BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

BRIMFIELD AUTO & TRUCK,	)	
	)	
Petitioner,	)	
	)	
vs.	)	
	)	PCB No. 12-134
ILLINOIS ENVIRONMENTAL	)	(UST Appeal)
PROTECTION AGENCY,	)	
	)	
Respondent.	)	

POST-HEARING BRIEF OF PETITIONER

NOW COMES Brimfield Auto & Truck, by its attorney, Robert M. Riffle, Esq., and as and for the Post-Hearing Brief of Petitioner, states as follows:

INTRODUCTION

Brimfield Auto & Truck ("Brimfield") retained Midwest Environmental Consulting & Remediation Services, Inc. ("Midwest") to remediate a Leaking Underground Storage Tank Site. The property was remediated. As part of that remediation project, soil borings and monitoring wells were drilled.

The Illinois Environmental Protection Agency ("IEPA") rejected certain costs which were admittedly incurred in connection with the project at issue. At issue in this appeal is the depth to which the initial borings on this site should have been drilled. There is no dispute regarding the actual depth to which the borings were actually advanced, or that the costs for that work was actually incurred and paid. Rather, the IEPA rejected the cost of advancing the borings to the depth to which they were drilled. The IEPA also rejected the associated sampling costs for samples taken below the depth to which the IEPA determined the drillings should have ceased. Respectfully, it was arbitrary and capricious to deny these costs.

RELEVANT FACTS

Mr. Green of Midwest testified at the hearing. His testimony is found at pages 7-12 and 44-53 of the Transcript of Proceedings. Mr. Green testified regarding the fact that the wells were actually drilled to the depths for which reimbursement was sought. (Transcript, p. 44). He explained, at length, why he thought that the depths were proper. (Transcript p. 10, 11-16, 44-49, 52-53). The drilling was outsourced to a reputable subcontractor. (Transcript p. 48). Mr. Green testified that it is not always feasible to determine whether groundwater has actually been reached (Transcript p. 53). Finally, Mr. Green testified as follows:

> Q. Is drilling down to about 20 feet a fairly standard practice?
> A. Yes, standard for that area.

(p. 53, lines 7-9; Transcript of Proceedings). Mr. Green's testimony largely stands unrebutted.

Mr. Chappel of the IEPA also testified at the hearing. Under cross-examination, he testified as follows:

> Q. Okay. Do you have any reason to believe that those are not accurate as to the depths they were actually drilled?
> A. No.
> Q. Okay. So monitoring well 1 was drilled to 26 feet. The other is either 20 or 22 feet?
> A. I believe so, yes.
> Q. Do you have any idea why they were drilled to that depth?
> A. No.
> Q. And it's your testimony that the only time it's appropriate to drill below the groundwater is during the actual remediation phase?
> A. No. During the investigative phase
>
> ***
>
> ...in subsequent stages, Stage 1, Stage II or Stage III, if you have evidence that contaminated soil is in contact with groundwater or you have other available evidence that groundwater is contaminated, you have to do a groundwater investigation. In order to construct a monitoring well, you obviously have to drill below the depth to the water.

Q. Do projects always proceed in that exact sequence of early action, Stage I, Stage II?
A. No.
Q. Under what circumstances is it appropriate not to proceed in that fashion?
A. In my opinion, the regulations don't allow for it.
Q. But it does happen?
A. It does happen.

(p. 36, lines 10-24; p. 37, lines 1-17; Transcript of Proceedings)

Mr. Chapel then discussed a scenario where a step was skipped in the process. He testified as follows:

Q. Are you describing a situation where somebody has essentially skipped a step that would have been required?
A. Correct.
Q. Okay. And what step is it that they skipped under that scenario?
A. The 734.210(h) early action requirements.
Q. Okay. So they skipped the early action requirements. They've gone right to a next step. What would that next step be called?
A. I assume they call it a Stage I.

***

Q. Okay.
A. But that's not what it is.
Q. Okay. What is it?
A. It's early action 210(h)(2) boring requirements which I just described where we try to fit what they did into what is required in 734.210(h)(2) for tanks that remain in place.
So we use the information they submit to the extent we can to satisfy those early
action requirements and then build upon that and say the following additional work needs to be done to finish up your early action before you go to Stage I.
Q. And is that your understanding of what happened in this particular case?
A. Yes.
Q. Okay. And on a percentage basis, could you give just a rough approximation of how often that happens?
A. 30 percent.

(p. 40, lines 11-24; p. 41, lines 1-20; Transcript of Proceedings)

ARGUMENT

The depth of borings which occurred in the field was appropriate.

The IEPA, through Mr. Chappel, argues that Petitioner should have determined that the wells should have terminated at a higher elevation. This 20/20 hindsight approach does not take into consideration the actual events encountered in the field. It is not always possible to determine when groundwater has been reached by examining the materials which have been encountered in the drilling process. (Transcript, p. 53) A very experienced drilling company and a very experienced environmental remediation contractor, proceeding in good faith, drilled to depths they thought were reasonable and necessary. The costs were incurred in good faith. The expenses actually incurred should be reimbursed.

Mr. Green's unrebutted testimony was that drilling to the depths where drilling occurred in this case is standard practice. This testimony was not rebutted. Mr. Chappel testified regarding what he thought was required, but ultimately acknowledged that procedures are not always precisely followed (in 30% of the cases). Just because procedures in the field do not always fall into precise categories does not mean that parties, proceeding in good faith, should not be reimbursed for the expenditures reasonably and actually incurred in remediating contamination from leaking underground storage tanks.

With all due respect, it has been difficult for small remediation contractors to survive over the past decade in this economic environment with the Illinois Leaking Underground Storage Tank Fund's well-known solvency problems. The IEPA's failure or refusal to pay for drilling charges which they freely admit were actually incurred is a source of great frustration to Petitioner and

Midwest. The denied drilling costs (in the amount of $2,241)[1] and the associated sampling costs (in the amount of $3,635.28) were reasonably and necessarily expended, and should be paid.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests approval and reimbursement of costs which indisputably were incurred and paid in connection with the remediation of the Subject Property.

Respectfully submitted,

BRIMFIELD AUTO & TRUCK, Petitioner

By: _____
Robert M. Riffle
Its Attorney

ROBERT M. RIFFLE, ESQ.
133A S. Main Street
Morton, IL 61550
(309) 321-8365

[1] Petitioner acknowledged that the reimbursement rates for the drilling and monitoring wells were incorrectly calculated. The rate for drilling is $26.09/foot, and the rate for monitoring wells is $18.72/foot, resulting in a total due of $2,241 for this category.

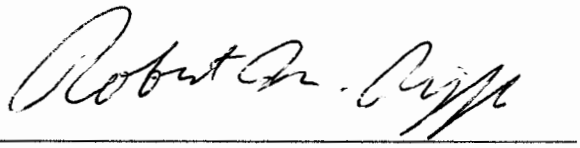
CERTIFICATE OF SERVICE

The undersigned certifies that on May 27, 2014, a copy of the foregoing document was filed electronically with the Illinois Pollution Control Board and served upon each party to this case by

_X_ Electronic delivery and United States Mail at 5:00 p.m. on said date.

Carol Webb
Hearing Officer
Illinois Pollution Control Board
1021 N. Grand Avenue East
PO Box 19274
Springfield, IL 62794-9274

Scott B. Sievers
Assistant Counsel
IEPA
1021 North Grand Avenue East
PO Box 19276
Springfield, IL 62794-9276



ROBERT M. RIFFLE, ESQ.
133A S. Main Street
Morton, IL 61550
(309) 321-8365