

ILLINOIS POLLUTION CONTROL BOARD
April 1, 2004

ILLINOIS AYERS OIL COMPANY,)	
)	
Petitioner,)	
)	
v.)	PCB 03-214
)	(UST Appeal)
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Respondent.)	

FRED C. PRILLAMAN OF MOHAN, ALEWELT, PRILLAMAN & ADAMI APPEARED ON BEHALF OF PETITIONER; and

JOHN J. KIM OF THE ILLINOIS ENVIRONMENTAL PROTECTION AGENCY APPEARED ON BEHALF OF RESPONDENT.

OPINION AND ORDER OF THE BOARD (by G.T. Girard):

On May 7, 2003, Illinois Ayers Oil Co. (Ayers) filed a petition for review of a March 28, 2003 decision by the Illinois Environmental Protection Agency (Agency) to modify the high priority corrective action plan (HPCAP) and budget for Ayers' site in Beardstown, Cass County. A release from the three underground storage tanks (USTs) on the property was reported in 2000. Ayers' appeal of the Agency's decision to reduce Ayers' previous HPCAP proposal for the same site is pending before the Board in Illinois Ayers Oil Company v. IEPA, PCB 03-70. In the instant case, Ayers challenges the Agency's reduction in budget and in the number of soil borings.

For the reasons below the Board reverses the Agency's modification to the HPCAP with regards to the number of soil borings and corresponding costs for personnel, equipment, handling charges, and investigation. The Board affirms the Agency's modifications for shipping, analytical costs and miscellaneous retail purchases.

The Board will begin the discussion by describing the procedural background and addressing preliminary matters. Next, the Board will enumerate the facts relevant to the discussion of the issues. Then, the Board will set forth the statutory and regulatory background and the standard of review. Finally, the Board will summarize the arguments of the parties and elaborate on the Board's reasoning for today's decision.

PROCEDURAL BACKGROUND

On May 7, 2003, Ayers filed a petition for review (Pet.) of a March 28, 2003 determination by the Agency that the HPCAP should be modified. On October 31, 2003, the

Agency filed the record in this matter (R.). Hearing was held before Board Hearing Officer Carol Sudman on January 7, 2004. On February 11, 2004, Ayers filed a brief (Pet. Br.) and on March 15, 2004, a reply (Reply). The Agency filed a brief (Ag. Br.) on March 10, 2004.

PRELIMINARY MATTER

On March 8, 2004, the Agency filed an “Objection to Hearing Officer’s Ruling and Motion to Strike” (Motion). The Agency moves the Board to overrule a hearing officer decision made at hearing on January 7, 2004. The hearing officer admitted, as exhibits, the depositions of Agency personnel over the objection of the Agency. *See* Tr. at 5-14. The Agency is asking that the Board strike the exhibits.

The Board’s procedural rules provide that an “objection to a hearing officer ruling made at hearing . . . will be deemed waived if not filed within 14 days after the Board receives the hearing transcript.” 35 Ill. Adm. Code 101.502(b). The Board received the hearing transcript on January 12, 2004, 56 days before the Board received the Agency objection to the hearing officer’s ruling. The Board notes that this proceeding has a decision deadline of May 5, 2004, and the petitioner’s brief had already been filed when the motion was received. Further, the Agency’s brief was due on the day the Board received the motion and was actually received by the Board on March 10, 2004. Because of the time sensitive nature of this case, the Board denies the motion to strike as untimely. Further, if any error had occurred by the admission of the depositions, the Agency was given the opportunity at hearing to object to those deposition portions the Agency believed were not properly before the Board. *See* Tr. at 170-71, 212-13.

FACTS

Ayers is the owner of a gasoline service station located at 310 State Street, Beardstown, Cass County. Pet. at 1; R. at 1. The service station is located in close proximity to personal residences and other commercial buildings. R. at 16, Fig. 1. Ayers reported a release from three USTs on the site to the Illinois Emergency Management Agency in 2000. The site was assigned Incident No. 2000-2020 and was subsequently classified a high priority site because one or more groundwater quality standards was exceeded at the property boundary line. Pet. at 1; R. at 4, 83. Ayers hired CSD Environmental Services, Inc. (CSD Environmental) to perform remediation at the site. Pet. Exh. 18.

On June 20, 2002, CSD Environmental on behalf of Ayers submitted a HPCAP to the Agency that was rejected. Pet. Exh. 6 (A). Ayers appealed the Agency’s decision, and that appeal is currently pending before the Board. *See Illinois Ayers Oil Company v. IEPA*, PCB 03-70. After the appeal in PCB 03-70 was filed, Ayers and the Agency met to discuss issues raised in the Agency’s first HPCAP rejection, including the use of the direct push groundwater sampling. Tr. at 69.

Mr. Joseph Truesdale is a professional engineer employed by CSD Environmental and has been involved in preparing the HPCAP for Ayers. Tr. at 25-26. Mr. Truesdale attended the meetings with the Agency to discuss this Beardstown project and another CSD Environmental project in another town. Tr. at 26. Mr. Truesdale testified that during those meetings he

provided to the Agency a copy of an Agency fact sheet that indicates that direct push technology is acceptable for groundwater and soil monitoring. Tr. at 33-34; Pet.Exh. 9. Mr. Truesdale attended a second meeting with Agency employees including Carol Hawbaker, who reviews corrective action plans and budgets, to discuss the Ayers site. Tr. at 29. As a result of the meetings, Ayers' revised HPCAP proposed using the direct push method for both groundwater and soil sampling. Tr. at 35.

Also at the meeting Mr. Truesdale discussed with both Ms. Hawbaker and Mr. Harry Chappel, Ms. Hawbaker's supervisor, the production time for direct push boring and the location of the borings. Tr. at 37-38. Mr. Truesdale indicated that CSD Environmental had performed field tests to establish the average time to conduct direct push borings. Tr. at 40. Mr. Truesdale testified that the testing confirms the hours proposed in the revised HPCAP are necessary given the geologic conditions at the site. Tr. at 40-41. Mr. Truesdale stated that at the meeting he explained that the placement of some of the borings was needed to evaluate potential source contaminants. Tr. at 42. Mr. Truesdale explained the proposed locations of some of the other borings were based on the groundwater transport modeling, and some of the borings were proposed to evaluate lateral spread of the plume. Tr. at 43. Mr. Truesdale testified that as a result of discussions with the Agency personnel, the professional engineer hours were reduced from the original application to the revised application. Tr. at 38.

On December 4, 2002, Ayers filed the revised HPCAP with the Agency that is the subject of this appeal. Pet. at 1; R. at 1. The cover letter for the revised HPCAP stated that the revised plan had been amended in response to the meetings with the Agency. R. at 1. More specifically, the cover letter indicated that the HPCAP was revised to include "only work associated with defining the extent of BTEX contamination." R. at 1. The cover letter stated that the unit rates had been maintained from the prior submission. *Id.*

The HPCAP stated, the "intention of this phase of corrective action process is to better define the extent and relative distribution of petroleum contamination in order to develop an effective future groundwater monitoring program" and "to evaluate potential future remediation strategies." R. at 11. The HPCAP identified that "[g]iven the relatively permeable geologic materials encountered at the site, and since the contamination is primarily associated with the groundwater, in-situ bioremediation and/or groundwater pump and treat would appear to be viable active remediation strategies." R. at 11.

To this end, the HPCAP proposed 6 on-site and 7 off-site locations for direct-push borings. R. at 6. Two separate borings would need to be taken, one for soil and one for groundwater at each of the proposed locations. Tr. at 105. Originally, all soil and groundwater borings were to be analyzed for BTEX, but Mr. Truesdale indicated that during meetings with the Agency, the Agency objected to chemical analysis being performed on all the soil borings. Tr. at 104. In response, Ayers reduced the number of soil borings that would be chemically tested. Tr. at 104. Instead, the HPCAP proposed that all 13 direct-push soil borings would be logged and screened, but soil samples from only 3 of the soil borings would be collected for laboratory analysis. R. at 6, Tr. at 104. Separate direct-push groundwater samples would be collected from all 13 of the proposed direct-push boring locations. R. at 6. All soil and groundwater samples collected for laboratory analysis would be analyzed for BTEX. R. at 6.

Truesdale stated in his testimony that although only 3 soil borings would be analyzed for BTEX, all 13 soil borings were intended to be logged. Tr. at 49, 50. Truesdale explained how logging each soil boring would be used to determine the significant physical features of the site and surrounding area that may affect contaminant transport and risk to human health and safety and the environment. Tr. at 50.

Truesdale testified that the site classification indicated that the regional geology was an “AX type stratigraphy which was defined by Berg as modern river alluvium consisting of a mixture of gravel, sand and silt along streams variable in composition and thickness.” Tr. at 71, R. at 8. The HPCAP described that materials beneath the site present a high potential for both surface and groundwater contamination. R. at 8. The HPCAP stated, “[h]ydraulic conductivities, on the order of 1×10^{-3} , make these materials an excellent medium for contaminant transport.” R. at 8. Truesdale elaborated in his testimony that this is essentially the definition of a migration pathway. Tr. at 104. Truesdale continued, “[s]ince the soils at the site were specified as variable in composition and thickness without quantifying that variability across the potential limits of the plume, there would be no way to fully evaluate those identified natural migration pathways or, as a matter of fact, would not be able to identify those potential natural migration pathways on off site locations, whatsoever.” Tr. at 72.

To quantify that variability, Truesdale elaborated that CSD Environmental “proposed to log the soil samples encountered at each boring in order to identify and verify locations of potential natural migration pathways that were encountered and identified during site classification and to classify the soils in accordance with ASTM standards in order to verify that the position stated in the site classification report was, in fact, accurate at all locations, including off site properties, as it relates to the heterogeneities and nonhomogenous nature of the soil encountered at the site during site classification.” Tr. at 48.

In her deposition, Hawbaker agreed that if the previous site classification found some layers that seemed to be heterogeneous in the site, then perhaps some soils investigation would be needed as part of a Phase 1 Plan. Pet. Exh. 2 at 22. However, Hawbaker felt this was not the case here. *Id.* Hawbaker stated, “[r]egional soil geology has been proven to be uniform at the site.” *Id.*

The budget summary and total included in the HPCAP proposed:

\$12,666.60 for investigation
 \$3,010.00 for analytical costs,
 \$32,514.00 for personnel costs
 \$1,599.60 for equipment costs
 \$863.00 for field purchases
 \$1,714.76 for handling charges. R. at 67

The investigation costs were based on 520 feet of total soil and groundwater borings and 50 hours of work. R. at 68. The analytical costs include \$2,100 for BTEX analysis of groundwater sampling. R. at 70-71. The personnel costs include a professional engineer, professional

geologist, project engineer, staff geologist and engineering tech. R. at 72. Equipment totals include use of equipment for five days of work. R. at 74. Field purchase include UPS shipping, peristaltic groundwater sampling pump, disposable tubes and miscellaneous retail purchases such as ice and film. R. at 76.

On March 28, 2003, the Agency issued a decision letter with modifications to the HPCAP submitted by Ayers. R. at 86. Specifically, the Agency found that 10 of the 13 proposed direct push soil borings were in excess of the minimum requirements of Title XVI of the Act (415 ILCS 5/Title XVI (2002)) because the soils were previously classified. R. 86-87. Specifically, the denial letter states:

The required modification(s) is/are as follows: The plan includes 13 additional direct push soil borings to better define and evaluate the extent and relative distribution of petroleum contaminants in the subsurface. The plan proposes that only 3 of these direct push soil borings will be sampled for BTEX concentrations. Therefore, it appears as though the remaining 10 direct push soil borings would be to classify and log the subsurface soils in connection with the 13 direct push groundwater sampling probes to define groundwater extent. For the purposes of reimbursement, as the soils were previously classified at the site during site classification activities, the additional 10 direct push soil borings are in excess of those necessary to meet the requirements of Title XVI of the Act for corrective action investigation; cost for such activities are not reimbursable (Section 57.5(a) of the Act and 35 IAC [sic] 732.606(o). R. at 86-87.

The budget proposed by Ayers was reduced by the following amounts:

\$8,910.72 and \$108.00 for Investigation costs
 \$490.00 for Analysis Costs
 \$18,450.00 for Personnel Costs
 \$849.30 for Equipment Costs
 \$36.00 for Camera
 \$150.00 for USP [sic] sample shipping
 \$50.00 for Miscellaneous Retail Purchases
 \$270.00 for Peristaltic Pump
 \$979.17 for handling charges. R. at 90-92.

Mr. Truesdale and Ms. Cindy Davis, owner of CSD Environmental, testified on behalf of Ayers at the Board's hearing on November 25, 2003. In addition to the testimony discussed above, Mr. Truesdale also described the direct push sample method. Tr. at 44-46. Mr. Truesdale indicated that there is a difference in the amount of time taken to collect only soil samples and the time to collect groundwater samples. Tr. at 45. Mr. Truesdale stated that the HPCAP was clear that Ayers would be using the direct push method to do both soil and groundwater sampling. Tr. at 46. Mr. Truesdale indicated that some time is needed when collecting groundwater samples to allow groundwater to collect. Tr. at 46-47. Mr. Truesdale stated that he included that time in the estimates of hours for work at the site. *Id.*

Mr. Truesdale also elaborated on how the soil samples would be examined and used. Tr. at 47-49. Mr. Truesdale testified that the information was all included in the HPCAP. *Id.* Mr. Truesdale testified that each of the line items on the budget were necessary to meet the requirements of the Act and Board regulations. Tr. at 52-64. Mr. Truesdale testified that the investigation of the site was prepared in accordance with a United States Environmental Protection Agency (USEPA) guidance document. Tr. at 65. Mr. Truesdale provided the Agency with a copy of the USEPA guidance document *Expedited Site Assessment Tools for Underground Storage Tank Sites*, USEPA (March 1997). Tr. at 65-66; Pet. Exh. 10.

Ms. Davis testified as to her experience in the field and described her company. Tr. at 126-34. Ms. Davis founded the firm in 1992. Tr. at 127. Prior to founding CSD Environmental, Ms. Davis worked for the Agency. Tr. at 128-29. Ms. Davis described how she developed the professional engineer rate. Tr. at 134-35. Ms. Davis indicated that the rate is based on the amount she actually pays the engineer and uses a standard engineering profit multiplier. Tr. at 134. Ms. Davis stated that she pays her employees about the same amount as the Agency. Tr. at 135. Ms. Davis indicated that the hourly rates for both the professional engineer and project engineer have been previously approved by the Agency. Tr. at 137. Ms. Davis also purchases a survey every year which does not include underground storage tank clean-ups but does indicate that the standard billing rate for a professional engineer at other projects is \$132 to \$155 per hour. Tr. at 140.

Ms. Hawbaker and Mr. Brian Bauer testified at hearing on behalf of the Agency. Ms. Hawbaker testified that she has been with the Agency since September 2000 and has reviewed over 200 sites, including approximately 70 high priority sites. Tr. at 171. Ms. Hawbaker indicated that she used the Agency rate sheet in making modifications to the budget. Tr. at 172. Ms. Hawbaker testified that the rate sheet is useful because the rate sheet helps Agency reviewers determine the guidelines and basis of charges being made. Tr. at 185.

In reference to the Agency modifications of the HPCAP, Ms. Hawbaker testified that 10 of the 13 soil borings, in her opinion, were not to be used to define the extent of contamination for soil. Tr. at 176. Ms. Hawbaker relied on a statement in the budget (R. at 68) for her opinion. Tr. at 177. On cross-examination, Ms. Hawbaker testified that the type of soil at the site would not affect her opinion on the number of soil borings needed. Tr. at 202.

Ms. Hawbaker further stated that the reduction for direct push borings were taken based on a discussion with her unit manager (Mr. Harry Chappel). Tr. at 179. Ms. Hawbaker testified that the costs for direct push investigation, drilling labor, utility truck, and job trailer were not reasonable as submitted based on the rate sheet so budget reductions were made. Tr. at 180-81. Ms. Hawbaker testified that "some" of the budget reductions were based on comparison with the rate sheet. Tr. at 182-83. Ms. Hawbaker delineated which rates were cut based on the rate sheet. Tr. at 183-85, 186-88.

Mr. Bauer testified that he is a project manager with the Agency also supervised by Mr. Chappel. Pet. Exh.4 at 2. Mr. Bauer testified that the maximum dollar amount or rate on the Agency rate sheet is a rate the project manager could approve without further information. Tr. at 215. Mr. Bauer testified that his involvement with the rate sheet included drafting the memo and

all of the attachments for Mr. Doug Clay, and “daily gathering for the rates.” Tr. at 217, Pet. Exh. 4 at. Exh. 3. Mr. Bauer testified that if a rate was received by an Agency reviewer that was higher than the one listed on the rate sheet, the higher rate would be modified or denied. Tr. at 217. Mr. Bauer indicated that a higher rate could be approved if additional information were provided. *Id.*

Mr. Bauer testified that the rate sheet was developed using the average of a sample collected and adding one standard deviation. Tr. at 219. Mr. Bauer stated that the practical result of using a formula of an average plus one standard deviation in terms of percentage of costs expected at or below the maximum figure would be 84%. Tr. at 220. Mr. Bauer indicated that determination of rates on a side-by-side basis would be impossible. Tr. a 221. Mr. Bauer concedes that the rate sheet is not provided to the public and is kept “secret” and internal to the Agency. Tr. at 225-26.

STATUTORY AND REGULATORY BACKGROUND

Section 57.7 of the Act (415 ILCS 5/57.7 (2002)) sets forth the requirements for site investigation and corrective action at a site where a leaking underground storage tank has been removed. Section 57.7(b)(2) requires that the owner or operator submit to the Agency, a corrective action plan designed to “mitigate any threat to human health, human safety, or the environment resulting from the underground storage tank release.” 415 ILCS 5/57.7(b)(2) (2002). Section 57.7(b)(3) requires that owners or operators “intending to seek payment from the Fund” must submit a budget to the Agency. 415 ILCS 5/57.7(b)(3) (2002).

Section 57.7(c) sets forth the provision for Agency review and approval and subsection (c)(3) provides in part:

In approving a plan . . . the Agency shall determine, by a procedure promulgated by the Board under Section 57.14, that the costs associated with the plan are reasonable, will be incurred in the performance of site investigation or corrective action, and will not be used for site investigation or corrective action activities in excess of those required to meet the minimums requirements of this Title. 415 ILCS 5/57.7(c)(3) (2002).

The Board’s rules promulgated pursuant to Section 57.7(c)(3) are at 35 Ill. Adm. Code 732.Subpart E. Section 732.501 provides in part that “all plans or reports shall be made on forms prescribed and provided by the Agency.” 35 Ill. Adm. Code 732.501. Section 732.504(a)(1) requires the Agency to perform a “full review” on high priority corrective action plans and budgets. 35 Ill. Adm. Code 732.504(a)(1). Section 732.502 defines the scope of a full technical and financial review and provides, in part:

A full review may include any or all technical or financial information, or both, relied upon by the owner or operator or Licensed Professional Engineer in developing the plan or report selected for review. The full review also may include the review of any other plans or reports submitted in conjunction with the site. 35 Ill. Adm. Code 732.503(a).

Section 732.505 provides the standards to be used in reviewing plans and budgets. Section 732.505(a) provides, in part:

The overall goal of the technical review for plans shall be to determine if the plan is sufficient to satisfy the requirements of the Act and regulations and has been prepared in accordance with generally accepted engineering practices. The overall goal of the technical review for reports shall be to determine if the plan has been fully implemented in accordance with generally accepted engineering practices, if the conclusions are consistent with the information obtained while implementing the plan, and if the requirements of the Act and regulations have been satisfied. 35 Ill. Adm. Code 732.505(a).

Section 732.505(c) provides, in part:

The overall goal of the financial review shall be to assure that costs associated with materials, activities and services shall be reasonable, shall be consistent with the associated technical plan, shall be incurred in the performance of corrective action activities, and shall not be used for corrective action activities in excess of those necessary to meet the minimum requirements of the Act and regulations. 35 Ill. Adm. Code 732.505(c).

STANDARD OF REVIEW

Pursuant to Sections 57.7(c) and 57.8(i) of the Act (415 ILCS 5/57.7(c) and 57.8(i) (2002)), an applicant may appeal an Agency to “disapprove or modify a plan or report” to the Board under the provisions of Section 40 of the Act (415 ILCS 5/40 (2002)). Under Section 40 of the Act (415 ILCS 5/40 (2002)), the Board’s standard of review is whether the application as submitted to the Agency would not violate the Act and Board regulations. Browning Ferris Industries of Illinois v. PCB, 179 Ill. App. 3d 598, 534 N.E.2d 616 (2nd Dist. 1989). Therefore, the Board must decide whether or not the application as submitted to the Agency, demonstrates compliance with the Act and Board regulations. Kathe’s Auto Service Center v. IEPA, PCB 96-102 (Aug. 1, 1996). Further, the Agency’s denial letter frames the issue on appeal. *Id.* Finally, the burden of proof is on the owner or operator, who must provide an accounting of all costs. Platolene 500, Inc. v. IEPA, PCB 92-9 (May 7, 1992); Ted Harrison v. IEPA, PCB 99-127 (July 24, 2003).

DISCUSSION

On appeal, Ayers raises three general issues in the opening brief. First, Ayers takes issue with the Agency’s use of the rate sheet to establish reasonable costs. Pet. Br. at 8. Second, Ayers challenges the technical review of the corrective action plan. Pet. Br. at 18. Third, Ayers challenges the financial review. Pet. Br. at 27. In the reply, Ayers also takes issue with the Agency’s characterization of the burden of proof and the scope of the Board’s review. The following discussion will first summarize the arguments by Ayers. Then, the Board will

summarize the Agency's arguments. Then the Board will elaborate on the Board's decision including the reasoning supporting the Board's decision.

Rate Sheet

Ayers argues that the rate sheet and all testimony based on the rate sheet should be stricken for one of two alternative reasons. First, Ayers argues that the rate sheet is invalid as a *de facto* rule. Pet. Br. at 9. In the alternative, Ayers asserts that the Agency's refusal to disclose the basis for the rate sheet prohibits the use of the rate sheet as evidence. Pet. Br. at 14. The Board will summarize in Ayers' position on these two assertions.

Next the Board will summarize the Agency's response that the use of the Agency's "internal guidance" was proper. Then the Board will summarize Ayers' reply.

Ayers Arguments

The Rate Sheet is a Rule. Ayers argues that the Agency's rate sheet is an unpromulgated rule that violates the Illinois Administrative Procedure Act (APA) (5 ILCS 100/1 *et seq.* (2002)). Pet. Br. at 9. Ayers points out that a rule is defined in the APA as "each agency statement of general applicability that implements, applies, interprets, or prescribes law or policy . . ." (5 ILCS 100/1-70 (2002)). Pet. Br. at 9. Ayers maintains that the Agency's rate sheet implements an Agency policy establishing the "maximum allowable cost" for many activities performed as a part of corrective action. Pet. Br. 9.

Ayers notes that Ms. Hawbaker indicated in deposition testimony that she and other reviewers are required to use the rate sheet as a matter of practice (Pet. Exh. 2 at 70). Pet. Br. at 10. Ms Hawbaker also testified that she did not deviate from the rate sheet nor did she look at any information upon which the rate sheet was based. Pet. Br. at 10, citing Tr. at 205. Mr. Bauer testified that the rate sheet was intended to promote consistency and speed of review. Pet. Br. at 10, citing Tr. at 221. Ayers argues that these "objectives are laudable" however, the rate sheet establishes consistency by creating a "standard of general applicability" that implements requirements of the Act. Pet. Br. at 10.

To support the argument, Ayers cites Senn Park Nursing Center v. Miller, 104 Ill. 2d 169 (1984). In Senn Park, the Illinois Supreme Court ruled that an agency policy for calculating reimbursable costs under Medicare is a rule of general applicability subject to the APA. Pet. Br. at 10, citing Senn Park, 104 Ill. 2d 169, 178. Ayers acknowledges that certain exceptions to the APA exist; however, for the rate sheet to be exempt from the APA, the rate sheet must relate to the internal management of the Agency and not effect private rights or procedures available to persons outside the Agency. Pet. Br. at 10-11, citing 5 ILCS 100/1-70(i) (2002). In this instance, Ayers asserts that the sole purpose of the rate sheet is to decide how much money people outside the Agency will be paid. Pet. Br. 11. Therefore, Ayers argues that the APA exception does not apply. *Id.*

Furthermore, Ayers asserts that the record is clear that the rate sheet is not merely "guidance" for Agency personnel. Pet. Br. at 11. Ayers relies on the testimony of Mr. Bauer to

bolster the argument. *Id.* Ayers cites to testimony that if a cost were higher than the maximum on the rate sheet, the cost would be modified down or disapproved. Pet. Br. at 11, citing Tr. at 217. Ayers asserts that Mr. Bauer and Ms. Hawbaker both support this use of the rate sheet. Pet. Br. at 11.

Ayers maintains that even if the Agency allows project managers discretion in applying the rates on the rate sheet, the rate sheet is still an improperly promulgated rule. Pet. Br. at 12. Ayers argues that the rate sheet is not issued on a case-by-case basis and the rate sheet is not a statement specifically about Ayers. *Id.* The rate sheet applies to all budget and reimbursement claims and signifies that the Agency “has moved away” from adjudicatory decision making in UST reimbursement decisions. Pet. Br. at 12.

The Rate Sheet is Not Proper Evidence. Ayers argues that the Agency’s refusal to disclose the underlying data used in developing the rate sheet renders the rate sheet improper. Pet. Br. at 14-15. Ayers cites Wirtz v. Baldor Electric Co., 337 F.2d 518 (D.C. Cir. 1964) and 2 Am.Jur. 2d, Administrative Law § 330 to support this proposition. Pet. Br. at 14-15. Ayers asserts that in Wirtz the court found that the government could not support a decision based upon summaries of evidence that the government refused to disclose to the opposing party. Pet. Br. at 14-15. Ayers indicates that the court found that summary evidence may only be used if the supporting documents are at least made available to the opposing party. *Id.* Ayers argues that the facts of this case are analogous to Wirtz and the Agency should not be allowed to rely on the rate sheet. *Id.*

Agency Arguments

The Agency argues that the use of the rate sheet is appropriate. Ag. Br. at 6. First the Agency maintains that the rate sheet is not a *de facto* rule. Ag. Br. at 6. Second the Agency asserts that the Agency merely handled the information regarding the rate sheet in the manner specified in Board and hearing officer orders during discovery. Ag. Br. at 9.

Rate Sheet is Not a De Facto Rule. The Agency asserts that the facts surrounding the Agency’s rate sheet are distinguishable from those in Senn Park and thus Senn Park is not applicable here. Ag. Br. at 6. The Agency argues that in Senn Park the state agency was amending a procedure for calculating an inflation factor used when determining rates of reimbursement for nursing home facilities. Ag. Br. at 6, citing Senn Park at 104 Ill. 2d 169, 176-77. In this case the internal guidance is not an amendment of an existing plan, argues the Agency, but rather the Agency’s means of implementing a requirement in the Board’s regulations. Ag. Br. at 6.

The Agency argues that the facts surrounding the rate sheet are more analogous to those in Donnelly v. Edgar, 117 Ill. 2d 59, 509 N.E.2d 1015 (1987) and Kaufman Grain Company v. Department of Agriculture, 179 Ill. App. 3d 1040, 534 N.E.2d 1259 (4th Dist. 1988). In Donnelly, the Illinois Supreme Court determined that statements concerning only internal management of an agency and not affecting private rights are not rules subject to the APA. Ag. Br. at 7. In Kaufman Grain, the appellate court repeated the “sentiment” in Donnelley and stated that not all statements of agency policy must be announced by means of a rule. *Id.*

The Agency also relies on Highland Park Convalescent Center v. Illinois Health Facility Planning Board, 217 Ill. App. 3d 1088, 578 N.E.2d 92 (1st Dist. 1991). In that case the court reviewed the methodology used by the state agency to make determinations. Ag. Br. at 8. The court found the methodology was not a rule as contemplated by the APA. *Id.*

The Agency argues that the rate sheet is an internal document expressly used in the promotion of consistency in decisions. Ag. Br. at 8. The Agency asserts that the document is internal to the Agency and does not affect private rights. *Id.* The Agency argues that the means by which the Agency makes the underground storage tank decisions is subject to appeal and adjudication is an appropriate means to establish agency policy. Ag. Br. at 8-9.

The Agency Treated the Rate Sheet Per the Board's Orders. The Agency responds to Ayers that the Agency was following Board and hearing officer orders issued during the discovery process regarding the rate sheet. Ag. Br. at 9. The Agency asserts that the Agency should not be penalized for following those orders. Ag. Br. at 10.

Ayers' Reply

Ayers concedes that not all statements of Agency policy must be announced by means of a promulgated rule. Reply at 3. Ayers further concedes that the case law allows an agency to interpret statutory provisions to a particular set of facts in adjudicated cases. *Id.* However, Ayers asserts that published rules are required for each agency statement of general applicability that implements, applies, interprets, or prescribes law or policy. *Id.* Ayers claims the rate sheet is such statement of general applicability. Reply at 3-5.

Ayers states that they are not challenging the Agency's choice of adjudication or rulemaking. Reply at 4. Instead, Ayers believes the Agency must accept the consequences of the choices. *Id.* Ayers argues that the Agency can choose to adopt a generalized standard through rulemaking or the Agency cannot rely on "secret 'internal guidance'" in making decision on reimbursement. *Id.*

Ayers argues that rates that can be charged by outside contractors are clearly not matters of internal management. Reply at 6. Furthermore, Ayers argues that the legislature in the APA had clearly directed any agency involved in rate making to do so through promulgated rules. Reply at 6, citing 5 ILCS 100/5-25. Thus, Ayers maintains that even if the Board were to determine that the rate sheet was solely an internal matter, the APA still requires the adoption of the rate sheet through rulemaking. *Id.*

Ayers also replies to the Agency argument that the Agency was following Board orders in not disclosing information regarding the rate sheet. Reply at 6. Ayers argues that the Agency cannot "hide behind the Board's discovery order" to defend the Agency's refusal to disclose rates relied upon by the Agency in determining the rates. *Id.* Ayers asserts that the Agency argument to the Board on the discovery issue was that the disclosure of the information would be premature until the hearing. *Id.* Ayers argues that the Agency had the hearing but the question remains as to whether the rate sheet is competent evidence of anything. *Id.*

Technical Review

The Board will first summarize the arguments in Ayers' brief. Next the Board will delineate the Agency's response. Then the Board will summarize Ayers' reply.

Ayers Arguments

Ayers argues that all 13 soil borings proposed as a part of the HPCAP are necessary to meet the minimum requirements of the Act. Pet. Br. at 18. Ayers states that the Board's rules acknowledge that corrective action may include additional soil and groundwater examination. Pet. Br. at 18, citing 35 Ill. Adm. Code 732.404(e). In this instance, Ayers claims that additional investigation was deemed necessary by the project's engineer because of information learned during soil classification. Pet. Br. at 18.

Ayers argues that the record supports additional investigation because the soil conditions pose a high potential for surface and groundwater contamination. Pet. Br. at 19, citing R. at 8. The corrective action plan included a diagram of the stratigraphic cross section along with a discussion of actual soil conditions. Pet. Br. at 19, citing R. at 19. Ayers maintains that the Act requires investigation and remediation of natural migration pathways and there was still inadequate information to determine the extent of contamination and of threats to human health and the environment. Pet. Br. at 19.

Ayers relies on Mr. Truesdale's testimony that the 13 soil borings proposed are the minimum necessary to achieve the Act's goals and in fact more soil borings may be necessary. Pet. Br. at 21, citing Tr. at 72. Even though chemical analysis will only be performed on three soil borings, Ayers argues that the qualitative information concerning soil conditions and characteristics of potential migration pathway can be established. Pet. Br. at 22. Ayers also argues that the approach to the investigation is consistent with USEPA guidance and generally accepted engineering practices. Pet. Br. at 21. Ayers asserts that the initial investigation identified soil conditions which make knowing the extent of contamination difficult and established a need for further investigation. Pet. Br. at 22. The corrective action plan explained this need. *Id.* Therefore, Ayers argues the Agency mistakenly reduced the number of soil borings at the site. Pet. Br. at 26.

Agency Arguments

The Agency asserts that Ayers has not demonstrated that the HPCAP as provided to the Agency was necessary to meet the requirements of the Act. Ag. Br. at 10. The Agency argues that the information and documentation with the corrective action and budget do not support the use of 13 soil borings. *Id.* The Agency maintains that the record contains no statement that the 10 direct push soil borings disallowed by the Agency would be tied to investigation of natural migration pathways. *Id.* The only direct reference, according to the Agency, is a reference that the locations will be probed and sampled "in accordance with 35 Ill. Adm. Code 732.308(a)." Ag. Br. at 11. The Agency argues that Section 732.308 relates to soil classification and soil classification had already occurred at this site. Therefore, the Agency's conclusion that the 10

soil borings were related to site classification is supported by the record according to the Agency. Pet. Br. at 11.

Ayers' Reply

Ayers asserts that, missing from the Agency's justification of the technical review performed by the Agency, is the reviewer's failure to read the corrective action plan. Reply at 7. Ayers maintains that the entire purpose of the investigation plan was clearly set forth. *Id.* Ayers cites to the record for support that the additional soil borings were needed. *Id.*, R. at 1 and 6. Ayers argues that the Agency's denial letter frames the issues on appeal and the Agency reviewer testified that the number of soil borings was excessive because of her mistaken understanding of local soil conditions. Reply at 7-8.

Financial Review

The Board will first summarize the arguments in Ayers' brief. Next the Board will delineate the Agency's response. Then the Board will summarize Ayers' reply.

Ayers Arguments

Ayers asserts that the Agency erroneously reduced the investigation costs. Pet. Br. at 27. Specifically, Ayers argues that the reduction in the number of soil borings was an incorrect decision based on the technical record so the corresponding reduction in costs should be restored. *Id.* Further, Ayers argues that the Agency incorrectly estimated the time necessary to do direct push soil borings. Pet. Br. at 27. Therefore, the corresponding reduction in costs for boring should be restored. Pet. Br. at 30. The remaining investigation charges should also be restored because of the restoration of these costs. Pet. Br. at 30.

Ayers also argues that all the reductions taken by the Agency based on the rate sheet should be restored. Pet. Br. at 31-36. The costs provided by Ayers are appropriate and Ayers argues that the only basis for reduction was the rate sheet. *Id.* Ayers also takes issue with hours of work, which were reduced for certain job titles. *Id.* Ayers asserts that the record also supports restoration of those hours.

Ayers also argues for restoration of equipment costs because the costs are based on a reasonable number of days worked and reasonable costs. Ayers offers the testimony of Mr. Truesdale to support this argument. Pet. Br. at 36-38. Finally, Ayers asks that handling charges also be restored based on the restoration of other costs. Pet. Br. at 38.

Agency's arguments

The Agency argues that there were essentially four components to the Agency's decision to reduce costs on the budget. Ag. Br. at 11. Those four components are: the reduction of 13 soil borings to 10; the reduction of five days time for investigation to two days time; the reduction of allowed hours; reduction of allowed rates/costs. *Id.* The Agency argues that on

each point Ayers has failed to sustain the burden of proof and the Agency's decision was reasonable and appropriate. Ag. Br. at 11-12.

The Agency relies on the prior argument that the reduction in soil borings was correct. Therefore, the Agency argues the corresponding reduction in investigation time was appropriate. Ag. Br. at 12. The Agency asserts that there is no supporting documentation for the days and hours found in the budget and as a result the reviewer sought advice from her supervisor. Ag. Br. at 12. The Agency reviewer appropriately relied on the experienced estimate to determine that the hours were not reasonable and reduced the hours accordingly. *Id.*

The Agency also argues that there is not documentation for the rates and costs associated with the tasks in the budget. Ag. Br. at 13. The explanation and testimony at hearing by Ms. Davis and Mr. Truesdale was not information provided in the HPCAP and therefore was not before the Agency when the Agency made the decision, according to the Agency. Pet. Br. at 13.

Ayers' Reply

In the reply, Ayers expresses frustration that the budget was completed using the forms provided by the Agency and on those forms the Agency sought a breakdown for drilling costs on the basis of feet to be bored. Reply at 8, citing R. at 68. However, Ayers argues that the rate sheet calculated the costs on a per-day basis, and as a result the reviewer asked her supervisor how many direct push soil borings could be done in a day. Reply at 8-9. Ayers asserts that the supervisor's answer did not take into account the site-specific requirements of the Ayers site and therefore the decision was based on the Agency's failure to consider the information before the Agency. Reply at 9.

As to the remaining reductions, Ayers argues that the Agency's response that the reductions were made "based on past experience of" Agency staff must be rejected. Reply at 9. Ayers argues that a single member of the staff who has only been with the Agency since 2000 made the reductions. *Id.* Ayers maintains that the Agency, in fact, relied on the rate sheet as a substitute for experience. Reply at 10.

Burden of Proof and Board Review

Ayers concedes that the parties generally cite the same legal authorities setting forth the burden of proof and the scope of the Board's review. However, Ayers argues that the Agency "largely discards these standards in" the Agency argument. Reply at 1. Ayers argues that the denial letter defines the issues on appeal, but the Agency makes no reference to the denial letter in the response brief. *Id.* Ayers points to the Act and states that the denial letter should contain specific reasons why the Act and the regulations require denial or modification. Reply at 1, citing 415 ILCS 5/57.7(c)(4) (2002). Ayers asserts that the Agency hopes to prevail on grounds other than those stated in the denial letter, which is that 10 soil borings were excessive. Reply at 1-2. Rather than justify the Agency's decision, Ayers asserts that the Agency argues that the HPCAP had insufficient information to know the purposes of the soil borings. Reply at 2.

Ayers argues that the Agency would not only ignore the denial reasons in the denial letter, but also have the Board ignore all evidence not contained in the HPCAP. Reply at 2. Ayers maintains that the hearing before the Board is the first opportunity for a petitioner to challenge the basis for the Agency's decision. Reply at 2, citing IEPA v. PCB, 138 Ill. App. 3d 550, 551-52 (3rd Dist. 1985). Ayers cites IEPA for the proposition that the Board hearing includes consideration of the record before the Agency together with receipt of testimony and "other proofs under the full panoply of safeguards normally associated with due process hearing." *Id.* Ayers asserts that this includes not only information before the Agency at the time of the decision, but also testimony explaining how the Agency record demonstrates that the HPCAP should have been approved. Reply at 2, citing Waste Management of Illinois v. IEPA, PCB 84-45 (Nov. 26, 1984) and Todd's Service Station v. IEPA, PCB 03-2 (Jan. 22, 2004).

Board Discussion

The following discussion will first clarify the standard of review used by the Board in this proceeding. Next, the Board will discuss the Agency rate sheet and applicability to this case. Finally, the Board will discuss the technical and financial review performed by the Agency.

Standard of Review

Both parties agree and the law is well settled that the denial letter frames the issues on appeal. The Board's review is based on the record before the Agency, and the petitioner bears the burden of demonstrating that the application as submitted demonstrates compliance with the Act and Board regulations. *See infra* 8. However, Ayers does correctly point out that the hearing before the Board is the petitioner's first opportunity to explain how the Agency record supports the application. Further, although the Board's review is limited to the record before the Agency, the Board does not review the Agency's decision using a deferential manifest-weight of the evidence standard. IEPA v. PCB, 115 Ill. 2d 65, 70, 503 N.E.2d 343, 345 (1986). Rather the Board reviews the entirety of the record to determine that the HPCAP as presented to the Agency demonstrates compliance with the Act.

Rate Sheet

Ayers main argument is that the Agency rate sheet is an unpromulgated rule that violates the APA by proscribing maximum allowable costs for items in a HPCAP. Ayers maintains that the court's decision in Senn Park was based on similar circumstances and is therefore precedential. The Agency argues that the rate sheet is an internal document expressly used in promotion of consistency in decisions. Ag. Br. at 8. The Agency also argues that the circumstances surrounding the rate sheet are not similar to Senn Park and therefore that decision does not apply.

The Board will first look to the definition of a rule in the APA, and will apply that definition to the facts of this case. The APA defines a rule as:

each agency statement of general applicability that implements, applies, interprets or prescribes law or policy, but does not include (i) statements concerning only

the internal management of an agency and not affecting private rights or procedures available to persons or entities outside the agency 5/ILCS 100/1-70 (2002)

The testimony of Agency personnel in this case shows that the rate sheet is a statement of Agency policy, which limits the amount of charges reimbursable for corrective action at a leaking underground storage tank site. The Agency's personnel indicated that if a rate was sought higher than the one listed on the rate sheet, the rate was reduced, unless additional information was provided. *See* Tr. at 215-17. The testimony of both Ms. Hawbaker and Mr. Bauer demonstrate that although the rate sheet is kept "secret" from the public, the rate sheet is a statement of general applicability. *See* Tr. at 185-6; 225-6. Furthermore, the rate sheet is used to affect the claims for reimbursement, by persons outside the Agency, from the leaking underground storage tank fund. Thus, the Board finds that, by definition, the rate sheet is a rule that the Agency should have promulgated pursuant to the APA.

The Board finds that, since the Agency rate sheet is a rule that was not promulgated and is of the type the courts have found invalid, the Board is not bound by the Agency rate sheet and the rate sheet has no legal or regulatory effect. Platolene 500, Inc. v. IEPA, PCB 92-9 (May 7, 1992), *slip op.* at 8. However even though the Board agrees with Ayers that the rate sheet is an improperly promulgated rule and the rate sheet has no binding effect on the Board, the Board will not strike the evidence in the record on the Agency rate sheet. The Board will accept the Agency's testimony regarding the rate sheet and the rate sheet as rebuttal to Ayers' argument that the rates in the HPCAP are reasonable and should be approved.

Technical and Financial

The Agency's denial letter frames the issue on appeal and the denial letter states that 10 of the direct push soil borings are in excess of those needed. The denial letter states that because BTEX testing will be done on only three of the suggested 13 soil borings, the remaining 10 soil borings are excessive since it appears that they would be used to only further classify the soils that were previously classified during the site classification activities. R. at 86-87. However, the testimony of Mr. Truesdale indicates that during meetings with the Agency, in his understanding the Agency had objected only to chemical analysis being performed on all the soil borings, so Ayers reduced the number of soil borings that would be chemically tested. Tr. at 104. Mr. Truesdale elaborated in his testimony that although only 3 soil borings would be analyzed for BTEX, all 13 soil borings were intended to be logged and used "to further evaluate the natural migration pathways identified during site classification" both on and off site. Tr. at 49, 50, 101.

Also, the site classification indicated the presence of soils with variable composition and thickness, and Mr. Truesdale testified that such variabilities needed to be quantified to further evaluate migration pathways on and off site. Tr. at 71-72, R. at 8. In addition, the record contains several references, which indicate that the 13 soil and groundwater borings are being proposed to establish the extent of contamination in order to develop future groundwater monitoring program and evaluate potential remediation strategies. *See* R. at 1, 6, and 8. This is consistent with the additional soil borings and analysis allowed under Section 732.404(e) for the development of a corrective action plan. In contrast, the Agency relies on one statement in the

record for support that 10 of the 13 soil borings are only for further site classification. *See* Tr. at 176-7. After careful review of the record, the Board finds that there is ample evidence that the soil type found at the site requires the 13 soil borings on and off site along with the proposed physical and chemical analysis to establish the extent of the contamination and aid in developing future groundwater monitoring and remediation strategies. Therefore, the Board finds that the HPCAP's provision for 13 direct push soil borings is necessary to meet the minimum requirements of the Act and the Board's regulations.

The Board also finds that the Agency statement in the denial letter that eight direct push borings per day can be accomplished is contrary to the record. The record clearly indicates that the direct push borings will be used for groundwater and soil monitoring. There is ample testimony in the record to establish that the time necessary to do groundwater monitoring makes the installation eight direct push borings per day unlikely. Therefore, the Board finds that the five days for investigation in the HPCAP is necessary to meet the minimum requirements of the Act and the Board regulations.

Because the Board finds that the 13 soil borings are not excessive and five days of investigation are necessary, several cost reductions must be restored in the HPCAP. First, the investigation costs must be restored to allow for the 10 soil borings eliminated by the Agency to proceed. Also, the corresponding reduction in personnel costs must be restored. Equipment costs, camera, Peristaltic pump (field purchases) and handling charges must also be restored consistent with the reinstatement of 13 soil borings and five days of drilling.

As to the reduction taken based on the hourly rates charged for the personnel at the site, Ms. Davis testified that the rates had been previously approved and explained how the rates were developed. Tr. at 126-40. The Agency relies on the rate sheet for the reduction and argues that the information in Ms. Davis testimony was not before the Agency when the Agency made the decision to reduce the rates. Therefore, the Agency would have the Board disregard the testimony. As noted above, the Agency's record is the basis for the Board's review; however, the hearing before the Board is the petitioner's first opportunity to challenge the Agency's decision and the Agency's reasoning. In this case, the Agency determined rates were unreasonable based on a rate sheet. The Board finds that the explanation of Ms. Davis is properly before the Board as are the challenges to the rate sheet. Given the evidence, the Board is convinced that the rates requested by Ayers for hourly work are reasonable. Therefore, the Board finds that the record supports the requested hourly rate and the Board restores the reductions for the hourly rate.

As to the adjustment in analytical costs, miscellaneous retail purchases and UPS sample shipping, the Board finds that the record does not support restoration of these costs. Although, the Agency reviewer reduced the analytical costs based on the rate sheet, Ayers does not point to evidence in the record, nor does Ayers adequately explain why the Agency decision is incorrect. Furthermore, the Board finds that the record does not justify as reasonable the UPS shipping and miscellaneous retail purchases. Although, Mr. Truesdale offered explanations for the cost in his testimony, the HPCAP and budget do not contain justifications. Therefore those costs will not be restored.

CONCLUSION

Ayers owns a site in Beardstown where leaking underground storage tanks were reported in 2000. On March 28, 2003 the Agency determined that the budget submitted for the high priority corrective action plan was excessive, and Ayers filed this appeal on May 7, 2003. The Board finds that, based on the record in this proceeding, the Agency improperly reduced the HPCAP budget by reducing the number of soil borings from 13 to three. Because the Board restores the number of soil borings to 13, the HPCAP budget is also restored consistent with that number of soil borings.

Also, the Board finds that the Agency used an internal rate sheet to reduce the hourly personnel rates for various professional activities at this site. The Board finds that the internal rate sheet is an improperly promulgated rule and, therefore, the Board is not required to follow the provisions of the rate sheet in this proceeding. In reviewing the record, the Board finds that the hourly personnel rates requested by Ayers are reasonable and the HPCAP budget is restored accordingly.

Finally, the Board finds that Ayers has failed to demonstrate that some requested analytical costs, miscellaneous retail purchases, and UPS sample shipping costs are reasonable, so the Board affirms the Agency's decision reducing the HPCAP budget for those items.

ORDER

1. The Board hereby orders the Illinois Environmental Protection Agency to restore the following modifications of Illinois Ayers Oil, Inc.'s high priority corrective action plan (HPCAP) and budget by approving the HPCAP's use of 13 direct push soil borings to determine the extent of the contamination plume and by restoring all corresponding budget reductions:

\$8,910.72 and \$108.00 for Investigation costs
 \$18,450.00 for Personnel Costs
 \$849.30 for Equipment Costs
 \$36.00 for Camera
 \$270.00 for Peristaltic Pump
 \$979.17 for Handling Charges.

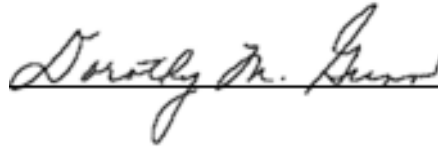
2. The Board hereby affirms the following Illinois Environmental Protection Agency budget reductions in the Illinois Environmental Protection Agency's March 28, 2003 letter:

\$490.00 for Analysis Costs
 \$150.00 for USP [sic] sample shipping
 \$50.00 for Miscellaneous Retail Purchases

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 5/31(a) (2002)); *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, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion and order on April 1, 2004, by a vote of 4-0.

A handwritten signature in cursive script, reading "Dorothy M. Gunn", is written over a horizontal line.

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board