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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

NOTICE

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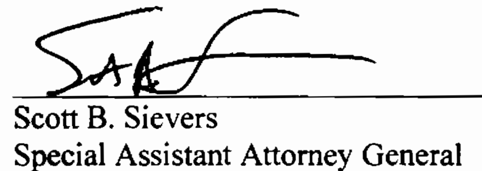
PLEASE TAKE NOTICE that I have today caused to be filed RESPONDENT'S CLOSING BRIEF with the Illinois Pollution Control Board, a copy of which is served upon you.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY,

Respondent,

Dated: June 25, 2014

BY: 
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ILLINOIS ENVIRONMENTAL	)	
PROTECTION AGENCY,	)	
	)	
Respondent.	)	

RESPONDENT'S CLOSING BRIEF

NOW COMES the Respondent, ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, by and through its attorney, Special Assistant Attorney General Scott B. Sievers, and for the Respondent's Closing Brief states the following:

I. STANDARD OF REVIEW

Section 57.3 of the Environmental Protection Act, 415 ILCS 5/1 *et seq.*, provides for the establishment of the Illinois Leaking Underground Storage Tank Program, which is to be administered by the Office of the State Fire Marshal and the Respondent, the Illinois Environmental Protection Agency ("Illinois EPA"). 415 ILCS 5/57.3. Section 57.7(c)(4) of the Act provides, in pertinent part, that "[a]ny action by the Agency to disapprove or modify a plan or report … shall be subject to appeal to the [Pollution Control] Board in accordance with the procedures of Section 40." 415 ILCS 5/57.7(c)(4).

The standard of review under Section 40 of the Act is whether the application, as submitted to the Agency, would not violate the Act and Board regulations. *Freedom Oil Co. v. Illinois EPA*, PCB No. 10-46, slip op. at 13 (Aug. 9, 2012). In appeals of final Agency determinations, the burden of proof rests upon the petitioner. *Id.* The standard of proof in LUST

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appeals is the preponderance of the evidence, meaning that a proposition is proved by a preponderance when it is more probably true than not. *Id.* The Pollution Control Board' review generally is limited to the record before the Agency at the time of its determination. *Evergreen FS, Inc. v. Illinois EPA*, PCB No. 11-51, op. at 14 (June 21, 2012). The Agency's denial letter frames the issue. *Id.*

II. STATEMENT OF FACTS

A. The Administrative Record

On May 26, 2011, Midwest Environmental Consulting & Remediation Services Inc. ("MECRS") submitted what it characterized as a Stage 1investigation and Stage 2 Site Investigation Plan (SIP) and Budget to the Respondent Illinois Environmental Protection Agency on behalf of the Petitioner, Brimfield Auto & Truck ("Brimfield"). (Admin. R. at 39-158; Ex. D.)

On August 19, 2011, Illinois EPA rejected the May 26 plan and budget for several reasons. (Admin. R. at 159-61; Ex. C.)

On March 28, 2012, MECRS President Allan Green had a telephone conversation with Illinois EPA's Hernando Albarracin. (Admin. R. at 165.) Following that conversation, MECRS submitted to Illinois EPA "a request to re-review the Stage 1 related sections of the Stage 2 Site Investigation Plan and Budget." (Admin. R. at 165; Ex. B.)

On April 30, 2012, Illinois EPA modified Brimfield's Stage 1 Site Investigation Plan Budget. (Admin. R. at 176-79; Ex. A.) Illinois EPA deducted $2,956.45 in costs based upon the submitted drilling and monitoring rates as well as the amount of drilling and monitoring, as it found they exceeded the maximum payment amounts set forth in the regulations and they were not reasonable. (Admin. R. at 179.) Illinois EPA also rejected the $3,635.28 in submitted costs for soil samples and EnCore samples taken below the depth to water. (*Id.*) However, Illinois EPA

approved $15,184.84 in submitted costs. (Admin. R. at 178.)

On July 24, 2012, Brimfield filed the Petition for Review And Hearing/Appeal at issue in this action. In it, Brimfield claimed it had submitted a $21,776.57 Stage 1 Site Investigation Plan Budget, but that Illinois EPA had rejected a $15,184.84 budget.[1] (Pet. at ¶¶ 3-4.) Brimfield petitioned for Illinois EPA's decision to be reversed or modified so that its proposed $21,776.57 budget would be accepted. (Pet. at 2.)

B. The Hearing

On April 22, 2014, Hearing Officer Carol Webb conducted a hearing in this action in Springfield, Illinois. (Tr. at 4.) MECRS President Allen Green testified on behalf of Brimfield, and Harry Chappel testified on behalf of Illinois EPA. (*E.g.*, Tr. at 3.)

At the outset of the hearing, Brimfield's attorney stated that they would stipulate to the applicability of the reimbursement rates attached to the motion filed by Illinois EPA to supplement the administrative record, which the Hearing Officer granted. (Tr. at 5.)

1. Brimfield Witness Allen Green

Allen Green testified that he was president of MECRS, and that he had done leaking underground storage tank work for Brimfield Auto & Truck. (Tr. at 7.) Green testified he believed the drilling depth he requested were proper because "[w]ithout something very obvious on the site as far as the geology or ground water levels during a Stage I which is the initial investigation, we don't know where the groundwater levels are at until we install monitoring wells and determine what the groundwater levels are." (Tr. at 10.) "Based on field observations, we don't know where the groundwater is at unless it's real obvious," Green testified. (Tr. at 44.)

[1] Brimfield's assertion in its petition that Illinois EPA rejected a $15,184.84 budget is erroneous, as Illinois EPA did the opposite: It approved $15,184.84 of the submitted budget. (Admin. R. at 178.)

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Green described the drilling process:

> In this case, they were using a poly stem auger, and they drill down to the depth that you want to sample. You put a hollow tube basically, a sampling tube inside the auger, and that's driven to a depth normally three feet below the bottom of the auger. That's pulled up, and then that tube is opened, it's split, and you've got a three-foot section of soil there that should be representative of the strata that's below the auger.
>
> Then you drill down to the next depth, and you do the same thing down to that depth to where you stop.

(Tr. at 45.) Green testified of drilling and taking samples in three-foot increments. (Tr. at 50.) Green testified that there was either a geologist or environmental tech on site for the drilling. (Tr. at 51.)

2. Illinois EPA Witness Harry Chappel

Harry Chappel testified that he is a professional engineer with a bachelor's degree in civil engineering and a master's degree in thermal and environmental engineering. (Tr. at 15.) Chappel has been employed by Illinois EPA for more than 31 years and worked for a private consulting firm for five years. (Tr. at 14.) Chappel is a unit manager within the Leaking Underground Storage Tank Section of Illinois EPA's Bureau of Land. (Tr. at 13.) Chappel estimated that he had worked with leaking underground storage tank issues for 11 or 12 years, and that he is experienced in reviewing both plans and budgets (Tr. at 14-15.)

Chappel testified that he wrote the letter admitted as Exhibit A, which is the decision letter at issue in this appeal. (Tr. at 16; Pet. for Review Ex. A.) Chappel testified that Exhibit D was Brimfield's original submittal, which was denied by Illinois EPA in Exhibit C. (Tr. at 17.) With Exhibit B, Brimfield sought reconsideration of the decision, which resulted in Illinois EPA's modification letter in Exhibit A. (Tr. at 17.) Exhibit E comprised Chappel's review notes. (Tr. at 18.)

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While Brimfield characterized the submittal at issue as a Stage 1 investigation, *see* Ex. D, Chappel testified that he considered Brimfield's submittal to constitute the early action samples of a 45-day report because it was the first submittal for the site. (*See* Tr. at 33-34.) Chappel testified that early action requirements are spelled out in Section 734.210(h) of the regulations, and that Stage 1 requirements are additional borings to further define the extent of impact after early action samples have been collected. (Tr. at 33.)

Chappel testified he understood that, under the regulations, drilling is not supposed to go below the depth to water. (Tr. at 28, 35.) "[O]nce you have achieved the depth to water, anything below that is a groundwater issue," Chappel testified. (Tr. at 28.) Chappel relied upon the boring logs submitted by Brimfield and contained on pages 77 through 82 of Exhibit D in determining the depth to water of the five monitoring wells to be nine (9) feet. (Tr. at 18-20.) Chappel determined that twelve (12) soil samples were taken below this depth-to-water figure. (Tr. at 18-19.) Had the borings been only for soil samples, Chappel testified that the borings should have been stopped at this nine foot depth-to-water figure, as he understood the regulations to limit drilling in the initial stages to the depth-to-water. (Tr. at 21, 25.) However, the borings were used for monitoring wells, so Chappel allowed an extra six feet for each well below the depth-to-water table. (Tr. at 22.) The open portion of a monitoring well is a screen where the groundwater infiltrates into the well and samples can be taken. (Tr. at 22-23.) Normally, Chappel allows for five feet because most screens are ten feet, and Illinois EPA allows for five feet above the depth-to-water and five feet below the depth-to-water to take into account groundwater fluctuations for the years the wells are there. (Tr. at 22.) "In this case rather than just allow five feet, I rounded it off and made it six feet to come up with an even 15-foot depth for each boring," Chappel testified. (Tr. at 22; *see also* Tr. at 27.) As he allowed 15 feet for each of the five monitoring

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wells, Chappel allowed a total of 75 feet for the borings. (*See* Tr. at 27.)

Chappel testified that he reviewed both Exhibit D, the original submittal, and Exhibit B, the request for re-review, and that neither identified site-specific conditions that warranted drilling below the depth to water, and no such conditions were called to his attention. (Tr. at 42.)

Chappel also testified that, of Brimfield's 22 BTEX and PNA samples, 12 were taken below the depth-to-water figure of nine feet and thus were inappropriate. (Tr. at 29-30.) Chappel further testified that in most cases, three EnCore samples are allowed at each sampling point. (Tr. at 31.) With 22 sampling points, there would be 66 EnCore samples. (*See* Tr. at 30-31.) However, only 10 of Brimfield's sampling points were taken above the depth to water figure, so only 30 EnCore samples were allowed. (Tr. at 31-32.)

In determining the proper payment amounts, Chappel testified that he relied upon the maximum payment amounts in effect at the time of the work at issue, and that those amounts were set forth in Exhibit H and were derived from Exhibit G (35 Ill. Adm. Code 734.870). (Tr. at 25-27.) "[T]he drilling rates and the monitoring rates both came from Exhibit H." (Tr. at 28.)

Based upon his determination that only 75 feet of borings, 10 BTEX and PNA samples, and 30 EnCore samples were allowed under the regulations and his determination of the applicable maximum payment amounts, Chappel made the modifications set forth in Illinois EPA's decision letter. (Tr. at 32; Ex. A.)

III. ARGUMENT

A. BRIMFIELD FAILED TO PROVE IT DID NOT VIOLATE BOARD REGULATIONS WHEN IT DRILLED BELOW GROUNDWATER WITHOUT SITE-SPECIFIC CONDITIONS WARRANTING IT.

This Board's regulations repeatedly limit drilling depth for borings to the point at which groundwater is encountered, unless site-specific conditions warrant otherwise. Section 734.210(h)(2)(A) and (B) of the Board's regulations concerning early action provide in pertinent part that each boring must be drilled to a specific depth below grade, "or **until groundwater or bedrock is encountered, whichever is less. Borings may be drilled below the groundwater table if site specific conditions warrant**," but no more than a specific depth below grade. 35 Ill. Adm. Code 734.210(h)(2)(A)-(B) (emphasis added). Section 734.315(a)(1)(A) and (B) of the regulations concerning Stage 1 Site Investigation provide in pertinent part that "[t]he borings must be advanced through the entire vertical extent of contamination, based upon field observations and field screening for organic vapors, provided that **borings must be drilled below the groundwater table only if site-specific conditions warrant**." 35 Ill. Adm. Code 734.315(a)(1)(A)-(B) (emphasis added). Thus, regardless whether Brimfield's borings were Early Action work as Illinois EPA's Harry Chappel characterized them or Stage 1 Site Investigation work as Brimfield reported them, this Board's regulations prohibited them from being drilled below the groundwater table regulations unless site-specific conditions warranted doing so.

In the instant case, Brimfield sought payment under its Stage 1 Actual Costs Summary for 25 feet for each of five borings, for a total of 125 feet. (Admin. R. at 141; Ex. D at 141.) However, Brimfield's own boring logs show that no well was drilled to a 25-foot depth: two were drilled to 20 feet, two more were drilled to 22 feet, and one was drilled to 26 feet. (Admin.

R. at 78-82; Ex. D at 78-82.) Brimfield's submittal shows a total of 110 feet drilled and not the 125 feet claimed in its Stage 1 Actual Costs Summary. (Admin. R. at 78-82, 141; Ex. D at 78-82, 141.)

In its Post-Hearing Brief of Petitioner, Brimfield disputes Illinois EPA's determination that the wells should not have been drilled below the groundwater table. (Br. at 4.) Brimfield asserts that "[t]his 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." (Br. at 4.) Likewise, Green testified that "we don't know where the groundwater levels are at until we install monitoring wells and determine what the groundwater levels are." (Tr. at 44.) The problem with this argument, though, is that Brimfield had either a geologist or an environmental tech on site during the drilling, and Brimfield reported in the boring logs submitted to Illinois EPA that it did know what the groundwater levels were, as it reported the depth to groundwater while drilling was nine feet for each of the five monitoring wells. (Tr. at 51; Admin. R. at 78-82; Ex. D at 78-82.)

Illinois EPA's Harry Chappel testified that a 10-foot screen[2] typically is used for monitoring wells, and he factors in five feet above the water table and five feet below the water table to allow for this screen. (Tr. at 22.) Thus, a monitoring well could be drilled to the nine-foot depth at which ground water was encountered and then an additional five feet for the monitoring well screen, for a total of 14 feet. Chappel, though, rounded up to six feet rather than five feet, thereby allowing for a drilling depth of 15 feet for each of the five monitoring wells, for a total of 75 feet of drilling—notably less than the 110 feet Brimfield reported drilling or the 125 feet for which it sought payment. (Tr. at 22; Admin. R. at 172; Ex. E at 172.) And while Board

[2] Green also spoke of a 10-foot screen being used for a monitoring well. (Tr. at 47.)

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regulations provide that borings may be drilled below the groundwater table where warranted by site-specific conditions, Chappel testified that neither Exhibit D, the original submittal, nor Exhibit B, the request for re-review, identified site-specific conditions warranting drilling below the depth to water, and that no such conditions were called to his attention. (Tr. at 42.)

In its brief, Brimfield falls back to its argument that the work was actually performed, its costs were actually incurred, and thus it should be reimbursed. (Br. at 4.) The Board, though, has held that Illinois EPA's failure to dispute that work was done "is beside the point; that the work was performed does not show that the work was necessary to meet the minimum requirements." *Beverly Powers, f/d/b/a Dick's Super Service v. Illinois EPA*, PCB No. 11-63 (Aug. 8, 2013 Opinion and Order at 19).

A preponderance of the evidence shows that Illinois EPA correctly modified Brimfield's Stage 1 submittal to limit the authorized drilling depth of the borings to the nine-foot depth to water Brimfield reported in its logs plus six feet to allow for the monitoring well screening, for a total of 75 feet of drilling. Brimfield's submittal, however, sought payment for 125 feet of drilling, which was not only more than Illinois EPA determined was authorized under the regulations but more than Brimfield itself reported having actually drilled in its boring logs. As Brimfield's submittal violated Board regulations by seeking payment both for 15 feet of drilling not actually performed as well as for drilling that exceeded the regulatory limits by boring below the depth to the groundwater table without identifying site-specific conditions warranting it, the Board should affirm Illinois EPA's April 30, 2012 modification of Brimfield's Stage 1 Site Investigation Plan Budget to approve 75 feet of drilling rather than the 125 feet submitted.

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B. BRIMFIELD FAILED TO MEET ITS BURDEN TO PROVE IT DID NOT VIOLATE BOARD REGULATIONS BY TAKING SAMPLES BELOW THE GROUNDWATER TABLE ABSENT SITE-SPECIFIC CONDITIONS.

In its submittal, Brimfield sought payment for 22 BTEX samples, 22 PNA samples, and 66 EnCore samples. (Admin. R. at 142-43; Ex. D at 142-43.) However, Illinois EPA's Chappel determined that only 10 of the BTEX and PNA soil samples were taken above the depth to water, with 12 taken below—a fact supported by Brimfield's boring logs. (Admin. R. at 78-82, 171, 175; Ex. D at 78-82, 171, 175.) Chappel determined that those 12 were inappropriate because they were taken below the depth to water. (Tr. at 30; Admin. R. at 175; Ex. D at 175.) With three EnCore samples allowed at each sampling point in most cases and with only 10 of the sampling points above the depth to water, Chappel determined the regulations only allowed for 30 EnCore samples. (Tr. at 31-32; Admin. R. at 173; Ex. D at 173.)

As Board regulations prohibit drilling below the groundwater table unless site-specific conditions exist, and as Brimfield's submittal did not identify any such site-specific conditions warranting drilling below the groundwater table, soil samples taken below the groundwater table likewise are not authorized by the regulations. *See, e.g.*, 35 Ill. Adm. Code 734.210(h)(2)(D). Therefore, Brimfield's submittal sought reimbursement for samples that were not authorized by Board regulations.

Consequently, the Board should affirm Illinois EPA's April 30, 2012 modification of Brimfield's Stage 1 Site Investigation Plan Budget to approve only the 10 BTEX and 10 PNA soil samples and 30 EnCore samples taken above the groundwater table and to deny the $3,635.28 in costs Brimfield sought for the 12 BTEX and 12 PNA soil samples and 36 EnCore samples taken below the groundwater table.

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C. BRIMFIELD'S SUBMITTAL REQUESTED ERRONEOUS RATES, AND IT NOW STIPULATES TO THOSE USED BY ILLINOIS EPA.

In its submittal, Brimfield sought reimbursement for drilling costs at the rate of $31.09 per foot and for its monitoring well costs at the rate of $24.31 per foot. (Admin. R. at 141; Ex. D at 141.) Illinois EPA's Chappel, however, testified that in modifying Brimfield's submittal, he relied upon the maximum payment amounts in effect at the time of the work at issue, and that those amounts were set forth in Exhibit H and were derived from Exhibit G (35 Ill. Adm. Code 734.870). (Tr. at 25-27.) Exhibit H sets forth the maximum payment amounts for hollow-stem auger (HSA) drilling at $26.09 per foot and for monitoring wells at $18.72 per foot. (Ex. H.) Chappel modified Brimfield's submittal from $31.09 per foot to this $26.09 per foot rate for drilling costs and from $24.31 per foot to this $18.72 per foot rate for the monitoring wells based upon the rates set forth in Exhibit H. (Tr. at 28; Admin. R. at 172, 179; Ex. A at 179; Ex. E at 172.) Illinois EPA moves the Board to take judicial notice that Exhibit H, which sets forth the maximum payment amounts from July 1, 2010, through June 30, 2011, is available to the public on Illinois EPA's website at http://www.epa.state.il.us/land/lust/forms/budget-forms/forms-1/max-payments-jul10.pdf.

Prior to the final hearing in the instant matter, Illinois EPA moved to supplement the administrative record with Exhibit H, which the Hearing Officer granted. (Tr. at 5.) At the outset of the final hearing, Brimfield's attorney stated that they would stipulate to the applicability of the reimbursement rates attached to Illinois EPA's motion. (Tr. at 5.)

Consequently, Illinois EPA has proven by a preponderance of the evidence that its modification of the drilling and monitoring well reimbursement rates in Brimfield's submittal was correct and that Brimfield's requested rates were incorrect[3], and Brimfield itself has

[3] Brimfield's request for erroneous drilling and monitoring well rates should be sufficient for the Board to affirm

stipulated that the modified rates are applicable in this action. As Brimfield's submittal sought reimbursement for its drilling and monitoring costs at rates that violated 35 Ill. Adm. Code 734.870, a Board regulation, the Board should affirm Illinois EPA's April 30, 2012 modification of Brimfield's Stage 1 Site Investigation Plan Budget to approve drilling costs at the rate of $26.09 per foot rather than $31.09 per foot and monitoring well costs at the rate of $18.72 per foot rather than $24.31 per foot.

IV. CONCLUSION

As Petitioner, Brimfield has the burden of proving that its submittal would not violate the Act and Board regulations. *Freedom Oil Co., supra.* In the instant case, Brimfield failed to prove that its submittal would not violate Board regulations prohibiting the drilling of borings below the groundwater table absent site-specific conditions and, in turn, samples taken below the groundwater table as well as Board regulations governing the applicable reimbursement rates for drilling and monitoring wells.

Consequently, Brimfield has failed to meet its burden of proof, and Illinois EPA's April 30, 2012 decision to modify Brimfield's Stage 1 Site Investigation Plan Budget should be affirmed.

Illinois EPA's entire modification of Brimfield's submittal. *See Broadus Oil Co. v. Illinois EPA*, PCB No. 10-48 (July 25, 2013 Opinion and Order at 8).

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WHEREFORE, the Respondent, ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, prays that this honorable Board DENY the Petitioner's appeal and AFFIRM the Respondent's April 30, 2012 decision.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,

Respondent,

Dated: June 25, 2014

BY:

Scott B. Sievers
Special Assistant Attorney General

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Brimfield Auto & Truck v. Illinois Environmental Protection Agency
Pollution Control Board No. 12-134

CERTIFICATE OF SERVICE

Scott B. Sievers, Special Assistant Attorney General, herein certifies that he has served a copy of the foregoing **RESPONDENT'S CLOSING BRIEF** upon:

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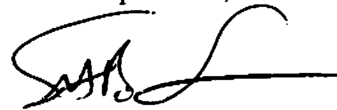
by mailing true copies thereof to the addresses referred to above in envelopes duly addressed bearing proper first class postage and deposited in the United States mail at Springfield, Illinois, on June 25, 2014.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY,

Respondent,

Dated: June 25, 2014

BY: 
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