ILLINOIS POLLUTION CONTROL BOARD
August 9, 2012

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

ROBERT M. RIFFLE; ELIAS, MEGINNES, RIFFLE & SEGHETTI, P.C.; APPEARED ON BEHALF OF PETITIONER; and

JAMES G. RICHARDSON; ASSISTANT COUNSEL, ILLINOIS ENVIRONMENTAL PROTECTION AGENCY; APPEARED ON BEHALF OF RESPONDENT.

OPINION AND ORDER OF THE BOARD (by T.A. Holbrook):

On December 28, 2009, Freedom Oil Company (Freedom Oil) filed a petition seeking the Board's review of a November 23, 2009 determination by the Illinois Environmental Protection Agency (Agency or Illinois EPA or IEPA). Freedom Oil requested reimbursement of $84,652.35 from the Underground Storage Tank Fund (Fund) for costs associated with early action activities at its site located at 712 El Dorado Road, Bloomington, McLean County (Site). The Agency partially approved Freedom Oil's request but rejected reimbursement of $19,594.85 in various costs on various grounds. Freedom Oil requests that the Board reverse the Agency's determination and allow additional reimbursement in the amount of the rejected costs.[1]

For the reasons stated below, the Board today affirms the Agency's determination to reduce reimbursement for excavation by $7,024.08 and for backfill by $3,729.51. The Board reverses the Agency's determination to reduce reimbursement for asphalt replacement by $2,574.80 and directs that the amount of this deduction be paid from the Fund. Finally, the Board concludes that Freedom Oil has in part prevailed before the Board, reserves ruling on whether to exercise its discretion to award attorney fees under Section 57.8(l) of the Act, and allows Freedom Oil to file a statement of fees to which the Agency may respond.

[1] Although Freedom Oil's petition for review sought reimbursement in the amount of $19,594.85 (Pet. at 2), Freedom Oil's testimony at hearing and post-hearing brief addressed the issues of reimbursing excavation, backfilling, and asphalt replacement. *See* Pet. Brief at 7-10. The Brief concluded with a request that the Board reverse the Agency's reductions of $13,328.39, with $7,024.08 of that total corresponding to excavation, $3,729.51 corresponding to backfill, and $2,574.80 corresponding to asphalt replacement. Pet. Brief at 11.

This opinion first reviews the procedural history and factual background of this case. Next, the opinion summarizes Freedom Oil's petition for review and the post-hearing briefs filed by Freedom Oil and the Agency. This opinion then sets forth the relevant legal authority and the standard of review and burden of proof applicable to this case. The Board then discusses and rules upon the issues before providing its conclusion and issuing its order.

PROCEDURAL HISTORY

On December 28, 2009, Freedom Oil filed its petition for review (Pet.). In an order dated January 7, 2010, the Board accepted the petition for hearing.

In an order dated April 16, 2012, the hearing officer scheduled a hearing on May 9, 2012, in Springfield. Also on April 16, 2012, the Agency filed the administrative record of its decision (R.).

The hearing took place as scheduled on May 9, 2012, and the Board received the transcript (Tr.) on May 11, 2012. During the hearing, Mr. Allan Green of Midwest Environmental Consulting and Remediation Services (MECRS) testified on behalf of Freedom Oil, and Mr. Brian Bauer testified on behalf of the Agency. The substance of this testimony, as relevant to the record and the issues in this case, is discussed below under "Factual Background."

On June 11, 2012, Freedom Oil filed its post-hearing brief (Pet. Brief). On July 2, 2012, the Agency filed its post-hearing brief (Agency Brief).

FACTUAL BACKGROUND

On June 20, 2008, Mr. Alan Green of "Midwest Environmental" reported a "leak or spill" of unleaded gasoline from an underground storage tank (UST) at the Site to the Illinois Emergency Management Authority (IEMA). R. at 222-23 (IEMA Hazmat Report). IEMA's report assigned the incident number H-2008-0880 and listed "Freedom Oil" as the "Responsible Party." *Id*. Addressing containment and cleanup actions and plans, the IEMA report noted that a "contractor has been hired." *Id*. at 223. IEMA also noted that, on June 20, 2008, it e-mailed its report to entities including the Agency and the Office of the State Fire Marshal (OSFM). *Id*. In a letter dated June 26, 2008, the Agency acknowledged receiving IEMA's notification of a release from a UST at the Site designated with Incident No. 20080880. R. at 221. The Agency assigned the release Number 1130205400. *Id*.

By letter dated July 9, 2008, MECRS filed a 20-Day Certification for the Freedom Oil Site designated by IEMA as Incident Number 20080880 and by the Agency as Incident Number 1130205400. R. at 218-20. The certification lists Freedom Oil Company as the UST owner or operator and also lists MECRS as the consultant with Mr. Allan Green as the contact. *Id*. at 220; *see* Tr. at 8-9. The Agency received the certification on July 11, 2008. R. at 218-19.

By letter dated July 22, 2008, MECRS cited delays and requested that the Agency "extend the deadline for reimbursable early action activities to October 4, 2008." R. at 217. In a letter dated August 11, 2008, the Agency stated that it had received MECRS' request on July 23,

2008, and extended "[t]he initial 45-day period for which early action costs shall be considered reimbursable" to October 4, 2008. *Id*. at 213.

On August 12, 2008, Mr. Andrew Fetterolf of MECRS re-reported incident number H-2008-0880 to IEMA, which assigned number H-2008-1232 to the re-reported incident. R. at 211-12; *see id*. at 167 (noting IEMA request for re-reporting). The report noted that "Illinois Oil Marketing is the tank removal contractor." *Id*. at 212. In a letter dated August 15, 2008, the Agency acknowledged receiving IEMA's notification of a release from a UST at the Site designated with Incident No. 20081232. R. at 210.

Also on August 12, 2008, Illinois Oil Marketing Equipment, Inc. (IOME) removed from the Site one 10,000-gallon gasoline tank and two 6,000-gallon gasoline tanks. R. at 33-34 (OSFM log of UST removal); *see id*. at 32, 195 (OSFM tank removal permit # 01040-2008REM dated June 25, 2008); *see also id*. at 196-210 (OSFM removal notification dated August 12, 2008). The OSFM tank removal log reported that "[f]ield tests produced positive results in the backfill and natural soils. A sheen was noted on the water in the UST's excavation." *Id*. at 33; *see* Tr. at 10-11. The log attributed the release to "suspected spills/overfills." R. at 33. The log characterized the contamination status for each of the three removed tanks as "major." *Id.* For each tank, the log indicated that the areas of contamination were the tank floor, tank walls and pipe trench. *Id*.

"During UST removal activities, soil samples were collected from the UST excavation and sent to TMI Analytical Laboratories for analysis." R. at 163 (45-Day Report); *see id*. at 179-90 (early action sampling results and data). One sample from the wall of the excavation revealed a benzene concentration of 108 parts per billion, which exceeded the Tier 1 soil remediation objective of 30 parts per billion. *Id*. at 180, *see id*. at 185; Tr. at 11.

In an application dated August 12, 2008, Freedom Oil requested that OSFM make a UST Fund eligibility and deductible determination. R. at 28-31 (noting re-reporting as incident number 20081232). In a letter dated September 3, 2008, OSFM acknowledged receiving Freedom Oil's application on August 29, 2008. *Id*. at 26, 61. In that letter, OSFM determined that Freedom Oil is "eligible to seek payment of costs in excess of $10,000" responding to incident numbers 2008-0880 and 2008-1232 and associated with three specified tanks. *Id*.

A notice dated August 27, 2008, and labeled with Freedom Oil's name and incident numbers indicated that Freedom Oil had failed to file a 20-Day Certification or 45-Day Notice. R. at 209; *but see id.* at 218-20 (20-Day Certification for Site). A notice dated October 30, 2008, and labeled with Freedom Oil's name and incident numbers indicated that Freedom Oil had failed to file a 20-Day Certification or 45-Day Notice. R. at 208; *but see id.* at 218-20 (20-Day Certification for Site).

In a transmission dated October 30, 2008, and including a letter from MECRS dated October 30, 2008, Freedom Oil submitted a "45 Day Report/Report of Early Action" to the Agency. R at 151-207. MECRS's report of early action activities stated in part that

> [t]he backfill in the UST excavation was contaminated, physically recognizable by soil discoloration and an odor. Field screening of the samples indicated volatile organics present in the soil. Soil samples were collected from native material at depths of about 3 feet below the invert elevation of the base of the tanks and from the UST excavation sidewalls. Sidewall samples were retrieved from the depths representative of two thirds the distance from the surface, in the lower one third of the excavation. The samples exhibited petroleum impact, which was confirmed by screening samples using a portable photoionization detector (PID). Backfill material was removed to native soil and transported for disposal to a licensed disposal facility. Approximately 447 cubic yards of contaminated soil was removed from the site. Excavation was discontinued upon reaching native soils that exhibited acceptable PID readings when headspace analysis was performed. R. at 167-68.

In a letter dated March 3, 2009, the Agency acknowledged receiving and reviewing Freedom Oil's 45-Day Report, "which included a Stage 1 Site Investigation Plan and Budget certification," on November 3, 2008. R. at 142. The Agency rejected Freedom Oil's 45-Day Report on various grounds. *Id*. First, the Agency determined that the report failed to include various required information: data on the nature and estimated quantity of the release; data concerning various factors pertaining to the Site; results of a site check to measure presence of a release; and results of the free product investigation. *Id*. at 142-43 (citations omitted); *see id*. at 148 (review notes dated February 24, 2009). Second, the Agency determined that Freedom Oil's report showed that "one soil sample collected from a sidewall has contamination above the remediation objectives of 35 Ill. Adm. Code 742 for the applicable indicator contaminants." R. at 143, citing 35 Ill. Adm. Code 734.210(h); *see* R. at 148 (review notes), 180 (Early Action Soil Analytical Results), 185 (Laboratory Data). Third, the Agency determined that the report "fails to include a site map" indicating various features including the location and dimensions of the excavation and the locations of soil samples collected from the excavation. R. at 143, citing 35 Ill. Adm. Code 734.210(h)(1), (h)(4); *see id*. at 148 (review notes).

The Agency's March 3, 2009 letter also stated that, "[p]ursuant to your certification, the Stage 1 Site Investigation Plan is approved and must be conducted in accordance with 35 Ill. Adm. Code 734.315." R. at 143.

By a letter dated April 21, 2009, MECRS submitted to the Agency a request for reimbursement of $84,652.35 in early action costs for the period from June 23, 2008, through October 4, 2008. R. at 50-94. The Agency received the request on May 4, 2009. *Id*. at 50. The "Remediation and Disposal Costs Form" requested reimbursement of costs including those for "Excavation, Transportation, and Disposal of contaminated soil and/or the 4-foot backfill material removal during early action activities" for 560 cubic yards at $62.15 per cubic yard, or $34,810.36. *Id*. at 75. Mr. Green testified that this figure is based upon "an actual calculation of the volume of the excavation itself." Tr. at 15; *see id*. at 23-24. The same form also requested reimbursement of costs for "Backfilling the excavation" for 670 cubic yards at $21.81 per cubic year, or $14,612.70. R. at 75. Mr. Green testified that the figure is based upon the size of the excavation increased by the volume of the removed tanks. Tr. at 15-16.

The reimbursement request included an invoice from Waste Management for services provided by the Peoria City County Landfill. R. at 90-93; *see* Tr. at 31. Mr. Green testified that the invoice is based on truckloads arriving at the landfill from the Site and reflects scale tickets obtained by weighing materials in those trucks. Tr. at 13. The invoice bills for disposal of a total of 670.34 tons. R. at 90-93. Mr. Green testified that Waste Management multiplied the total tons by three to convert that weight to a volume of 2,011 cubic yards. Tr. at 14-15, 23-24; *see* R. at 90-93.

In addition, the request for reimbursement included a "Paving, Demolition, and Well Abandonment Costs Form" seeking payment of costs for "Concrete and Asphalt Placement/Replacement" for an area of 1,711 square feet at a thickness of six inches at a rate of $3.36 per square foot, or $5,750. *Id*. at 77. Mr. Green testified that this request was "[b]ased upon the calculated area of what was removed for the tank removal and then replaced as an area of the engineered barrier." Tr. at 19-20. He further testified that, on more than occasion, he physically calculated that area. *Id*. at 20.

In a transmission dated July 20, 2009, and including a letter from MECRS dated June 17, 2009, Freedom Oil submitted to the Agency a Site Investigation Completion Report (SICR). R. at 95-141. The SICR included a request for reimbursement of $7,228.89 in costs associated with the Stage 1 Site Investigation Plan and Budget. *Id*. at 133-34. The Agency received the SICR on August 3, 2009. *Id*. at 98.

In a letter dated September 1, 2009, the Agency acknowledged receiving Freedom Oil's April 21, 2009 request for reimbursement of $84,652.35 in corrective action costs on May 4, 2009. R. at 35-41; *see id*. at 50. The Agency stated that, "[a]s a result of the Illinois EPA's review of this application for payment, a voucher cannot be prepared for submission to the Comptroller's office for payment." R. at 35. An attachment to the Agency's letter listed "costs that are not being paid and the reasons these costs are not being paid." *Id*. at 36; *see* Tr. at 29.

The Agency's attachment first addressed accounting matters by stating in pertinent part that the Agency

> has reviewed all the information previously submitted for the site to ensure that the application for payment is consistent with early action work actually performed in conjunction with the site. The $84,652.35 in Early Action costs are denied because this information provides no supporting documentation which demonstrates that these costs are consistent with work actually performed in conjunction with the site. R. at 38, citing 415 ILCS 5/57.7(c)(3) (2010), 35 Ill. Adm. Code 734.210(b, c, d), 734.610(b, c); *see* R. at 45 (Agency review).

Regarding technical documentation, the Agency stated that, "[s]ince there is no supporting documentation of costs, the Illinois EPA cannot determine that costs will not be used for activities in excess of those necessary to meet the minimum requirements of Title XVI of the Act." R. at 38, citing 415 ICLS 5/57.7(c)(3) (2010), 35 Ill. Adm. Code 734.630(cc). The Agency's attachment also noted that it had rejected Freedom Oil's 45-Day Report. R. at 38-39; *see id*. at 142-44 (rejection letter).

In its attachment, the Agency directed that "[a]n accounting of all costs must be provided, including but not limited to, invoices, receipts, and supporting documentation showing the dates and descriptions of the work performed. Invoices need to be provided for all subcontractors performing the work." R. at 39; *see* Tr. at 38-39. In addition, the Agency stated that, "[i]n order to calculate the actual cost per cubic yard for excavation, transportation, disposal and backfilling (ETD&B), a time and material breakdown is needed for Illinois Oil Marketing Equipment, Inc. invoice #0027691-IN, dated September 30, 2008. The costs associated with the ETD need to be separated from the Backfilling costs." R. at 39; *see id*. at 63-64 (IOME invoice #0027691-IN).

The Agency's attachment also described additional bases for deductions encompassed within the technical deduction described above. R. at 39; *see id*. at 45 (Agency review). Those deductions first included $34,810.36 for early action costs for excavation, transportation, and disposal "that are not reasonable as submitted" and "which lack supporting documentation." *Id*. at 40, citing 415 ILCS 5/57/7(c)(3) (2010), 35 Ill Adm. Code 734.630 (cc, ee); *see* R. at 75-76 (Remediation and Disposal Costs Form). The Agency stated that the "Peoria City County Landfill invoice indicates a total of 670.34 tons of special waste disposal, for a conversion of 446.89 cubic yards. Documentation previously submitted to the Illinois EPA indicted 447 cubic yards of contaminated soil was removed. The cubic yards are being reduced from 560 to 447 cubic yards." R. at 40; *see id*. at 75-76, 93; Tr. at 16-17, 25. To convert to volume in cubic yards, the Agency divided the weight in tons by 1.5. Tr. at 16-17, 25, 34; *see* 35 Ill. Adm. Code 734.825(a)(1). The Agency added that "[n]o manifest or trucking tickets were provided for transportation/hauler." R. at 40. The Agency also stated that Freedom Oil had not provided a breakdown of the time and material involved in excavation. *Id*.

Second, those deductions included $14,612.70 in early action costs for backfilling, "which lack supporting documentation." R. at 39-40, citing 415 ILCS 5/57.7(c)(3), 35 Ill. Adm. Code 734.630(cc). The Agency elaborated that Freedom Oil's backfill invoices and documentation did not indicate "the quantities and dates of purchase." R. at 40. The Agency added that it had no "documentation indicating the hauler." *Id*. The Agency also stated that an IOME invoice "indicates a total of 748.27 tons of Gravel for a conversion of 498.8 cubic yards. The cubic yards are being reduced from 670 to 499 cubic yards. No invoice provided." *Id*.; *see also id.* at 63-64 (IOME invoice). On behalf of the Agency, Mr. Bauer testified that the Agency divided the number of tons of gravel by 1.5 to convert the weight to volume in cubic yards. Tr. at 35-36; *see* 35 Ill. Adm. Code 734.825(b)(1).

Third, those deductions included $5,750 in "costs for asphalt replacement, which lack supporting documentation." R. at 41, citing 415 ICLS 57.7(c)(3), 35 Ill. Adm. Code 734.630(cc). The Agency noted a quote by Rowe Construction Co. dated August 20, 2008, for $23,657.75. R. at 41; *see id*. at 78 (Rowe quote). The Agency also stated that Freedom Oil had not provided an excavation dimensions map "to verify 1,711 square feet of asphalt replacement." *Id*. at 41; *see id*. at 77 (Paving, Demolition, and Well Abandonment Costs Form). Mr. Bauer testified that this deduction was based on a map of the Site included in the administrative record. Tr. at 37, citing R. at 20, 113 (MECRS map of sampling locations). He further testified that the Agency relied on the map's scale to calculate an excavation area of 21 feet by 45 feet, or 945 square feet. Tr. at 37, 40. Mr. Green testified that the excavation area was significantly larger

because the map does not indicate the area of lines and islands adjacent to the tank pit that were also excavated. *Id*. at 48-49, 53-54; *see* R. at 20. Mr. Green further testified that Freedom Oil did not submit a map of asphalt removal to the Agency "because it was all shown on the excavation extents." Tr. at 54. Mr. Green also testified that, although the entire lot was paved at the Site, "[w]e only took the excavation extents and requested that amount for reimbursement, separated it from the entire lot." Tr. at 54.

In an e-mail dated October 8, 2009, to Mr. Bauer, Mr. Green of MECRS requested that the Agency "re-review the early action reimbursement submittal for incident number 20080880 known as Freedom Oil located at 712 Eldorado Road in Bloomington, Illinois." R. at 16; *see id*. at 8-11, 13-15, 17-25; *see also* Tr. at 28-29.

In an undated letter[2], the Agency acknowledged receiving Freedom Oil's request for reimbursement of $84,652.35 in corrective action costs on May 4, 2009. R. at 1-5, 247-51; *see id*. at 50. Mr. Green had submitted additional documents for the Agency to consider during its re-review. Tr. at 29-30; *see* R. at 4, 21-25. The Agency stated that, after re-reviewing the application, "a voucher for $55,057.50 will be prepared for submission to the Comptroller's Office for payment as funds become available. . . ." *Id*. at 1, 247; *see id*. at 65. After applying a $10,000 deductible (*see id*. at 26, 61), the Agency stated that "[t]here are costs from this claim that are not being paid." *Id*. at 2, 248. An attachment to the Agency's letter listed "costs that are not being paid and the reasons these costs are not being paid." *Id*.

The Agency's attachment first addressed the requested re-review by deducting $10,754.35 in "costs for Remediation and Disposal Costs, which lack supporting documentation." R. at 4, 250, citing 415 ILCS 5/57.7(c)(3) (2010), 35 Ill. Adm. Code 734.630(cc). Stating that "[t]he landfill invoice indicates only 447 cubic yards were disposed," the Agency reduced excavation, transportation, and disposal costs from 560 to 447 cubic yards, or by $7,024.84. R. at 4, 250; *see id*. at 8 (payment summary), 10, 15, 18, 19, 75-76, 93; Tr. at 16-17, 30-31. The Agency also reduced backfilling costs from 670 to 499 cubic yards, or by $3,729.51. R. at 4, 250; *see id*. at 8 (payment summary), 10, 15, 18, 19, 66, 75-76.

The Agency's attachment next addressed the requested re-review by deducting $2,574.80 in "costs for Asphalt Replacement, which exceed the minimum requirements necessary to comply with the Act." R. at 4, 250, citing 415 ILCS 5/57.7(c)(3) (2010), 35 Ill. Adm. Code 734.630(o). Specifically, the Agency reduced the reimbursement for asphalt replacement from 1,711 square feet to 945 square feet. R. at 4, 250; *see id*. at 8 (payment summary), 10, 19, 66, 77.

The Agency's attachment also reflects a deduction of $6,265.70 in "handling charges for subcontractor costs when the contractor has not submitted proof of payment for subcontractor costs." R. at 5, 251, citing 415 ILCS 5/57.7(c)(3) (2010), 35 Ill. Adm. Code 734.630(ii); *see* R. at 81 (Handling Charges Form). The Agency stated that it lacked proof of payment to

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[2] The administrative record includes a receipt for payment of certified mail postage apparently dated November 19, 2009, for this letter and a certified mail return receipt clearly showing delivery to Freedom Oil on November 20, 2009. R. at 6; *see* Tr. at 30.

subcontractors and that an affidavit submitted by TMI Analytical Services, LLC was "not dated by Notary Public." R. at 5, 251; *see id*. at 87 (affidavit).

The Agency's letter states that "[t]his constitutes the Illinois EPA's final action" regarding Freedom Oil's application for payment from the UST Fund. R. at 1, 247.

FREEDOM OIL'S PETITION FOR REVIEW

Freedom Oil stated that it retained MECRS to remediate the property at 712 El Dorado Road in Bloomington designated with LPC No. 1130204300 and UST Incident No. 20080880. Pet at 1 (¶ 1). Freedom Oil alleged that early action activities at the property included "UST removal, contaminated backfill removal/disposal, and pavement replacement." *Id*. (¶2). Freedom Oil further alleged that performance of these activities was "all within IEPA approved guidelines" and that "[t]he final report of early action activities detailed the work performed." *Id*. Freedom Oil claimed that "[n]o work was performed outside the early action guidelines (four (4) foot rule) and was within acceptable IEPA LUST Fund reimbursement requirements." *Id*.

Freedom Oil stated that, in a letter dated April 21, 2009, MECRS submitted to the Agency a request for reimbursement of $84,652.35 in costs of early action activities at the Site. Pet. at 2 (¶3); *see* Pet., Att. A (request). Freedom Oil claimed that, on November 23, 2009, the Agency approved reimbursement in the amount of $55,057.50 but denied reimbursement of $19,594.85. Pet at 3 (¶4); *see* Pet., Att. B (Agency decision letter).

Freedom Oil alleged that the Agency's partial rejection of the request for reimbursement is based on the amount of tonnage billed by a landfill. Pet. at 2; *see* Pet. at Att. B. Freedom Oil further alleged that the Agency "adjusted all of the reimbursement amounts based upon a calculation of a single bill in the request." Pet. at 2. Freedom Oil argued that the amounts for which it claimed reimbursement were "reasonably, customary, and necessary for the proper completion of the project and site closure." *Id*. Freedom Oil further argued that the "work performed was within the guidelines pre-approved by the IEPA." *Id*. Freedom Oil claimed that the costs for which the Agency denied reimbursement "were actually and legitimately expended and performed." *Id*. Freedom Oil requested that the Board reverse or modify the Agency's determination by "allowing additional reimbursement in the amount of $19,594.85." *Id*.

FREEDOM OIL'S POST-HEARING BRIEF

Reimbursement of Excavation, Transportation, and Disposal Costs

Freedom Oil argues that its consultant followed the Board's UST regulations by calculating the volume of soil excavated and removed from the Site based upon the dimensions of the excavation. Pet. Brief at 7, citing 35 Ill. Adm. Code 734.825(a)(1). Freedom Oil further argues that the Agency "disregarded the actual volume, erroneously relying on a theoretical calculation related to weight." Pet. Brief at 7, citing 35 Ill. Adm. Code 734.825 (Soil Removal and Disposal), 734.Appendix C (Backfill Volumes).

Freedom Oil claims that the three subsections of Section 734.825 contain "an inherent ambiguity." Pet. Brief at 7, citing 35 Ill. Adm. Code 734.825. Freedom Oil states that "[r]egulated parties are required to calculate volumes by determining the size of the excavation (length x width x depth), and multiplying this resulting number by 1.05," which "yields a fair calculation of volume." Pet. Brief at 8, citing 35 Ill. Adm. Code 734.825(a). Freedom Oil argues that Section 734.825 then requires the application of a conversion factor to translate weight in tons to volume in cubic yards. Pet. Brief at 8; *see* 35 Ill. Adm. Code 734.825(a). Freedom Oil claims that "[t]his makes no sense." Pet. Brief at 8. Freedom Oil argues that "[t]here is no apparent need to convert tons to cubic yards, because the unit cost or payment limit is based on cubic yards, and the required volume calculation is based on cubic yards." *Id*. Freedom Oil claims that requiring these two separate calculations "will almost invariably lead to inconsistent results." *Id*. Freedom Oil sought to illustrate this claim with an example based upon two excavations identical in volume. The example calculated that excavation of heavy wet clay weighing more than 1.5 tons per cubic yard would be reimbursed more than an excavation of light dry soil weighing less than 1.5 tons per cubic yard. *Id*. at 8-9.

Freedom Oil argues that the Board's regulations and the Agency's forms are based upon cubic yards and establish reimbursement based on volume of the excavated materials. Pet. Brief at 9. Freedom Oil further argues that calculating volume on the basis of weight "is arbitrary and capricious." *Id*. Freedom Oil claims that it is not possible to reconcile the separate calculations of volume and weight and that there "rational way to apply the regulation in a sensible manner." *Id*.

Freedom Oil argues that the Section 734.825, "requiring a regulated party to perform two separate and inconsistent calculations to determine excavation and backfill volumes, is arbitrary and capricious." Pet. Brief at 11. Alternatively, Freedom Oil claims that the Agency's "interpretation and application of the regulation is arbitrary and capricious." *Id*. Freedom Oil concludes that the Agency's reduction of $7,024.08 in reimbursement for expenses related to excavation was "arbitrary and capricious, and should be paid." *Id*. at 10.

Reimbursement of Backfill Costs

Freedom Oil argues that the Agency's determination on reimbursement of backfilling costs illustrates the arbitrary application of the Board's regulations. Pet. Brief at 9. Freedom Oil states that the Agency's reimbursement form provides that "[t]he cubic yard rate includes all costs associated with the purchase, transportation, and placement of clean backfill material. The rate includes but is not limited to all personnel, equipment, materials, and other expenses for the purchases, transportation, and placement of clean backfill." *Id*. at 10; *see* R. at 75 (Remediation and Disposal Costs Form). Freedom Oil emphasized that IOME billed MECRS a total of $10,777.08 for backfill material. Pet. Brief at 10, citing R. at 63 (IOME invoice). Freedom Oil adds that the Agency approved reimbursement of $10,883.19 for this expense, a reduction of $3,729.51 from its request for $14,612.70. Pet. Brief at 10; *see* R. at 75. Freedom Oil claims that this resulted in reimbursement of $106.11 to handle and transport 742.27 tons of backfill material. Pet. Brief at 10. Freedom Oil argues that the Agency's reduction is an absurd result of its request for reimbursement. *Id*.

Freedom Oil argues that Section 734.825, "requiring a regulated party to perform two separate and inconsistent calculations to determine excavation and backfill volumes, is arbitrary and capricious." Pet. Brief at 11. Alternatively, Freedom Oil claims that the Agency's "interpretation and application of the regulation is arbitrary and capricious." *Id*. Freedom Oil concludes that the Agency's reduction of $3,729.51 in reimbursement for expenses related to backfilled material was "arbitrary and capricious, and should be paid." Pet. Brief at 10.

Reimbursement of Asphalt Replacement Costs

Freedom Oil argues that the Agency reduced the reimbursement of asphalt replacement by $2,574.80, *i.e.*, from $5,750.00 to $3,175.20, "based solely on a miscalculation of square footage. . . ." Pet. Brief at 10. Freedom Oil notes Mr. Green's testimony "that the square footage set forth in the reimbursement request (1711) was based on the actual square footage, physically calculated on actual dimensions, reasonably and necessarily replaced." *Id*., *see* Tr. at 19-20. Freedom Oil notes that MECRS was billed a total of $23,657.75 for asphalt replacement. Pet. Brief at 10, citing R. at 78. Freedom Oil emphasizes that it "sought reimbursement for only 24% of that overall expenditure." Pet. Brief at 10.

Freedom Oil concludes that the Agency's reduction of $2,574.80 in reimbursement for expenses related to asphalt replacement was "arbitrary and capricious, and should be paid." Pet. Brief at 10.

Reimbursement of Costs

Freedom Oil argued that it "should recover its costs and attorneys fees incurred in overturning an erroneous, arbitrary and capricious regulation, and/or the IEPA's arbitrary and capricious application of that regulation." Pet. Brief at 11. Freedom Oil did not request recovery of these costs or fees in its petition. *See* Pet. at 2.

AGENCY'S POST-HEARING BRIEF

Reimbursement of Excavation, Transportation, and Disposal and Backfill Costs

The Agency noted Freedom Oil's statement that its "consultant calculated the volume of soil removed and disposed using the 'dimensions of the resulting excavation,' precisely as required pursuant to Section 734.825(a)(1)." Agency Brief at 5-6, citing Pet. Brief at 7. The Agency further noted Freedom Oil's argument that the Agency "disregarded the actual volume, erroneously relying on a theoretical calculation related to weight." Agency Brief at 6, citing Pet. Brief at 7; *see* 35 Ill. Adm. Code 734.825, 734.Appendix C. The Agency claims that Freedom Oil apparently believes that the reimbursement of excavation and backfill costs should be based only on volume and not on weight. Agency Brief at 6. The Agency argues that the "position is flawed on many levels." *Id*.

First, the Agency expressed doubt that any landfill would accept contaminated backfill based on a calculation of the volume of a remote excavation made by the excavator's employee. Agency Brief at 6. The Agency also doubted that any supplier would bill for clean backfill on

the basis of volume calculated by a non-employee. *Id*. The Agency stated that both landfills and backfill suppliers compare the weight of loaded and empty trucks to determine the amount of material that they have accepted for disposal or that they have provided for backfilling an excavation. *Id*. The Agency argued that "[b]oth the landfill and backfill supplier in the instant case based their invoices on tonnage. . . . Taking measurements for volume calculations would be more labor intensive and less accurate. Freedom's methodology is neither superior to nor more practical than the existing process." *Id*.

In addition, the Agency noted that the Board's proposal and adoption of a factor for converting weight in tons to volume in cubic yards generated comment during the rulemaking process. Agency Brief at 5. The Agency argued that Freedom Oil's "concern over variations in the weights of different fill materials was examined and addressed by the Board in the rulemaking." *Id*. at 7. The Agency noted that, when the Board proposed Part 734 for first-notice publication, it acknowledged a range of conversion factors. *Id*., citing Proposed Amendments to Regulation of Petroleum Leaking Underground Storage Tanks (35 Ill. Adm. Code 732, 734), R04-22, 23 (consol.), slip op. at 73-74 (Feb. 17, 2005). The Agency claimed that the Board addressed the issue in its first-notice opinion by stating that,

> [r]egarding the conversion factor, the Board recognizes that the factor ranges from one to two tons per cubic yard for different types of geologic material. The conversion factor proposed by the Agency takes into consideration various types of geologic material that occur at Illinois UST sites and the Board finds that the record supports a 1.5 tons per cubic yard conversion factor. Agency Brief at 6, citing Proposed Amendments to Regulation of Petroleum Leaking Underground Storage Tanks (35 Ill. Adm. Code 732, 734), R04-22, 23 (consol.), slip op. at 74 (Feb. 17, 2005).

The Agency noted that, although the Board accepted additional comment on the conversion formula, it did not change that formula in proceeding to second notice or to adoption of Part 734. Agency Brief, citing Proposed Amendments to Regulation of Petroleum Leaking Underground Storage Tanks (35 Ill. Adm. Code 732, 734), R04-22, 23 (consol.), slip op. at 72-73 (Dec. 1, 2005) (second-notice opinion and order). The Agency noted that Part 734 became effective on March 1, 2006 with a conversion factor of 1.5 tons per cubic yard. Agency Brief at 5; *see* 35 Ill. Adm. Code 734.825, 734.Appendix C; Proposed Amendments to Regulation of Petroleum Leaking Underground Storage Tanks (35 Ill. Adm. Code 732, 734) (consolidated), R04-22, 23 (Feb. 16, 2006) (Board adoption opinion and order).

The Agency noted that the 45-Day Report/Report of Early Action for the Site states that "[a]pproximately 447 cubic yards of contaminated soil was removed from the site." Agency Brief at 7, citing R. at 168. The Agency also noted Mr. Green's testimony that he relies on the conversion factor to prepare plans and budgets, but the Agency stated that the "45-Day Report is neither a plan nor a budget." Agency Brief at 7, citing Tr. at 50-51. The Agency stated that both Mr. Green and Mr. Bauer applied the conversion factor of 1.5 to the weight 670.34 tons in the landfill invoice to determine that 447 cubic yards of contaminated backfill had been excavated from the Site. Agency Brief at 7; *see* R. at 93, 168. The Agency indicated that, after completing

activities at the site, Freedom Oil submitted two different volumes of the excavated backfill. Agency Brief at 7; *see* R. at 75, 168.

The Agency also noted testimony that, although Freedom Oil's consultant had completed work on more than 300 UST sites since its founding in 1991, this was the first case in which a request for reimbursement was reduced through application of the conversion factor. Agency Brief at 7, citing Tr. at 6-7, 9, 17. The Agency stated that this testimony indicates "that the regulations in question and the Illinois EPA's application of them have successfully worked." Agency Brief at 7. The Agency suggested that this experience contradicts Freedom Oil's claim that the regulation or its application is arbitrary and capricious. *See id*. at 7-8.

The Agency concludes that the conversion factor was "duly promulgated" and that Freedom Oil failed to show that it was arbitrarily and capriciously applied in this case. Agency Brief at 9. The Agency concluded that Freedom Oil has not met its burden of demonstrating that the deductions for disposal of contaminated backfill and clean backfill were "inconsistent with the facts of this site and the law applicable to it." *Id*. The Agency requested that the Board affirm its reimbursement determination. *Id*.

Reimbursement of Asphalt Replacement Costs

The Agency noted Mr. Green's testimony that Freedom Oil's request for reimbursement of asphalt replacement costs "was based on the actual square footage, physically calculated on actual dimensions, reasonably and necessarily replaced." Agency Brief at 8, citing Pet. Brief at 10; *see* Tr. at 19-20. The Agency also stressed his testimony that, although the administrative record does not include a map of the asphalt removal area, "it was all shown on the excavation extents." Agency Brief at 8, citing Tr. at 54. The Agency argued that it used that map of the excavation extents to calculate the amount of asphalt removal it would reimburse. Agency Brief at 8. The Agency claimed that, in the absence of any indication in the record that additional asphalt removal was necessary, its "calculation and the resulting deduction stand unrefuted." *Id*.

The Agency also noted testimony that Freedom Oil took this facility out of operation and paved the entire site before selling it. Agency Brief at 8, citing Tr. at 10-11. The Agency also noted references to installation of asphalt as an engineered barrier. Agency Brief at 8, citing Tr. at 12, 19-20, 49-50. The Agency stressed Mr. Bauer's testimony that an engineered barrier can be an element of corrective action, a remediation stage never reached at the Site. Agency Brief at 8, citing Tr. at 36. Although it acknowledges that Mr. Green may have been mistaken in his use of the term "engineered barrier," the Agency suggests that Freedom Oil may have been motivated "to install additional paving at the site beyond that which was destroyed by the UST removal." Agency Brief at 8-9.

The Agency concluded that Freedom Oil has not met its burden of demonstrating that the deduction for asphalt replacement was "inconsistent with the facts of this site and the law applicable to it." Agency Brief at 9. The Agency requested that the Board affirm its reimbursement determination. *Id*.

LEGAL AUTHORITY

Section 734.825 of the Board's UST regulations, which addresses soil removal and disposal, provides in its entirety that

> [p]ayment for costs associated with soil removal, transportation, and disposal must not exceed the amounts set forth in this Section. Such costs must include, but are not limited to, those associated with the removal, transportation, and disposal of contaminated soil exceeding the applicable remediation objectives or visibly contaminated fill removed pursuant to Section 734.210(f) of this Part, and the purchase, transportation, and placement of material used to backfill the resulting excavation.
>
> a) Payment for costs associated with the removal, transportation, and disposal of contaminated soil exceeding the applicable remediation objectives, visibly contaminated fill removed pursuant to Section 734.210(f) of this Part, and concrete, asphalt, or paving overlying such contaminated soil or fill must not exceed a total of $57 per cubic yard.
>
> 1) Except as provided in subsection (a)(2) of this Section, the volume of soil removed and disposed must be determined by the following equation using the dimensions of the resulting excavation:
>
> (Excavation Length x Excavation Width x Excavation Depth) x 1.05
>
> A conversion factor of 1.5 tons per cubic yard must be used to convert tons to cubic yards.
>
> 2) The volume of soil removed from within four feet of the outside dimension of the UST and disposed of pursuant to Section 734.210(f) of this Part must be determined in accordance with Appendix C of this Part.
>
> b) Payment for costs associated with the purchase, transportation, and placement of material used to backfill the excavation resulting from the removal and disposal of soil must not exceed a total of $20 per cubic yard.
>
> 1) Except as provided in subsection (b)(2) of this Section, the volume of backfill material must be determined by the following equation using the dimensions of the backfilled excavation:

(Excavation Length x Excavation Width x Excavation Depth) x 1.05

A conversion factor of 1.5 tons per cubic yard must be used to convert tons to cubic yards.

2) The volume of backfill material used to replace soil removed from within four feet of the outside dimension of the UST and disposed of pursuant to Section 734.210(f) of this Part must be determined in accordance with Appendix C of this Part.

c) Payment for costs associated with the removal and subsequent return of soil that does not exceed the applicable remediation objectives but whose removal is required in order to conduct corrective action must not exceed a total of $6.50 per cubic yard. The volume of soil removed and returned must be determined by the following equation using the dimensions of the excavation resulting from the removal of the soil:

(Excavation Length x Excavation Width x Excavation Depth)

A conversion factor of 1.5 tons per cubic yard must be used to convert tons to cubic yards. 35 Ill. Adm. Code 724.825.

STANDARD OF REVIEW AND BURDEN OF PROOF

Section 57.8(i) of the Act, which addresses the UST Fund, allows an owner or operator to appeal Agency determinations pursuant to Section 40 of the Act. 415 ILCS 5/40, 57.8(i) (2010). The standard of review under Section 40 of the Act (415 ILCS 5/40 (2010)) is whether the application, as submitted to the Agency, would not violate the Act and Board regulations. Ted Harrison Oil Co. v. IEPA, PCB 99-127, slip op. at 5 (July 24, 2003); citing Browning Ferris Industries of Illinois v. PCB, 534 N.E.2d 616 (2nd Dist. 1989). "The Board does not review the Agency's decision using a deferential manifest-weight of the evidence standard," but "[r]ather the Board reviews the entirety of the record to determine that the [submittal] as presented to the Agency demonstrates compliance with the Act." Illinois Ayers Oil Co. v. IEPA, PCB 03-214, slip op. at 15 (Apr. 1, 2004).

The Board's review is generally limited to the record before the Agency at the time of its determination. Freedom Oil v. IEPA, PCB 03-54 (consolidated), slip op. at 11 (Feb. 2, 2006). The Board will not consider new information that was not before the Agency prior to its final determination regarding the issues on appeal. Kathe's Auto Service Center v. IEPA, PCB 95-43, slip op. at 14 (May 18, 1995). The Agency's denial letter frames the issues on appeal. Pulitzer Community Newspapers, Inc. v. IEPA, PCB 90-142 (Dec. 20, 1990).

The Board's procedural rules provide that, in appeals of final Agency determinations, "[t]he burden of proof shall be on the petitioner. . . ." 35 Ill. Adm. Code 105.112(a), citing 415 ILCS 5/40(a)(1), 40(b), 40(e)(3), 40.2(a). The standard of proof in UST appeals is the "preponderance of the evidence" standard. Freedom Oil v. IEPA, PCB 03-54 (consolidated), slip op. at 59 (Feb. 2, 2006); *see also* McHenry County Landfill, Inc. v. County Bd. of McHenry County, PCB 85-56, 85-61, 85-62, 85-63, 85-64, 85-65, 85-66 (consolidated), slip op. at 3 (Sept. 20, 1985) ("A proposition is proved by a preponderance of the evidence when it is more probably true than not.").

DISCUSSION

Reimbursement of Excavation, Transportation, and Disposal Costs and Backfill Costs

Title VII of the Act addresses regulations, and Section 29 of the Act specifically addresses review of regulations adopted by the Board. 415 ILCS 5/26-29 (2010). The Board notes that, in Public Act 85-1048, effective January 1, 1989, the General Assembly added Section 29(b), which provides in its entirety that "[a]ction by the Board in adopting any regulation for which judicial review could have been obtained under Section 41 of this Act shall not be subject to review regarding the regulation's validity or application in any subsequent proceeding under Title VIII [Enforcement], Title IX [Variances] or Section 40 of this Act." 415 ILCS 5/29(b) (2010).[3] Under Section 41, specified entities generally may seek judicial review of final Board action by filing a petition for review with the Appellate Court within 35 days of service of the order sought to be reviewed. *See* 415 ILCS 5/41(a) (2010).

By arguing that Section 734.825 is facially invalid, Freedom Oil has lodged the type of collateral challenge of the rule prohibited by Section 29(b). For this reason alone, the Board denies Freedom Oil's claim. However, even considering the merits of the Freedom Oil's challenge that the conversion factor in the regulations is facially invalid on the basis that it is arbitrary and capricious, the Board is not persuaded by the argument. Below, the Board first addresses Freedom Oil's argument that the Section 734.825 contains an inherent ambiguity and requires inconsistent calculations. The Board then addresses the conversion factor established in that regulation.

The Board first notes Freedom Oil's argument that Section 734.825 is arbitrary and capricious because it requires "a regulated party to perform two separate and inconsistent calculations to determine excavation and backfill volumes. . . ." Pet. Brief at 11. Section 734.825(a)(1) provides an equation to determine the volume of an excavation. While separate volume and weight calculations may occur at different points at a UST site, they may simply reflect the course of activities there. To prepare a plan or budget, an owner or operator may rely

[3] Under Section 57.8 of the Act, an owner or operator eligible to seek payment from the UST Fund may apply to the Agency for payment "for activities taken in response to a confirmed release." 415 ILCS 5/57.8 (2010). Section 57.8(l) provides in its entirety that, "[i]f the Agency refuses to pay or authorizes only a partial payment, the affected owner or operator may petition the Board for a hearing in the manner provided for review of permit decisions in Section 40 of this Act." 415 ILCS 5/57.8(l) (2010); *see* 415 ILCS 5/40 (2010).

upon the volume calculation. However, after excavation an owner or operator may receive measurement by weight. The regulation does not require a weight measurement or forbid the use of a volume measurement. Section 734.825 also provides a factor that must be used where necessary to convert weight in tons to volume in cubic yards. This conversion factor allows an owner or operator to translate a weight measurement into volume, which is the basis for reimbursement. In this case, the landfill billed Freedom Oil for disposal of excavated material measured to one-hundredth of a ton. R. at 90-93. In its request for reimbursement, Freedom Oil sought payment for 560 cubic yards of excavated material, an increase from the 447 yards reflected in its 45-Day Report, without providing clear support in the record for that additional volume. Under circumstances such as these, the volume and weight calculations may be separate but would not be inconsistent. The conversion factor, well-supported in the original rulemaking record, merely provides translation between measurements of weight and volume.

The Board notes that, during the rulemaking process that culminated in adoption of Part 734, it received 72 public comments by various participants and admitted 115 exhibits during eight days of hearing. The conversion factor addressed by Freedom Oil generated testimony and comment. In its opinion and order proposing Part 734 for first-notice publication, the Board stated that one participant had favored a conversion factor of 1.15 to 1.2 tons per cubic yard as "a more appropriate conversion factor for loose sands, clays, silts, or silty clay. Proposed Amendments to Regulation of Petroleum Leaking Underground Storage Tanks (35 Ill. Adm. Code 732, 734), R04-22, 23 (consol.), slip op. at 73 (Feb. 17, 2005). The same opinion noted that the Agency had taken the position that "a conversion factor of 1.5 tons per cubic yard is reasonable for Illinois soils." *Id*. at 74. The opinion also cited testimony by another participant that a conversion factor of 1.68 tons per cubic yard "more accurately reflects the conversion factor for glacial till, which is the predominant soil type in Illinois." *Id*. After reviewing this record, the Board stated that it "recognizes that the factor ranges from one to two tons per cubic yard for different types of geologic material. The conversion factor proposed by the Agency takes into consideration various types of geologic material that occur at Illinois UST sites and the Board finds that the record supports a 1.5 tons per cubic yard conversion factor." *Id*. The Board ultimately adopted a conversion factor of 1.5 tons per cubic yard, and Section 734.825 became effective on March 1, 2006. Proposed Amendments to Regulation of Petroleum Leaking Underground Storage Tanks (35 Ill. Adm. Code 732, 734), R04-22, 23 (consol.), slip op. at 15, 241-42 (Feb. 16, 2005).[4] On the basis of this rulemaking history, the Board cannot now conclude that the adoption of Section 734.825 was arbitrary or capricious. *See* Illinois State Chamber of Commerce v. IPCB, 364 N.E.2d 631, 636 (1st Dist. 1977) (noting regulations based in part on "the testimony of witnesses representing a broad variety of interests in 16 public hearings statewide, are not clearly arbitrary, capricious, or unreasonable"). Consequently,

[4] While the Board since March 1, 2006, has twice amended Part 734, neither of these amendments has included Section 734.825. *See* Amendments Under P.A. 96-908 to Regulations of Underground Storage Tanks (UST) and Petroleum Leaking UST: 35 Ill. Adm. Code 731, 732, and 734, R11-22 (Mar. 15, 2012); Amendments to the Board's Procedural Rules and Underground Storage Tank Rules to Reflect P. A. 94-0274, P.A. 94-0276, P.A. 94-0824, P.A. 95--031, P.A. 95-0177, and P.A. 95-0408 (35 Ill. Adm. Code 101.202, 732.103, 732.702, 634.115, and 734.710), R7-17 (Nov. 15, 2007).

considering the merits of the challenge raised by Freedom Oil, the Board would decline to invalidate Section 734.825 as facially invalid.

Next, the Board addresses Freedom Oil's claim that the Agency's application of Section 734.825 to its request for reimbursement was arbitrary and capricious. In City of East Moline v. IPCB, the appellate court specifically addressed the issue of "whether a petitioner can challenge the validity of a regulation *as applied* in the context of a permit application and appeal." City of East Moline v. IPCB, 544 N.E.2d 82, 83 (3rd Dist. 1989) (emphasis in original). The court emphasized that "East Moline is not challenging the general applicability of a regulation, but is stating the regulation as applied to East Moline creates an unreasonable hardship." *Id*. at 84. In affirming the Board's decision to uphold the denial of a permit, the court stated that "[a]pplying for what is, in effect, a variance at a permit hearing is not provided for by The Act or case law. . . ." *Id*. at 85. In its opinion affirming the Agency's permit denial, the Board had noted the adoption of Section 29(b) of the Act in Public Act 85-1048. City of East Moline v. IEPA, PCB 86,218, slip op. at 9 (Sept. 8, 1988). The Board stated that the statutory amendment clearly sought "to preclude subsequent 'as applied' challenges to regulations" and clearly indicated "that the legislature never intended the sort of proceeding now sought by petitioner." *Id.* (citation omitted).

However, considering the merits of the "as applied" challenge raised by Freedom Oil, the Board cannot conclude that the Agency's application of the conversion factor under the facts and circumstances of this case was arbitrary, capricious, or unreasonable. First, the record reveals that the Peoria City County Landfill billed MECRS for special waste disposal services based on weight measured to one-hundredth of a ton for a total of 670.34 tons. R. at 90-93. The record also reveals that IOME billed MECRS for backfill gravel based on weight measured to one-hundredth of a ton for a total of 748.27 tons. R. at 63. Freedom Oil has not challenged the accuracy of these measurements, and the record does not include any clear basis on which to dispute them.

Section 734.825 of the Board's UST regulations provides with respect to both excavation and backfill that "[a] conversion factor of 1.5 tons per cubic yard *must be used* to convert tons to cubic yards." 35 Ill. Adm. Code 734.825(a)(1), (b)(1) (emphasis added). In reviewing Freedom Oil's request for reimbursement of these expenses, the Agency applied this regulatory conversion factor to the weights shown in the record to determine that Freedom Oil had disposed of 447 cubic yards of excavated material and had backfilled the excavation with 499 cubic yards of material.

The Board notes that this determination is consistent with information Freedom Oil supplied to the Agency before it requested reimbursement. In the "Report of Early Action Activities" in its 45-Day Report, Freedom Oil stated that "[a]pproximately 447 cubic yards of contaminated soil was removed from the site." R. at 168. However, in its subsequent request for reimbursement, Freedom Oil sought reimbursement for excavation of 560 cubic yards. *Id*. at 75. While Mr. Green testified that volume "was based upon the size of the excavation" (Tr. at 15), neither his testimony nor Freedom Oil's request for reimbursement indicate such information as when this calculation was performed, who performed it, what device or instrument was used, or whether it was verified. *See* R. at 75; Tr. at 15. Although Freedom Oil's request for

reimbursement relied on volume, converting the 670.34 tons of waste reflected in the landfill invoice to yield 560 cubic yards would require a conversion factor of approximately 1.196 tons per cubic yard. Freedom Oil also sought reimbursement for 670 cubic yards of backfill. *Id*. at 75. Although this request also relied on volume, converting the 748.27 tons of gravel reflected in the IOME invoice to yield 670 cubic yards would require a conversion factor of approximately 1.117 tons per cubic yard.

Consequently, considering the merits of the "as applied" challenge raised by Freedom Oil, the Board would find on the basis of the record before it that Freedom Oil had failed to meet its burden of demonstrating that the reimbursement application it submitted to the Agency would not violate the Act and Board regulations. For the reasons stated above, the Board affirms the Agency's determination to reduce reimbursement for excavation by $7,024.08 and for backfill by $3,729.51, a total reduction of $10,734.35 for these expenses.

Reimbursement of Asphalt Costs

Freedom Oil claimed that its request for reimbursement of $5,750 for replacement of 1,711 square feet of asphalt is based upon an actual and repeated calculation of that area by Mr. Green. He testified that he physically calculated the area from which asphalt had to be removed for tank removal. Tr. at 19-20. The Agency, however, relied on a map of sampling locations and the "approximate scale" of that map to determine that the tank excavation area was 21 feet by 45 feet, or 945 square feet, and reduced reimbursement to $3,175.20 based on that area. *See* R. at 20.

Freedom Oil's 45-Day Report and Mr. Green's testimony show that pumps, piping runs, and islands adjacent to the tanks were also removed, necessitating removal of more asphalt than that required by removal of the tanks alone. R. at 163; Tr. at 53-54. The map of sampling locations shows that the Agency's calculated asphalt replacement area does not appear to include the pump island north of the tank excavation. *See* R. at 20. Extending that area north to include the clearly-marked pump island and applying the map's approximate scale to that extension result in an asphalt replacement calculation consistent with Freedom Oil's request. *See id*.

Freedom Oil acknowledged that it paved the entire lot at the Site. However, Mr. Green testified that its requested reimbursement for asphalt replacement separated the area of the required excavation from the remainder of the paving. Tr. at 54. The Board notes that the record includes both a quote and an invoice reflecting this itemization. *See* R. at 25, 78. The Board also notes that Freedom Oil has requested reimbursement of $5,750, an amount equal to approximately one-quarter of the total quoted cost of asphalt replacement at the Site. *See* R. at 78.

On the basis of the record before it, the Board concludes that Freedom Oil has met its burden of demonstrating that the reimbursement application it submitted to the Agency would not violate the Act and Board regulations. The Board is particularly persuaded by Mr. Green's testimony that the request for reimbursement of the cost of 1,711 square feet of asphalt replacement is based on actual physical measurement of the excavation area necessary for removal of tanks and related equipment. Accordingly, the Board reverses the Agency's

determination to reduce Freedom Oil's reimbursement of asphalt replacement by $2,574.80 and directs that the amount of this deduction be paid to Freedom Oil from the Fund in addition to the $3,175.20 reimbursement previously approved by the Agency.

Reimbursement of Attorney Fees and Costs

In its post-hearing brief, Freedom Oil requested recovery of its costs and attorneys' fees. Pet. Brief at 11. Section 57.8(l) of the Act provides that corrective action does not include "legal defense costs," which include "legal costs for seeking payment . . . unless the owner or operator prevails before the Board in which case the Board may authorize payment of legal fees." 415 ILCS 5/57.8(l) (2010). Under Section 734.630 of the Board' UST regulations, "[c]osts ineligible for payment from the Fund include . . . [l]egal fees or costs, including but not limited to legal fees or costs for seeking payment under this Part [734] unless the owner or operator prevails before the Board and the Board authorizes payment of such costs." 35 Ill. Adm. Code 734.630(g).

As noted above, the Board reversed the Agency's determination to reduce Freedom Oil's reimbursement of asphalt replacement costs by $2,574.80 and directed that this amount be paid to Freedom Oil from the Fund. Having reversed this determination and directed payment of that amount, the Board concludes that Freedom Oil has in part prevailed before the Board for the purposes of Section 57.8(l) of the Act. *See* 415 ILCS 5/57.8(l). However, the record does not now include any amount of "legal costs for seeking payment" incurred by Freedom Oil in this proceeding. Consequently, the Board today reserves ruling on whether to exercise its discretion to award attorney fees and, if it should exercise that discretion, the amount of any reimbursement. In its order below, the Board allows Freedom Oil to file a statement of attorney fees that may be eligible for reimbursement. The order also provides an opportunity for the Agency to respond any statement filed by Freedom Oil. *See* Webb & Sons, Inc. v. IEPA, PCB 07-24, slip op. at 14 (Feb. 15, 2007).

CONCLUSION

The Board affirms the Agency's determination to reduce reimbursement for excavation by $7,024.08 and for backfill by $3,729.51, a total reduction of $10,734.35 for these expenses. The Board reverses the Agency's determination to reduce Freedom Oil's reimbursement of asphalt replacement by $2,574.80 and directs that the amount of this deduction be paid from the Fund. Finally, the Board concludes that Freedom Oil has prevailed in part before the Board, reserves ruling on whether to exercise its discretion to award attorney fees under Section 57.8(l) of the Act, and allows Freedom Oil to file a statement of fees to which the Agency may respond..

ORDER

1. The Board affirms the Agency's determinations to reduce reimbursement for excavation by $7,024.08 and for backfill by $3,729.51, a total reduction of $10,734.35 for these expenses. Having reversed the Agency's determination to reduce Freedom Oil's reimbursement of asphalt replacement costs by $2,574.80,

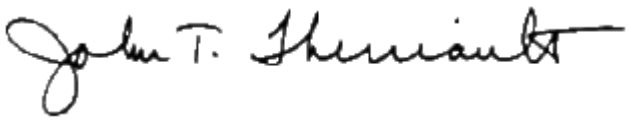
the Board directs the Agency to reimburse Freedom Oil in that amount from the UST Fund.

2. Freedom Oil may file on or before Monday, September 24, 2012, the first business day after 45 days from the date of this order, a statement of its legal fees and costs that may be eligible for reimbursement under Section 57.8(l) of the Act and its argument why the Board could exercise its discretion to direct the Agency to reimburse those costs. The Agency may respond to any statement submitted by Freedom Oil by filing its response within 21 days of that deadline, on or before Monday, October 15, 2012.

IT IS SO ORDERED.

Section 41(a) of the Environmental Protection Act provides that final Board orders may be appealed directly to the Illinois Appellate Court within 35 days after the Board serves the order. 415 ILCS 5/41(a) (2008); *see also* 35 Ill. Adm. Code 101.300(d)(2), 101.906, 102.706. Illinois Supreme Court Rule 335 establishes filing requirements that apply when the Illinois Appellate Court, by statute, directly reviews administrative orders. 172 Ill. 2d R. 335. The Board's procedural rules provide that motions for the Board to reconsider or modify its final orders may be filed with the Board within 35 days after the order is received. 35 Ill. Adm. Code 101.520; *see also* 35 Ill. Adm. Code 101.902, 102.700, 102.702.

I, John T. Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion and order on August 9, 2012, by a vote of 5-0.



John T. Therriault, Assistant Clerk
Illinois Pollution Control Board