BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

NOTICE

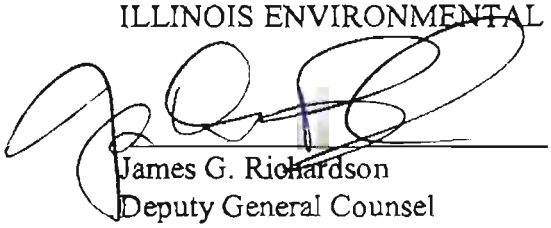
John Therriault
Illinois Pollution Control Board
100 West Randolph Street, Suite 11-500
Chicago, Illinois 60601-3218

Robert M. Riffle
Elias, Meginnes, Riffle & Seghetti, P.C.
416 Main Street, Suite 1400
Peoria, Illinois 61602-1611

Carol Webb
Hearing Officer
Illinois Pollution Control Board
1021 North Grand Avenue East
P.O. Box 19274
Springfield, Illinois 62794-9274

PLEASE TAKE NOTICE that I have today caused to be filed a RESPONSE TO POST-HEARING BRIEF OF PETITIONER with the Illinois Pollution Control Board, copies of which are served upon you.

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY



James G. Richardson
Deputy General Counsel

Dated: July 2, 2012
P.O. Box 19276
Springfield, Illinois 62794-9276
217/782-5544

THIS FILING SUBMITTED ON RECYCLED PAPER

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

RESPONSE TO POST-HEARING BRIEF

NOW COMES the Respondent, the Illinois Environmental Protection Agency ("Illinois EPA"), by one of its attorneys, James G. Richardson, Deputy General Counsel, and hereby submits to the Illinois Pollution Control Board ("Board") its Response to Post-Hearing Brief.

I. STANDARD OF REVIEW

Sections 57.7(c) and 57.8(i) of the Illinois Environmental Protection Act ("Act"), 415 ILCS 5/57.7(c),57.8(i), grant an individual the right to appeal a determination of the Illinois EPA to the Board pursuant to Section 40 of the Act, 415 ILCS 5/40. Section 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. Therefore when reviewing an Illinois EPA determination of ineligibility for reimbursement from the Underground Storage Tank Fund ("UST Fund"), the Board must decide whether or not the application, as submitted to the Illinois EPA, demonstrates compliance with the Act and Board regulations. Broderick Teaming Company v. Illinois EPA, PCB 00-187 (December 7, 2000), p. 2.

Pursuant to 35 Ill. Adm. Code 105.112(a), the Petitioner, Freedom Oil Company ("Freedom"), has the burden of proof in this case. In reimbursement appeals, the burden is on the

applicant for reimbursement to demonstrate that incurred costs are related to corrective action, properly accounted for, and reasonable. Rezmar Corporation v. Illinois EPA, PCB 02-91 (April 17, 2003), p. 9. Consideration of the administrative record as well as hearing cross-examination and testimony challenging the information relied on by the Illinois EPA for its determination is appropriate, but petitioners cannot introduce new matters outside of the Administrative Record. Freedom Oil Company v. IEPA, PCB 03-54, 03-56, 03-105, 03-179, and 04-02 (consld) (February 2, 2006), p. 11. Thus Freedom must demonstrate to the Board with appropriate information that it has satisfied its burden before the Board can enter an order reversing or modifying the Illinois EPA decision under review.

II. RELEVANT FACTS

Freedom owned and operated this former gas station and convenience store located at 712 El Dorado Road in Bloomington, McLean County, Illinois. Administrative Record ("AR") pp. 28, 105. Due to contamination identified near the site's UST system prior to UST removal activities, Allan Green of Midwest Environmental Consulting and Remediation Services, Inc. ("Midwest") reported a release to the Illinois Emergency Management Agency ("IEMA") on June 20, 2008. AR pp. 105, 222. The three USTs present at the site were removed on August 12, 2008. AR pp. 33-34.

An application for reimbursement of $84,652.35, with a cover letter from Midwest dated April 21, 2009, was received by the Illinois EPA on May 4, 2009. AR p. 50. A Site Investigation Completion Report dated June 17, 2009 from Midwest was received by the Illinois EPA on August 3, 2009. AR pp. 96, 98. The application for reimbursement was denied in its entirety on September 1, 2009. AR p. 35. On October 8, Green requested Illinois EPA Project Manager Brian Bauer to re-review the reimbursement application and some additional documentation was subsequently provided

to the Illinois EPA. AR pp. 4, 16, 21-25. Based upon this re-review, an undated determination letter was mailed on or about November 19, 2009 that approved $65,057.50 in costs for reimbursement less the $10.000.00 deductible. AR pp. 1-7. Reimbursement of $19,594.85 was denied.

III. THE ILLINOIS EPA'S NOVEMBER 19, 2009 DECISION

The first deduction identified in Attachment A was for $10,754.35 in Remediation and Disposal Costs as the costs lacked supporting documentation. Such costs are ineligible for payment from the UST Fund pursuant to 35 Ill. Adm. Code 734.630(cc) and, without such documentation, the Illinois EPA was unable to determine whether the costs were not used for site investigation and corrective action activities in excess of the minimal requirements of Title XVI of the Act. The costs deducted here consisted of $7,024.84 in excavation, transportation and disposal ("ETD") costs and $3,729.51 in backfill costs.

In reviewing the ETD costs, Bauer examined the Waste Management invoice that indicated how much soil from this site was disposed. AR pp. 88-93, Transcript ("TR") pp. 31, 34-35. The invoice indicated that 670.34 tons were received by the landfill. Employing the conversion factor of 1.5 tons per cubic yard found in 35 Ill. Adm. Code Part 734 Appendix C, Bauer calculated that 446.89 cubic yards, rounded to 447 cubic yards, of soil was disposed. AR p. 93. Although Freedom sought reimbursement for 560 cubic yards of soil at $62.16 per cubic yard on the Illinois EPA's budget form it completed, this number was reduced to 447 cubic yards and resulted in a $7,024.84 deduction to the amount of reimbursement sought. AR p. 75.

Concerning the backfill costs, an invoice from Illinois Oil Marketing Equipment indicated that 592.56 tons of CA-16 aggregate and 155.71 tons of gravel were used at the site. AR p. 63, TR pp. 35-36. Totaling 748.27 tons, the 35 Ill. Adm. Code Part 734 Appendix C conversion formula was

again used to determine that 498.8 cubic yards, rounded to 499 cubic yards, was used at this site. For backfill, Freedom sought reimbursement for 670 cubic yards at $21.81 per cubic yard on the Illinois EPA's budget form. AR p. 75. This number was reduced to 499 cubic yards and the reimbursement requested was reduced by $3,729.51.

Deduction Number 2 in Attachment A was for $2,574.80 for Asphalt Replacement Costs that exceeded the minimum requirements necessary to comply with the Act pursuant to 35 Ill. Adm. Code 734.603(cc). Bauer explained that he examined a map of the site prepared by Freedom that was included in the Site Investigation and Completion Report. AR pp. 20, 113. TR pp. 36-38. The UST pit excavation was depicted on the map as the locations of pit wall soil samples were identified on its perimeter. Bauer measured the length and width perimeters of the excavation and, based upon the scale of the map, determined that the excavation was 45 feet by 21 feet, or 945 square feet, in size. As Freedom sought reimbursement for 1711 square feet of asphalt replacement at a cost of $5,750.00 (rounded from 1171 x $3.36 per square foot = $5,748.96), this request was reduced by 766 square feet and $2,574.80 (766 x 3.36 per square foot = $2,573.76 ÷ $1.04 "rounded up" in Freedom's calculation = $2574.80.) AR p. 77.

Attachment A's third deduction was for $6,265.70 for handling charges due to a lack of proof that subcontractors had been paid pursuant to 35 Ill. Adm. Code 734.630(ii). Bauer testified that the Illinois EPA accepts cancelled checks, affidavits from subcontractors stating that they have been paid, or lien waivers. TR p. 38. Referencing the Illinois EPA form for handling charges submitted by Freedom, Bauer noted that no proof of payment was received for the Peoria City County Landfill and Rowe Construction Company. The affidavit from T.M.I. Analytical Services, LLC was unacceptable since it was undated. AR p. 87, TR p. 39. Illinois Oil Marketing Equipment's affidavit was

inadequate as it stated "the subcontractor payment agreement has been made to the satisfaction of the AFFIANT" rather than specifically declaring that the subcontractor had been paid. AR pp. 21-23, TR p.39. As no adequate proofs of payment by Freedom's subcontractors were submitted to the Illinois EPA, all of the handling charges sought by Freedom were denied.

IV. ARGUMENT

The conversion formula of 1.5 tons per cubic yard was the subject of much input and comment during the rulemaking proceeding for Part 734 of the Board's UST rules. In its opinion concerning the first notice proposal, the Board considered cubic yard weights that were higher and lower than 1.5 tons. Proposed Amendments to Leaking Underground Storage Tanks (35 Ill. Adm. Code 732, 734), R04-22, 23 (First Notice) (February 17, 2005) pp. 73-74. In presenting its decision on the issue, the Board remarked as follows:

> "Regarding the conversion factor, the Board recognizes that the factor ranges from one to two tons per cubic yard for different types of geologic material that occur at Illinois UST sites and the Board finds that the record supports a 1.5 tons per cubic yard conversion factor. The Board will proceed to first notice with the swell factor and conversion factor as proposed by the Agency." Id.

Although further comments concerning the formula were received by the Board prior to issuance of the second notice proposal, the Board did not change the formula in that proposal. Proposed Amendments to Leaking Underground Storage Tanks (35 Ill. Adm. Code 732, 734), R04-22, 23 (Second Notice) (December 1, 2005) pp. 72-73. The Part 734 regulations took effect on March 1, 2006.

In its brief, Freedom states "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). . . . 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. Adm. Code, Part 734, Section 735.825 [sic], and in Appendix C to Part 734." Freedom's Brief ("BR") p. 7. Freedom apparently believes that contaminated backfill and clean backfill should be measured and reimbursed solely by volume without the use of a weight conversion formula.

But Freedom's position is flawed on many levels. Concerning the disposal of backfill, it is doubtful that a landfill would accept numerous truckloads of contaminated backfill based upon a volume calculation of a distant excavation performed by someone not in their employ. Would the landfill similarly rely on this stranger's volume calculation in billing for the disposal? Would a supplier of clean backfill keep loading trucks destined for the excavation until it was advised that the excavation was filled, and then bill based solely upon the volume of a distant excavation calculated by someone not in its employ? Or would a landfill or backfill supplier have an employee jump into the bed of a dump truck with a tape measure and try to determine the volume of the load even though the load is not nicely squared in the truck but is unevenly spread? Of course not. Landfills weigh dump trucks loaded with contaminated fill on a truck scale, and then weigh the truck again after it has dumped its load. From the difference in weights, the landfill knows how much waste it has accepted and how much to charge the generator. Backfill suppliers also weigh empty and loaded trucks to know how much product they have provided and how much to charge the customer. Both the landfill and backfill supplier in the instant case based their invoices on tonnage. Trucks can be quickly and accurately weighed. Taking measurements for volume calculations would be more labor intensive and less accurate. Freedom's methodology is neither superior to nor more practical than the existing process.

Freedom identifies no professional or trade organizations involved with the use of geologic materials that are proponents of using volume-only measurements. It does not appear that such a scheme was seriously considered, if even proposed, during the Part 734 rulemaking proceeding. Freedom's concern over variations in the weights of different fill materials was examined and addressed by the Board in the rulemaking.

Freedom's response to the backfill deductions in this case also raises some questions. Green testified that on plans and budgets, he uses the conversion formula of 1.5 tons per cubic yard. TR pp. 50-51. But when he seeks reimbursement, his requests are based solely on volume calculations. Id. It is difficult to believe that this dual practice has not caused Green difficulty at other LUST sites. But Green's statements are not accurate. In his 45-Day Report for this site, dated October 13, 2008 and received by the Illinois EPA on November 3, 2008, it is noted that "Approximately 447 cubic yards of contaminated soil was removed from the site." AR p. 168. A 45-Day Report is neither a plan nor a budget. 447 cubic yards is the same number Bauer calculated by using the tonnage total from the landfill invoice and applying the conversion formula of 1.5 tons per cubic yard. It is unclear why Green, with site activities completed, presented the Illinois EPA with two different cubic yard figures for the amount of backfill disposed.

Also, Freedom's attorney and Green both noted that since providing environmental consulting services since 1991, completing over 300 UST sites, and UST work accounting for 75% of Green's business, this was the first time that a cubic yard claim was reduced due to the application of the 1.5 tons per cubic yard conversion formula. TR pp. 6-7, 9, 17. As the Part 734 regulations have been in effect since 2006, this statement is tantamount to a testimonial that the regulations in question and the Illinois EPA's application of them have successfully worked. But Freedom overreacts to the situation

it finds itself in by asking the Board, among other things, to find the 1.5 tons per cubic yard conversion formula to be arbitrary and capricious, or to find the Illinois EPA's application of the regulations to be arbitrary and capricious. BR p. 11. All of this over a $10,754.35 claim deduction and the first such deduction Green has experienced. Why is the relief requested so drastic when this apparently is an isolated, rather than a recurring, occurrence?

Concerning the asphalt replacement costs that were deducted in Item 2 of Attachment A, Green testified that Freedom's reimbursement request for 1711 square feet of asphalt "was based on the actual square footage, physically calculated on actual dimensions, reasonably and necessarily replaced." BR p. 10. But on cross-examination, Green acknowledged that there was no map of the asphalt removal area in the Administrative Record. TR p. 54. Green stated that "it was all shown on the excavation extents." Id. As the map depicting the excavation extents was what Bauer used to calculate the amount of asphalt Illinois EPA would reimburse, and no other map was in the Administrative Record that indicated additional asphalt had to be removed, Bauer's calculation and the resulting deduction stand unrefuted.

Two other points in Green's testimony are relevant here. First, Green noted that after a release was detected at the site, Freedom decided to take the facility out of operation. TR. pp. 10-11. After the UST removal, Freedom directed that the entire site be paved to facilitate its sale. Id. Second, Green makes several references to the asphalt installed at the site as serving as an engineered barrier. TR pp. 12, 19-20, 49-50. But as Bauer testified, using paving as an engineered barrier only occurs at the corrective action phase of the UST review process. TR p. 36. This site never reached that phase. These two points are mentioned to suggest that Freedom and Green were motivated by other reasons, even if Green was mistaken on the engineered barrier concept, to install additional

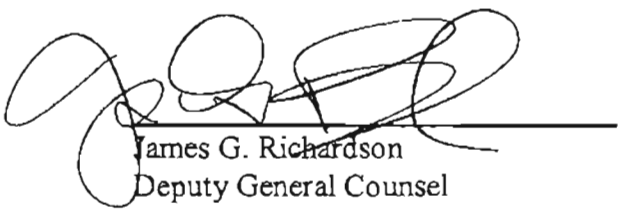
paving at the site beyond that which was destroyed by the UST removal. An owner/operator or consultant can pave as much of a site as they wish, but the UST Fund will only pay for the minimum amount of asphalt necessary to comply with the Act.

IV. CONCLUSION

Freedom has clearly failed in proving that the 1.5 tons per cubic yard conversion formula is arbitrary and capricious. It is clear that the regulations were duly promulgated. Let alone has Freedom not shown that the Illinois EPA's application of the formula in the instant case was arbitrary and capricious, it has not even met its burden in demonstrating that the Illinois EPA deductions concerning contaminated backfill, clean backfill, asphalt replacement, and handling charges, all of which have been presented in detail in this brief, were inconsistent with the facts of this site and the law applicable to it. For all of the reasons and arguments presented herein, the Illinois EPA respectively requests that the Board affirm its November 19, 2009 decision.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY



James G. Richardson
Deputy General Counsel

CERTIFICATE OF SERVICE

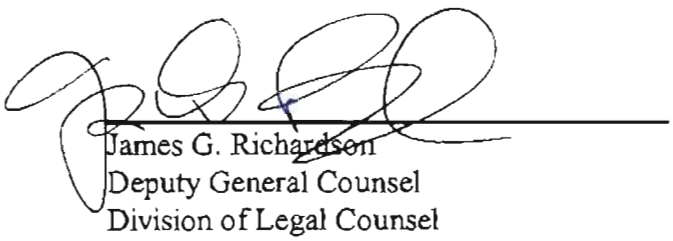
I, the undersigned attorney at law, hereby certify that on July 2, 2012 I served true and correct copies of a RESPONSE TO POST-HEARING BRIEF OF PETITIONER by Facsimile and 1st Class U.S. Mail upon the persons as follows:

John Therriault
Illinois Pollution Control Board
100 West Randolph Street, Suite 11-500
Chicago, Illinois 60601-3218

Robert M. Riffle
Elias, Meginnes, Riffle & Seghetti, P.C.
416 Main Street, Suite 1400
Peoria, Illinois 61602-1611

Carol Webb
Hearing Officer
Illinois Pollution Control Board
1021 North Grand Avenue East
P.O. Box 19274
Springfield, Illinois 62794-9274

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY



James G. Richardson
Deputy General Counsel
Division of Legal Counsel
1021 North Grand Avenue East
P.O. Box 19276
Springfield, Illinois 62794-9276
217/782-5544
217/782-9143 (TDD)