ILLINOIS POLLUTION CONTROL BOARD
April 3, 2008

T-TOWN DRIVE THRU, INC.,	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB 07-85
	)	(UST Appeal)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
	)	
Respondent.	)	

OPINION AND ORDER OF THE BOARD (by T.E. Johnson):

This is an appeal of an Illinois Environmental Protection Agency (Agency) determination denying reimbursement from the Underground Storage Tank (UST) Fund. T-Town Drive Thru, Inc. (T-Town) had applied to the Agency for reimbursement concerning T-Town's leaking petroleum UST site located at 101 West Main Street in Teutopolis, Effingham County. On March 2, 2007, the Agency denied T-Town reimbursement in the amount of $8,109.02 for claimed sample handling and analytical costs. T-Town timely appealed to the Board. T-Town filed a motion for summary judgment and the Agency filed a counter-motion for summary judgment.

For the reasons detailed in this opinion, the Board denies T-Town's motion, grants the Agency's motion, and affirms the Agency's determination to deny $8,109.02 in reimbursement from the UST Fund. In so ruling, the Board provides its first adjudicatory interpretation of the Part 732, Subpart H rules on "maximum payment amounts," adopted by the Board in Proposed Amendments to Regulation of Petroleum Leaking Underground Storage Tanks (35 Ill. Adm. Code 732), R04-22(A) (Feb. 16, 2006).[1]

This opinion is organized into the following parts: (1) a summary of the Board's decision; (2) the procedural history of the case; (3) the Board's findings of fact; (4) the relevant provisions of the Environmental Protection Act (Act) (415 ILCS 5 (2006)) and the Board's UST rules (35 Ill. Adm. Code 732); (5) the general legal framework for a UST Fund reimbursement appeal and the standard applied when the Board considers motions for summary judgment; (6) a discussion of the parties' arguments, with the Board's analysis and rulings on the motions; and (7) the Board's conclusion. The opinion is followed by the Board's order.

[1] The Agency filed the rulemaking proposal on January 13, 2004. After seven days of hearings and over 70 public comments, the Board issued its final opinion and order on February 16, 2006. The rules took effect on March 1, 2006.

SUMMARY OF DECISION

The Board finds that there are no genuine issues of material fact on this record and that the Agency is entitled to judgment as a matter of law. Subpart H sets forth "maximum" payment amounts. These amounts are not guaranteed irrespective of supporting documentation, and do not replace the requirement that a UST owner or operator provide an accounting of all costs to receive UST Fund reimbursement. In considering T-Town's reimbursement application, the Agency acted within the scope of its reviewing authority when it requested laboratory invoices from T-Town. By not providing the laboratory invoices, T-Town failed to include adequate documentation to support the claim for $8,109.02 in sampling and analysis costs. The Board therefore denies T-Town's motion for summary judgment, grants the Agency's counter-motion, and affirms the Agency's denial of reimbursement.

PROCEDURAL HISTORY

On March 14, 2007, T-Town filed a petition asking the Board to review the March 2, 2007 determination of the Agency. On April 19, 2007, the Board accepted the appeal for hearing. On April 2, 2007, T-Town filed an open waiver of the Board's decision deadline. *See* 415 ILCS 5/40(a)(2) (2006), 35 Ill. Adm. Code 101.308, 105.114. On April 26, 2007, the Agency filed the administrative record of its determination.[2]

On September 12, 2007, T-Town filed a motion to consolidate this appeal with 14 other then-pending UST Fund appeals. On September 27, 2007, the Agency filed a response opposing consolidation. The Board denied the motion to consolidate in an order of October 4, 2007, but stated:

> If the claimed identity of issues does exist among the appeals, a final Board decision in a single case would then serve as precedent for the other appeals, enhancing the prospects for their most efficient resolution. T-Town Drive-Thru, Inc. v. IEPA, PCB 07-85, slip op. at 4 (Oct. 4, 2007).

This case has not been to hearing. On September 12, 2007, T-Town filed a motion for summary judgment. On September 27, 2007, the Agency filed both a response to the motion and a counter-motion for summary judgment. On October 12, 2007, T-Town filed a response to the Agency's counter-motion.[3]

[2] The Board cites the Agency record as "Ag. Rec. at _."

[3] The Board cites T-Town's motion for summary judgment as "TT Mot. at _"; the Agency's response and counter-motion for summary judgment as "Ag. Resp./Mot. at _"; and T-Town's response as "TT Resp. at _."

FACTS

The Site

T-Town owns a leaking UST site located at 101 West Main Street in Teutopolis, Effingham County. Ag. Rec. at 019-021. The site is assigned Land Pollution Control No. 0490450002. A release at the site was reported to the Illinois Emergency Management Agency (IEMA) on November 5, 1998, and assigned Leaking UST Incident No. 982759. *Id*. at 005, 007, 012.

Approved Corrective Action Plan and Budget

T-Town retained United Science Industries, Inc. (USI) as contractor to remediate the release at the site. Ag. Rec. at 005. On August 29, 2006, the Agency approved T-Town's proposed High Priority Corrective Action Plan and associated budget, with various modifications. The approved budget authorized, among other things, $15,867.57 in "Analytical Costs" and $39,042.16 in "Consulting Fees." *Id*. at 008, 022, 172-174.

Reimbursement Application

On November 3, 2006, the Agency received from USI, on behalf of T-Town, an application for reimbursement from the UST Fund, requesting $171,623.81, including a total of $8,109.02 in analytical costs and $13,531.04 in consulting fees. Ag. Rec. at 001, 003, 006, 007, 022, 024-025, 029. The reimbursement application contained, among other things, an analytical costs form, a consulting fees form, two USI invoices, and various certifications.

Analytical Costs Form

The reimbursement application included a completed "Analytical Costs Form." Ag. Rec. at 024-025. The Agency form called for summary information on the laboratory analyses, the number of samples, the rate per analysis, and the total cost per parameter. *Id*. The form provided the following instructions:

> The laboratory analysis charge includes all cost associated with the transportation and/or delivery and analysis of each applicable sample. The charge includes but is not limited to costs associated with laboratory personnel, sample handling, transportation and/or delivery of samples to the laboratory, sampling equipment, sampling containers, sample disposal and all aspects of the applicable laboratory analysis. Please enter the number of samples for each analysis and the actual cost per analysis up to the maximum cost per analysis. *Id*. at 024.

The completed analytical costs form in T-Town's reimbursement package provided the following information:

Laboratory Analysis/Other	Number of Samples	Rate per Analysis	Total per Parameter
BTEX Soil with MTBE (EPA 8260)	21	$87.37	$1,834.77
Flash Point or Ignitability Analysis EPA 1010	1	$33.92	$33.92
Paint Filter (Free Liquids)	1	$14.39	$14.39
pH	21	$14.39	$302.19
Polynuclear Aromatics PNA, or PAH Soil EPA 8270	20	$156.24	$3,124.80
Moisture Content ASTM D2216-90/D4643-87	1	$12.33	$12.33
Soil preparation fee for Metals Soil TCLP (one fee per soil sample)	1	$81.20	$81.20
Soil preparation fee for Metals Total Soil (one fee per soil sample)	20	$16.45	$329.00
Lead/TCLP Soil	1	$16.45	$16.45
Metals Total Soil (a combination of all metals) RCRA	20	$96.62	$1,932.40
Soil sampling equipment	21	$10.57	$221.97
Sample shipping per sampling event	4	$51.40	$205.60

Ag. Rec. at 024-025. These costs totaled $8,109.02.

Consulting Fees Form

In the reimbursement application, T-Town sought reimbursement for $13,531.04 in consulting fees, consisting of $12,179.33 in "consulting personnel time costs" and $1,351.71 in "consultant's materials costs." Ag. Rec. at 029. The completed form for consulting personnel time costs included the following information: (1) a "Senior Technician" performed "[s]oil screening, soil sampling, mapping, documentation, sample prep," covering 64 hours at a rate of $66.80 per hour, for a total of $4,275.20; (2) a "Senior Administrative Asst" "[a]rrange[d] for sample shipment," covering one hour at a rate of $46.24 per hour; and (3) an "Environmental Tech" performed "Waste Characterization Sample Collection," covering four hours at a rate of $54.48 per hour for a total of $217.92. *Id*. at 030. The completed form for consultant's materials costs included the following information: (1) use of a Technician's "environmental utility vehicle" in connection with, among other things, "Waste Char sampl[ing]," covering 6.5 days at a rate of $61.64 per day for a total of $400.66; and (2) use of a photoionization detector or "PID" for "Soil Screening for guiding excavation and soil sampl[ing]," covering five days at a rate of $107.92 per day for a total of $539.60. *Id*. at 032.

October 20, 2006 USI Invoice

The reimbursement application included two invoices from USI to T-Town that contained the $8,109.02 in analytical costs, one dated October 20, 2006, and the other dated October 11, 2006. The October 20, 2006 invoice included $60,287.11 in "Field Purchases and Other," $4,930.08 in "Personnel Charges," and $462.40 in "Equipment." Ag. Rec. at 053; *see also id*. at 052. The invoice set forth a work description that included this passage: "utility

vehicle and PID for soil excavation, . . . wall and floor sample collections, . . . 14 each of BTEX, pH, PNA, total metal, soil preparation for total metals analysis, two sample shipping events." *Id*. at 053.

Among the $60,287.11 in "Field Purchases and Other" were $7,787 in costs related to sampling equipment and soil sample shipping, preparation, and analysis. Ag. Rec. at 053-061. Attached to this USI invoice was an Agency form entitled "Stock Items," in which USI provided, among other things, the following information:

Stock Items	Quantity	Price/Item	Total Cost/Item
BETX Soil with MTBE-BETX Soil	20.00	$87.37/EACH	$1,747.40
pH	20.00	$14.39/EACH	$287.80
PNA or PAH Soil	20.00	$156.24/EACH	$3,124.80
Metals Total Soil	20.00	$96.62/EACH	$1,932.40
Soil preparation Metals Total	20.00	$16.45/EACH	$329.00
Soil Sample Collection-VOA SAMPLING/PRESERVATION KIT	20.00	$10.57/EACH	$211.40
Sample Shipping	3.00	$51.40/DAY	$154.20

Id. at 61; *see also id*. at 024-025. The total cost for the above items was $7,787.

Also accompanying the October 20, 2006 USI invoice were three reports from Teklab, Inc. (Teklab), an environmental testing laboratory, to USI, dated October 12, 13, and 18, 2006. Ag. Rec. at 064, 082, 103. The first two Teklab reports each concern 7 samples, while the last Teklab report concerns 6 samples. *Id*. Each Teklab report included, among other things, laboratory analytical results and a chain-of-custody record. *Id*. at 064-121.

Personnel worksheets in support of the $4,930.08 in "Personnel Charges" included entries for a "Senior Technician" conducting "Soil Sample Collection." Ag. Rec. at 056. A worksheet in support of the $462.40 in "Equipment" provided an entry for "ENV. UTILITY VEHICLE-Soil Sample Collection" and an entry for "PHOTOIONIZATION DETECTOR-Soil Sample Collection." *Id*. at 060.

October 11, 2006 USI Invoice

The second invoice from USI to T-Town, also included in the reimbursement application, is dated October 11, 2006. Ag. Rec. at 129. That invoice included $44,662.80 in "Field Purchases and Other," $5,406.04 in "Personnel Charges," and $477.86 in "Equipment Charges." *Id*. The invoice set forth a work description that included this passage: "Waste Characterization collection analysis (BTEX, flashpoint, paint filter, pH, Lead TCLP and shipping)." *Id*.

Among the $44,662.80 in "Field Purchases and Other" were $322.02 in costs related to sampling equipment and soil sample shipping, preparation, and analysis. Ag. Rec. at 129-140. Attached to this USI invoice was an Agency form entitled "Stock Items," in which USI provided, among other things, the following information:

Stock Items	Quantity	Price/Item	Total Cost/Item
BETX Soil with MTBE-BETX Soil	1.00	$87.37/EACH	$87.37
Flash Point or Ignitability	1.00	$33.92/EACH	$33.92
Paint Filter (Free Liquids)	1.00	$14.39/EACH	$14.39
pH-pH	1.00	$14.39/EACH	$14.39
Moisture Content	1.00	$12.33/EACH	$12.33
Lead TCLP Soil	1.00	$16.45/EACH	$16.45
Soil preparation Metals TCLP	1.00	$81.20/EACH	$81.20
Sample Shipping	1.00	$51.40/DAY	$51.40
Soil Sample Collection-VOA SAMPLING/PRESERVATION KIT	1.00	$10.57/EACH	$10.57

Id. at 140; *see also id*. at 025-025. The total cost for the above items was $322.02.

Also accompanying the October 11, 2006 USI invoice was one report from Teklab to USI, dated September 22, 2006. Ag. Rec. at 143. The Teklab report concerns one sample and included, among other things, laboratory analytical results and a chain-of-custody record. *Id*. at 143-148.

Personnel worksheets in support of the $5,406.04 in "Personnel Charges" included entries for a "Senior Technician" conducting "Soil Sample Collection." Ag. Rec. at 134, 136. Worksheets in support of the $477.86 in "Equipment" provided entries for "ENV. UTILITY VEHICLE-Soil Sample Collection" and entries for "PHOTOIONIZATION DETECTOR-Soil Sample Collection." *Id*. at 138-139.

Certifications

For each of the four Teklab reports accompanying the USI invoices, an Agency "Laboratory Certification for Chemical Analysis" form was provided, completed by a USI employee as "sample collector" and a Teklab employee as "laboratory representative." Ag. Rec. at 062-063, 101-102, 120-121, 141-142. The USI sample collector certified each time that (1) "[a]ppropriate sampling equipment/methods were utilized to obtain representative samples"; (2) "[c]hain-of-custody procedures were followed in the field"; (3) "[s]ample integrity was maintained by proper preservation"; (4) "[a]ll samples were properly labeled." *Id*. at 062, 101, 120, 141. The Teklab laboratory representative certified each time that (1) [p]roper chain-of-custody procedures were followed as documented on the chain-of-custody forms"; (2) "[s]ample integrity was maintained by proper preservation"; (3) "[a]ll samples were properly labeled"; (4) "[q]uality assurance/quality control procedures were established and carried out"; (5) "[s]ample holding times were not exceeded"; (6) "SW-846 Analytical Laboratory Procedure (USEPA) methods were used for the analyses"; and (7) "[a]n accredited lab performed quantitative analysis using test methods identified in 35 IAC 186.180 (for samples collected on or after January 1, 2003)." *Id*. at 062-063, 101-102, 120-121, 141-142.

Also a part of the reimbursement application was an "Owner/Operator and Licensed Professional Engineer/Geologist Billing Certification Form," completed by John Buening of T-Town and Joseph M. Kelly of USI. Ag. Rec. at 021. Each certified, among other things, that (1)

"[t]he bills in the attached application for reimbursement are for performing corrective action activities associated with Incident # 982759"; (2) "[t]he bills . . . were incurred in conformance with the Environmental Protection Act and 35 Ill. Adm. Code 731, 732, or 734"; and (3) "the costs for remediating the above-listed incident are correct, are reasonable, and were determined in accordance with Subpart H: Maximum Payment Amounts, Appendix D Sample Handling and Analysis amounts, and Appendix E Personnel Titles . . . of 35 Ill. Adm. Code 732 or 734." *Id*. Additionally, the reimbursement application included a "payment certification form" completed by Buening of T-Town, who certified that "the amount sought for payment was expended in conformance with the approved budget." *Id*. at 020.

Agency Determination

On both February 23 and 27, 2007, an Agency representative sent an e-mail message to a USI representative, each time requesting "backup invoices" for the analytical costs totaling $8,109.02. Ag. Rec. at 010-011; *see also id*. at 006. The latter e-mail message stated: "If I don't have backup invoices for the analysis costs by the close of business today I will have to cut the costs." *Id*. at 010.

On March 2, 2007, the Agency issued its final determination on T-Town's application for reimbursement from the UST Fund. Ag. Rec. at 001-003. Of the requested $171,623.81, the Agency determined that T-Town was entitled to be paid $163,514.32 . *Id*. at 001. All but $0.47 of the denied $8,109.49 consisted of requested analytical costs. *Id*. at 003. The Agency determination letter stated:

> $8,109.02, deduction for costs that lack supporting documentation. Such costs are ineligible for payment from the Fund pursuant to 35 Ill. Adm. Code 732.606(gg). Since there is no supporting documentation of costs, the Illinois EPA cannot determine that costs will not be used for activities in excess of those necessary to meet the minimum requirements of Title XVI of the Act; therefore, such costs are not approved pursuant to Section 57.7(c)(4)(C) of the Act because they may be used for corrective action activities in excess of those required to meet the minimum requirements of Title XVI of the Act.
>
> Analysis costs do not have any backup invoices listing the costs for lab costs. *Id*.; *see also id*. at 006.

The reimbursement package included a request for a total of $284.17 in handling charges, based entirely on (1) "Photography/Cameras" from Wal-Mart; (2) "Over the Road Permit" from A-1 Over the Road Permit Service; and (3) a "Removal Permit" from the Office of the State Fire Marshal (OSFM). Ag. Rec. at 033. The Agency deducted $0.47 from the requested handling charges because that amount "exceeded the sliding scale." *Id*. at 003.

Accordingly, the entirety of the denied costs consists of requested "analytical costs" and "handling charges" and T-Town appeals only the denial of the former. All requested "consulting fees" were awarded reimbursement. Ag. Rec. at 001-003.

RELEVANT PROVISIONS OF THE ACT AND PART 732 RULES

Title XVI of the Act

Title XVI of the Act is called the "Leaking Underground Storage Tank Program" (415 ILCS 5/57-57.17 (2006)). Section 57.7(c) of Title XVI concerns corrective action plans and budgets and provides:

> (1) Agency approval of any plan and associated budget . . . shall be considered final approval for purposes of seeking and obtaining payment from the Underground Storage Tank Fund if the costs associated with the completion of any such plan are less than or equal to the amounts approved in such budget.
>
> ***
>
> (3) In approving any plan submitted pursuant to subsection (a) or (b) of this Section [includes a corrective action plan and budget], 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 minimum requirements of this Title. 415 ILCS 5/57.7(c)(1), (3) (2006).

Section 57.8(a) of the Act addresses applications for reimbursement from the UST Fund and reads:

> (a) Payment after completion of corrective action measures. The owner or operator may submit an application for payment for activities performed at a site after completion of the requirements of Sections 57.6 [early action] and 57.7 [site investigation and corrective action], or after completion of any other required activities at the underground storage tank site.
>
> (1) In the case of any approved plan and budget for which payment is being sought, the Agency shall make a payment determination within 120 days of receipt of the application. Such determination shall be considered a final decision. The Agency's review shall be limited to generally accepted auditing and accounting practices. In no case shall the Agency conduct additional review of any plan which was completed within the budget, beyond auditing for adherence to the corrective action measures in the proposal. *** 415 ILCS 5/57.8(a)(1) (2006).

Part 732 UST Rules

Generally, Part 732 of the Board's regulations applies to owners and operators of petroleum USTs for which a release was reported to IEMA on or after September 23, 1994, but

before June 24, 2002, in accordance with OSFM regulations. *See* 35 Ill. Adm. Code 732.100(a). This case requires analysis of three subparts of Part 732: (1) Subpart H "Maximum Payment Amounts"; (2) Subpart F "Payment from the Fund"; and (3) Subpart E "Review of Plans, Budget Plans, and Reports."

Subpart H "Maximum Payment Amounts"

Much of the dispute on appeal centers on Part 732's Subpart H, which is entitled "Maximum Payment Amounts," and the Board rulemaking through which the subpart was adopted. Subpart H became effective just over two years ago, on March 1, 2006, and was adopted through a Board rulemaking proceeding captioned Proposed Amendments to Regulation of Petroleum Leaking Underground Storage Tanks (35 Ill. Adm. Code 732), R04-22(A) (R04-22(A)).[4]

Subpart H provides "three methods for determining the maximum amounts that can be paid from the Fund for eligible corrective action costs." 35 Ill. Adm. Code 732.800(a). Two methods were not used in this case: "bidding" under Section 732.855 and "unusual or extraordinary circumstances" under Section 732.860. 35 Ill. Adm. Code 732.800(a)(2), (3).[5]

The other method of determining maximum reimbursable amounts, which is at issue here, is to "use the maximum amounts for each task" set forth in Sections 732.810 through 732.850, and 732.870. 35 Ill. Adm. Code 732.800(a)(1).[6] "All costs associated with conducting corrective action are grouped into the tasks set forth in Sections 732.810 through 732.850." 35 Ill. Adm. Code 732.800(a). The referenced Sections 732.810 through 732.850 address the following:

Section 732.810	UST Removal or Abandonment Costs
Section 732.815	Free Product or Groundwater Removal and Disposal
Section 732.820	Drilling, Well Installation, and Well Abandonment
Section 732.825	Soil Removal and Disposal
Section 732.830	Drum Disposal
Section 732.835	Sample Handling and Analysis
Section 732.840	Concrete, Asphalt, and Paving; Destruction or Dismantling and Reassembly of Above Grade Structures
Section 732.845	Professional Consulting Services
Section 732.850	Payment on Time and Materials Basis

[4] R04-22(A) was consolidated with Regulation of Petroleum Leaking Underground Storage Tanks (Proposed New 35 Ill. Adm. Code 734), R04-23(A).

[5] *See* 35 Ill. Adm. Code 732.855, 732.860.

[6] *See* 35 Ill. Adm. Code 732.810, 732.815, 732.820, 732.825, 732.830, 732.835, 732.840, 732.845, 732.850, 732.870.

Among Sections 732.810 through 732.850, "[i]n some cases the maximum amounts are specific dollar amounts, and in other cases the maximum amounts are determined on a site-specific basis." 35 Ill. Adm. Code 732.800(a)(1). In addition:

> The costs listed under each task set forth in Sections 732.810 through 732.850 of this Part identify only some of the costs associated with each task. They are not intended as an exclusive list of all costs associated with each task for the purposes of payment from the Fund. 35 Ill. Adm. Code 732.800(b).

Section 732.835 on sample handling and analysis states:

> Payment for costs associated with sample handling and analysis must not exceed the amounts set forth in Section Appendix D of this Part. Such costs must include, but are not limited to, those associated with the transportation, delivery, preparation, and analysis of samples, and the reporting of sample results. *** 35 Ill. Adm. Code 732.835.

The Appendix D referenced in Section 732.835 provides in relevant part:

Section 732.APPENDIX D Sample Handling and Analysis

	Max. Total Amount per Sample
Chemical	
BETX Soil with MTBE	$85
Flash Point or Ignitability Analysis EPA 1010	$33
Paint Filter (Free Liquids)	$14
PH	$14
Polynuclear Aromatics PNA, or PAH SOIL	$152
Geo-Technical	
Moisture Content ASTM D2216-90 / D4643-87	$12
Metals	
Lead TCLP Soil	$16
Metals Total Soil (a combination of all RCRA metals)	$94
Soil preparation for Metals TCLP Soil (one fee per sample)	$79
Soil preparation for Metals Total Soil (one fee per sample)	$16

Other	
En Core® Sampler, purge-and-trap sampler, or equivalent sampling device	$10
Sample Shipping (*maximum total amount for shipping all samples collected in a calendar day)	$50*

35 Ill. Adm. Code 732.Appendix D (omissions not indicated).

The maximum payment amounts of Subpart H must be "adjusted annually by an inflation factor determined by the annual Implicit Price Deflator for Gross National Product as published by the U.S. Department of Commerce in its Survey of Current Business." 35 Ill. Adm. Code 732.870. Among other things, Section 732.870 requires the Agency to post the inflation factors on its website. *Id*.

Sections 732.845 and 732.850 of Subpart H address, respectively, "Professional Consulting Services" and "Payment on Time and Materials Basis." Section 732.845 reads as follows:

> Payment for costs associated with professional consulting will be reimbursed on a time and materials basis pursuant to Section 732.850. Such costs must include, but are not limited to, those associated with project planning and oversight; field work; field oversight; travel; per diem; mileage; transportation; vehicle charges; lodging; meals; and the preparation, review, certification, and submission of all plans, budget plans, reports, applications for payment, and other documentation. 35 Ill. Adm. Code 732.845.

Section 732.850 in turn provides:

> This Section sets forth the maximum amounts that may be paid when payment is allowed on a time and materials basis.
>
> a) Payment for costs associated with activities that have a maximum payment amount set forth in other Sections of this Subpart H (e.g, sample handling and analysis, drilling, well installation and abandonment, or drum disposal[)] must not exceed the amounts set forth in those Sections . . . .
>
> b) Maximum payment amounts for costs associated with activities that do not have a maximum payment amount set forth in other Sections of this Subpart H must be determined by the Agency on a site-specific basis, provided, however, that personnel costs must not exceed the amounts set forth in Section Appendix E of this Part. *** 35 Ill. Adm. Code 732.850 (Board Note omitted).

Section 732.800(c) addresses the applicability of Subpart H:

This Subpart H sets forth only the methods that can be used to determine the maximum amounts that can be paid from the Fund for eligible corrective action costs. Whether a particular cost is eligible for payment must be determined in accordance with Subpart F of this Part. 35 Ill. Adm. Code 732.800(c).

Subpart F "Payment from the Fund"

As referenced in the Section 732.800(c), quoted immediately above, Subpart F of Part 732 concerns "payment from the Fund." Section 732.601(b) provides:

b) A complete application for payment shall consist of the following elements:

1) A certification from a Licensed Professional Engineer or a Licensed Professional Geologist acknowledged by the owner or operator that the work performed has been in accordance with a technical plan approved by the Agency or, for early action activities, in accordance with Subpart B of this Part;

2) A statement of the amounts approved in the corresponding budget plan and the amounts actually sought for payment along with a certified statement by the owner or operator that the amounts so sought have been expended in conformance with the elements of a budget plan approved by the Agency;

3) A copy of the OSFM or Agency eligibility and deductibility determination;

4) Proof that approval of the payment requested will not exceed the limitations set forth in the Act and Section 732.604 of this Part [per occurrence limits and owner/operator aggregate calendar year limits];

5) A federal taxpayer identification number and legal status disclosure certification;

6) A private insurance coverage form;

7) A minority/women's business form;

8) Designation of the address to which payment and notice of final action on the application for payment are to be sent;

9) An accounting of all costs, including but not limited to, invoices, receipts, and supporting documentation showing the dates and descriptions of the work performed; and

10) Proof of payment of subcontractor costs for which handling charges are requested. Proof of payment may include cancelled checks, lien waivers, or affidavits from the subcontractor. 35 Ill. Adm. Code 732.601(b).

Section 732.602, entitled "Review of Applications for Payment," reads:

a) At a minimum, the Agency must review each application for payment submitted pursuant to this Part to determine the following:

1) whether the application contains all of the elements and supporting documentation required by Section 732.601(b) of this Part [quoted immediately above];

***

4) Whether the amounts sought are eligible for payment.

b) When conducting a review of any application for payment, the Agency may require the owner or operator to submit a full accounting[7] supporting all claims as provided in subsection (c) of this Section.

c) The Agency's review may include review of any or all elements and supporting documentation relied upon by the owner or operator in developing the application for payment, including but not limited to a review of invoices or receipts supporting all claims. The review also may include the review of any plans, budget plans, or reports previously submitted for the site to ensure that the application for payment is consistent with work proposed and actually performed in conjunction with the site.

d) Following a review, the Agency shall have the authority to approve, deny or require modification of applications for payment or portions thereof. The Agency shall notify the owner or operator in writing of its final action on any such application for payment. *** If the Agency denies payment for an application for payment or for a portion thereof or requires modification, the written notification shall contain the following information, as applicable:

1) An explanation of the specific type of information, if any, that the Agency needs to complete the review;

[7] "Full Accounting" means "a compilation of documentation to establish, substantiate and justify the nature and extent of the corrective action costs incurred by an owner or operator." 35 Ill. Adm. Code 732.103.

2) An explanation of the Sections of the Act or regulations that may be violated if the application for payment is approved; and

3) A statement of specific reasons why the cited Sections of the Act or regulations may be violated if the application for payment is approved.

***

35 Ill. Adm. Code 732.602.

Section 732.606 provides a non-exhaustive list of costs that are ineligible for UST Fund reimbursement. It provides:

Costs ineligible for payment from the Fund include but are not limited to:

***

gg) Costs that lack supporting documentation;

***

35 Ill. Adm. Code 732.606.

"Handling Charges" are defined as follows:

administrative, insurance, and interest costs and a reasonable profit for procurement, oversight, and payment of subcontracts and field purchases. 35 Il. Adm. Code 732.103.

Section 732.607 on handling charges provides:

Handling charges are eligible for payment only if they are equal to or less than the amount determined by the following table:

Subcontract or Field Purchase Cost:	Eligible Handling Charges as a Percentage of Cost:
$0 - $5,000	12%
$5,001 - $15,000	$600 + 10% of amt. over $5,000
$15,001 - $50,000	$1,600 + 8% of amt. over $15,000
$50,001 - $100,000	$4,400 + 5% of amt. over $50,000
$100,001 - $1,000,000	$6,900 + 2% of amt. over $100,000

35 Ill. Adm. Code 732.607.

Section 732.865 of Subpart H in turn provides that "[p]ayment of handling charges must not exceed the amounts set forth in Section 732.607 of this Part."

Subpart E "Review of Plans, Budget Plans, and Reports"

Section 732.505 provides the standards for Agency review of plans and budgets:

a) A full technical review shall consist of a detailed review of the steps proposed or completed to accomplish the goals of the plan and to achieve compliance with the Act and regulations. Items to be reviewed, if applicable, shall include, but not be limited to, number and placement of wells and borings, number and types of samples and analysis, results of sample analysis, and protocols to be followed in making determinations. 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.

***

c) A full financial review shall consist of a detailed review of the costs associated with each element necessary to accomplish the goals of the plan as required pursuant to the Act and regulations. Items to be reviewed shall include, but not be limited to, costs associated with any materials, activities or services that are included in the budget plan. 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(a), (c).

UST FUND APPEALS AND MOTIONS FOR SUMMARY JUDGEMENT

Under Title XVI of the Act, the UST owner or operator may appeal to the Board an Agency determination denying UST Fund reimbursement. Appeals to the Board are governed by Section 40 of the Act (415 ILCS 5/40 (2006)), which addresses Board review of Agency permit determinations. *See* 415 ILCS 5/40(a)(1), 57.8(i) (2006); *see also* 35 Ill. Adm. Code 105.Subpart D, 732.602(g).

Consistent with Section 40 of the Act, the Board must decide whether the reimbursement application, as submitted to the Agency, demonstrates compliance with the Act and the Board's regulations. *See, e.g.*, Kathe's Auto Service Center v. IEPA, PCB 96-102, slip op. at 13 (Aug. 1, 1996). Accordingly, the Board's review is limited to the record before the Agency at the time of its determination. *See, e.g.*, Karlock v. IEPA, PCB 05-127, slip op. at 7 (July 21, 2005); *see also* 35 Ill. Adm. Code 105.412. Further, on appeal before the Board, the Agency's denial letter frames the issue (*see, e.g.*, Kathe's Auto Service, PCB 96-102, slip op. at 13) and the UST owner or operator has the burden of proof (*see, e.g.*, Ted Harrison Oil v. IEPA, PCB 99-127, slip op. at 5-6 (July 24, 2003); *see also* 35 Ill. Adm. Code 105.112).

Summary judgment is appropriate when the pleadings, depositions, admissions, affidavits, and other items in the record, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *See* Dowd & Dowd, Ltd. v. Gleason, 181 Ill. 2d 460, 483, 693 N.E.2d 358, 370 (1998); *see also* 35 Ill. Adm. Code 101.516(b). When ruling on a motion for summary judgment, the Board "must consider the pleadings, depositions, and affidavits strictly against the movant and in favor of the opposing party." Dowd & Dowd, 181 Ill. 2d at 483, 693 N.E.2d at 370.

Summary judgment "is a drastic means of disposing of litigation," and therefore the Board should grant it only when the movant's right to the relief "is clear and free from doubt." Dowd & Dowd, 181 Ill. 2d at 483, 693 N.E.2d at 370, citing Putrill v. Hess, 111 Ill. 2d 229, 240, 489 N.E.2d 867, 871 (1986). "Even so, while the nonmoving party in a summary judgment motion is not required to prove [its] case, [it] must nonetheless present a factual basis, which would arguably entitle [it] to a judgment." Gauthier v. Westfall, 266 Ill. App. 3d 213, 219, 639 N.E.2d 994, 999 (2d Dist. 1994).

DISCUSSION

The Board will summarize the parties' arguments by subject, after which the Board will provide its analysis and rulings.

Parties' Arguments

Whether T-Town's Reimbursement Application Provided Adequate Documentation

T-Town's Motion. T-Town argues that it was improper for the Agency "to disregard the applicant's evidence." TT Mot. at 1. First, T-Town observes that amounts charged by USI and sought in reimbursement "were exactly what Subpart H provided for the tasks at issue, adjusted for inflation" as provided by Board rule. *Id*. at 17, citing 35 Ill. Adm. Code 732.870. Citing Agency testimony and comment from R04-22(A), T-Town asserts that "[t]here can be no dispute that these amounts are, as a matter of law, reasonable." *Id*. at 17-18. Moreover, continues T-Town, the Board at second notice in R04-22(A) expressly found, except as rejected for professional services, "the maximum payment rates to be 'reasonable' and not in 'excess' of activities necessary to meet the 'minimum' requirements of the Act." *Id*. at 18, quoting R04-22(A), slip op. at 62-63 (Dec. 1, 2005) (second notice) (Board quoting 415 ILCS 5/57.7(c)(3) (2006)).

According to T-Town, because Teklab's work is only a part of the services covered by the Subpart H "lump sum," the Agency's demand for documentation of Teklab's charges is improper. TT Mot. at 18. T-Town adds that "the historical function of subcontractor invoices was as evidence for a consultant's handling charge, not at issue here." *Id*. The Agency represented in R04-22(A), T-Town maintains, that with the new streamlining process, many documents would no longer have to be submitted to the Agency, "specifically citing subcontractor invoices." *Id*. at 18. Further, T-Town states that according to Agency comment in R04-22(A), a reimbursement application could now properly include "merely 'an invoice'" with a minimum amount of information, documenting the task performed, the date it was performed,

and the amount charged. *Id*. at 18-19. T-Town asserts that it "provided *at least* that information here." *Id*. at 19 (emphasis in original).

The Agency's Response and Motion. The issue in this appeal, according to the Agency, is whether it "can authorize payments for costs that lack supporting documentation." Ag. Resp./Mot. at 2. The Agency states that T-Town sought reimbursement of $8,109.02 "for analyses performed by Teklab," yet the application lacked an invoice "indicating what Teklab had charged to perform these analyses or documenting that these costs had been billed to T-Town or USI." *Id*. T-Town's treatment of the requested analysis costs as "stock items," according to the Agency, did not provide the Agency with sufficient information and documentation to authorize reimbursement. *Id*. at 4.

The Agency quotes from the Board's decision in Rezmar Corp. v. IEPA, PCB 02-91, slip op. at 9 (Apr. 17, 2003):

> Based on Board precedent, the burden is on the applicant to demonstrate that incurred costs 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 92-104 (Mar. 11, 1993) at 4. When requesting reimbursement from the fund, the owner or operator must provide an accounting of all costs. Ag. Resp./Mot. at 2.

The need for supporting documentation, continues the Agency, is a "cornerstone for reimbursement in any institutional accounting situation," not just for UST Fund reimbursement. Ag. Resp./Mot. at 2 (receipts for such "relatively inexpensive and mundane costs as taxicab fares and parking garage fees are routinely required to process these expenses for reimbursement"). Here, the two USI invoices to T-Town, the Agency argues, do not constitute "an invoice by the subcontractor that performed the analyses documenting what was charged and that these charges were billed." *Id*. The Agency concludes:

> The Act and regulations clearly prescribe that only actual costs be reimbursed and that generally accepted accounting practices be utilized in the review of applications for payment. *Id*. at 4.

T-Town's Response. T-Town responds first that USI charged T-Town $8,109.02 "for a bundle of services, of which the analyses performed by Tek-Lab were only a part, and the remainder of which were performed by USI." TT Resp. at 1. T-Town further notes that there were two USI invoices in the application documenting the charges billed by USI to T-Town. *Id*. at 1-2.

T-Town also argues that Board decisions issued before the regulatory adoption of the "bundle-of-services, lump-sum approach" are inapposite, as case decisions "cannot be divorced from the regulations being applied." TT Resp. at 4. Similarly, continues T-Town:

> the invocation of "generally accepted accounting practices" [citation omitted] cannot be relied upon to require documentation of matters which the regulations,

> as a matter of law, have made irrelevant. If IRS regulations and an employer policy permit reimbursement for use of one's car at the rate of 30 cents a mile, "generally accepted accounting practices" do not call for the accountant to demand that the employee produce evidence he has been making timely payments on the car, changing the oil, and paying a garage for tune-ups. *Id*.

T-Town asserts that in R04-22(A), the Board found the Subpart H amounts reasonable and the Agency "repeatedly stated that if a budget had been approved for such amounts, they would be paid upon submission of a simple invoice for same." TT Mot. at 4-5. T-Town maintains that the Agency "is estopped to repeal in this underhanded fashion the regulations which it insisted upon so vigorously and so long in 2004-06" (*id*. at 5), adding by way of footnote that:

> The plethora of cases where the Agency has raised this issue (with an aggregate value of $145,000 and rising) demonstrates that in fact the Agency's error here is not an isolated occurrence and that a repeal of the rule is in fact being applied (*id*. at 5 n.2).

Whether the Agency's Reimbursement Denial "Reversed" its Budget Approval

T-Town's Motion. Town argues that the Agency is not "empowered," when reviewing a reimbursement application, to "[r]everse" the earlier determination it made when it approved the budget. TT Mot. at 1, 7. T-Town states that under Section 57.7(c)(3) of the Act (415 ILCS 5/57.7(c)(3) (2006)), the Agency's budget approval means that "as a matter of law," the proposed costs were reasonable, would be incurred in performing corrective action, and would not be used for corrective action activities in excess of those required to meet the minimum requirements of the Act. *Id*. at 8. After approving the budget, continues T-Town, the Agency, by the terms of Section 57.8(a)(1) of the Act (415 ILCS 5/57.8(a)(1) (2006)), cannot conduct additional review of a plan performed within the budgeted amount, beyond auditing for adherence to the proposed corrective action measures. *Id*.

T-Town argues that the denial letter's statement that the Agency cannot determine whether the claimed costs "will not be used" for activities in excess of minimum requirements is not only contrary to the earlier budget approval, it is "specious." TT Mot. at 9. T-Town stresses that "[t]his was a *reimbursement* application; the claimed costs 'will not' be used for *any* activities - *the activities have been completed*." *Id*. (emphasis in original).

Additionally, T-Town notes that the amount billed by USI to T-Town and sought by T-Town for reimbursement was "*less* than what the Agency had previously found to be 'reasonable' and to 'be incurred in the performance of . . . corrective action activities [not] in excess of those required to meet the minimum requirements' of the Act." TT Mot. at 11 (emphasis in original). Quoting various portions of the R04-22(A) record, T-Town further claims that the Agency's attempt to "reconsider" its budget approval here is "unreasonable and contrary to the representations which the Agency made in obtaining approval of the Subpart H regulations." *Id*.; *see also id*. at 9-11.

The Agency's Response and Motion. According to the Agency, many of T-Town's references on this issue, including Section 57.8(a)(1) of the Act and testimony from R04-22(A), actually indicate that "supporting documentation and generally accepted accounting practices are still essential to the reimbursement process." Ag. Resp./Mot at 2-3. The Agency, of course, also does not accept T-Town's characterization of the salient question as whether the Agency has the power "disregard its previous decision" (TT Mot. at 1). Rather, as stated above, the Agency asks whether it "can authorize payments for costs that lack supporting documentation." Ag. Resp./Mot at 2.

Whether the Agency Attempted to Limit Reimbursement to the Laboratory's Charges

T-Town's Motion. T-Town represents that:

> In consultations with USI, the Agency insisted that Petitioner submit invoices from Teklab for the portion of the services performed by it and that reimbursement be limited to those invoices. TT Mot. at 4.

According to T-Town, because Teklab's services are only part of the services making up the Subpart H lump sum, the Agency's attempt to limit reimbursement to those amounts is improper. *Id*. at 18.

T-Town notes that the Agency in R04-22(A) made it clear that, because of the impossibility of enumerating, in the rule, every cost that may be associated with a task, Subpart H identifies only the major costs associated with each particular task, but the maximum payment amount nevertheless includes all costs associated with completing the task. TT Mot. at 12, 14. When industry participants objected in R04-22(A), according to T-Town, "because it was not clear what all was to be included in the proposed lump sum," the Agency "repeatedly replied that everything related to a task was included." *Id*. at 13.

T-Town states that these "principles" were specifically applied in R04-22(A) to sample handling and analysis costs. For example, when asked if Appendix D's "per sample rates listed may be divided up between the entity doing the transportation, deliver, analysis, etc.," T-Town notes, the Agency responded:

> Sections 734.835 and 734.Appendix D merely set forth the maximum payment amounts owners and operators may be reimbursed for costs associated with sample handling and analysis. Please note that an individual maximum payment amount for shipping is included at the bottom of Section 734.Appendix D. *The Board's proposed rules do not address, and the Illinois EPA did not envision the rules addressing, how the amounts reimbursed to an owner or operator are divided among the parties performing the work.* TT Mot. at 14 (emphasis added by T-Town).[8]

[8] Generally, Part 734 (35 Ill. Adm. Code 734) applies to later-reported UST releases than those covered by Part 732. Part 734 contains Subpart H and Appendix D "maximum payment amount" provisions that correspond to and are substantively identical to those of Part 732. Part

According to T-Town, the Agency in R04-22(A) "made clear that consultants are entitled to the Subpart H amounts even if parts of the services in a task area are acquired, or could be acquired, at a lower price." TT-Mot. at 16-17. In support of this statement, T-Town quotes, from the August 9, 2004 hearing transcript of R04-22(A), a question posed by Board Member Thomas E. Johnson and the response of Douglas W. Clay, Manager of the Leaking UST Section of the Agency's Bureau of Land:

> Q. [Member Johnson] . . . [Y]our proposed language is the maximum payment amount for the work bid shall be the amount of the lowest bid, unless the lowest bid is less than the maximum payment amount set forth in Subpart H, in which case the maximum payment amount set forth in Subpart H shall be allowed. . . . [I]t's implying that regardless of what the bids are [--] you get three of them, they're all under the amount that you've defined as the maximum number . . . [-- w]e're going to get the maximum payment allowed. Am I reading that right?
>
> A. (By Mr. Clay) *Yes. Id*. at 17 (emphasis added by T-Town).

T-Town argues that the Agency "repeatedly made clear" in R04-22(A) that the sum allowed by the regulation for sample handling and analysis tasks "covers not just the laboratory analysis of the soil, but everything related thereto." TT Mot. at 19. Here, T-Town concludes, Teklab "merely analyzed the samples and reported the results to USI. Everything else was done and provided by USI." *Id*.

The Agency's Response and Motion. The Agency counters that "the fact that the Illinois EPA would still need subcontractor invoices in this new system was clearly stated by Doug Clay in his [R04-22(A)] testimony":

> Q. So that's true of all the lump sum and unit rates from your perspective, that you don't go behind those once an invoice is submitted, saying that I've done that work?
>
> A. For subcontractors, you know, we have to have backup invoices for the subs.
>
> For example, if we've got a drilling subcontractor, you know, we'd want to have $19 a foot, which is how many feet that were drilled, the dates. But that's what we would expect from the subcontractor. It would be from the consultant. We have to have that invoice from the sub. But, yeah, for the lump sum and the unit rate, that's what we would expect. Ag. Resp./Mot. at 3.

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734 was proposed by the Agency as a new part of the Board's UST rules in Regulation of Petroleum Leaking Underground Storage Tanks (Proposed New 35 Ill. Adm. Code 734), R04-23(A) (Feb. 16, 2006), which was consolidated with R04-22(A).

T-Town Response. T-Town responds that the Agency **"**misrepresents the [R04-22(A)] rulemaking record when it contends Mr. Clay warned that the Agency would still need subcontractor invoices." TT Resp. at 2. According to T-Town, the Board "limited its approval of required subcontractor data to situations where the contractor was seeking a handling charge on the subcontractor charges." *Id*. Moreover, continues T-Town:

> the quotation from Mr. Clay is ambiguous at best, unintelligible at worst, and the example he cited ($19 per foot for drilling done by a subcontractor) is one where all the services in the Subpart H price are performed by the subcontractor (*see* 35 ILL. ADM. CODE § 732.820(a)). In such a case, the contractor is entitled to handling charges, not to compensation for its own additional services which are a part of the bundled price. *Id*.

T-Town reiterates that "[p]roof of a subcontractor's charges is relevant only in situations where the contractor is seeking a handling charge on those charges - which is not the situation here." *Id*.

The Board's Analysis and Rulings

The issue on appeal is framed by the Agency's denial letter. *See* Kathe's Auto Service, PCB 96-102, slip op. at 13. The denial letter to T-Town stated:

> $8,109.02, deduction for costs that lack supporting documentation. Such costs are ineligible for payment from the Fund pursuant to 35 Ill. Adm. Code 732.606(gg). Since there is no supporting documentation of costs, the Illinois EPA cannot determine that costs will not be used for activities in excess of those necessary to meet the minimum requirements of Title XVI of the Act; therefore, such costs are not approved pursuant to Section 57.7(c)(4)(C) of the Act because they may be used for corrective action activities in excess of those required to meet the minimum requirements of Title XVI of the Act.
>
> Analysis costs do not have any backup invoices listing the costs for lab costs. G. Rec. at 003; *see also id.* at 006.

The Board agrees with the parties that there are no genuine issues of material fact in this case and that one of the movants is entitled to judgment as a matter of law. *See* Dowd & Dowd, 181 Ill. 2d at 483, 693 N.E.2d at 370. The dispute on appeal chiefly concerns the permissible breadth of the Agency's review of T-Town's reimbursement application. The parties disagree over whether laboratory invoices were required to substantiate T-Town's reimbursement claim of $8,109.02 for "sample handling and analysis" costs. It is undisputed that the $8,109.02 figure is both within the approved budget amount and equal to the Subpart H maximum payment amounts.

The Agency's final determination cited Section 57.7(c)(4)(C) "in effect prior to June 24, 2002." Ag. Rec. at 003. Current Section 57.7(c)(3) became effective on June 24, 2002, and as TT Town acknowledges (TT Mot. at 5), is substantively no different from the former Section

57.7(c)(4)(C) cited by the Agency. *See* P.A. 95-0331, eff. Aug. 21, 2007 (First 2007 General Revisory Act). Section 57.7(c)(3) provides:

> In approving any plan submitted pursuant to subsection (a) or (b) of this Section [includes a corrective action plan and budget], 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) (2006) (emphasis added).

Section 57.7(c)(1) of the Act states:

> Agency approval of any plan and associated budget . . . *shall be considered final* approval for purposes of seeking and obtaining payment from the Underground Storage Tank Fund *if* the costs associated with the completion of any such plan are less than or equal to the amounts approved in such budget. 415 ILCS 5/57.7(c)(1) (2006) (emphasis added).

Section 57.8(a) of the Act addresses the Agency's review of reimbursement applications after the completion of corrective action measures. Section 57.8(a)(1) reads:

> In the case of any approved plan and budget for which payment is being sought, the Agency shall make a payment determination within 120 days of receipt of the application. *The Agency's review shall be limited to generally accepted auditing and accounting practices. In no case shall the Agency conduct additional review of any plan which was completed within the budget, beyond auditing for adherence to the corrective action measures in the proposal*. 415 ILCS 5/57.8(a)(1) (2006) (emphasis added).

Three types of sample handling and analysis costs make up the entirety of the disputed $8,109.02: (1) sample collection device costs (totaling $221.97); (2) sample shipping costs (totaling $205.60); and (3) analytical-specific per sample costs (totaling $7,681.45). The Board agrees with T-Town that the Subpart H maximum payment amounts, including those for sample handling and analysis, as adjusted by rule for inflation, are considered reasonable. *See* R04-22(A), slip op. at 62-63 (Dec. 1, 2005) (second notice). Further, how those amounts, once reimbursed, might be allocated between contractor and subcontractor is irrelevant under the regulations.

Whether the costs requested have been properly accounted for, however, so as to warrant reimbursement, is addressed not in Subpart H ("Maximum Payment Amounts"), but rather in Subpart F ("Payment from the Fund"). Section 732.800(c) makes this clear:

> This Subpart H sets forth only the methods that can be used to determine the maximum amounts that can be paid from the Fund for eligible corrective action costs. *Whether a particular cost is eligible for payment must be determined in*

> *accordance with Subpart F of this Part.* 35 Ill. Adm. Code 732.800(c) (emphasis added).

The referenced Subpart F of Part 732, as its title indicates, addresses payment from the UST Fund. Under Section 732.601(b)(9) of Subpart F, a "complete application for payment" must include:

> An *accounting of all costs, including but not limited to, invoices*, receipts, and supporting documentation showing the dates and descriptions of the work performed. 35 Ill. Adm. Code 732.601(b)(9) (emphasis added).

Accordingly, contrary to T-Town's claim, adoption of the Subpart H maximum payment amounts did not render "irrelevant" the obligation of the UST owner or operator to provide an accounting of all costs when seeking reimbursement. In fact, Section 732.601(b)(9) was adopted by the Board in R04-22(A), the very rulemaking which created Subpart H. *See* R04-22(A), slip op. at 21 (Feb. 17, 2005) (first notice) (Douglas E. Oakley, Manager of the Leaking UST Claims Unit of the Agency's Bureau of Land, testified that "Section 732.601(b)(9) was amended to require submission of legible invoices, receipts and supporting documentation" and that "this information has always been requested by the Agency as a part of an application for payment"); *see also, e.g.*, Platolene 500, Inc. v. IEPA, PCB 92-9, slip op. at 8 (May 7, 1992) ("When requesting reimbursement from the fund, the owner or operator must provide an accounting of all costs . . . ."); Rezmar, PCB 02-91, slip op. at 9 (same).

Subpart F further states that the Agency *must* review each application for payment to determine "whether the application contains all of the elements and supporting documentation required by Section 732.601(b)" and "[w]hether the amounts sought are eligible for payment." 35 Ill. Adm. Code 732.602(a)(1), (4). In addition, when reviewing a reimbursement application, the Agency "may require the owner or operator to submit a full accounting supporting all claims as provided in subsection (c) of this Section." 35 Ill. Adm. Code 732.602(b). A "full accounting" is defined as "a compilation of documentation to establish, substantiate and justify the nature and extent of the corrective action costs incurred by an owner or operator." 35 Ill. Adm. Code 732.103. The subsection (c) referred to in Section 732.602(b) provides:

> The Agency's review may include review of *any or all elements and supporting documentation relied upon by the owner or operator in developing the application for payment, including but not limited to a review of invoices or receipts supporting all claims*. The review *also may include* the review of any plans, budget plans, or reports previously submitted for the site to ensure that the application for payment is consistent with work proposed and actually performed in conjunction with the site. 35 Ill. Adm. Code 732.602(c) (emphasis added); *see also* R04-22(A), Jan. 13, 2004 Agency Proposal, Statement of Reasons at 22 ("Sections 732.602(a) through (d) (re-lettered to 732.602(a) through (c)) are revised . . . to reflect that the Agency performs 'full' reviews of all applications for payment . . . .").

T-Town's contractor, USI, did not seek handling charges for working with the laboratory, Teklab. "Consulting Fees" were a separate line item from "Analytical Costs" in the approved budget. Within the reimbursement application, and distinct from the requested analytical costs, T-Town sought reimbursement for the consulting fees associated with sample collecting and shipping. T-Town was awarded reimbursement of these consulting fees.

It is uncontested that T-Town's claimed cost of $8,109.02 for the completed analytical work was well within the budgeted amount, and that the sought-after rates did not exceed those of Subpart H, Appendix D, as adjusted for inflation. Moreover, the Agency denial letter did not state that the sampling or analytical testing was improper. Nor is there is any question, based on this record, that samples were collected, delivered, and tested. In fact, the reimbursement application included Teklab's reports of analytical results.

The Agency determined, instead, that even with the two USI invoices, there was a lack of documentation supporting these requested costs. The Agency had twice asked for the Teklab invoices, but none were provided. The denial letter cited Section 732.606(gg), stating that T-Town's failure to supply "backup invoices" from the laboratory (Ag. Rec. at 003) constituted a "lack [of] supporting documentation" (35 Ill. Adm. Code 732.606(gg)). T-Town counters that USI provided part of the "bundle of services" resulting in the $8,109.02 in sample handling and analysis costs (TT Resp. at 1); that Teklab provided only a portion of those services, and USI did "[e]verything else" (TT Mot. at 19).

There is no explanation, however, of what "[e]verything else" is. The consulting fees associated with sample collecting and shipping, as discussed above, were not part of the claimed $8,109.02, and were reimbursed. The costs for sampling devices ($221.97) and sample shipping ($205.60), which were part of the $8,109.02 and for which there are separate Subpart H rates, apparently did result from the activities of USI as contractor. Even if that is the case, without Teklab's invoices, the Agency could not verify whether the laboratory's charges accounted for the entire $7,681.45 balance of the $8,109.02. T-Town's reimbursement application does not describe any other work that USI added to the "bundle of services" to result in the $8,109.02 total. Additionally, T-Town's pleadings before the Board do not, and could not, provide any such information. It is well-settled that the Board's review is limited to the record that was before the Agency at the time of its determination denying reimbursement. *See*, *e.g.*, Karlock, PCB 05-127, slip op. at 5-6.

The "*overall goal*" of reviewing a proposed budget:

> *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) (emphasis added).

The Board agrees with T-Town that the Agency, having approved a corrective action plan and budget, cannot later reconsider the merits of the approved tasks and costs just because the

reimbursement application is submitted. *See* 415 ILCS 5/57.7(c)(1), 57.8(a)(1) (2006); *see also* Reichhold Chemicals, Inc. v. PCB, 204 Ill. App. 3d 674, 678-80, 561 N.E.2d 1343, 1345-46 (3rd Dist. 1990) (the Agency "lacks authority to modify or reconsider its decisions").

When an application requests reimbursement for costs that are at or under the amounts of Subpart H and the approved budget, *and* provides documentation demonstrating that the costs were actually incurred for approved work, the Agency cannot "second-guess" whether the requested reimbursement is reasonable. In fact, much of the "streamlining" anticipated in R04-22(A) was expected to occur precisely because the Agency would not be determining "reasonableness" on a case-by-case basis:

> the Board believes that the mere adoption of these [Subpart H] rates will expedite the review process for remediation at UST sites in Illinois. As one of the concerns from the participants is that the review of applications takes too much time, this should alleviate some of the time necessary to review the reasonableness of the reimbursement request. R04-22(A), slip op. at 61 (Dec. 1, 2005) (second notice); *see also, e.g.*, R04-22(A), slip op. at 17 (Feb. 17, 2005) (first notice) ("Under this proposal, the Agency believes there will be significant savings in cleanup costs with reasonable rates being established in regulations. *Id*. Mr. Clay testified that there will be less time needed for consultants to prepare budgets and reimbursement packages and less time required for Agency review. *Id*.").

The Board cannot find, however, that the Agency, by denying reimbursement here, in any way "reversed" its earlier budget approval. Though T-Town can quibble with the denial letter's grammar, the Board finds that if some portion of the claimed $8,109.02 in costs cannot be accounted for, then those costs were surely not "used for . . . corrective action activities . . . required to meet the minimum requirements of this Title [XVI]." 415 ILCS 5/57.7(c)(3) (2006). That the rule, applicable across the State, does not list all costs for each task, did not relieve T-Town from its obligation to provide "[a]n accounting of all costs" for this one site.

The Board finds that the Agency's insistence upon the submission of Teklab invoices did not go beyond "generally accepted auditing and accounting practices" or "auditing for adherence to the corrective action measures in the proposal." Where a contractor, not seeking a handling charge, adds no work to a task that is performed by a subcontractor for less than the Subpart H maximum, the contractor cannot simply augment its bill to equal the Subpart H limit. Awarding full reimbursement in such an instance could allow for the detailed restrictions on reimbursing handling charges to be circumvented. Those restrictions originated in the Act and are codified in Part 732. *See* P.A. 92-574, eff. June 26, 2002 (deleting language of 415 ILCS 5/57.8(f), which had set forth eligible handling charges as a percentage of subcontract or field purchase costs to apply "[u]ntil the Board adopts regulations"); 35 Ill. Adm. Code 732.607 (Board regulation same as statutory language).

Even with a budget approval for $15,867.57 in analytical costs, T-Town was, of course, not automatically entitled to be reimbursed $15,867.57 without regard to the costs actually

incurred. The same logic applies with Subpart H. Section 732.835 on sample handling and analysis provides:

> Payment for costs associated with sample handling and analysis *must not exceed* the amounts set forth in Section Appendix D of this Part. *** 35 Ill. Adm. Code 732.835 (emphasis added).

In fact, the maximum payment amount provisions are replete with the phrase "must not exceed." *See* 35 Ill. Adm. Code 732.810, 732.815, 732.820, 732.825, 732.830, 732.835, 732.840, 732.850. Subpart H therefore sets forth the methods for determining the "*maximum* amounts that *can* be paid from the Fund," not what "must" be paid in every instance. 35 Ill. Adm. Code 732.800(c) (emphasis added). "Whether a particular cost is eligible for payment must be determined in accordance with Subpart F." 35 Ill. Adm. Code 732.800(c). Consistent with the plain meaning of the term, the Subpart H figures are "maximum" payment amounts, and where actual costs are less, less would be awarded from the UST Fund. *See* 35 Ill. Adm. Code 732.800(a)(1).

The Board finds no ambiguity in these provisions of the Act and regulations. *See* Krohe v. City of Bloomington, 204 Ill. 2d 392, 395, 789 N.E.2d 1211, 1212 (2003) ("The best indication of legislative intent is the statutory language, given its plain and ordinary meaning."); Ohio Grain Co. v. IEPA, PCB 90-143, slip op. at 16 (Oct. 16, 1992) (in construing administrative regulations, the rules for statutory construction apply), citing May v. PCB, 35 Ill. App. 3d 930, 933, 342 N.E.2d 784, 787 (2nd Dist.1976). Moreover, none of the many passages of R04-22(A) testimony and comment quoted by T-Town stands for the broad proposition that, as a matter of law, subcontractor invoices need not be provided unless handling charges are sought or that Subpart H maximum amounts are to be reimbursed regardless of actual costs incurred. *See, e.g.*, R04-22(A), Aug. 9, 2004 Tr. at 45 (Agency did *not* specify that subcontractor invoices would no longer have to be submitted).

Where the rulemaking record of R04-22(A) sheds light on the precise issue presented by this appeal, it is consistent with the Board's reasoning today. For example, Douglas W. Clay, Manager of the Leaking UST Section of the Agency's Bureau of Land, testified about the nature of the Agency's review of a reimbursement application under Section 57.8(a)(1) of the Act, when a budget had been approved beforehand:

> the statute talks about review based on generally accepted audit and accounting practices. And this is when this refers to when there's been a budget approved ahead of time, and that is what we do. The budget has been approved. And what the LUST claims unit will do is basically *add up invoices, make sure that the costs are eligible and are consistent with the plan that had been approved, the plan and budget had been approved*. R04-22(A), May 25, 2004 Tr. at 23-24 (emphasis added); *see also* R04-22(A), Sept. 23, 2005 Agency Public Comment, No. 62, at 18-19 (Agency opposing industry proposal that would, in Agency's view, "eliminate the submission of cost breakdowns and invoices for costs paid by 'lump sum or unit of production'").

In response to a question from Claire A. Manning of Posegate & Denes, P.C., on behalf of the Professionals of Illinois for the Protection of the Environment (PIPE), Clay testified specifically about subcontractor invoices:

> Q So that's true of all the lump sum and unit rates from your perspective, that you don't go behind those once an invoice is submitted, saying that I've done that work?
>
> A *For subcontractors*, you know, *we have to have backup invoices for the subs*.
>
> For example, if we've got a drilling subcontractor, you know, we'd want to have $19 a foot, which is how many feet that were drilled, the dates. But that's what we would expect from the subcontractor. It would be from the consultant. We have to have that invoice from the sub. But, yeah, for the lump sums and the unit rate, that's what we would expect. R04-22(A), Aug. 9, 2004 Tr. at 23-24 (emphasis added).

Contrary to T-Town's assertions, the Board finds nothing contradictory in Clay's testimony. He merely clarified that the subcontractor invoice would be submitted by the consultant in the reimbursement application. T-Town also takes issue with the example of a drilling subcontractor offered by Clay, but it was just that—an example. Clay's initial, unequivocal statement about needing subcontractor "backup invoices" remains. *See* Ag. Rec. at 003 (denial letter stated "backup invoices" from laboratory were not included). Moreover, the Board in R04-22(A) specifically found the Agency's explanations, regarding the documentation required for a complete reimbursement application, to be consistent with the Act. *See* R04-22(A), slip op. at 77 (Dec. 1, 2005) (second notice).

T-Town goes so far as to argue that "[p]roof of a subcontractor's charges is relevant only in situations where the contractor is seeking a handling charge on those charges." TT Resp. at 2. The Board disagrees. First, as is plain in the new rule, handling charges require *proof of payment* of subcontractor costs, such as by cancelled check or lien waiver. *See* 35 Ill. Adm. Code 732.601(b)(10). A subcontractor invoice stating what the subcontractor is charging, while itself not proof of payment, does help to document the actual costs incurred and work performed. Without that information here, the Agency could not properly determine whether all of the claimed analytical costs were eligible. Neither the rules nor the R04-22(A) record support T-Town's sweeping conclusion.

To bolster its notion that the Subpart H maximum amounts must be reimbursed, T-Town quotes a transcript exchange from R04-22(A) concerning competitive bidding (above at 20). As noted, however, competitive bidding was not used in this case. Nevertheless, the example T-Town relies upon actually supports the Board's analysis here. Where the Board intended to *require* that the Subpart H maximum amount be allowed for reimbursement, the Board provided so explicitly in the rule:

> The maximum payment amount for the work bid must be the amount of the lowest bid, *unless the lowest bid is less than the maximum payment amount set forth in this Subpart H in which case the maximum payment amount set forth in this Subpart H must be allowed*. 35 Ill. Adm. Code 732.855(c) (emphasis added).

No comparable rule language exists in Section 732.835 on sample handling and analysis, or for that matter in any of the maximum payment provisions of Sections 732.810 through 732.850.

Another question and answer exchange at hearing in R04-22(A) left no doubt that the Subpart H amounts were proposed by the Agency as "maximum" amounts, not amounts to be reimbursed regardless of whether actual costs incurred and documented were less:

> BOARD MEMBER JOHNSON: . . . I just want to clarify one thing you said, Mr. Clay.
>
> You said that the applicants are going to know what they're paid up front. But, in fact, these are still *maximum* payment amounts, aren't they, and isn't there a process -- we all know human nature, and I suspect that the maximum payment amount is going to be more likely than not the amount applied for, *but if, in fact, the actual costs are less than the scheduled maximum payment amount, that's what you'll end up reimbursing, correct*?
>
> MR. CLAY: *Yes, that's correct*. I should have stated that those were the *maximum* payment amount, that's correct. So then they get that approved in a budget, but then when they come in to be reimbursed and they have *documentation from invoices and receipts that only support, you know, 90 percent of that, for example, they would get paid for that 90 percent, that's correct*. R04-22(A), Mar. 15, 2004 Tr. at 73 (emphasis added).

The Agency reiterated its position in public comment. *See* R04-22(A), Sept. 23, 2005 Agency Public Comment, No. 62, at 17 ("The maximum payment amounts in Subpart H were developed and intended to be used as maximums . . . .") and 27 (Agency opposing industry-proposed amendments that would, in the Agency's view, "mandate that the Illinois EPA reimburse an owner or operator the full maximum payment amount for a task regardless of the amount actually charged for the task.").

Nowhere did the Board state in R04-22(A) that the Subpart H maximum amounts, upon request, must be reimbursed regardless of actual costs incurred. On the contrary, at first notice in R04-22(A), the Board specifically rejected an industry proposal to alter the "must not exceed" language:

> PIPE asks the Board to change the phrase "costs . . . shall not exceed" to "the following costs . . . shall be considered reasonable" throughout Subpart H. The Board declines to make this change. Subpart H sets forth maximum payment amounts and the language "costs . . . shall not exceed" is appropriate. R04-22(A),

slip op. at 81 (Feb. 17, 2005) (first notice) (the Board did change "shall" to "must" consistent with the Board's rule-drafting practice).

Even the Agency's "Analytical Costs Form" called for T-Town to "enter the number of samples for each analysis and the *actual cost per analysis up to the maximum cost per analysis*." Ag. Rec. at 024 (emphasis added).

Referencing "consultations" between USI and the Agency (TT Mot. at 4), T-Town claims that the Agency said it would limit the reimbursement of sample handling and analysis costs to the Teklab charges. The Board finds that any such exchanges are outside of the record before the Agency at the time of denial and therefore beyond the proper scope of the Board's review on appeal. *See, e.g.*, Karlock, PCB 05-127, slip op. at 5-6. In addition, by not establishing Agency misrepresentation in R04-22(A), let alone a "misrepresentation with knowledge that the misrepresentation was untrue," T-Town's claim of estoppel against the Agency fails. Noveon, Inc. v. IEPA, PCB 91-17, slip op. at 3 (Nov. 4, 2004), quoting People v. QC Finishers, Inc., PCB 01-7, slip op. at 11 (July 8, 2004). Lastly, the Board is mindful of the certifications provided by T-Town and USI in the reimbursement application. These certifications, however, are required independently of, and in no way supplant, the required "accounting of all costs," including invoices. *See* 35 Ill. Adm. Code 732.601(b)(1), (2), (9).

The Board finds that the Agency, in requesting the laboratory invoices, acted within the scope of its authority for reviewing reimbursement applications, as provided for in both the Act and the Board's regulations. By denying funds in the absence of those invoices, the Agency did not "reconsider" its budget approval. When T-Town did not provide the requested Teklab invoices, it failed to provide adequate documentation to support the claim. The Board finds that the Agency's denial is consistent with the plain meaning of the Act and regulations and is supported by the rulemaking record of R04-22(A). Accordingly, the Board denies T-Town's motion for summary judgment and grants the Agency's counter-motion for summary judgment, affirming the Agency's determination to deny T-Town reimbursement.

CONCLUSION

The Board finds that T-Town failed to demonstrate that it was entitled to UST Fund reimbursement for $8,109.02 in claimed sample handling and analysis costs. As there is no genuine issue of material fact and the Agency is entitled to judgment as a matter of law, the Board denies T-Town's motion for summary judgment, grants the Agency's counter-motion for summary judgment, and affirms the Agency's denial of reimbursement.

ORDER

1. The Board denies T-Town's motion for summary judgment, filed on September 12, 2007.

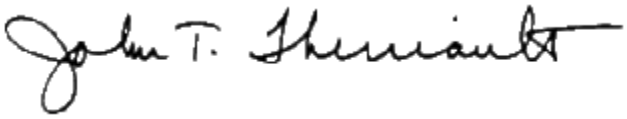
2. The Board grants the Agency's counter-motion for summary judgment, filed on September 27, 2007.

3. The Board affirms the Agency's March 2, 2007 denial of UST Fund reimbursement for T-Town's claimed sample handling and analysis costs in the amount of $8,109.02.

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) (2006); *see also* 35 Ill. Adm. Code 101.300(d)(2), 101.906, 102.706. Illinois Supreme Court Rule 335 establishes filing requirements that apply when the Illinois Appellate Court, by statute, directly reviews administrative orders. 172 Ill. 2d R. 335. The Board's procedural rules provide that motions for the Board to reconsider or modify its final orders may be filed with the Board within 35 days after the order is received. 35 Ill. Adm. Code 101.520; *see also* 35 Ill. Adm. Code 101.902, 102.700, 102.702.

I, John Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion and order on April 3, 2008, by a vote of 4-0.



John Therriault, Assistant Clerk
Illinois Pollution Control Board