

ILLINOIS POLLUTION CONTROL BOARD

December 15, 2005

MIDWEST PETROLEUM COMPANY,)	
)	
Petitioner,)	
)	
v.)	PCB 06-28
)	(UST Appeal)
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Respondent.)	

CURTIS W. MARTIN OF SHAW & MARTIN, P.C., 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 T.E. Johnson):

Midwest Petroleum Company (Midwest) seeks review of a determination by the Illinois Environmental Protection Agency (Agency) that rejected the amended corrective action plan budget for Midwest's leaking underground petroleum storage tank (UST) facility located at 529 Maple Street, Shiloh, St. Clair County. Midwest appeals on the grounds that the amounts submitted for Agency approval in the amended budget were reasonable, justifiable, necessary, consistent with generally accepted engineering practices, and eligible for reimbursement out of the Underground Petroleum Storage Tank Fund (Fund). For the reasons below, the Board finds that the record supports the Agency's decision to reject the budget amendment.

PROCEDURAL BACKGROUND

On August 25, 2005, Midwest filed its petition for review. The Board accepted this matter for hearing on September 1, 2005. The Agency filed the administrative record on September 27, 2005. Board Hearing Officer Carol Sudman held a hearing on October 7, 2005. Midwest submitted a post-hearing brief on October 27, 2005. The Agency submitted a post-hearing brief on November 14, 2005.

FACTS

Midwest is the owner and operator of the facility located in St. Clair County. Midwest's facility has an Illinois Emergency Management Agency (IEMA) incident number of No. 982804. AR at 104. United Science Industries (USI) is the environmental consultant performing the remediation activities at Midwest's facility. AR at 104; Tr. at 7. Midwest submitted an amended corrective action plan (2004 CAP) and budget (2004 budget) to the Agency on August 13, 2004.

AR at 101. The 2004 CAP proposed an area of soil excavation, transportation and disposal traditionally known as a “dig and haul” project. Tr. at 15. The 2004 CAP includes information regarding the proposed excavation of contaminated soil and clean overburden at the site. AR at 123; Tr. at 134, 152. Overburden refers to clean soil found above the contaminated soil at the site that would not need to be disposed of off-site and would be available for use as backfill. Tr. at 16.

The 2004 CAP proposed excavation and removal of contaminated soil simultaneously with the backfilling of overburden to be completed in 25 days. AR at 118. The 2004 CAP proposed that a photo-ionization detector (PID) along with laboratory analysis would be used to segregate overburden from contaminated soil. AR at 121-24. The overburden was estimated to be 5,544. AR at 121. The soil borehole data indicated an overburden of 5,575. AR at 123. Subtracting the overburden from the total estimated amount of 20,713 cubic yards of excavated soil revealed that approximately 15,148 cubic yards of in-place contaminated soil would need to be excavated for disposal. *Id.*

The 2004 budget provided for an estimated 270 hours for the environmental technician to perform excavation and overburden screening, manifesting, sampling, surveying and sample shipment. AR at 320. The 2004 plan and budget estimated that it would take 25 days to complete the excavation, transportation, disposal and backfilling of contaminated soil and an additional two days for excavation and replacement of overburden. AR at 25. The Agency conditionally approved the 2004 CAP and 2004 budget on September 1, 2004. AR at 61-63.

Upon the Agency’s approval of the 2004 CAP, excavation activities at the site began on October 1, 2004. Tr. at 62. The removal of the contaminated soil took 28 days and was performed during the months of October and November 2004, and January 2005. Tr. at 106-08. Approximately 12,460 cubic yards of contaminated soil was addressed. AR at 25. This first phase of excavation did not include the excavation of overburden. Tr. at 109. An additional 5,327 cubic yards of overburden and 1,540 cubic yards of additional contaminated soil were removed in February and March of 2005.

On March 29, 2005, a proposed budget amendment at was sent to the Agency (2005 budget). AR at 19-27. The 2005 budget seeks additional costs related to personnel activities in the removal of overburden at the site, as set forth in the justification statement in the budget. AR at 25-26. In the justification, Midwest stated that the 2004 budget estimate for the project underestimated the time needed for the environmental technician, and that the weather conditions at the site were wetter than anticipated. AR at 25. The justification also provided that the 2004 budget significantly underestimated the amount of time required to complete the simultaneous overburden handling and contaminated soil disposal, and asserts that the technician time required for the clean overburden tasks was not provided in the original budget. AR at 26.

The 2005 budget seeks approval of time for activities associated with excavation over an additional 16 days. AR at 138, 142; Tr. at 35-37. The total additional personal costs sought in the 2005 budget are \$13,555. AR at 23. On July 18, 2005, the Agency issued a final decision rejecting the 2005 budget. AR at 1-3. In the final decision, the Agency stated that the 2005 budget included costs that were not reasonable as submitted. AR at 1. The decision provides

that the 2005 budget indicates that the amount of time to excavate, transport, dispose and backfill contaminated soils from the site continued over a span of approximately five months and that the approved plan does not include approval for soil remediation to include a span of approximately five months. *Id.* Therefore, the decision continues, the request for additional personnel costs to remediate the contaminated soils from the site is not reasonable. *Id.*

A hearing was held on October 7, 2005. Four witnesses testified. A summary of the testimony follows.

Harry A. Chappel

Mr. Harry A. Chappel (Chappel) is employed by the Agency as a manager in the leaking underground storage tank section. Tr. at 6. He has been employed with the Agency for twenty-three years. *Id.* He oversees one of the units responsible for the review of UST remediations and reimbursement in Illinois, including the review of budgets that are proposed with regard to remediation on specific sites. *Id.* Chappel testified that he reviewed the 2005 budget. Tr. at 10. He testified that the 2005 budget proposed additional time for the original proposal in that the 2004 CAP proposed 25 or 27 days of activities, but the 2005 budget proposed an additional 13 or 16 days of activities. Tr. at 14.

Chappel testified that the Agency is not really concerned with what quarter the work actually occurred in, but that the question is the amount of time spent as proposed in the 2004 CAP versus what is being proposed in the 2005 budget. Tr. at 23. He testified that the 2004 CAP says the removal will occur during the second quarter of 2005, and that the budget attached thereto allows for 25 or 27 days to do the removal of soil. Tr. at 25. He testified that the proposed modification that the Agency rejected requests a significant increase in the amount of time to complete the removal and associated activities. Tr. at 26. Chappel stated that the basis for the denial was that, for some reason, it has now taken five months and has resulted in a significant increase in personnel costs. *Id.*

Chappel testified that the justification submitted as part of the 2005 budget did not justify the additional 16 days of personnel time. Tr. at 33. He testified that the 2005 budget primarily indicated that it took an additional 16 days because it rained, and asks why, during that period of five months, Midwest didn't just work on the days it didn't rain. Tr. at 43. He testified that the determination of unreasonableness was not based on production rate, but on the fact that the additional 16 days, based on rainfall, was not a justifiable argument. Tr. at 44. He states that the Agency made no determination as to the production rates. *Id.* He testified that the rates requested with regard to the various personnel are the same in the 2005 budget as in the 2004 budget. Tr. at 46.

Chappel testified that based on the 2004 CAP and budget it was the Agency's understanding that the remediation, including work with the overburden, would be completed in 27 days. Tr. at 49. Chappel testified that it was the Agency's understanding that 27 days total, 25 designated for contaminated soil removal and 2 for overburden, was a reasonable amount of time to complete the degree of work that was proposed based on the information provided in the 2004 CAP and budget, and looking at all the information that Midwest submitted. TR. at 52-53.

He testified that the work did not necessarily have to be performed in 27 consecutive days. Tr. at 53.

Jeffrey Schwartz

Jeffrey Schwartz (Schwartz) is employed by United Science Industries (USI) as manager of field operations. Tr. at 55-56. He has been employed with USI for nine years, and has been the manager of field operations for four years. Tr. at 56. He reports to the general manager, and is listed as remediation manager on the 2004 budget. Tr. at 68, 71. He has a two-year associates degree in science. *Id.* He testified that an environmental technician was responsible for conducting the PID screening and sampling, and that a technician was on site each day the excavation took place. Tr. at 58-59. He testified that PID is used to determine if the excavator needed to dig deeper, and that once they got close to the anticipated depth, they starting screening at six-inch intervals. Tr. at 60. He testified that even if the PID indicates that the soil is possibly overburden, a laboratory sample is still taken. *Id.*

Schwartz testified that the depth and direction of digging is determined by mapping, that the drilling had already been done, and that the excavation proceeded according to the map. Tr. at 61. He testified that the map shows the estimated area of contamination, the estimated areas of overburden, and is modified on an ongoing basis. Tr. at 62. He testified that in this case, the map was pretty close, and was not modified very much at the time of the overburden activity. *Id.*

Schwartz testified that he was responsible for estimating the time of excavation transportation and disposal in regards to the budgeting of the costs associated with the excavation. Tr. at 64-65. He testified that dealing with the overburden is a more precise remediation because the area of contamination must be found first so that clean soil is not being removed. Tr. at 65.

Schwartz stated that the 2004 budget set aside two days for the overburden. Tr. at 75. He said the fact that it took 16 days instead of 2 days to complete the overburden work was due to underestimation. Tr. at 75, 77. He testified that at the time of the 2004 CAP and budget, bore swell sampling had already been performed to find out the extent of overburden versus contaminated soil, and that USI had an understanding at that time of how much overburden and contaminated soil was present at the site. Tr. at 79-80.

Schwartz testified that during the first 28 days of excavation there was no overburden removed. Tr. at 83. He testified that there was an underestimation of the overburden to be dealt with. Tr. at 89. He testified that the "inching the project along" was not anticipated in the 2004 CAP and budget. Tr. at 90.

Robert J. Pulfrey

Robert J. Pulfrey (Pulfrey) has been employed by USI as a project manager since 2002. Tr. at 92. He has B.S. and M.S. degrees in geology, and is referred to in the CAP and budgets as senior project manager. *Id.* As project manager, he is in overall charge of a project, from the initial development of work plans to making sure the project runs efficiently. Tr. at 92.

He testified that in the 2004 CAP and budget, based on the estimated tonnage of the contaminated soil and the time for the trucking, it was assumed that simultaneous soil removal and backfilling would require 25 days to complete. Tr. at 95. He stated that the 2004 CAP and budget implied that Midwest would deal with the excavation of contaminated soil for 25 days and with the overburden for 2 days. Tr. at 97. He testified that this was an error, or oversight, on his part. *Id.*

Pulfrey testified that he was told by Schwartz that it would take 25 days for the removal of the contaminated soil, and that he used this information in compiling the 2004 CAP and budget. Tr. at 97. Pulfrey testified that it is unreasonable to think that the overburden work could be completed in only two days. Tr. at 98. He testified that he did calculate the amount of overburden at 5,500 cubic yards in the 2004 CAP. *Id.* He testified that he did not intend the entire excavation project to be concluded in 27 consecutive days, and that all the excavation was completed in early March 2005. Tr. at 106. He testified that during the initial 28 days of excavation, no excavation of overburden occurred. Tr. at 107.

Pulfrey testified that at the end of the initial 28 days of excavation he reviewed the project and it was obvious that he had created an oversight and that he did not know how long it was going to take to conduct operations on the overburden. Tr. at 109. He said he decided to wait until the project was done before submitting an amended budget to the Agency. *Id.* Pulfrey stated that it was an oversight on his part as project manager, that he had not taken into account the amount of time that it would take to remove the overburden area. Tr. at 124-25. He testified that in the 2004 budget he forgot to put in time for overburden, but acknowledged that there is a specific mention included in the time the environmental technician would be spending on the site of activities concerning overburden. Tr. at 127. He testified that it was an oversight on his part to think that the overburden sampling would only take two days. Tr. at 140.

He testified that the justification contained in the 2005 budget indicates that the original budget significantly underestimated the amount of time required to complete the simultaneous overburden handling and contaminated soil disposal. Tr. at 113. He believes that the additional request of \$13,555 contained in the 2005 budget is reasonable. Tr. at 118. He testified that the rate of production during the initial 28 days of excavation was approximately 445 cubic yards per day and that he believes this to be a reasonable rate of production. Tr. at 118-19. He testified that the rate of production during the additional 16 days of excavation was approximately 458 cubic yards per day and that he believes that to be a reasonable rate of production. *Id.*

Pulfrey stated that his work in regards to the 2004 CAP was reviewed by a professional engineer. Tr. at 125. He testified that the final version of the working map would have shown that what was actually excavated was not included in the 2005 budget. Tr. at 129-30. He testified that at the time he prepared the 2004 CAP, he was aware that 5,565 cubic yards of overburden removal was projected. Tr. at 131. Pulfrey acknowledged that the approximate volumes of the overburden and the contaminated soil to be removed were known at the time the 2004 CAP was submitted to the Agency. Tr. at 133.

Barry Franklin Sink

Barry Franklin Sink (Sink) has been employed by USI for four years. Tr. at 144-45. He is a professional engineer, and the manager of engineering services for USI. Tr. at 145. He is a licensed professional engineer, and has held that license for 24 years. *Id.* His duties include certifying that budgets associated with corrective actions plans contain activities that are necessary, reasonable, and accurate. Tr. at 146.

Sink testified that he assisted Pulfrey in preparing the budget, and reviewed it upon completion. Tr. at 147. In reviewing the 2004 CAP he assumed that two days were allowed for overburden. Tr. at 149. He testified that overburden was not specifically addressed in the 2004 CAP and he believes it was an oversight on his part. Tr. at 150. He testified that the most overburden he had encountered in a project prior to the instant one was approximately 250 cubic yards. Tr. at 152. Sink stated that generally, USI tries to average a rate of production of approximately 500 cubic yards per day, and that he believes the 450 cubic yards per day achieved at the Midwest site is due in significant part to the rainfall. Tr. at 153.

Sink testified that at the time the 2004 CAP and budget were submitted, he was aware of exactly how much overburden was being projected at the site, and that he was aware of the concept of a stripping ratio as a tool to determine the ease or difficulty of soil removal at the site. Tr. at 156. He testified that production rate is the ratio of the amount of contaminated soil removed to the number of days it takes to remove that contaminated soil. Tr. at 157.

Sink testified that he did not consider production rates during his review of the 2004 CAP and budget, but did so for the purpose of the 2005 budget once he realized that USI was in trouble and began to attempt to figure out why. Tr. at 162-63.

APPLICABLE LAW

The Environmental Protection Act (Act) provides that in order to seek reimbursement from the Fund, an owner or operator must submit an accounting of costs:

The Act also requires the Agency to determine whether costs associated with a plan are reasonable:

In approving any plan submitted pursuant to subsection (a) or (b) of this Section, the Agency shall determine . . . 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 minimum requirements of this Title. 415 ILCS 5/57.7(c)(3) (2004).

The Board's procedural rules regarding costs reimbursable from the Fund provide:

Costs ineligible for payment from the Fund include but are not limited to: . . . costs proposed as part of a budget plan that are unreasonable. 35 Ill. Adm. Code 732.606(hh).

BURDEN OF PROOF

Section 105.112(a) provides the burden of proof is on the petitioner. 35 Ill. Adm. Code 105.112(a). The burden is on the petitioner for reimbursement to demonstrate that the costs incurred are related to corrective action, properly accounted for, and reasonable. Beverly Malkey, as Executor of the Estate of Roger Malkey d/b/a Malkey's Mufflers v. IEPA, PCB 02-104 slip op. at 9 (Apr. 17, 2003). When requesting reimbursement from the Fund, the owner or operator must provide an accounting of all costs associated with the implementation and completion of the corrective action plan. *Id.*; 415 ILCS 5/57.7(b)(3).

STANDARD OF REVIEW

The standard of review under Section 40 of the Act 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, 179 Ill. App. 3d 598, 534 N.E.2d 616 (2nd Dist. 1989). The Board will not consider new information 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. EPA, PCB 90-142 (Dec. 20, 1990).

DISCUSSION

Midwest challenges the Agency's July 18, 2005 decision to reject the 2005 budget seeking approval of an additional \$13,555 of personnel costs as unreasonable. As discussed below, the Board affirms the Agency's rejection of Midwest's budget amendment.

Midwest's Arguments

Midwest argues that despite its request in accordance with the Act and regulations, the Agency essentially refused to consider the justification for the additional personnel costs proffered by Midwest. *Mid.* at 9. Midwest argues that the Agency's determination of unreasonableness was completely devoid of any standard upon which to make such a determination. *Id.*

Midwest asserts that the Agency approved the 2004 CAP's corrective action activities of excavation, transportation, disposal and backfilling along with the associated services. *Mid.* at 10. Midwest contends that Sink, a licensed professional engineer, testified that a production rate of 500 cubic yards per day has been deemed reasonable. *Id.* Midwest asserts that the additional 16 days of excavation activities for which Midwest seeks approval, dealt primarily with overburden that had been overlooked at the time the 2004 CAP was presented to the Agency, and

that the reference in the 2004 CAP to simultaneous overburden handling and contaminated soil disposal was an error. Mid. at 11.

Midwest contends that there are no different corrective action activities in the 2005 budget than those contained in the 2004 CAP already approved by the Agency. Mid. at 11. Midwest asserts that the majority of the hours requested in the 2005 budget are associated with the environmental technician, and that the hourly rates requested for the additional hours of all the activities are the same as previously approved by the Agency in the 2004 CAP and budget. Mid. at 12. Midwest notes that Sink and Pulfrey both testified that based on their experience and training, the additional personnel time sought for approval was reasonable. Mid. at 13.

Midwest argues that the rate of production for the second 15 days of excavation reveals that 5,327 cubic yards of overburden and 1,540 cubic yards of contaminated soil were removed giving an average daily production rate of 458 cubic yards per day that is well within what could independently objectively be deemed reasonable. Mid. at 13. Midwest argues that the reasonableness of the objective production rate proposed by Midwest can be confirmed by reference to the Board's opinion and order of February 17, 2005 entitled Proposed Amendments to Regulation of Petroleum Leaking Underground Storage Tanks (35 Ill. Adm. Code 732), R04-22. *Id.* Midwest points to proposed rule 734.845(c)(2)(A) as providing insight that the Agency deems a range from 226 to 450 cubic yards per day to be justification for a maximum payment. Mid. at 14. Midwest asserts that measured by this proposed standard of reasonableness, Midwest demonstrated the services and costs incurred were necessary to address the additional soil excavation and to meet the minimum requirements of the Act and regulations and should be approved. *Id.*

Midwest concludes that the Agency's denial of the additional personnel costs was arbitrary and capricious. Mid. at 14. Midwest argues that it has met its burden of proof that the additional costs are associated with corrective action activities and services, are reasonable, are consistent with the associated technical plan, and were not used for corrective action activities in excess of those necessary to meet the minimum requirements of the Act and regulations. *Id.*

Agency's Arguments

The Agency argues that the 2004 CAP and budget terms are applicable. Ag. at 6. The Agency contends the 2004 CAP explicitly states that the time needed for excavation of contaminated soil at the site is 25 days, and that the Agency's approval of the 2004 CAP did not contain any condition or modification changing the 25-day period, thus making the time period binding on Midwest. AG. at 6-7. The Agency asserts that the start and stop date of the removal are not of importance when compared to the actual time spent on the job, given that the work performed is charged on a daily or hourly basis. AG. at 7.

The Agency asserts that Midwest's argument that the overburden at the site was either overlooked or underestimated is not supported by the content of the 2004 CAP and budget. Ag. at 7. Both the 2004 CAP and 2004 budget, contends the Agency, contain specific and numerous references to how the overburden will be addressed, how much overburden would be removed, and the time needed for personnel to handle overburden related tasks. *Id.*

The Agency asserts that the 2004 CAP clearly states that 25 days will be taken to perform removal and disposal of contaminated soil, and that the 2004 budget clearly provides that an environmental technician will require 270 hours (or 27 days at 10 hours per day) for work related to the overburden at the site. Ag. at 8. The Agency reiterates that at the time of the preparation of the 2004 CAP and budget, both Pulfrey and Sink were aware of the amounts of overburden involved at the site, and that both testified that they knew when submitting the 2004 CAP and budget that the amount was quite large. *Id.*

The Agency asserts that Pulfrey testified that in preparing the 2004 CAP, he inputted the days for excavation work as provided by Schwartz and then forgot about the handling of the overburden. Ag. at 9. However, the Agency asserts, Schwartz testified that he did not have any involvement in the site until after August 2004 when the 2004 CAP and budget were submitted. Ag. at 9, citing Tr. at 72. The Agency contends Midwest's arguments are tangled. Ag. 10. First, the Agency notes that Pulfrey, the project engineer responsible for drafting the 2004 CAP and budget, stated at hearing that he put figures received from Schwartz, the manager of field operations, into the 2004 CAP and budget. Ag. at 9. Then, the Agency continues, Pulfrey testified that aside from the numerous references to overburden, the calculations regarding overburden and the time allotted for an environmental technician to perform work related to overburden, he either overlooked or underestimated the time needed to perform overburden work. Ag. at 9-10. Finally, the Agency contends, Schwartz testified that he did not provide those days to Pulfrey as Pulfrey believes. Ag. at 10. The Agency concludes that the only sense to be made from these arguments is that Midwest knew of the existence and extent of the overburden at the site before August 2004, because it made reference to the overburden in its 2004 CAP and budget and its own consultant believed that the time periods contained therein were reasonable. *Id.*

The Agency argues that the 2005 budget was not sufficient. AG. at 10. The Agency contends in considering the 2005 budget, the Agency can only look to the site-specific information conveyed in the submission and, in this case, looked to the information provided by USI. Ag. at 10-11. The Agency asserts that the pending rulemaking of amendments to Part 732 of the Board's rules is not final and should have no precedential or other persuasive weight in this case as correctly decided by the hearing officer at hearing. Ag. at 11.

According to the Agency, the 2005 budget submitted by Midwest argued the additional personnel costs were justified for three reasons: 1) that the time periods approved in the 2004 CAP and budget were the product of either an oversight or underestimation, 2) that during the time period in which the contaminated soil was excavated and disposed of the weather conditions were wetter than normal, and 3) that the production rate for the extended period of time sought for approval was reasonable and very near the definition as established by the Agency in the pending rulemaking. Ag. at 11.

The Agency asserts that the first justification has been shown to have no merit. Ag. at 11. Regarding the second justification, the Agency contends that the 2005 budget contains no specific information regarding rainfall at the site or even in the county in which the site is located. *Id.* The Agency notes that the information provided is from St. Louis, Missouri (approximately 20 miles from the site) and that no information from any field notes or any

employee of USI is provided. *Id.* Further, the Agency argues, Pulfrey testified at hearing that any rain in the area affected the site only “somewhat.” Ag. at 11, citing Tr. at 114. As to the third justification, the Agency contends that its witness testified that the notion of production rates was not taken into account because the Agency has no standard with regard to production rates of excavation. Ag. at 11-12. The Agency argues that there is no statutory or regulatory authority in place that addresses such a rate and this it is impossible for the Agency to apply any such standard. Ag. at 12. Further, the Agency contends, there was never any mention of using such a production rate to determine reasonableness in any of the previous submittals for this site so that even if the Agency had been asked to look at this as a legitimate yardstick, there was no prior reliance on that factor. *Id.*

The Agency asserts that Midwest has sought to twist or somehow obfuscate the plain wording of the July 2005 final decision, but that a simple reading of that decision shows it to be an accurate and sufficient explanation of the Agency’s conclusion. Ag. at 12. The Agency asserts that the final decision states the 2005 budget cannot be approved since the costs are not reasonable as submitted for the reasons provided therein. *Id.* The Agency continues that the 2004 CAP did not include approval for soil remediation to include a span of five months, but the 2004 CAP and budget stated that the contaminated soil excavation would take 25 days and the overburden activity would take two days. *Id.*

The Agency contends the hearing testimony supports the final decision, and specifies Schwartz’s testimony concerning the map used to determine the depth of excavation at the site. Ag. at 13. The Agency argues that Schwartz testified the map was to be updated from time to time but in this case was not modified much. *Id.* The Agency also asserts that Pulfrey testified that the same map changed in a significant way as the excavation progressed. *Id.* The Agency notes that Pulfrey acknowledged the final map was not provided to the Agency. *Id.*

The Agency asserts that although the Act provides that an owner or operator may submit successive plans containing budgets if additional costs are incurred beyond what has been approved, Midwest failed to file an amended corrective action plan in this case that seeks an amendment from the time periods set forth in the 2004 CAP. Ag. at 13-14. The Agency argues that because the technical plan contains a time period of 25 days, the 2005 budget is inconsistent with the 2004 CAP. Ag. at 14.

BOARD ANALYSIS

After careful review of the record in this proceeding, the Board is persuaded that the Agency correctly denied reimbursement for additional personnel costs contained in Midwest’s 2005 budget. The Board has held that the purposes of the UST Fund are narrow. Rantoul Township High School Dist. No. 193 v. IEPA, PCB 03-42, slip op. at 13 (Apr. 17, 2003); citing Strube v. PCB, 242 Ill. App. 3d 822, 610 N.E.2d 717, 851 (3rd Dist. 1993). The standard the Agency must apply when reviewing budgets is found in the Act and Board rules. In reviewing a corrective action plan budget, the Agency must consider whether the costs are reasonable and not incurred for corrective action in excess of that which is necessary to meet the minimum requirements of the Act and Board regulations. 415 ILCS 57.7(c)(4)(C) (2004); 35 Ill. Adm. Code 732.505(c).

Midwest submitted an amended budget, but did not submit an amended corrective action plan as a basis for that budget. The Act clearly provides that in the event that costs are or will be incurred in addition to those approved by the Agency, the owner or operator may “submit successive plans containing amended budgets.” 415 ILCS 57.8(a)(5) (2004). Board regulations do allow the submission of a corrective action plan or associated budget plan for review by the Agency following the approval of a corrective action plan or associated budget plan if revised procedures or cost estimates are necessary in order to comply with the minimum required activities for the site. 35 Ill. Adm. Code 732.405(e). However, Board regulations also require the Agency to ensure that costs associated with materials, activities and services, are reasonable and consistent with the associated technical plan. 35 Ill. Adm. Code 505(c).

The Board finds Midwest did not meet its burden in this case to show that the costs incurred were properly accounted for and reasonable. The 2005 budget submitted by Midwest was not submitted with a new corrective action plan. Because no amended corrective action plan was submitted with the 2005 budget, the Board must look to the 2004 CAP when determining whether the costs in question are consistent with the associated technical plan. The 2005 budget is not consistent with the 2004 CAP in that it exceeds the explicitly stated and approved time allowed of 25 days for excavation of contaminated soil at the site plus two days for overburden activity. Midwest could readily have submitted an amended corrective action plan concurrently with the 2005 budget, and, in fact, the 2004 CAP approved by the Agency was an amended corrective action plan.

The fact that the activities for which the reimbursement is being sought are essentially the same as those contained within the 2004 CAP, does not alter the fact that the costs associated with these activities are not reasonable because they are not consistent with the associated technical plan – in this case, the 2004 CAP.

Further, the Board is not persuaded by Midwest’s arguments regarding the need for the amended budget. Midwest’s primary argument is that overburden was not properly considered in the 2004 CAP because of either an oversight or an underestimation. A review of the record reveals that Midwest had accurately predicted the amount of overburden and contaminated soil present at the site in the 2004 CAP. In addition, Midwest did not meet its burden of proof in showing that excessive rainfall was a significant reason for the additional time spent at the site. Thus, the Board cannot find that the Agency erred in making its decision that the 2005 budget included costs that were not reasonable.

In any event, the justifications offered by Midwest fail to address the primary fact that the 2005 budget is not consistent with an associated technical plan as required by both the Act and the Board regulations. On a final note, the Board agrees with the hearing officer decision made at hearing that consideration of information regarding production rates being discussed in a pending rulemaking is not appropriate in this case.

The Board finds that the record supports the Agency’s decision rejecting the March 29, 2005 budget submitted by Midwest. Accordingly, the Board affirms the Agency’s June 18, 2005 decision rejecting the budget and disallowing the \$13,555 in additional personnel costs.

This opinion constitutes the Board's findings of fact and conclusions of law.

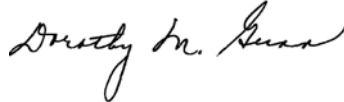
ORDER

The Board affirms the July 18, 2005 determination of the Illinois Environmental Protection Agency

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) (2004); *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 December 15, 2005, by a vote of 4-0.

A handwritten signature in cursive script, appearing to read "Dorothy M. Gunn".

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board