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BEFORE THE POLLUTION CONTROL BOARD  
OF THE STATE OF ILLINOIS

TODD'S SERVICE STATION,  
Petitioner,

vs. NO. PCB03-2  
(UST Appeal-Petition  
for Review and  
Hearing/Appeal

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,  
Respondent.

REPORT OF PROCEEDINGS before CAROL  
SUDMAN, Hearing Officer, on the 15th day of  
July, 2003, at the Pekin City Hall, Council  
Chambers, 100 South Capitol Street, Pekin,  
Illinois.

APPEARANCES:

ELIAS, MEGINNES,  
RIFFLE & SEGHETTI, P.C.  
BY: ROBERT M. RIFFLE, ESQ.  
416 Main Street, Suite 1400  
Peoria, IL 61602  
On behalf of the Petitioner;

JOHN J. KIM, ESQ.  
Assistant Counsel  
1021 North Grand Avenue East  
Springfield, IL 62794  
On behalf of the Respondent.



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1                   HEARING OFFICER: Good morning.  
2 My name is Carol Sudman and I am a hearing  
3 officer with the Pollution Control Board.

4                   This is PCB No. 03-2 Todd's  
5 Service Station versus IEPA. It is Tuesday,  
6 July 15th, 2003 and we're beginning at ten  
7 o'clock a.m.

8                   Before we begin I would like to  
9 sincerely apologize for publishing an  
10 incorrect address in the hearing notice.  
11 Pekin City Hall moved several months ago. I  
12 will note for the record that the new  
13 address is prominently displayed in the  
14 window at the former address and the  
15 buildings are only four blocks apart.

16                   Accordingly, I find no prejudice  
17 to the public in proceeding with this  
18 hearing.

19                   I want to note for the record  
20 that there are no members of the public  
21 present. Members of the public are allowed  
22 to provide public comments if they so  
23 choose.

24                   At issue in this case is the



1 EPA's modification of petitioner's high  
2 priority corrective action plan budget  
3 regarding petitioner's property at 1303  
4 Washington Road in Washington, Tazewell  
5 County. The statutory decision deadline in  
6 this case was waived.

7                   You should note it's the  
8 Pollution Control Board and not me that will  
9 make the final decision in this case. My  
10 purpose is to conduct the hearing in a  
11 neutral and orderly manner so we have a  
12 clear record of the proceedings.

13                   I will assess the credibility of  
14 any witness on the record at the end of the  
15 hearing.

16                   This hearing was noticed  
17 pursuant to the Act and the Board's Rules  
18 and will be conducted pursuant to Sections  
19 101.600 through 101.632 of the Board's  
20 Procedural Rules.

21                   I'd like to ask the parties to  
22 please make their appearances on the record.

23                   MR. RIFFLE: Robert Riffle on  
24 behalf of the Petitioner.





1                   MR. KIM: John Kim on behalf of  
2 the Respondent.

3                   HEARING OFFICER: Are there any  
4 preliminary matters you wish to discuss on  
5 the record?

6                   MR. KIM: I had one issue I  
7 wanted to bring up. In the course of going  
8 through our preparation for the hearing we  
9 noticed that there's a mathematical error in  
10 the final decision that's under appeal and I  
11 wanted to point out it's on page 138 of the  
12 Administrative record.

13                   That's entitled Attachment A.  
14 That's attachment A to the final decision  
15 which itself is dated June 7 of 2002.  
16 Specifically in Section 2 there's a list of  
17 line items underneath the statement that The  
18 Agency has deemed the following hours and  
19 rates acceptable.

20                   Second from the bottom is line  
21 item for professional engineering and it  
22 states 4 hours at \$125 an hour equals \$250  
23 and that's an error that should be \$500 and  
24 therefore the total amount approved is



1 listed as \$2,806.08 and actually should read  
2 \$3,056.08, so certainly that's something  
3 that the Agency would consider to be part of  
4 the original decision and would certainly  
5 consider that additional \$250 to be part of  
6 the approval.

7 We apologize for the  
8 mathematical error.

9 HEARING OFFICER: Mr. Kim, could  
10 you provide an amended page of this to the  
11 Board?

12 MR. KIM: Well, it's part of our  
13 final decision and --

14 HEARING OFFICER: I see.

15 MR. KIM: I can't modify it that  
16 way. If the Board order does reflect this  
17 should be taken into consideration, then I  
18 guess what I was contemplating, if the Board  
19 notes, at the very least, no matter what  
20 else happens in the case, this \$250 line  
21 item should read \$500. If and when we would  
22 take the Board's opinion, put it into the  
23 file and consider that as part of the  
24 decision, therefore if and when a request



1 for reimbursement came in we would consider  
2 at least as this line item goes that \$500 is  
3 approved for professional engineers as  
4 opposed to \$250.

5 HEARING OFFICER: I think that  
6 will work.

7 MR. RIFFLE: Yes.

8 HEARING OFFICER: Do you have  
9 anything, Mr. Riffle?

10 MR. RIFFLE: No.

11 HEARING OFFICER: Would you like  
12 to proceed with your opening statements?

13 MR. RIFFLE: Yes, thank you.

14 I will be very brief in my  
15 opening statement. I think the issues are  
16 pretty well crystallized at this point.

17 By way of brief background,  
18 Midwest Environmental was engaged by Todd's  
19 Service Station as their environmental  
20 contractor for the LUST site, for that site,  
21 and the initial recommendation was to do  
22 this in a phased approach.

23 The IEPA approved of that  
24 proposal. When they got into the project



1 and got the initial data it become clear  
2 that additional work beyond that which was  
3 originally budgeted would be necessary.

4           There was considerable  
5 coordination between Midwest Environmental  
6 and Mr. Malcolm, the IEPA project manager on  
7 this project. There were considerable phone  
8 conversations at every stage of the way as  
9 the project was being developed.

10           Mr. Malcolm encouraged Midwest  
11 to proceed on the course they were  
12 proceeding on, to go ahead and obtain Tier 2  
13 objectives for Tier 2 closure of the site.

14           Midwest did exactly what Mr.  
15 Malcolm had approved and encouraged. Mr.  
16 Malcolm was aware of every significant step  
17 that was being taken along the way. When  
18 Midwest put their budget amendment in, it  
19 was initially rejected entirely because it  
20 was submitted after the No Further  
21 Remediation letter was issued.

22           The EPA subsequently  
23 acknowledged that Midwest should be allowed  
24 to resubmit that budget amendment because it





1 had been encouraged to do what they did,  
2 that being proceed with the oral approval of  
3 the IEPA. The IEPA agreed that it wouldn't  
4 be right to reject that budget and allotted  
5 it to be resubmitted. When it was  
6 resubmitted, the budget was trimmed from  
7 roughly \$7,500 down to, as Mr. Kim  
8 acknowledged, the right number should be  
9 somewhere around \$3,000.

10 So, significantly more than half  
11 of the amended budgeted amount was taken  
12 out.

13 Now, there were two reasons for  
14 these reductions in the budget. The first  
15 is a fairly minor matter in terms of the  
16 dollars that are at stake here today.

17 The IEPA reduced the hourly  
18 rates of three of the categories of the  
19 submittals, but of the 4,000 or so dollars  
20 that are at issue here, only about \$250 of  
21 the reduction relates to these hourly rate  
22 reductions. The vast majority of the amount  
23 in controversy is a reduction in the number  
24 of hours that were authorized for this



1 amended budget.

2           We think it's clearly improper  
3 for this reduction to have occurred. The  
4 evidence will be clear that all of these  
5 hours, and indeed many more hours were spent  
6 on the project, and moreover, the IEPA's  
7 employee, Mr. Malcolm, was specifically  
8 aware of the amount of time it was taking,  
9 the exact tasks that were involved and the  
10 difficulty of the project.

11           We believe that the reductions  
12 in these hours were simply arbitrary  
13 reductions, not based on the reasonableness  
14 of the time expended or the actual fact that  
15 these hours were expended, and for those  
16 reasons, it's our position that those  
17 additional hours should clearly be  
18 reinstated and paid as budgeted.

19           This was a project that involved  
20 significant effort on Midwest's part to  
21 obtain Highway Authority Agreements from two  
22 different governing bodies to do extensive  
23 testing to avoid having to do a massive  
24 clean-up of this property that would have



1     been at great expense to the Illinois LUST  
2     fund.

3                     The project was done  
4     efficiently, the project was done in a  
5     reasonable manner, all the expenses were  
6     both reasonable and actually expended. We  
7     think the record will be unrebutted on those  
8     points and for those reasons we would  
9     respectfully request the full reinstatement  
10    of the amended budget.

11                    Thank you.

12                    HEARING OFFICER: Mr. Kim, would  
13    you like to give an opening statement?

14                    MR. KIM: Just a very brief one.  
15    The Illinois EPA believes that based upon  
16    the information that was included in the  
17    budget that was reviewed, the circumstances  
18    that surrounded the submittal of that  
19    budget, and the past approval that was  
20    issued by the Agency in this case, that the  
21    decision that's under appeal is actually  
22    correct. It was appropriate. The deductions  
23    were reasonable and that upon review of the  
24    facts and the law the Board should issue an



1 order affirming the decision.

2 That's all.

3 HEARING OFFICER: Thank you.

4 Mr. Riffle, you may proceed with  
5 your case.

6 MR. RIFFLE: Our first witness  
7 will be Mr. Allan Green, the president of  
8 Midwest Environmental.

9 HEARING OFFICER: Would the  
10 court reporter please swear in the witness?

11

12 ALLEN M. GREEN,  
13 having been first duly sworn, was examined  
14 and testified as follows:

15

16 DIRECT EXAMINATION

17

18 BY MR. RIFFLE:

19 Q. Mr. Green, would you please  
20 state your name for the record?

21 A. Allan Green.

22 Q. Would you briefly state your  
23 educational background?

24 A. I have a Bachelor's degree in





1 Prelaw from the University of Illinois,  
2 Springfield, and a Bachelor's degree in  
3 Civil Engineering, environmental emphasis  
4 from Bradley University.

5 Q. You indeed are the president of  
6 Midwest Environmental?

7 A. Yes.

8 Q. Can you describe what that  
9 company is?

10 A. We're an environmental  
11 consulting firm. We do underground storage  
12 tank work, modeling, and general  
13 environmental investigations, Phase 1, Phase  
14 2s, property transactions.

15 Q. Approximately how long has  
16 Midwest been in business?

17 A. Since '91.

18 Q. Can you approximate how many  
19 LUST fund projects Midwest has been involved  
20 in?

21 A. Well over 300.

22 Q. With respect to the Todd's  
23 project, could you give an overview of what  
24 that project involved?



1           A.    Todd's Service Station is  
2    located in Washington, Illinois. We did a  
3    preliminary investigation of that property  
4    prior to an underground storage tank  
5    upgrade, discovered there was contamination  
6    around the tanks. Rather than upgrade the  
7    tanks at that point, they got an incident  
8    number with the state, and instead of  
9    upgrading the tanks decided to remove them  
10   and replace them.

11                We oversaw the removal of the  
12   tanks, the early action activities,  
13   significant contamination in the tank  
14   backfill and line areas. That material was  
15   removed as part of early action, and then  
16   they replaced their tank systems, repaved  
17   their lot and we went on with the  
18   classification of the site.

19                We did the soil borings, and  
20   testing the site, received a high priority  
21   classification based upon contamination at  
22   the property boundaries above the standard,  
23   and at that point we had to look at remedial  
24   alternatives, and took the TACO approach



1 basically looking for a closure to the site  
2 without undergoing a massive remediation,  
3 and basically that is the way the site was  
4 closed.

5 Q. Did you submit an initial  
6 budget?

7 A. Yes. The budget started with  
8 the submittal of the classification plan and  
9 budget.

10 Q. Did you suggest at that time to  
11 do some kind of a phased approach to  
12 assessing and remediating the site?

13 A. Yes.

14 Q. Could you give a little bit of  
15 detail as to what that entailed?

16 A. Basically we would do a  
17 preliminary investigation of the site and at  
18 that particular point determine what our  
19 next course of action would be and then we  
20 would submit a plan and budget for the next  
21 course of action from there.

22 Q. What response did you receive  
23 from the IEPA with respect to that proposal?

24 A. It was approved.



1 Q. Did Midwest proceed to do site  
2 related activities at that site?

3 A. Yes.

4 Q. What activities did Midwest  
5 perform?

6 A. We performed a site  
7 investigation to determine what the extent  
8 of contamination was on and off site, to  
9 come up with a corrective action plan.

10 Q. Did you encounter any particular  
11 difficulties in connection with that phase  
12 of the project?

13 A. The off-site contamination was  
14 determined to extend underneath the highway,  
15 the right of way was governed by the state  
16 and by the city. The utilities, including  
17 fiber-optic lines that ran along that  
18 section of road made it difficult to get  
19 close to the road to do any kind of borings.  
20 So we had to eventually move across the  
21 street and drill on the other side of the  
22 street and attempt to get closure that way.

23 Q. Were those borings on the other  
24 side of the street included in your initial





1 budget?

2 A. No.

3 Q. Did you receive any type of  
4 approval from the IEPA to advance those  
5 borings and do that testing across the  
6 street?

7 A. Yes.

8 Q. What approval did you receive?

9 A. They basically gave us an  
10 approval to do a certain number of borings  
11 to try to determine the extent of the  
12 contamination.

13 Q. Was that in one communication or  
14 was this an ongoing dialogue with the IEPA?

15 A. This was pretty well extensively  
16 communicated between the project manager who  
17 was assisting that we try to get as close to  
18 the road on the station side as possible to  
19 the point where we attempted to do hand  
20 borings, but with the utilities we could not  
21 safely get into that area. So there was  
22 ongoing dialogue back and forth as to how to  
23 solve the problem without creating the  
24 problem.



1           Q.   Who was your point of contact at  
2 the IEPA?

3           A.   James Malcolm.

4           Q.   Were the Highway Authority  
5 Agreements part of the initial budget?

6           A.   No.

7           Q.   Can you briefly describe the  
8 efforts undertaken by Midwest to obtain  
9 highway authorities? Let me back up. Can  
10 you tell us what governmental bodies were  
11 necessary to obtain Highway Authority  
12 Agreements from?

13          A.   The IDOT, the State Department  
14 of Transportation and the city of  
15 Washington.

16          Q.   Can you describe the efforts you  
17 undertook with respect to obtaining the  
18 Highway Authority Agreement from IDOT?

19          A.   The Department of Transportation  
20 had contacted the department division  
21 headquarters for that area. They send you  
22 the forms to be filled out and basically  
23 you're giving them a copy of everything you  
24 have for them to review to determine if it's



1 going to be acceptable to them to leave it  
2 there. Fill out the forms.

3                   Once in a while they ask for a  
4 bonding agreement. In this case that wasn't  
5 asked for. Basically, it's a matter of  
6 filling out forms, sending them to the  
7 department. They send those back. Then we  
8 fill out another section and they send it to  
9 their division headquarters, and if they  
10 agree, they will send us an approval.

11               Q. Did you indeed obtain a Highway  
12 Authority Agreement from the Illinois  
13 Department of Transportation on behalf of  
14 the Todd's Service Station?

15               A. Yes.

16               Q. That was part of the amended  
17 budget?

18               A. Right.

19               Q. In turning now to the city of  
20 Washington, can you describe the efforts you  
21 undertook, or Midwest undertook to obtain a  
22 Highway Authority Agreement from the city of  
23 Washington?

24               A. The city of Washington had never



1     dealt with this before, so it took a little  
2     bit for them to decide how they were going  
3     to approach it and who was going to handle  
4     it, and basically it was a matter of  
5     communicating back and forth with the city  
6     to make them feel at ease in signing the  
7     Agreement with their legal representation  
8     and all different members of the city that  
9     were involved in trying to figure out, since  
10    they hadn't dealt with us before, if they  
11    were going to sign it or not.

12           Q.    Can you approximate how many  
13    hours you spent in attempting to obtain and  
14    actually obtaining the Highway Authority  
15    Agreement from the city of Washington?

16           A.    I myself probably had anywhere  
17    between 8 and 12 hours and then my staff  
18    probably roughly the same.

19                   MR. RIFFLE:  I will have this  
20    marked as Exhibit 1.

21                           (Petitioner's Exhibit No. 1 was  
22    marked for identification.)

23                   HEARING OFFICER:  Off the  
24    record.





1 (Discussion held off the record.)

2 HEARING OFFICER: We'll go back  
3 on the record.

4 Petitioner is submitting Exhibit  
5 No. 1, which is --

6 MR. RIFFLE: Three pages from  
7 the Administrative record, the first of  
8 which is one page from the amended budget,  
9 which is the summary of the personnel costs.  
10 That is stamped or marked as page 119 from  
11 the Administrative record.

12 The second page is a page from a  
13 letter or receipt from the Illinois  
14 Environmental Protection Agency which shows  
15 which amounts were approved and which were  
16 not. That's marked as 138.

17 The third is a handwritten sheet  
18 that addresses what part of the amended  
19 budget the IEPA was going to approve and  
20 that was marked page 139.

21 HEARING OFFICER: These are  
22 three pages of the Agency's Administrative  
23 record.

24 MR. RIFFLE: Yes.



1                   HEARING OFFICER: We have marked  
2 it as Exhibit No. 1.

3                   MR. KIM: The handwritten notes  
4 are page 135, and the Respondent doesn't  
5 object.

6 BY MR. RIFFLE:

7                   Q. Mr. Green, I am handing you what  
8 has been marked for identification as  
9 Petitioner's Exhibit 1, and particularly  
10 drawing your attention to only the first  
11 page of that which is stamped 119 in the  
12 lower right-hand corner. Can you take a  
13 moment to look at that and identify the  
14 document?

15                  A. It's the personnel summary sheet  
16 from the corrective action plan budget  
17 amendment submitted to the IEPA by Midwest.

18                  Q. Was that prepared by Midwest  
19 under your direction and control?

20                  A. Yes.

21                  Q. I want to spend some time  
22 looking at this in detail. I want to ask  
23 you a couple general questions first. Does  
24 this document, page 1 of Exhibit 1,



1 accurately depict the number of hours that  
2 Midwest spent solely in connection with the  
3 scope of work covered by the amended budget?

4 A. Actually there were probably  
5 more hours spent. This was what we deemed  
6 to be reasonable and acceptable to submit in  
7 as far as the time that was spent.

8 Q. As to each of the categories  
9 where you have specific hours listed, can  
10 you testify unequivocally that Midwest spent  
11 at least that many hours on each of the  
12 those categories for each of those  
13 classifications of individuals solely on the  
14 amended budget phase of the project?

15 A. Yes.

16 Q. Looking now at the hourly rates,  
17 I note that the IEPA challenged three of  
18 those rates. They happen to be the first  
19 three on that listing. If my records are  
20 accurate, they reduced the hourly fee for  
21 environmental hydrogeologist from \$98.00 to  
22 \$85.00. In your experience in the  
23 environmental field is the \$98.00 an hour  
24 amount that Midwest charged for



1 environmental hydrogeologist reasonable and  
2 customary?

3 A. Yes.

4 Q. Turning now to the professional  
5 geologist category that reduced that from  
6 \$110.00 to \$100.00, in your view was the  
7 \$110.00 an hour rate that you charged  
8 reasonable and customary?

9 A. Yes.

10 Q. Thirdly, they have reduced the  
11 senior environmental manager category from a  
12 \$110.00 to a \$100.00. In your experience is  
13 a \$110.00 an hour for senior environmental  
14 manager a reasonable and customary amount to  
15 charge for those tasks?

16 A. Yes.

17 Q. I'd like you to just generally  
18 describe what the scope of work was solely  
19 for the amended budget portion of the Todd's  
20 project.

21 A. It would have been for the  
22 actual TACO and tier for closure of the  
23 site, the model and calculation, the Highway  
24 Authority Agreements, and the final closure





1 documentation, the report to the EPA and the  
2 final reimbursement for that work.

3 Q. The total amount you charged for  
4 that phase of the project was \$7,483.58?

5 A. Yes.

6 Q. Has that amount indeed been paid  
7 by Todd to Midwest Environmental?

8 A. Yes.

9 Q. In your experience was \$7,483.58  
10 a reasonable total amount to charge for the  
11 scope of work that was covered by the  
12 amended budget?

13 A. Yes.

14 Q. In your experience have you seen  
15 instances where significantly higher amounts  
16 have been charged for that type of scope of  
17 work?

18 A. Yes.

19 Q. To get TACO closure on a  
20 project?

21 A. Yes.

22 Q. Do you believe that the IEPA had  
23 a clear understanding of exactly what  
24 Midwest Environmental was doing in



1 connection with the scope of work covered in  
2 the amended budget?

3 A. Yes.

4 Q. On what do you base that  
5 conclusion?

6 A. The ongoing coordination and  
7 conversations with the project manager at  
8 the EPA.

9 MR. RIFFLE: No further  
10 questions.

11 HEARING OFFICER: Thank you.

12 Mr. Kim?

13

14 CROSS-EXAMINATION

15

16 BY MR. KIM:

17 Q. I think I am going to have a few  
18 questions of this witness.

19 Mr. Green, there have been  
20 several budgets submitted in relation to the  
21 Todd's Service Station site, is that  
22 correct?

23 A. Yes.

24 Q. There is at least one budget



1 that was submitted regarding site  
2 classification work?

3 A. Yes.

4 Q. Two budgets submitted regarding  
5 corrective action work, is that correct?

6 A. Yes.

7 Q. The first budget that was  
8 submitted regarding corrective action work  
9 was submitted sometime in September of 2000.  
10 Does that sound right?

11 A. It sounds correct.

12 Q. Sometime in the fall of 2000?  
13 Does that sound about right?

14 A. Yes.

15 Q. The second budget amendment was  
16 submitted in April of 2002, is that correct?

17 A. It sounds correct.

18 Q. I will show you page 114 of the  
19 Administrative record.

20 A. Yes.

21 Q. What is page 114? What is that  
22 a depiction of?

23 A. Cover letter from Midwest  
24 Environmental onto the EPA submitted with



1 the budget amendment for the project.

2 Q. This is the cover letter that  
3 accompanied the budget amendment that is  
4 currently the subject of the appeal, is that  
5 right?

6 A. Yes.

7 Q. In between the submittal of the  
8 first budget for the corrective action work  
9 and the second budget for the corrective  
10 action work a No Further Remediation Letter  
11 was issued in December of 2001, is that  
12 correct?

13 A. Yes.

14 Q. I am going to reference the No  
15 Further Remediation Letter with the acronym  
16 NFR. Is it correct some member of your  
17 staff had a conversation with the EPA staff  
18 concerning whether or not the second budget  
19 amendment could be submitted after issuance  
20 of the NFR letter?

21 A. Yes.

22 Q. It was decided through some  
23 conversation that the second budget  
24 amendment could be submitted after the





1 issuance of the NFR letter?

2 A. Yes.

3 Q. I know that you're not the  
4 owner-operator of the site, you're the  
5 consultant, you represent Todd's Service  
6 Station. Did you represent Todd's Service  
7 Station and did you prepare the first budget  
8 amendment for corrective action work?

9 A. Yes.

10 Q. To the best of your knowledge  
11 did Todd's Service Station file an appeal of  
12 that first budget decision?

13 A. No.

14 MR. KIM: Nothing further.

15 HEARING OFFICER: Any redirect?

16 MR. RIFFLE: No.

17 HEARING OFFICER: Thank you very  
18 much.

19

20 (Whereupon the witness was excused.)

21

22 HEARING OFFICER: Call your next  
23 witness.

24 MR. RIFFLE: Our next witness



1 would be Todd Birky, also an employee of  
2 Midwest Environmental.

3

4 TODD BIRKY,  
5 having been first duly sworn, was examined  
6 and testified as follows:

7

8 DIRECT EXAMINATION

9

10 BY MR. RIFFLE:

11 Q. Please state your name for the  
12 record.

13 A. Todd Birky.

14 Q. What is your current position?

15 A. Environmental geologist at  
16 Midwest Environmental.

17 Q. Would you briefly describe your  
18 educational background?

19 A. I have a Bachelor's in Geology  
20 and geophysics from the University of  
21 Missouri at Rolla.

22 Q. In what year did you receive the  
23 degree?

24 A. 1995, I believe.



1 Q. How long have you worked for  
2 Midwest Environmental?

3 A. Four and a half years.

4 Q. What type of experience do you  
5 have in the clean-up of petroleum  
6 contaminated sites?

7 A. As far as?

8 Q. Approximately how many petroleum  
9 contaminated sites have you worked on?

10 A. About 75, maybe.

11 Q. Have you worked considerably  
12 with the Illinois Environmental Protection  
13 Agency in getting closures at those types of  
14 sites?

15 A. Yes.

16 Q. Of those 75, how many would have  
17 been in Illinois?

18 A. Most of them.

19 Q. Can you briefly describe your  
20 personal involvement in the remediation of  
21 the Todd's Service Station site?

22 A. I was basically the one  
23 overseeing the project. I wrote all the  
24 plans in the budget from site classification



1 on. I was not involved in any of the early  
2 action. I did perform all the site  
3 classification field work, and completion  
4 reports. I wrote the corrective action  
5 plan, the initial corrective action planned  
6 in the budget, performed all the field work  
7 there, and was also involved in doing the  
8 corrective action budget amendment as well  
9 as the complete report for closure and the  
10 TACO work as well.

11 Q. Specifically in connection with  
12 the amended budget that's at issue here  
13 today, did you do quite a bit of the work  
14 that was involved in the scope of work  
15 within that amended budget?

16 A. Yes.

17 Q. Can you describe specifically  
18 the tasks you performed that were covered by  
19 that amended budget?

20 A. We did the detailed TACO  
21 calculations and modeling. We also do the  
22 -- I did the Highway Authority Agreement  
23 with the City and the State, and then all  
24 the plans and the budget.





1           Q.    When you say you did them, are  
2 you talking about the drafting of those  
3 documents?

4           A.    Yes.

5           Q.    Did you have communication with  
6 the Illinois Environmental Protection Agency  
7 with respect to the scope of work covered by  
8 the amended budget?

9           A.    Yes.

10          Q.    What was the nature of that  
11 communication?

12          A.    Several telephone conversations,  
13 and mostly I spoke with Mr. James Malcolm.  
14 Me and him were fairly consistent as far as  
15 what we had -- what we would talk about and  
16 how we would respond with each other.  If we  
17 did this, is that okay.  He would, you know,  
18 give me instructions on his thinking as well  
19 because I didn't want to do anything over  
20 and beyond what he thought was necessary as  
21 well.

22          Q.    Can you give us a little more  
23 detail as to exactly what was going on in  
24 the field in terms of decisions on how to



1 remediate the property?

2           A.    When we were doing the  
3 corrective action investigation, there was,  
4 toward the front of the station there was  
5 significant utility problems. We had  
6 fiber-optic cables overhead as well. We  
7 were trying to get placements of those  
8 borings on site to determine whether those  
9 utility conduits had been impacted,  
10 specifically the underground conduits.

11                    When we were fairly certain we  
12 couldn't get access to an area to determine  
13 that without potential damage to fiber-optic  
14 cables, we decided to move across the  
15 street.

16           Q.    When you say we decided, can you  
17 give a little detail as to how that  
18 happened?

19           A.    That was basically a telephone  
20 conversation that I was on site talking with  
21 James Malcolm on the phone and kind of  
22 telling him where I was at and what I was  
23 looking at there.

24                    That's basically when he and I



1 decided if we had to we could go across the  
2 street and obtain the Highway Authority  
3 Agreement.

4 Q. Was that something that he  
5 suggested or you suggested, or do you  
6 recall?

7 A. I think it was him, because it  
8 was -- I was a little reluctant to have to  
9 go that extra step beyond what had been  
10 approved as far as the Highway Authority  
11 Agreement. I told him I really can't get  
12 access to this area, you know, comfortably  
13 anyway. He suggested I move across the  
14 street and obtain those.

15 Q. Did you proceed to do that?

16 A. Yes.

17 Q. It's probably obvious to  
18 everybody. Can you explain why it was that  
19 you couldn't do more borings right around  
20 the front of the property there?

21 A. We had done a boring earlier, I  
22 believe it was part of site classification.  
23 To step closer to the fiber-optic cables,  
24 you damage a fiber-optic cable and you're



1 looking at huge amounts of money that the  
2 state would not reimburse. It was just not  
3 a risk that I am willing to take just to  
4 determine that. It would be much easier to  
5 go across the street.

6 Q. I think you mentioned there was  
7 hand-augering. What was the purpose of  
8 that?

9 A. It was discussed whether or not  
10 a hand-augering boring would be sufficient  
11 enough, but given the place of our last  
12 boring and the fiber-optic cable, it was  
13 deemed we really wouldn't be able to tell  
14 anything significant from that because it  
15 was in relatively close proximity to our  
16 previous boring location.

17 Q. Would it have been significantly  
18 less costly to obtain closure of this site  
19 if you hadn't had to obtain the off-site  
20 samples and the Highway Authority Agreement?

21 A. Yes.

22 Q. Would it be fair to say a  
23 significant portion of this amended budget  
24 relates to the need to go off site and do





1 the testing and to obtain the two Highway  
2 Authority Agreements?

3 A. Yes, as well as obtaining  
4 off-site access from the City of Washington.

5 Q. The City of Washington was the  
6 owner of the off-site property?

7 A. That's correct. It was joint  
8 between them and the Illinois Department of  
9 Transportation.

10 Q. You have in front of you what  
11 has previously been identified as  
12 Petitioner's Exhibit 1. Do you remember  
13 that document?

14 A. Yes.

15 Q. Can you just identify that for  
16 the record?

17 A. This is the personnel page of  
18 the budget amendment submitted.

19 Q. Did you have personal  
20 involvement in the preparation of this  
21 document?

22 A. Yes.

23 Q. Do you see the hours listed in  
24 each of those categories, next to



1 environmental hydrogeologist, 12 hours? Can  
2 you attest to the accuracy of that entry as  
3 to hours actually expended on the project by  
4 an environmental hydrogeologist?

5 A. Yes. At least.

6 Q. Would the same be true with  
7 respect to each of those categories that are  
8 depicted on page 1 of Petitioner's Exhibit  
9 1?

10 A. Yes.

11 Q. It's your testimony that Midwest  
12 spent at least the number of hours depicted  
13 on Petitioner's Exhibit 1 in connection with  
14 the amended budget for this project?

15 A. That's correct.

16 Q. Can you quantify approximately  
17 how many conversations you had with Mr.  
18 Malcolm in connection with the amended  
19 budget?

20 A. The amount of time, I am not  
21 quite sure, it was around four or five.

22 MR. RIFFLE: No further  
23 questions.

24 HEARING OFFICER: Thank you.



1 Mr. Kim?

2

3

CROSS-EXAMINATION

4

5 BY MR. KIM:

6 Q. Just a few questions, Mr.

7 Birky.

8 Look at petitioner's Exhibit No.

9 1, page 119, there are different line items  
10 for different job titles, is that correct?

11 A. Yes.

12 Q. You stated that you are by  
13 training an environmental geologist, is that  
14 correct?

15 A. Yes.

16 Q. Is it safe to say of these  
17 different line items, the line item for  
18 hydrogeologist is referencing your work?

19 A. That's correct.

20 Q. On this site you were not the  
21 professional geologist, is that correct?

22 A. That's correct.

23 Q. Not going through the whole  
24 list, you were not acting in any of the



1 capacities of any other of the line items,  
2 you were acting as the hydrogeologist?

3 A. No, I had some tasks as senior  
4 project manager as well.

5 Q. If we look at the line items for  
6 environmental hydrogeologist and the line  
7 item of senior project manager, the line  
8 item for hydrogeologist states that the work  
9 performed was relevant to the letters CACR,  
10 which is Corrective Action Completion  
11 Report, is that correct?

12 A. Yes.

13 Q. I am going to reference that as  
14 CACR. On that line item the tasks to be  
15 performed are listed as Contractor Highway  
16 Authority Agreement and Final Reimbursement  
17 Preparation, is that right?

18 A. That's correct.

19 Q. Under line item for senior  
20 project manager, line items Contractor,  
21 letters TACO, pathway exclusion and Highway  
22 Authority Agreement, is that correct?

23 A. That's correct.

24 Q. Comparing the two line items





1 TACO and Pathway Exclusion are listed under  
2 senior project manager, otherwise the two  
3 line items are both listing Contractor and  
4 Highway Authority Agreement, is that  
5 correct?

6 A. That's correct.

7 MR. KIM: That's all I have.

8 HEARING OFFICER: Any redirect?

9 MR. RIFFLE: Yes.

10

11 REDIRECT EXAMINATION

12

13 BY MR. RIFFLE:

14 Q. Did you also serve as project  
15 manager on this project?

16 A. I may have. It just depends on  
17 what kind of work that's referring to.

18 Q. I see that there's different  
19 rates for senior project manager and project  
20 manager in that the project manager's hourly  
21 fee is \$78.00, which is the lowest of the  
22 professional categories. What kind of  
23 projects would come within that \$78.00  
24 project manager category?



1           A.    If there were, say maps or a  
2 CADE program, when you use the CADE program  
3 to draw maps and stuff like that, that would  
4 fall under the project manager scope of  
5 work.

6           Q.    Do you perform that type of  
7 function?

8           A.    Yes.

9           MR. RIFFLE:  Nothing further.

10          HEARING OFFICER:  Any recross?

11

12                        REXCROSS-EXAMIANCTION

13

14          BY MR. KIM:

15          Q.    Did you say on this site you did  
16 or did not act as project manager as set  
17 forth in 119?

18          A.    I didn't have extensive project  
19 manager billing on this site.

20          Q.    The 8 and a half hours that are  
21 attributed to the project manager for this  
22 site, those do not include your time, is  
23 that correct?

24          A.    That's probably the case, that's



1 correct.

2 MR. KIM: Thank you.

3 HEARING OFFICER: Thank you.

4

5 (Whereupon the witness was excused.)

6

7 HEARING OFFICER:

8 Do you have any more witnesses?

9 MR. RIFFLE: Can I have a short  
10 break?

11 HEARING OFFICER: Sure. We'll  
12 go off the record for a minute.

13

14 (A short recess was taken.)

15 HEARING OFFICER: Back on the  
16 record.

17 Mr. Riffle?

18 MR. RIFFLE: With counsel's  
19 permission, I'd like to recall Mr. Birky for  
20 one last question or two.

21 HEARING OFFICER: Yes.

22

23 REDIRECT EXAMINATION OF TODD BIRKY

24



1 BY MR. RIFFLE:

2 Q. Mr. Birky, you were asked  
3 earlier some questions about your  
4 involvement in which categories of page 1 of  
5 Exhibit 1 you were involved in. Can you  
6 just identify for the record who else was  
7 involved in this project on behalf of  
8 Midwest, and generally speaking, what their  
9 responsibilities were?

10 A. Sure. Professional geologist,  
11 Penny Silver is a licensed PG in the state  
12 of Illinois; that would have been her. She  
13 did a lot of the -- some of the TACO  
14 calculations in Tier 2 calculations and  
15 modeling.

16 Senior environmental manager  
17 would have been Mr. Green, and he would have  
18 overseen all the reports and basically a  
19 general oversight of the entire project.

20 Administrative/Clerical would  
21 have been Kaylynn Green. She's the office  
22 manager and she would take care of mailing  
23 the reports and copying the reports and  
24 binding them.





1                   Senior project manager, that  
2 was, some of that was me. Some of it was  
3 also Penny Silver, our professional  
4 geologist. Some of that work may have  
5 fallen under Mr. Green.

6                   Professional engineering, that  
7 would have been Dale Bennington. He is our  
8 licensed PE in the State of Illinois. He  
9 would review reports and make sure the  
10 calculations were correct, and also  
11 reimbursement. He would certify the  
12 reimbursements as well.

13                   Principal was Mr. Green. It's  
14 the same, he would overlook all the reports  
15 and have some work in preparing the final  
16 draft.

17                   Project manager, most of that  
18 work would fall under Greg Hugher, he is not  
19 currently with us any longer. He would be  
20 the one responsible for all the CADE and  
21 sample preparations, sending them out to the  
22 lab and what not.

23                   Q. You had personal involvement in  
24 the preparation of the amended budget?



1           A.    Yes.

2           Q.    Your testimony was that page 1  
3 of Exhibit 1 does accurately reflect the  
4 hours that Midwest spent on that phase of  
5 the project or you spent at least that many  
6 hours, is that correct?

7           A.    Yes.

8           MR. RIFFLE:  No further  
9 questions.

10          HEARING OFFICER:  Mr. Kim?

11          MR. KIM:  I have one follow-up.

12

13                        RE CROSS-EXAMINATION

14

15   BY MR. KIM:

16           Q.    You were describing just now the  
17 different work people did and how it might  
18 go different ways.  To clarify, on page 119  
19 of the Administrative record which is part  
20 of the exhibit there, there's no breakouts?  
21 For example, look at your line item  
22 environmental hydrogeologist at 12 hours and  
23 3 tasks listed.  There's not a breakdown of  
24 how many hours per task was performed, is



1     that correct?

2             A.     That's correct.

3             Q.     With the exception of somebody  
4     who was one line item, for the other people  
5     on the page that have multiple tasks, there  
6     are no breakouts of how many hours were  
7     spent on each task to come up with that  
8     total number of hours, is that right?

9             A.     That's correct.

10            MR. KIM:   That's all I have.

11            HEARING OFFICER:   Mr. Riffle?

12            MR. RIFFLE:   Nothing further.

13            HEARING OFFICER:   Thank you, Mr.

14     Birky

15

16            (Whereupon the witness was excused.)

17            HEARING OFFICER:   Any further

18     witnesses?

19            MR. RIFFLE:   No.

20            HEARING OFFICER:   Mr. Kim, you  
21     may proceed with your case.

22            MR. KIM:   I'd like to call Harry  
23     Chappel, please.

24



1                   HARRY A. CHAPPEL,  
2   having been first duly sworn, was examined  
3   and testified as follows:

4

5                   DIRECT EXAMINATION

6

7   BY MR. KIM:

8                   Q.   Would you state your name and  
9   spell your last name?

10                  A.   Harry Chappel.  C-H-A-P-P-E-L.

11                  Q.   Mr. Chappel, what is your  
12   current employment?

13                  A.   I am currently the manager of  
14   one of the units in the Leaking Underground  
15   Storage Tank Section, Bureau of Land,  
16   Illinois EPA.

17                  Q.   Have you held different  
18   positions within the EPA?

19                  A.   Yes, I have.

20                  Q.   Can you describe what those  
21   different positions were?

22                  A.   Going back to when I started?

23                  Q.   When did you start with the EPA?

24                  A.   1976.





1           Q.   Well, let's relate it to your  
2 positions with the leaking underground  
3 storage tank program.

4           A.   I formed the leaking underground  
5 storage tank section as the original manager  
6 in 1991.  Served as the manager until  
7 1994-95, which I then left the Agency and  
8 went into private practice.

9                   I came back to the Agency two  
10 years ago, and approximately one year ago  
11 was hired as the unit manager, which is the  
12 position I am in now.

13           Q.   During the time you worked  
14 outside of the Agency in private practice,  
15 can you describe whether or not that work  
16 also related to leaking underground storage  
17 tank remediation?

18           A.   Many of the projects in private  
19 practice that I dealt with were underground  
20 storage tank projects being approved and  
21 reimbursed through the Agency Program as it  
22 existed.

23           Q.   Do you know roughly how many  
24 leaking underground storage tank sites you



1 have worked on either directly or in a  
2 managerial capacity during your time at the  
3 EPA?

4 A. Hundreds.

5 Q. Would it be close to a thousand?

6 A. It could be.

7 Q. That's fine.

8 Do you have any professional  
9 certifications or registrations?

10 A. Registered professional engineer  
11 in Illinois. I am a registered asbestos  
12 inspector, management planner and designer.

13 Q. Specifically turning to the site  
14 that's the subject of the appeal, are you  
15 familiar with Todd's Service Station?

16 A. Yes, I am.

17 Q. Were you responsible for signing  
18 -- I am going to turn to 136 of the  
19 Administrative record. Could you look at  
20 that document?

21 A. Okay.

22 Q. Are you familiar with that  
23 document?

24 A. Yes, I am.



1 Q. Can you describe what it is?

2 A. It's a June 7, 2002 modification  
3 of the High Priority Corrective Action  
4 Budget submitted June 4th and received June  
5 4th, 2002, and it specifies the amounts of  
6 that budget that were approved.

7 Q. Who signed that letter?

8 A. I did.

9 Q. Do you have an understanding of  
10 the review and decision making that led to  
11 the issuance of that letter?

12 A. Yes, I do.

13 Q. On page 138, could you  
14 specifically describe what that page is?

15 A. 138 is Attachment A to the June  
16 -- is that June 7th?

17 Q. I think so.

18 A. June 7th, 2002 approval with  
19 modification of the budget submittal. It  
20 specifies how much of that budget was  
21 approved and how much was not. It doesn't  
22 specify how much was not, but specifies the  
23 amounts being approved in that modified  
24 budget.



1           Q.   By implication, does it show the  
2 difference?

3           A.   If you do the mathematics, you  
4 would know the difference.

5           Q.   Could you also please look at  
6 what's identified as page 98 of the  
7 Administrative Record?

8                     After you have had a chance to  
9 look at it, would you describe what that is?

10          A.   This is a November 1st, 2000  
11 approval of a High Priority Corrective  
12 Action Plan and Budget with modifications  
13 for Todd's Service Station. This would have  
14 been, I believe, the original corrective  
15 action plan budget.

16          Q.   Who signed that letter?

17          A.   Kendra Brocamp.

18          Q.   Can you describe your position  
19 now compared to Ms. Brocamp's position in  
20 her capacity when she signed that letter?

21          A.   Mrs. Brocamp was serving in the  
22 exact same position that I am in presently.  
23 I replaced her.

24          Q.   The letter on page 99, is there





1 a name provided as a contact person?

2 A. In terms of Agency contact?

3 Q. Yes.

4 A. In case of assistance, please  
5 contact James R. Malcolm, III and it lists  
6 his phone number.

7 Q. Does he work for you now?

8 A. Yes, he does.

9 Q. Are you familiar with that  
10 letter?

11 A. Yes, I am.

12 Q. Did you review that letter as  
13 part of your decision-making process that  
14 led to the issuance of the June 2002 letter?

15 A. Yes, I did.

16 MR. KIM: I would like this  
17 marked as Respondent's Exhibit No. 1.

18 (Respondent's Exhibit No. 1 was  
19 marked for identification.)

20 BY MR. KIM:

21 Q. Could you look at what's been  
22 marked as Respondent's Exhibit No. 1?

23 A. Yes.

24 Q. Do you know what that document



1 is?

2 A. Yes, it's a budget summary that  
3 I prepared on July 11, 2003 in preparation  
4 for this hearing of the two budgets that  
5 were submitted and the actions taken by the  
6 Agency on those budgets.

7 Q. Is the information on this sheet  
8 contained within the Administrative record,  
9 not necessarily in this form?

10 A. It is not in this form. The  
11 information is there. Other than maybe the  
12 rates, if you look at the column under  
13 9-20-2000, that rates approved column there,  
14 may not be in the original budget approval.  
15 Other than that these numbers are all in the  
16 record.

17 Q. Let's focus on that. If you  
18 turn to page 98 -- page 100 of the  
19 Administrative record, can you describe what  
20 that page is?

21 A. It's Attachment A to the  
22 November 1st, 2000 approval of the original  
23 Corrective Action Plan Budget, which  
24 specifies the amounts that were approved for



1 that plan.

2 Q. On the Respondent's Exhibit No.  
3 1, there's reference to a September 20, 2000  
4 budget. Is that the budget that was the  
5 subject of that final decision that you're  
6 looking at in the Administrative record?

7 A. Yes.

8 Q. Is there a method or way that  
9 you could calculate the figures found in the  
10 rates approved column in Exhibit No. 1,  
11 comparing it to the Administrative record?

12 A. Well, if you look at the  
13 Administrative record on page 100, it  
14 indicates, on Section 2 it indicates that  
15 \$612.00 for an adjustment in mobilization  
16 rates and the hourly rates for a  
17 hydrogeologist was deducted.

18 Later on in the second  
19 paragraph, it indicates that the  
20 environmental hydrogeologist rate was  
21 unreasonable and reduced by \$572.00. The  
22 amount proposed for mobilization was reduced  
23 by \$40.00.

24 If you look at the \$572.00 that



1 was reduced for the hydrogeologist, the  
2 budget proposed 44 hours for that  
3 hydrogeologist, so if you divide 572 by 44  
4 hours, you get the reduction in hourly rates  
5 for that hydrogeologist, which was \$98.00 to  
6 \$85.00.

7 Q. Were there any other deductions  
8 of hourly rates?

9 A. In the original budget, no.

10 Q. If you were to then look to page  
11 80 of the Administrative record, what is  
12 that a page from, can you tell us?

13 A. Page 80 is contained in Appendix  
14 E, which is the originally approved budget  
15 for the Corrective Action Plan.

16 Q. Does that page contain hourly  
17 rates?

18 A. Yes, it does.

19 Q. How do those hourly rates  
20 correspond to the information found on  
21 Exhibit 1?

22 A. The 9-20-2000 on Exhibit 1, that  
23 table, the rates are all the same except for  
24 environmental hydrogeologist which was





1 reduced from 98 to 85.

2 Q. Let's just take one line item,  
3 the very first senior project manager, can  
4 you walk through each one of those columns  
5 to provide an example of how that works out?

6 A. This is from the 9-20-2000  
7 approved Corrective Action Plan Budget.  
8 Senior project manager was listed as  
9 requiring 42 hours, Rate PROP, is the rate  
10 proposed for those hours, and the amount  
11 PROP is the amount proposed. If you take 42  
12 hours as proposed times the rate, \$98.00,  
13 they were proposing \$4,116.00 for that task.

14 The next column on my  
15 preparation is the number of hours the  
16 Agency approved from that plan and budget,  
17 the rates we approved from that budget and  
18 the resulting amount approved in that  
19 budget.

20 It goes through the same thing  
21 for each one of the categories.

22 Q. Based upon that, and based upon  
23 your explanation of the reduction in the  
24 environmental hydrogeologist rates, is it



1 your testimony that the information found on  
2 the table there for the September 2000  
3 budget is found within the Administrative  
4 record?

5 A. Yes.

6 Q. Let's move to the more recent  
7 budget submittal. If you could look on page  
8 119 of the Administrative record, I believe  
9 this has been testified to already. I think  
10 that has been identified as part of the  
11 second budget submittal and specifically  
12 listing personnel hours and rates. Could  
13 you compare your table in Respondent's  
14 Exhibit No. 1 with page 119 of the  
15 Administrative record?

16 A. The second table on my  
17 information again breaks out the personnel  
18 titles, the hours proposed for those titles,  
19 dollar rates they proposed, and the amount  
20 based on those rates.

21 The last three columns are what  
22 the Agency approved from that budget, the  
23 rates we approved and the resulting amount  
24 therefore approved under that budget



1 amendment.

2 Q. If you look at pages 119 and  
3 page 138, is the information contained  
4 within your table, in Respondent's Exhibit  
5 No. 1 found in the Administrative record?

6 A. Yes, it is, except for the  
7 mathematical error that was discussed  
8 earlier.

9 Q. To summarize then, although this  
10 information was prepared after the issuance  
11 of the final decision, is the information  
12 included within Respondent's Exhibit No. 1  
13 all taken from information already in the  
14 Administrative record?

15 A. Yes.

16 MR. KIM: I know that the  
17 Board's rule and the Board case law is very  
18 clear that information that postdates the  
19 final decision is not something that's  
20 generally considered to be part of the  
21 record and not appropriate as evidence.

22 However, the Board has made at  
23 least one exception and that is when  
24 evidence or exhibits are prepared as



1 demonstrative evidence where they simply  
2 contain information taken from part of the  
3 record and put onto one page.

4 I have a case, Community  
5 Landfill Company and City of Morris versus  
6 IEPA, specifically on page 16 -- page 19 of  
7 the Board's order, the Board does state  
8 toward the bottom of that page that the  
9 exhibit that was discussed there, which is  
10 D2, was something that was demonstrative  
11 only, cumulative to other information in the  
12 record.

13 Based upon that and based upon  
14 Mr. Chappel's testimony, I would ask that  
15 Respondent's Exhibit 1 be admitted.

16 MR. RIFFLE: Two comments. One,  
17 I have only had this document for this  
18 morning and haven't had a chance to check  
19 the matter. We want to reserve the  
20 objection with respect to any accuracy  
21 issues.

22 Second, I think I want to  
23 comment on the, what I believe is the  
24 irrelevancy of the top half of that





1 document. We're here only dealing with the  
2 budget amendment and I am not sure what if  
3 any use would be made of the top half of it,  
4 but again, I think there's no relevance to  
5 the analysis of the initial budget that is  
6 not at issue here today.

7                   With those two caveats, I have  
8 no objection to at least the last half of  
9 that exhibit, assuming it's mathematically  
10 accurate.

11                   HEARING OFFICER: Mr. Kim, would  
12 you like to comment on the first half?

13                   MR. KIM: First of all, I hope  
14 the math on the exhibit is going to be  
15 better in the final decision of appeal.

16                   I understand Mr. Riffle's point.  
17 The reason that the first half relating to  
18 the September 2000 budget I believe is  
19 relevant is it goes to one of the rates  
20 that's in dispute, specifically the Agency  
21 reduced the rates for the environmental  
22 hydrogeologist, and in the decision that's  
23 under appeal from \$98.00 to \$85.00, and Mr.  
24 Green testified previously that he was aware



1 a budget had been submitted for corrective  
2 action work earlier that was not appealed  
3 and in that budget the Agency made a similar  
4 deduction from \$98.00 to \$85.00 for  
5 environmental hydrogeologist, and so it's  
6 relevant in that we're being consistent.

7 We have taken that specific  
8 action with a specific job title on this  
9 site and we want to demonstrate what we did  
10 there was not appealed. What we did here  
11 was consistent with what we did before.

12 Mr. Green's testimony was his  
13 rates are customary and reasonable, which is  
14 fine, but we want to demonstrate what we  
15 have done is at least in this particular  
16 case customary in the sense that it's  
17 something we have already issued.

18 That's why I think the first  
19 part is relevant and why, as Mr. Chappel  
20 stated, he did review the initial decision  
21 and the information that led to the initial  
22 decision that's found within the  
23 Administrative record.

24 HEARING OFFICER: Does that



1 address your concerns, Mr. Riffle, as to the  
2 first half of the form?

3 MR. RIFFLE: I don't want to  
4 make a large issue of it because I don't  
5 think it's that important. I want to make it  
6 clear for the record that my position is a  
7 failure or decision not to appeal a prior  
8 decision of the Agency doesn't stop us from  
9 challenging it at a different time.

10 I want to make clear simply  
11 because somebody doesn't appeal an earlier  
12 decision as to an hourly rate, they are not  
13 forever barred from making a challenge.

14 In an earlier decision, it may  
15 be of such a low dollar amount it wouldn't  
16 be cost effective to challenge. To the  
17 extent they are trying to use it as some  
18 type of estoppel or course of dealing or  
19 acquiescence, I want to make it clear for  
20 the record we would disagree with that  
21 position.

22 In terms of allowing it in for  
23 the other purpose stated to show that they  
24 have taken the position on the prior



1 occasion, I have no objection.

2 HEARING OFFICER: Duly noted.

3 I am going to go ahead and admit  
4 Respondent's Exhibit No. 1 into the record.

5 I will just add a citation to  
6 the case that Mr. Kim cited, Community  
7 Landfill Company and City of Morris versus  
8 IEPA is PCB 01-48 and 49. That was a  
9 consolidated docket and the Board's order is  
10 dated April 5th, 2001, and we were looking  
11 at page 19.

12 Mr. Kim, you would describe this  
13 as a summary of the figures that are in the  
14 Administrative record?

15 MR. KIM: That's correct.  
16 Frankly, I thought it would be easier to  
17 reference one page.

18 HEARING OFFICER: This is a very  
19 nice, readable document and it's really,  
20 it's very clear. It makes it easy to  
21 understand.

22 I agree with Mr. Riffle, neither  
23 of us has had an opportunity to refer to the  
24 record. I will go ahead and admit this as





1 Respondent's Exhibit 1.

2 MR. KIM: I'd like to thank Mr.  
3 Chappel for preparing it.

4 Q. I'd like to move away from this  
5 a little bit and ask you about your  
6 understanding of the communications that  
7 took place between the Illinois EPA and  
8 Midwest Environmental. Are you aware there  
9 were some communications between a member of  
10 your staff, Mr. Malcolm, and representatives  
11 of Midwest Environmental concerning the  
12 submission of the second budget amendment?

13 A. Yes.

14 Q. Can you describe what your  
15 understanding of those conversations were?

16 MR. RIFFLE: I will object on  
17 hearsay grounds.

18 MR. KIM: In response, it's his  
19 understanding of what happened. Mr. Birky  
20 and Mr. Green testified as to what their  
21 understanding was of these conversations and  
22 it's -- I am not asking what was  
23 specifically said. I am asking what his  
24 understanding was.



1 HEARING OFFICER: You may  
2 proceed with what your understanding was.

3 THE WITNESS: The conversations  
4 that I am aware of dealt with the issue of  
5 whether a budget could or could not be  
6 submitted after the issuance of an NFR. I  
7 believe that the conversations and the  
8 decisions reached regarding that topic, I  
9 documented in a memo that's a part of the  
10 record.

11 BY MR. KIM:

12 Q. What authority does the Agency  
13 have to issue approvals of budget  
14 amendments?

15 MR. RIFFLE: I will object. It  
16 calls for a legal conclusion.

17 MR. KIM: Let me rephrase. I  
18 will strike that question.

19 Q. Mr. Riffle accurately described  
20 there are two deductions that were under  
21 appeal, one relating to hourly rates and one  
22 relating to the number of hours of work  
23 performed. Could you describe the reasoning  
24 behind the reduction in the number of hours



1 performed in the second budget amendment?  
2 What I am asking is, they asked for X number  
3 of hours. We approved a different number.  
4 Can you explain the difference between the  
5 two numbers?

6 A. You have to take into account  
7 the originally approved budget which has  
8 certain activities approved and amounts for  
9 those, and the amended budget, which was  
10 later submitted, which reportedly has  
11 additional costs for maybe some other tasks,  
12 maybe the same tasks. It's not clear from  
13 the second submitted budget exactly what  
14 tasks and how many hours were being  
15 attributed to those tasks.

16 As I looked at the second  
17 submitted budget, I believe that certain  
18 portions of those tasks were approved in the  
19 original budget, amount and hours.  
20 Therefore, I considered the amount of time  
21 being spent in preparing the amended budget  
22 which had to be submitted and the amount of  
23 additional time that may have been spent  
24 above and beyond what was approved in the



1 original budget.

2                   The numbers reflected on this  
3 table that show hours approved, are the  
4 hours that I deemed reasonable for the  
5 additional efforts in preparing the second  
6 budget and the Highway Authority Agreements  
7 and that I felt were above and beyond the  
8 original budget was approved.

9                   Q.    What did you base what you  
10 believe to be reasonable on those specific  
11 deductions?

12                   A.    My experience in preparing  
13 budgets and reviewing them.

14                   MR. KIM:  I don't have anything  
15 further at this time.

16

17                                   CROSS-EXAMINATION

18

19 BY MR. RIFFLE:

20                   Q.    Mr. Chappel, when did you first  
21 become involved in the Todd project?

22                   A.    I don't recall the specific  
23 date.  As manager for Mr. Malcolm, I would  
24 assume I was probably involved with it on





1 March 18 of 2001 when I became the manager,  
2 until today.

3 Q. Other than the work that you  
4 described with respect to the amended  
5 budget, were there any other specific tasks  
6 that you recall being involved in on the  
7 Todd's project?

8 A. I believe I had phone  
9 conversations with representatives from  
10 Midwest Environmental regarding the budget.  
11 Other than that, I don't recall any.

12 Q. Do you know how many meetings  
13 Midwest attended with the City of Washington  
14 to obtain the highway Authority Agreement?

15 A. No, I don't.

16 Q. Do you know how many meetings  
17 Midwest attended with the Illinois  
18 Department of Transportation to obtain the  
19 IDOT Highway Agreement?

20 A. No, I don't.

21 Q. Do you know what process was  
22 followed by Midwest to get the City of  
23 Washington approval to go on City of  
24 Washington land to conduct those additional



1 soil borings?

2 A. No, I don't.

3 Q. Do you have any doubt that it  
4 was Mr. Malcolm who suggested or insisted  
5 that Midwest obtain off-site samples in  
6 order to complete this project? Do you have  
7 any reason to doubt that?

8 A. The suggested part, I accept.  
9 The insisted part, I don't accept.

10 Q. In your work in private practice  
11 did you ever have occasion to try to obtain  
12 Highway Authority Agreements from  
13 municipalities?

14 A. No.

15 Q. You've never personally obtained  
16 a Highway Authority Agreement, correct?

17 A. No.

18 Q. That would be true of IDOT as  
19 well as municipalities?

20 A. That's correct.

21 Q. Do you have an understanding  
22 that that can sometimes be a fairly  
23 difficult and tedious process?

24 A. I have no experience.



1           Q.   Do you have any specific  
2 evidence that the hours claimed in the  
3 amended budget were not actually expended by  
4 Midwest on this project?

5           A.   No, I do not.

6           Q.   From the time you reviewed the  
7 amended budget were you aware that two  
8 Highway Authority Agreements had been  
9 obtained by Midwest on behalf of Todd's?

10          A.   I believe the budget listed HAA,  
11 which I believe stands for Highway Authority  
12 agreement, the amended budget listed that as  
13 a specific activity. I was not aware there  
14 were two or three separate ones.

15          Q.   Would that have made any  
16 difference in connection with your review of  
17 the budget?

18          A.   I don't believe so.

19          Q.   So you wouldn't allocate any  
20 more time to get two or three highway  
21 agreements than you would allocate to get  
22 one?

23          A.   I didn't see that. The budget  
24 specified Highway Authority Agreement. As



1 far as I knew, that was only one Highway  
2 Authority Agreement. The forms for  
3 obtaining those are available on the Agency  
4 web site. You simply download them, fill in  
5 the blanks and send them to the city. I  
6 don't see where that was a large expenditure  
7 of time or effort.

8 Q. You're not aware in your years  
9 of experience with the IEPA that contractors  
10 and property owners have had difficulty  
11 getting Highway Authority Agreements from  
12 municipalities?

13 A. I have heard that those  
14 difficulties do exist, yes.

15 Q. Have you ever conducted any type  
16 of survey to determine what a reasonable  
17 hourly rate is, for instance, for an  
18 environmental hydrogeologist?

19 A. No, I haven't.

20 Q. Are there other contractors  
21 operating in the, for instance, the central  
22 Illinois region that are charging at least  
23 \$98.00 an hour for environmental  
24 hydrogeologists?





1           A.    I wouldn't know.

2           Q.    Do you have any generic rules or  
3 rules of thumb as to how much time you can  
4 approve for a particular NFR project?

5           A.    How many hours?

6           Q.    Right.

7           A.    That I can allot?

8           Q.    Right.  That you would normally  
9 allot for an NFR.

10          A.    In determining a budget  
11 submittal, the number of hours?

12          Q.    Correct.

13          A.    No, we don't.

14          Q.    It's entirely subjective?

15          A.    Correct.

16          Q.    Was anybody else other than  
17 yourself involved in the determination with  
18 respect to the partial disapproval of the  
19 amended budget in this particular case?

20          A.    I believe it was -- I believe  
21 the second budget was reviewed and approved  
22 by me.  Mr. Malcolm probably wrote the  
23 letter, but I reviewed the actual budget and  
24 made the deductions.



1           Q.    Do you have just one standard  
2 rate that you approve for hydrogeologist or  
3 does that vary from contractor to  
4 contractor?

5           A.    We have a standard internal rate  
6 that has been developed for the different  
7 job titles.

8           Q.    Are those the rates that have  
9 been approved here?

10          A.    I believe so, yes.

11          Q.    So the IEPA never approves more  
12 than \$85.00 for an Environmental  
13 hydrogeologist on a LUST fund site?

14          A.    I didn't say that.  That's not  
15 to say there aren't projects out there that  
16 some higher amounts haven't been approved  
17 because the Agency does not review each and  
18 every plan and budget submitted.

19                    If a plan or budget is not  
20 selected for review, there could be much  
21 higher rates approved in that budget because  
22 it wasn't selected, it has been approved by  
23 de facto inaction by the Agency.

24          Q.    How was that \$85.00 an hour



1 figure arrived at for the environmental  
2 hydrogeologist?

3 A. I did not develop that number  
4 and, like I say, it's developed internally  
5 by our LUST claims unit and my limited  
6 understanding of it is that is a summary of  
7 all the costs for that job title over, and I  
8 am guessing three or four years. They find  
9 the medium and add the standard deviation  
10 and that's the allowable rate.

11 Q. Who is they? Who did this?

12 A. The LUST Claim Unit within the  
13 Bureau of Land.

14 Q. Do you know who the people are  
15 within that department?

16 A. The manager is Doug Oakley, and  
17 he has maybe eight, ten people that work for  
18 him.

19 Q. Are you personally familiar with  
20 the process that brought that about or are  
21 you just --

22 A. No, I am not personally  
23 familiar.

24 Q. Do you take into consideration



1 the reputation and ability of contractors  
2 when you determine the appropriateness of  
3 hourly rates?

4 A. No.

5 Q. Regardless of whether somebody  
6 is very good or not so good, they are going  
7 to get the same hourly rate?

8 A. To the extent humanly possible,  
9 I try to do that, yes.

10 Q. You try to do what?

11 A. I try to make the hours and the  
12 decision consistent throughout at least my  
13 unit.

14 Q. Consistent in that they all  
15 receive the same hourly rates?

16 A. Consistent in that given a task,  
17 the number of hours that I feel are  
18 reasonable for that task, keeping that  
19 number consistent.

20 Q. When you undertake your efforts  
21 to review a budget, is there any document at  
22 all, documents at all that you refer to in  
23 making your reasonableness determinations?

24 A. I think I need to clarify one





1 thing before I go any further. I said that  
2 I was the only one that looked at this  
3 budget. I noticed there was a reduction in  
4 the Senior Environmental Manager from 110 to  
5 100. Jamie would have made that, James  
6 Malcolm would have made that deduction. The  
7 rest would have been mine.

8 Q. Why do you say that?

9 A. I did not look at the hourly  
10 rates. I left that up to him to review. So  
11 I would not have done that reduction. My  
12 reduction would have only been in the hours  
13 approved.

14 Q. You don't know how many hours  
15 actually were expended by Midwest on this  
16 project, correct?

17 A. No.

18 MR. RIFFLE: I have no further  
19 questions. I am not certain that I actually  
20 moved for the admission of Petitioner's  
21 Exhibit 1. I think it was stipulated to.

22 HEARING OFFICER: I thought that  
23 you had. Petitioner's Exhibit No. 1 is  
24 admitted.



1                   MR. KIM: Just a few follow-up  
2 questions.

3

4                   REDIRECT EXAMINATION

5

6 BY MR. KIM:

7                   Q. Where in the record is there  
8 documentation of how many meetings were held  
9 between Midwest Environmental and the City  
10 of Washington?

11                  A. To the best of my knowledge,  
12 it's not in there.

13                  Q. Same question. Where in the  
14 record are any of the documents put in by  
15 Midwest, is there documentation between  
16 Midwest Environmental and the Department of  
17 Transportation?

18                  A. Again, to the best of my  
19 knowledge there is nothing in here.

20                  Q. I believe you testified earlier  
21 that, and if I mischaracterize the question,  
22 correct me. I was trying to keep track. I  
23 believe you were responding to a question  
24 concerning the number of hours that are



1 generally allowed for when reviewing a  
2 budget in terms of certain types of work  
3 that's performed. I think you said that  
4 it's a subjective kind of standard. Do you  
5 recall giving that answer?

6 A. Yes.

7 Q. What did you mean by subjective?  
8 Can you explain that a little further?

9 A. There are no standard tasks or  
10 standard number of hours for those tasks  
11 within the Agency.

12 I have experience personally in  
13 developing those hours within the Agency  
14 myself for purposes of a new rule making to  
15 be submitted to the Board.

16 So the subjective part is that  
17 the number of hours for a given task have to  
18 be based on some kind of experience that you  
19 have had in either reviewing these before or  
20 doing the actual work yourself, or on the  
21 specifics provided in the application given  
22 to you by the applicant.

23 Q. I think you were also asked  
24 regarding preparation of Highway Authority



1 Agreements, whether or not sometimes they  
2 can be tedious, sometimes they can't. I  
3 think you testified you don't have any  
4 direct firsthand knowledge of that. Do you  
5 see budget submittals that specify how much  
6 time is attributed to acquisition of a  
7 Highway Authority Agreement?

8 A. On other projects you will see  
9 obtaining Highway Authority Agreements as  
10 one of the activities listed on the line  
11 item for the budget, yes.

12 Q. What kind of range do you see?

13 A. I would not be able to even  
14 specify a range for that individual item.

15 Q. So there's no consistency  
16 necessarily?

17 A. That's correct.

18 MR. KIM: That's all I have.

19 HEARING OFFICER: Mr. Riffle?

20 MR. RIFFLE: Very briefly.

21

22 RE-CROSS-EXAMINATION

23

24 BY MR. RIFFLE:





1           Q.    Would it be fair to say that  
2 every site where you're doing environmental  
3 clean-up has its own differences from site  
4 to site?

5           A.    Yes.

6           Q.    Do you see quite a variation in  
7 the budget proposed in different LUST sites  
8 that come by your office?

9           A.    Yes.

10          Q.    Do you review the environmental  
11 data relating to this site?

12          A.    No.

13          Q.    Have you ever been on that site?

14          A.    No.

15          Q.    Have you ever reviewed the maps  
16 or plans or anything related to the site?

17          A.    No.

18          Q.    Did you ever speak with Mr.  
19 Malcolm about that difficulty with the  
20 utility lines that was encountered in terms  
21 of where the boring locations could be  
22 located?

23          A.    Not that I remember.

24                MR. RIFFLE:  Nothing further.



1 MR. KIM: Nothing further.

2 HEARING OFFICER: Thank you.

3

4 (Whereupon the witness was excused.)

5

6 HEARING OFFICER: Mr. Kim, have  
7 you no further witnesses?

8 MR. KIM: I have no further  
9 witnesses.

10 HEARING OFFICER: Before we hear  
11 closing arguments, I would like to go off  
12 the record to discuss the transcript  
13 availability and the briefing schedule.

14 Off the record.

15 (Discussion held off the record.)

16 HEARING OFFICER: Back on the  
17 record. We have had an off-the-record  
18 discussion regarding posthearing briefs.

19 The parties have agreed to a  
20 briefing schedule. The transcript of these  
21 proceedings will be available from the court  
22 reporter by July 25th and will appear on the  
23 Board web site by July 30th.

24 The public comments deadline is



1 going to be August 1st and public comments  
2 must be filed in accordance with the Section  
3 101.628 of the Board's procedural rules.

4 The Petitioner's brief will be  
5 due by August 21st and Respondent's response  
6 will be due by September 11th. The  
7 petitioner's reply brief, if any, will be  
8 due by September 25th. The mailbox will  
9 apply in this case.

10 At this time I will ask you if  
11 you would like to make a closing argument.

12 MR. RIFFLE: Yes. Thank you.

13 We believe the record is  
14 abundantly clear that Midwest did need to  
15 expend the number of hours that they claim  
16 to have expended on this project and in fact  
17 they expended more time.

18 The difficulties encountered on  
19 the project, the particular requirements of  
20 the project and the IEPA's significant  
21 involvement in not so much directing Midwest  
22 on what to do, but in agreeing with the  
23 proper way to clean up this property, I  
24 think it's clear in the record, I think



1 there's no reason for the reduction in the  
2 amended budget that appears of record.

3           The grounds stated for reducing  
4 the budget so drastically really are not  
5 supportable, we believe, under the totality  
6 of the record. We're looking at very, very  
7 significant reductions in the hourly amounts  
8 allotted for each of the categories of  
9 personnel, and again we think that there's  
10 no basis in the record to support those  
11 types of reductions.

12           For all the reasons stated, we  
13 believe it would be appropriate to look at  
14 the original amended budget as submitted and  
15 reinstate the amounts originally requested  
16 in their entirety that we did for both of  
17 the criteria that were used to lower the  
18 budget, both the hourly rates and the number  
19 of hours planned.

20           I think the testimony was clear  
21 that what was originally charged is  
22 reasonable and customary in the area.  
23 There's been no substantial evidence to the  
24 contrary and the hours incurred are





1 credible. Those hours were really  
2 necessarily expended on this project and  
3 should be paid for.

4 Another thing to keep in mind is  
5 Todd's Service Station has paid their  
6 contractor for those amounts and it would be  
7 inequitable for that situation to remain as  
8 it is when there's no evidence that those  
9 hours were not actually expended on this  
10 project to remediate the site and no  
11 evidence that the site was not remediated in  
12 a cost effective manner. Our request would  
13 be for reinstatement of the original amended  
14 budget.

15 Thank you.

16 HEARING OFFICER: Mr. Kim.

17 MR. KIM: The Illinois EPA

18 waives the closing argument.

19 HEARING OFFICER: At this time I  
20 will ask if there are any members of the  
21 public that would like to make a statement  
22 on the record, and seeing none, I will  
23 proceed to make a statement as to the  
24 credibility of witnesses testifying during



1 this hearing.

2                   Based on my legal judgment and  
3 experience, I find all of the witnesses  
4 testifying to be credible.

5                   I thank all of you for your  
6 participation and we stand adjourned.

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CERTIFICATE

I, THERESA L. HAAS, C.S.R. in  
and for the State of Illinois, do hereby  
certify that I reduced to typewriting the  
foregoing and it is a true and correct  
transcript.

I further certify that I am not  
counsel for nor in any way related to any of  
the parties to this hearing, nor am I in any  
way interested in the outcome thereof.

In testimony thereof, I have  
hereunto set my hand this 16th day of July,  
2003.

CSR

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