

**BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS**

FREEDOM OIL COMPANY,)	
)	
Petitioner,)	
)	
vs.)	
)	PCB No. 10-46
ILLINOIS ENVIRONMENTAL)	(UST Appeal)
PROTECTION AGENCY,)	
)	
Respondent.)	

POST-HEARING BRIEF OF PETITIONER

NOW COMES Petitioner, Freedom Oil Company (“Freedom”), by its attorneys, Elias, Meginnes, Riffle & Seghetti, P.C., and as and for its Post-Hearing Brief, Petitioner hereby states as follows:

INTRODUCTION

It is respectfully submitted that Petitioner and its environmental consultant, Midwest Environmental Consulting & Remediation Services, Inc. (Midwest Environmental) have been subjected to arbitrary and capricious actions by the Illinois Environmental Protection Agency (IEPA) which have reduced reimbursement for expenses for materials and services which were reasonably and necessarily incurred, and properly reimburseable pursuant to the applicable law. Additionally, this appeal brings to light the existence of an arbitrary and capricious, and internally inconsistent, regulation, which must be changed (or, at the very least, clarified). Petitioner and Midwest Environmental calculated the actual volume of materials excavated and backfilled based on actual volume. IEPA calculated the volume based on an arbitrary formula, and reduced the reimbursement arbitrarily. In doing so, IEPA disavowed any need to calculate

actual volume. IEPA rejected and ignored the primary rule governing volume calculations, namely that the calculations must be based on the actual dimensions of the excavation.

IEPA also arbitrarily reduced the reimbursement for required pavement, again without regard to the actual size of the pavement which was installed.

For the reasons set forth herein, it is respectfully requested that the reductions in reimbursements which were requested by Petitioner be reversed, that the applicable regulation (specifically Illinois Administrative Code, Title 35, Part 734, Section 734.825) be declared invalid, and for such other and further relief as is deemed appropriate.

STATEMENT OF ISSUES

1. Whether the IEPA acted erroneously, and/or arbitrarily and capriciously, in reducing the reimbursement requests for excavated and backfilled materials.

a. Whether Illinois Administrative Code, Title 35, Part 734, Section 734.825 is arbitrary and capricious as written.

b. Whether Illinois Administrative Code, Title 35, Part 734, Section 734.825 has been applied in an arbitrary and capricious manner.

2. Whether the IEPA acted erroneously, and/or arbitrarily and capriciously, in reducing the reimbursement requested for pavement.

FACTS

1. Freedom retained Midwest Environmental Consulting & Remediation Services, Inc. (Midwest) to remediate the property located at 712 El Dorado Road, Bloomington, Illinois, LPC #1130205400, LUST Incident No. 20080880-57567 (the Property).

2. The Property was the site of early action activities to include UST removal, contaminated backfill removal/disposal and pavement replacement, all within IEPA approved guidelines. The final report of early action activities detailed the work performed. No work was performed outside the early action guidelines (four (4) foot rule) and was within acceptable IEPA LUST Fund reimbursement requirements.

3. By letter dated April 21, 2009, Midwest submitted a reimbursement request, seeking payment of the additional amount of \$84,652.35, which was the amount reasonably and necessarily expended to complete the work on the project. A true and correct copy of that submittal was attached to the Complaint as Exhibit A.

4. By letter dated April 21, 2009, the IEPA approved part of the previously submitted Budget Amendment, but rejected the remainder thereof. Specifically, of the \$84,652.35 requested, \$55,057.50 was approved, and \$19,594.85 was rejected. A true and accurate copy of the November 23, 2009 letter and attachments was attached to the Complaint as Exhibit B. That letter was designated as a final and appealable order.

5. Freedom sought costs related to removal and disposal of excavated materials. (Admin. Record, p. 75).

6. The reimbursement for costs related to removal and disposal of excavated materials was reduced from \$34,809.60 to \$27,785.52, for a difference of \$7,024.08. (Id.).

7. Freedom sought costs related to backfilling. (Id)

8. The reimbursement for costs related to removal and disposal of excavated materials was reduced from \$14,612.70 to \$10,883.19, for a difference of \$3,729.51 (Id.).

9. Freedom sought reimbursement for asphalt pavement covering 1711 sq. feet, in the amount of \$5,750.00. (Admin. Record, p. 77).

10. The reimbursement for pavement was reduced from \$5,750 to \$3,175.20, (for a difference of \$2,574.80) and from 1711 sq. feet to 945 sq. feet.

Testimony Regarding Volume Calculations for Excavation and Backfilling.

11. Al Green, President of Midwest Environmental, testified as follows:

Q. How many cubic yards of excavated and disposed material did you bill for?

A. 560

Q. And that's indicated in the first section of page 7 of the record, is that correct?

A. Yes.

Q. And how was calculated?

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

Q. Okay. And its actual calculation of the volume of the excavation itself, correct?

A. Right.

Q. And how many cubic yard were backfilled?

A. 670.

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

A. Right, with the tank volume added in because the tanks were gone.

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

A. Right.

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

A. Yes.

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

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

(Transcript of hearing, p. 15-16, lines 7-18).

12. Mr. Green further testified as follows:

Q. And again, before we leave this topic, the numbers that you submitted as depicted on page 75, the 560 cubic yards of excavated material and the 670 cubic yards of backfilled material,

do you have any doubt that those are legitimate actual reasonable cubic yardage figures for the particular project?

A. No.

(Hearing Transcript, page 19, lines 5-12).

13. In cross-examination by the IEPA attorney, Mr. Green testified as follows:

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

A. Yes.

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

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

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

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

A. Right.

(Hearing Transcript, pages 23-24, lines 6-11).

14. Brian Saur, IEPA employee testified as follows:

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

A. We based it upon the total tons that went to the landfill. We added up the tons, and we did divide by 1.5 tons per cubic yard and came up with the cubic yardage of 447 cubic yards....

(Hearing Transcript, page 34, lines 9-15).

15. On cross examination, Mr. Saur testified as follows:

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

A. No.

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

A. That's correct.

(Hearing Transcript, page 40-41, lines 23-5)

16. Mr. Saur further testified as follows:

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

A. Sure.

Q. So you're going to use some variation some site to site on what the actual volume is compared to the tonnage, correct?

(Hearing Transcript, page 42-43, lines 20-3).

17. Finally, Mr. Sauer admitted as follows:

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

A. That's correct.

18. Finally, Mr. Green testified as follows:

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

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

(Hearing Transcript, page. 52, lines 4-11).

Testimony Regarding Calculation of Area of Asphalt Pavement.

19. With respect to the asphalt, Mr. Green testified as follows:

Q. and how many square feet of asphalt did you submit a claim for on this particular project?

A. 945.

Q. What was the original submittal?

A. 1,711.

Q. And what was the 1,711 based on?

A. Based upon the calculated area of what was removed for the tank removal and then replace as an area of the engineered barrier.

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

A. Yes.

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

A. Yes.

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

A. Yes.

(Hearing Transcript, page. 19-20, lines 16-12).

ARGUMENT

I. The Reductions in Reimbursement for Excavated and Backfilled Materials were Erroneous, Arbitrary and Capricious.

Freedom's consultant calculated the volume of soil removed and disposed using the "dimensions of the resulting excavation," precisely as required pursuant to Section 734.825 (a)(1). The testimony regarding the manner in which Freedom's consultant calculated the volume of soil removed stands un rebutted.

In sharp contrast, the IEPA disregarded the actual volume, erroneously relying on a theoretical calculation related to weight. This calculation is found in 35 Ill. Admin. Code, Part 734, Section 735.825, and in Appendix C to Part 734.

There is an inherent ambiguity in Section 734.825, subparts (a)(b) and (c). This provision provides, in pertinent part, as follows:

...the volume of soil removed and disposed must be determined by the following equation using the dimensions of the resulting excavation:

(Excavation Length x Excavation Width x Excavation Depth) x 1.05.

A conversion factor of 1.5 tons per cubic yard must be used to convert tons to cubic yards.

Regulated parties are required to calculate volumes by determining the size of the excavation (length x width x depth), and multiplying this resulting number by 1.05. This makes sense, and yields a fair calculation of volume. The regulations then proceed to require a “conversion” from weight to volume. This makes no sense.

There is no apparent need to convert tons to cubic yards, because the unit cost or payment limit is based on cubic yards, and the required volume calculation is based on cubic yards.

Regulated parties are instructed, in mandatory terms (i.e., “must”), to do two separate things to calculate volumes. These two mandatory calculations will almost invariably lead to inconsistent results.

An excavation of dry, loose soil will result in a relatively high volume and a relatively low weight. An excavation of wet, tight soil (e.g., clay) will result in a relatively low volume and a relatively high weight.

An example proves the point. Take two excavations of identical size, 50 ft x 50 ft x 10 foot depth. The volume of the excavation is (indisputably) 925.925 square yards ($50 \times 50 \times 10 = 25,000 \div 27 = 925.925$). Multiplying by 1.05 yields 972.22 yards for which reimbursement should be paid. Now, assume that one of the two excavations (Excavation 1) consisted of heavy, wet clay, weighing 1.75 tons per yard. For Excavation 1, 925 yards are transported to the landfill, weighing 1618.75 tons. The other excavation (Excavation 2) consisted of light, dry soil weighing 1.25 tons per yard. Again, 925 yards are transported to the landfill, but this time

weighing 1156.25 tons. Under IEPA's interpretation of the regulation, the owner of Excavation 1 can seek reimbursement for 1079 cubic yards of excavated material ($1618.75 \div 1.5$), even though the volume of excavated material was only 925.925 cubic yards. The owner of Excavation 2 can only seek reimbursement for 770.83 cubic yards, even though the volume of the excavated materials was that same 925.925 cubic yards. Under IEPA's interpretation, if the owner of Excavation 2 submitted the reimbursement request for 925.925 cubic yards of excavated material, the request would have arbitrarily been reduced to 770.83 cubic yards. The owner could have provided irrefutable evidence that the volume was greater. However, the IEPA would arbitrarily deny the claim. Freedom Oil is in the position of the owner of Excavation 2.

The clear intent of the regulations, and the forms utilized by the IEPA, (see, e.g. Admin. Record p. 75) is to have a fixed cubic yard rate, and to reimburse based on volume. To the extent the regulation requires a calculation of volume based on weight, that regulation (at least as written and applied) is arbitrary and capricious. There is no way to reasonably reconcile the inconsistency of the two competing requirements of the regulations, nor is there any rational way to apply the regulation in a sensible manner.

Evidence regarding the arbitrary nature of the application of the regulation in this case can be found by simply comparing the invoice for fill material with the actual approved reimbursement request. The total backfill allowance (for materials, transportation, and placement) was only slightly more than the material cost alone. Midwest Environmental was billed \$10,777.08 by its vendor for backfill material. (Admin. Record, p. 63). Freedom was ultimately reimbursed in the amount of \$10,883.19 (out of the \$14,612.70 reimbursement request) for material transportation, labor, and all other related charges. The difference between

these figures if \$106.11. The reimbursement request covered materials, transportation, handling, and placement. IEPA's form states as follows:

The cubic yard rate includes all costs associated with the purchase, transportation, and placement of clean backfill material. The rate includes but is not limited to all personnel, equipment, materials, and other expenses for the purchases, transportation, and placement of clean backfill material.

Freedom Oil and its contractor, Midwest Environmental, were paid \$106.11 for handling and transporting 742.27 tons of fill material. That equates to 14¢/ton. This \$106.11 needs to cover material handling, transportation, equipment, personnel, and all "other expenses." This points out the absurdity of the resolution in this particular case. Obviously, the reduction in the backfilling allowance was arbitrary and capricious.

The reductions of \$7,024.08 in excavation related expenses, and \$3,729.51 in backfill related expenses, were arbitrary and capricious, and should be paid.

II. Reduction of the Asphalt Replacement Reimbursement Request was Arbitrary and Capricious.

IEPA reduced the reimbursement request for replacement of asphalt from \$5,750 to \$3,175.20, based solely on a miscalculation of square footage of asphalt replaced. Al Green testified at the hearing that the square footage set forth in the reimbursement request (1711) was based on the actual square footage, physically calculated on actual dimensions, reasonably and necessarily replaced. The actual bill for pavement (Admin. Record, page 78) was for \$23,657.75. Freedom sought reimbursement for only 24% of that overall expenditure. The reduction of \$2,574.80 was arbitrary and capricious, and should be paid.

CONCLUSION

With respect to the excavation and backfill reductions, it is respectfully submitted that the regulation at issue in this case, requiring a regulated party to perform two separate and inconsistent calculations to determine excavation and backfill volumes, is arbitrary and capricious. Alternatively, it is respectfully submitted that the IEPA's interpretation and application of the regulation is arbitrary and capricious. It is further submitted that the reduction in the pavement reimbursement request was arbitrary and capricious. The total of the arbitrary and capricious reductions is \$13,328.39 (\$7,024.08 + \$3,729.51 + \$2,574.80). Additionally, Freedom should recover its costs and attorneys' fees incurred in overturning an erroneous, arbitrary and capricious regulation, and/or the IEPA's arbitrary and capricious application of that regulation.

Respectfully submitted,

Freedom Oil Company, Petitioner

By: /s/ Robert M. Riffle
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CERTIFICATE OF SERVICE

The undersigned certifies that on June 11, 2012, a copy of the foregoing document was served upon each party to this case by

- Enclosing a true copy of same in an envelope addressed to the attorney of record of each party as listed below, with first class postage fully prepaid, and depositing each of said envelopes in the United States Mail at 5:00 p.m. on said date.
- Personal delivery to the attorney of record of each party at the address(es) listed below
- Electronically filed with confirmation via regular mail
- Via Federal Express - Express Package Service - Priority Overnight

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