BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

BROADUS OIL COMPANY,	)	
	)	
Petitioner,	)	
	)	
vs.	)	
	)	PCB No. 12-124
ILLINOIS ENVIRONMENTAL	)	(UST Appeal – Petition for Review and
PROTECTION AGENCY,	)	Hearing/Appeal)
	)	
Respondent.	)	

PETITIONER'S REPLY BRIEF

NOW COMES Broadus Oil Company, by its attorney, Robert M. Riffle, Esq., and as and for the Reply Brief of Petitioner, states as follows:

I. ARGUMENT

A. Petitioner did meet its burden that its submittal did not violate the Act and Regulations.

Broadus Oil Company ("Broadus") submitted its November, 2011 CAP Budget Amendment in reliance upon conversations with IEPA individuals who are now deceased. IEPA instructed Petitioner and its remediation contractor to proceed in that manner. But for the unforeseen deaths of these two (2) individuals, Petitioner is confident that the Amended Budget would have been approved, and payment would have been made. Mr. Broadus and Mr. Green testified at great length regarding the instructions from IEPA official, Sam Hale and Cliff Wheeler. Petitioner's testimony in this regard was not subject to any objections. (For example, no hearsay, Dead Man's Act (735 ILCS 5/8-201) or other objections were made). This unrebutted testimony must be accepted as true. (Sweilen v. Illinois Department of Revenue, 865 N.E.2d 459, (1st Dist. 2007))). As previously stated, the testimony of Mr. Broadus and Mr. Green stands entirely

unrebutted. They were not in any way impeached. In fact, when given an opportunity to rebut any portion of that testimony, Mr. Bauer, the senior IEPA employee who testified at the hearing, testified as follows:

> Q. And do you have any reason to dispute either the testimony of either Mr. Broadus or Mr. Green as they testified here today?
>
> A. No.

Under the **Sweilan and Bucktown Partners** cases cited at page 17 of Petitioner's Post Hearing Brief, the unrebutted testimony of Mr. Broadus and Mr. Green cannot be discounted, and must be accepted as true. The factfinder cannot disregard the testimony of Mr. Broadus and Mr. Greene. Tellingly, the IEPA makes no argument to the contrary.

Both Mr. Broadus and Mr. Green testified that they were instructed by IEPA officials to perform substantial services which were not pre-approved. The very same individuals who instructed them to proceed in that manner instructed them to submit the Amended CAP Budget. (Tr. p. 25, lines 18-24; p. 26, lines 1-10). The Record at the time the CAP Amendment was submitted included thousands of pages of documentation to establish that the project was unique and problematic. The person who requested the submittal, (Mr. Hale) who is now deceased, knew everything he needed to know to approve the CAP Amendment. He lived with the project, the agitated neighbor, and the political pressure, for a very long period of time. There was no deficiency in the record.

In reasonable reliance on IEPA's instructions, Broadus incurred $104,163.03 of additional expense for which it has not been reimbursed. This amount should be paid.

B. Petitioner Proved that Its Submittal Justified the Additional Costs, and that they were not in excess of applicable requirements.

The unrebutted testimony of Mr. Broadus and Mr. Green established that the additional costs were absolutely necessary to obtain closure of the incidents relating to the subject property, and were not in excess of minimum requirements. Absent these expenditures, closure of the incidents in question would not have occurred.

For example, the IEPA initially rejected the neighbor's request for installation of a trench adjacent to the properties. The neighbor insisted, intervened with political pressure and direct pressure on IEPA, and IEPA (through Sam Hale) ultimately directed Broadus's contractor to install the trench. See testimony of Steve Broadus and Al Green, quoted in Petitioner's Brief. There is very substantial testimony in the record to establish that the costs were absolutely necessary. Much of this testimony is quoted in Petitioner's Post Hearing Brief. There is no testimony or evidence that the costs incurred were not necessary, or exceeded minimum requirements. But for these expenditures, the incidents in question would never have been closed.

C. Petitioner proved that the oral agreement occurred, and that the Agency was aware of those agreements.

Petitioner proved through unrebutted testimony that the oral agreements were reached, and that Petitioner acted in reliance on these instructions, statements and agreements to incur the costs, perform the work, and submit the Amended CAP. The oral instructions and agreements at issue clearly existed in the record at the time of the Agency's decision. Mr. Wheeler and Mr. Hale, the individuals who gave the instructions, and to whom the CAP Amendment was submitted, knew of, and created, the agreement. Additionally, and perhaps most importantly, it stands unrebutted that Hernando Albarracin, who is in charge of the LUST section of the IEPA, was aware of the agreement in November of 2011, immediately after the submittal. (Tr. p. 25, 26). Mr. Albarracin

informed Mr. Green that his submittal "sounds like a decent approach." Id. at p. 26, lines 7-19. This remains unrebutted. He further informed Mr. Green "we'll get it resolved." Id. This unrebutted testimony entirely contradicts IEPA's claim that the record was devoid of information regarding the agreement between the parties. The system cannot work if IEPA can instruct people to take actions in the field, incur substantial expenses, and then renege on that commitment. That is, with all due respect, what has occurred here.

This was a site where a prior contractor estimated the remediation costs to be far in excess of $2,200,000 (and perhaps as much as $5,000,000). The project was completed through great diligence and effort at a small fraction of that amount.

That apparent jurisdictional argument (i.e., that this case should have been filed in the Illinois Court of Claims) is simply wrong. This is simply a claim for reimbursement under the Illinois Leaking Underground Storage Tank Fund. The Fund is the source of recovery, and this is not a general claim against the State of Illinois. The Illinois Pollution Control Board has jurisdiction to hear this appeal. Any claim to the contrary has been waived.

D. As previously indicated, it is undisputed that the hours in question were actually expended, and the costs in question were actually incurred.

Mr. Green testified that the hours were actually expended, and expenses actually incurred. (Transcript p. 28, lines 5-12).

Mr. Broadus testified that the expenses were paid, and that his company is "out" the $104,163.03 at issue in this case. (Transcript p. 53, lines 6-13).

Ms. South acknowledged that she had no reason to believe that the hours were not actually expended, that evidence to contradict the testimony that the expenses were actually incurred. (Tr. pp. 80-82).

Similarly, Mr. Bauer had no reason to dispute the testimony of Mr. Broadus or Mr. Green. (Transcript p. 100, lines 15-24; p. 101, lines 21-24).

Again, the unrebutted testimony of Mr. Broadus and Mr. Green must be accepted as true, and not discounted. See e.g., **Sweilen, Bucktown Partners**, and **People ex. rel. Brown**, *supra.*

CONCLUSION

It is undisputed that Petitioner reasonably and necessarily incurred the personnel costs which are at issue in the amount of $87,484.16, the third party costs, in the amount of $14,891.84, and handling costs of $1,787.02 in remediating the subject property, and that these reasonably and necessarily incurred personnel costs and third party cots have not been reimbursed. The undisputed testimony is that these expenses were verbally approved by IEPA Project Managers, and that Broadus and its consultant were instructed to incur these expenses. It is respectfully submitted that there is no valid ground for denial of the personnel charges and third party expenses at issue in this case. The relevant testimony in support of Petitioner's claims stand unrebutted.

As the IEPA knows full well, this was a very difficult site, for technical and other reasons. Substantial off-site migration of contamination had occurred, and a neighboring property owner had pursued legal and political channels. Petitioner had hired a previous consultant, which had proposed remediation which would have cost well in excess of $1,500,000 cap. Petitioner's replacement consultant, Midwest, with unprecedented oversight and instruction from IEPA Project Managers and Supervisors, completed the remediation well within the cap, including substantial offsite remediation and complex agreements with the neighboring property owner. The individuals who appeared for the IEPA at the hearing, had no first-hand familiarity and/or personal involvement with the project, and were not in a position to rebut the relevant testimony.

With all due respect, Broadus should not be denied reimbursement of substantial expenses which it has already paid, based on the subjective views of IEPA personnel who were not directly involved in this remediation project. Moreover, it has been difficult for small and medium sized remediation contractors to survive over the past decade in this economic environment with the Illinois Leaking Underground Storage Tank Fund's well-known solvency problems. The IEPA's failure or refusal to pay for personnel charges and third party expenses which they freely admit were reasonably and necessarily incurred is a source of great frustration to Petitioner and Midwest. The personnel costs and third party expenses were reasonably and necessarily expended, and should be paid.

For the foregoing reasons, Petitioner respectfully requests approval and reimbursement of costs which indisputably were necessarily incurred and paid by Broadus in connection with the remediation of the Subject Property, in the aggregate amount of $104,163.03.

Respectfully submitted,

BROADUS OIL COMPANY, Petitioner

By: /s/ *ROBERT M. RIFFLE*
Robert M. Riffle
Its Attorney

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

CERTIFICATE OF SERVICE

The undersigned certifies that on July 30, 2014, a copy of the foregoing document was filed electronically with the Illinois Pollution Control Board and served upon each party to this case by

_X_ Electronic delivery

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

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

ROBERT M. RIFFLE, ESQ.
133A S. Main Street
Morton, IL 61550
(309) 321-8365
M244