "wet conditions").

The only sense that can be made of this tangled presentation of arguments is that Midwest knew of the existence of the clean overburden at the site before August 2004, it knew of the extent of the clean overburden, it made reference to the clean overburden in its corrective action plan and budget, and its own consultant believed that (with the meteorological facts that would have been available to the Illinois EPA at the time of reviewing the August 2004 CAP and budget) the time periods were reasonable. Therefore, the Petitioner itself has demonstrated that the time periods in the August 2004 CAP and budget were reasonable and should be adhered to.

VI. THE MARCH 2005 BUDGET WAS NOT SUFFICIENT

But what of the Petitioner's more recent argument that, those original approved time periods notwithstanding, additional time should be approved for work related to contaminated soil and clean overburden excavation? Such was the request made in the March 2005 budget. However, looking to the information and explanation contained within that document, the Illinois EPA had no choice but to reject the request.[4]

[3] It is curious to track Mr. Pulfrey's testimony and characterization of his acknowledgment (or lack thereof) of clean overburden in the August 2004 CAP. At some times he testified that he overlooked the clean overburden, at other times he stated he underestimated the time needed to handle clean overburden, and then combines the two terms to state that he forgot about the handling of the overburden at the time of the plan, and by the time the project was finished, he decided he had underestimated the time. TR, p. 127. This testimony is not just confusing, it is indicative of the weakness of the Petitioner's argument in general. Clearly, given the numerous references to clean overburden in the August 2004 CAP and budget, that topic was not overlooked.

[4] The Petitioner argues that the Illinois EPA was somehow lacking in describing what standard was employed in reviewing the March 2005 budget. Petitioner's brief, p. 8. This argument is baseless, as Harry Chappel of the Illinois EPA testified at the hearing that the Illinois EPA looked to the information provided by USI. The Illinois EPA does not have a standard formula or other codified guideline, and can only look to the site specific information

The March 2005 budget argued that the additional personnel costs were warranted for three reasons. First, the time periods approved in the September 1, 2004 final decision were the product of either an oversight or underestimation by the Petitioner's consultant. AR, p. 25. As has been discussed, that argument has no merit.

Second, during the period of time in which contaminated soil was excavated and disposed of, the weather conditions were much wetter than normal. AR, p. 25. Unfortunately, in the March 2005 budget, the Petitioner does not provide any specific information regarding rainfall at the site, or even for the county in which the site is located. Rather, the only information given is for St. Louis, Missouri, approximately 20 miles from the site. The Illinois EPA was thus being asked to accept weather conditions from 20 miles away as being identical to that evidenced at the site itself. There was no information from any field notes of any employee of USI, no information from a source closer to the site, only information from St. Louis. While it is possible that weather conditions 20 miles from a given location may be the same, it is also quite possible that weather 20 miles away is not at all the same.

And, at the hearing, Mr. Pulfrey himself testified that any rain in the area affected the site activities only "somewhat." TR, p. 114. To describe the effect of this supposed adverse weather condition as only affecting the site "somewhat" is telling.

Finally, third, the Petitioner argued that the production rate for the extended period of time sought for approval in the March 2005 budget was reasonable and very near the definition as established by the Illinois EPA in the pending rulemaking. AR, p. 26. The Illinois EPA's witness testified that the notion of production rates was not taken into account. The Illinois EPA

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as conveyed in a submission. Tr,, p. 35. The Petitioner argues repeatedly that the Board and the Illinois EPA should somehow take the pending rulemaking of amendments to Part 732 of the Board's rules as being an authority here. As the hearing officer correctly noted at hearing, those rulemakings are not final, and therefore have no precedential or other persuasive weight here.

has no standard with regard to production rates of excavation. TR, pp. 34-35. There is no statutory or regulatory authority in place that addresses such a rate, and thus it is impossible for the Illinois EPA to apply any such standard. Furthermore, there was never any mention of using such a production rate to determine reasonableness in any of the previous submittals for this site, so even if the Illinois EPA had been asked to look at this as a legitimate yardstick, there was no prior reliance on that factor.

There is nothing within the March 2005 budget that supports the requested approval of additional time, and therefore the rejection of the budget was appropriate.

VII. THE FINAL DECISION WAS CORRECT

The Petitioner has sought to twist or somehow obfuscate the plain wording of the July 2005 final decision. A simple reading of that decision shows it to be an accurate and sufficient explanation of the Illinois EPA's conclusion.

The final decision states that the budget cannot be approved since the costs are not reasonable as submitted, for the reasons provided herein. The final decision further explains that the budget indicated the time needed to excavate, transport, dispose and backfill contaminated soils continued over five months. As the March 2005 budget stated, work took place in October 2004, November 2004, January 2005, February 2005, and March 2005, or five months. The decision then states that the approved plan (as approved on September 1, 2004) did not include approval for soil remediation to include a span of five months, which it did not. Rather, the August 2004 CAP and budget (as approved) stated that the contaminated soil excavation would take 25 days and the clean overburden activity would take two days.

There is nothing in the final decision that is incorrect, inaccurate or unsupported by the documents in the Record.

VIII. THE HEARING TESTIMONY SUPPORTS THE FINAL DECISION

There are numerous passages of testimony from the hearing that either support the Illinois EPA's final decision or weaken the Petitioner's arguments. For example, Mr. Schwartz testified that a map was used to determine the depth of excavation at the site. TR, p. 61. He noted that the map was to be updated from time to time, but that in this case, the map was pretty close, and was not modified much. TR, p. 62. The map is Petitioner's Exhibit 2, which is also page 143 of the Record. However, Mr. Pulfrey testified that the same map changed in a significant way from day to day as excavation progressed. TR, p. 100-101. He also acknowledged that the final version of the map was never provided to the Illinois EPA in support of the March 2005 budget. TR, p. 129.

Mr. Pulfrey never testified that the time allowed for removal of contaminated soil as set forth in the March 2004 CAP (i.e., 25 days) was itself insufficient, but he later conceded in testimony at hearing that the total time needed for excavation of all the contaminated soil at the site was 44 days, or close to double the time set forth in the CAP. TR, p. 136.

IX. THE PETITIONER'S BRIEF IS IN ERROR

The Petitioner's brief fails to present any tangible or persuasive argument on which the Board could rely in reversing the Illinois EPA's final decision. In addition to the arguments and instances noted above, the Petitioner's brief fails on several points.

Midwest cites to several statutory and regulatory provisions in apparent support for its position. But those provisions only strengthen the Illinois EPA's final decision. Section 57.8(a)(5) of the Environmental Protection Act ("Act") (415 ILCS 5/57.8(a)(5)) stands for the proposition that an owner or operator may submit successive plans containing budgets if additional costs are incurred beyond what has been approved. Here, the Petitioner failed to file

an amended corrective action plan seeking an amendment from the time periods set forth in the March 2004 CAP. That failure alone precludes the approval of any related amendatory budget.

Similarly, Section 732.405(e) of the Board's rules (35 Ill. Adm. Code 732.405(e)) states that an amended corrective action plan and/or budget may be submitted for review. Again, the failure of Midwest to file an amended CAP with the March 2005 budget prevents any approval of the budget on its own. Also, Section 732.505(c) of the Board's rules (35 Ill. Adm. Code 732.505(c)) requires that a financial review include, inter alia, a determination that the costs in a budget are consistent with the associated technical plan. Here, the technical plan contains a time period (i.e., 25 days) inconsistent with the proposed amended budget.

X. CONCLUSION

For all the reasons and arguments included herein, the Illinois EPA respectfully requests that the Board affirm the Illinois EPA's July 18, 2005 final decision. The Petitioner has not met even its *prima facie* burden of proof, and certainly has not met its ultimate burden of proof. For these reasons, the Illinois EPA respectfully requests that the Board affirm the Illinois EPA's final decision.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,
Respondent

_____

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Dated: November 14, 2005

CERTIFICATE OF SERVICE

I, the undersigned attorney at law, hereby certify that on November 14, 2005, I served true and correct copies of a RESPONSE TO PETITIONER'S BRIEF, by electronic filing to the Clerk of the Illinois Pollution Control Board 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 Springfield, Illinois, with sufficient First Class Mail postage affixed thereto, to the Petitioner and Hearing Officer:

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