

3. The Illinois Environmental Protection Agency ("IEPA") orally authorized Midwest to perform the additional work. Midwest, with the prior approval of the IEPA, performed the additional work to obtain site closure.

4. By letter dated April 18, 2002, Midwest submitted a Budget Amendment, seeking payment of the additional amount of \$7,483.58, which was the amount reasonably and necessarily expended to complete the work on the project.

5. By letter dated May 23, 2002, the IEPA rejected the Budget Amendment.

6. Subsequently, on June 3, 2002, Todd Birky of Midwest spoke with Harry Chappel and James Malcolm of the IEPA, and discussed the May 23, 2002, rejection letter. Midwest was informed that the IEPA would reconsider the denial of the Budget Amendment, if it received a written request to do so.

7. By letter dated June 4, 2002, Midwest made such a written request.

8. By letter dated June 7, 2002, the IEPA approved part of the previously submitted Budget Amendment, but rejected the remainder thereof. Specifically, of the \$7,483.58 requested, \$2,806.08 was approved, and \$4,677.50 was rejected without comment. That letter was designated as a final and appealable order.

9. Todd's has paid Midwest the entire \$7,483.58.

10. All of the personnel time, which comprises the entire \$7,483.58 requested, was time actually spent on the project.

11. This appeal concerns the propriety of the \$4,677.50 reduction of the amended budget, which Petitioner respectfully maintains was arbitrary and capricious.

12. The hearing in this case was conducted on July 15, 2003.

SUMMARY OF CRUCIAL TESTIMONY

TODD BIRKY, ENVIRONMENTAL GEOLOGIST, MIDWEST

Mr. Birky oversaw the project at issue. (Tr. 31) He had worked on approximately 75 petroleum contaminated sites. (Id.) He prepared the budget which is at issue in this case. (Id.) The work performed pursuant to that budget included the TACO calculations and modeling, two Highway Authority Agreements, and the plans and budget work. (Tr. 32). Mr. Birky testified that he had frequent phone contact with James Malcolm of the IEPA regarding the work which was performed in the field. (Id.) The project was complicated because of the presence of fiber optic lines (which limited the locations for subsurface sampling). (Id.) Mr. Malcolm of the IEPA made the suggestion to do off-site sampling across a major roadway. (Id.) That suggestion significantly added to the cost of the project. (Tr. 36). The off-site testing and the necessity of obtaining two (2) Highway Authority Agreements were a major portion of the costs involved in this case.

Mr. Birky identified Petitioner's Exhibit 1 (which was admitted without objection) as the personnel page of the budget amendment which was submitted. (Tr. 37). He was personally involved in the preparation of that document. Mr. Birky testified that Midwest spent at least the number of hours depicted on Petitioner's Exhibit 1 in connection with the amended budget for the project in question. (Tr. 38).

AL GREEN, PRESIDENT OF MIDWEST

Mr. Green testified that Midwest has been in business since 1991, and has been involved in well over 300 LUST Fund projects. (Tr. 13). Mr. Green provided an overview of the project in question, the difficulty encountered, and the communication and approvals from the IEPA.

He testified extensively regarding the process of obtaining the Highway Authority Agreements and the additional work necessitated by the off-site testing.

Mr. Green identified Petitioner's Exhibit 1 as the personnel summary sheet from the corrective action plan budget amendment submitted to the IEPA by Midwest. (Tr. 22).

He testified regarding that Exhibit as follows:

(by Mr. Riffle)

Q. I want to spend some time looking at this in detail. I want to ask you a couple general questions first. Does this document, page 1 of Exhibit 1, accurately depict the number of hours that Midwest spent solely in connection with the scope of work covered by the amended budget?

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

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

A. Yes.

(Tr. 22-23).

With respect to the hourly fee changes, Mr. Green testified as follows:

(by Mr. Riffle)

Q. Looking now at the hourly rates, I note that the IEPA challenged three of those rates. They happen to be the first three on that listing. If my records are accurate, they reduced the hourly fee for environmental hydrogeologist from \$98.00 to \$85.00. In your experience in the environmental field is the \$98.00 an hour amount that Midwest charged for environmental hydrogeologist reasonable and customary?

A. Yes.

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

A. Yes.

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

A. Yes.

(Tr. 23-24).

Mr. Green testified as follows regarding the scope of work related to the amended budget, and the reasonableness of the amounts charged:

A. It would have been for the actual TACO and tier for closure of the site, the model and calculation, the Highway Authority Agreements, and the final closure documentation, the report to the EPA and the final reimbursement for that work.

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

A. Yes.

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

A. Yes.

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

A. Yes.

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

A. Yes.

(Tr. 24-25).

**HARRY CHAPPEL, IEPA, UNIT MANAGER,
LEAKING UNDERGROUND STORAGE TANK SECTION**

Mr. Chappel testified that he signed the June 7, 2002, letter which modified (reduced) the amended budget. (Tr. 51).

With respect to the "deductions" for the number of hours and rates approved, Mr. Chappel testified as follows on direct examination:

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

(by Mr. Kim)

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

A. My experience in preparing budgets and reviewing them.

(Tr. 68).

On cross-examination Mr. Chappel testified that he had never been to the site in question and furthermore, at no point made an investigation of the unique data regarding the site, stating in pertinent part, as follows:

(by Mr. Riffle)

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

A. Yes.

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

A. Yes.

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

A. No.

Q. Have you ever been on that site?

A. No.

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

A. No.

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

A. Not that I remember.

(Tr. 81).

Mr. Chappel was not aware of the processes followed in obtaining the Highway Authority Agreements, or the difficulties encountered. (Tr. 69-70). He was not aware that obtaining Highway Authority Agreements can be a tedious and time-consuming process, testifying as follows:

A. I have no experience.

(Tr. 70)

With respect to the budget review process, Mr. Chappel testified as follows:

(by Mr. Riffle)

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

A. How many hours?

Q. Right.

A. That I can allot?

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

- A. In determining a budget submittal, the number of hours?
Q. Correct.
A. No, we don't.
Q. It's entirely subjective?
A. Correct.

(Tr. 73).

With respect to reasonableness of hourly rates, Mr. Chappel testified as follows:

(by Mr. Riffle)

Q. Do you take into consideration the reputation and ability of contractors when you determine the appropriateness of hourly rates?

A. No.

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

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

(Tr. 75-76).

With respect to the number of hours actually expended by Midwest on this project, Mr.

Chappel testified as follows:

(by Mr. Riffle)

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

A. No, I do not.

(Tr. 71).

(by Mr. Riffle)

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

A. No.

(Tr. 77).

ARGUMENT

It is undisputed that Midwest expended at least the number of hours set forth in the amended budget (Petitioner's Exhibit 1) in order to properly complete the project. (Tr. 22-23; 38; 71; 77). It is also undisputed that these hours were reasonably necessary, and were expended at the direction of the IEPA (or, at the very least, with their full approval). (Tr. 32).

Additionally, it is undisputed that difficulties were encountered on the project which required off-site testing, and the procurement of two Highway Authority Agreements.

The IEPA has never articulated any valid reason for rejecting more than 62% of the amount requested in the Amended Budget, other than Mr. Chappel's testimony that the reduction was based on his "experience in preparing budgets and reviewing them." (Tr. 68). However, Mr. Chappel has acknowledged that he had no evidence that the hours claimed were not actually expended (Tr. 71) and that he did not know how many hours were expended by Midwest on the project (Tr. 77). He claimed not to be aware of the actual field activities, Highway Authority Agreements, or difficulties encountered on the project. He never reviewed the environmental data relating to the site. (Tr. 81). He apparently did not consult with Mr. Malcolm in making his determination regarding the deductions (although it appears that Mr. Malcolm was actually the author of the June 7, 2002 letter in which \$4,677.50 of the amended budget amount of \$7,483.58 was rejected).

Petitioner respectfully maintains that the reduction of \$4,677.50 from the Amended Budget was improper, rising to the level of being arbitrary and capricious. If the IEPA had a defined standard for reviewing budgets, and followed that standard, it would probably be entitled to a deferential standard of review, and petitioner would be required to establish that the decision at issue was arbitrary and capricious. (*See, e.g., Town of Sugar Loaf v. Illinois Environmental Protection Agency*, 305 Ill.App.3d 483, 712 N.E.2d 393, 238 Ill.Dec. 671 (5th Dist. 1999)). Even under that standard, Petitioner should prevail, because the determination at issue was, indeed, arbitrary and capricious. In *City of East St. Louis v. East St. Louis Financial Advisory Authority*, the Illinois Supreme Court explained that failure to follow guidelines set by the legislature is grounds for a finding that the agency's decision is arbitrary and capricious. 188

Ill.2d 474, 722 N.E.2d 1129, 243 Ill.Dec. 60 (1999); *see also* Greer v. Illinois Housing Development Authority, 122 Ill.2d 462, 505-06, 120 Ill.Dec. 531, 524 N.E.2d 561 (1988).

Absent such guidelines, however, deferential review is not even possible.

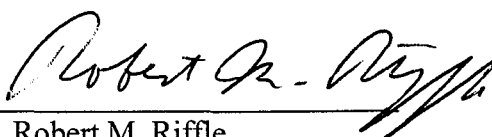
Here it is clear that there is no established standard, and certainly no written standard, applied by the IEPA. Rather, the determination is purely subjective, varies from unit to unit, and is not susceptible to any meaningful comparison or analysis. In the absence of such criteria, Petitioner respectfully maintains that discretionary review is not appropriate, and the higher standard of arbitrary and capricious should not apply. (Id.) Regardless of what standard is applied, however, the deductions should be reversed.

CONCLUSION

For all of the foregoing reasons, Todd's Service Station respectfully requests that the Final Decision be reversed or modified by increasing and accepting the budget as initially proposed, thereby allowing additional reimbursement in the amount of \$4,677.50.

Respectfully submitted,

Todd's Service Station, Petitioner

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CERTIFICATE OF SERVICE

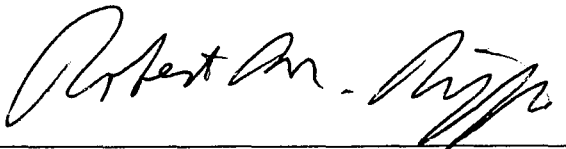
The undersigned certifies that on August 21, 2003, a copy of the foregoing document was served upon each party to this case by

- Enclosing a true copy of same in an envelope addressed to the attorney of record of each party as listed below, with first class postage fully prepaid, and depositing each of said envelopes in the United States Mail at 5:00 p.m. on said date.
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