ILLINOIS POLLUTION CONTROL BOARD
November 5, 2015

SHARON BURGESS,	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB 15-186
	)	(UST Appeal)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
	)	
Respondent.	)	

INTERIM OPINION AND ORDER OF THE BOARD (by D. Glosser):

On April 22, 2015, Sharon Burgess (petitioner) timely filed a petition asking the Board to review a determination of the Illinois Environmental Protection Agency (Agency). *See* 415 ILCS 5/40(a)(1) (2014); 35 Ill. Adm. Code 101.300(b), 105.402, 105.404, 105.406. The Agency's determination concerns petitioner's leaking underground storage tank (UST) site located at 1584 US Highway 52, Kankakee, Kankakee County.

The Agency approved a corrective action plan and budget, but reduced reimbursement amounts to the rates set forth in the Board's rules. Petitioner appeals on the grounds that under the Economic Development Act (P.A. 98-109), petitioner is required to pay prevailing wage and that amount is above the rate in the Board's rules. *See* 820 ILCS 130/2 (2014).

For the reasons set forth below, the Board reverses the Agency's decision. The Board finds that the application as submitted does not violate the Environmental Protection Act (Act) or Board regulations. Specifically, the Board finds that the reimbursement costs are eligible for reimbursement because the costs incurred are a result of unusual or extraordinary circumstances. The Board further finds that petitioner's plan and budget are seeking prevailing wage rates and the rates are reasonable. Therefore, the Board reverses the Agency's finding and remands the case to the Agency to approve the requested amounts.

The Board sets a deadline for petitioner to file a statement of legal fees that may be eligible for reimbursement and petitioner's arguments why the Board should exercise its discretion to direct the Agency to reimburse those fees from the UST Fund. The Board also provides for an Agency response to any statement filed by petitioner.

PROCEDURAL BACKGROUND

On April 22, 2015, the petitioner filed a petition for review (Pet.) seeking review of a March 19, 2015, Agency decision to reduce reimbursement rates in petitioner's corrective action plan and budget. On July 14, 2015, the Agency timely filed the record in this proceeding (R.). On August 11, 2015 hearing was held before Hearing Officer Carol Webb (Tr.).

On September 1, 2015, petitioner filed the opening brief (Br.) and on September 22, 2015, the Agency filed a brief (Ag.Br.) and a motion to strike (Mot.).

On October 5, 2015, petitioner filed its reply brief (Reply) and the response to the motion to strike (Resp.).

MOTION TO STRIKE

The Agency filed a motion to strike certain elements of the petitioner's brief and the petitioner responded to that motion. The Board will set forth the general arguments in the Agency's motion and petitioner's response. The Board will then set forth the statement being challenged and summarize the Agency's issues with that statement and the petitioner's response. The Board will then discuss its decision on the request to strike the statement or fact.

The Agency asks that the Board strike facts it claims are not in evidence relied upon by petitioner in the opening brief. Mot. at 1. The Agency maintains that petitioner included facts that were never placed in evidence and those facts "must be stricken" and the arguments based on the facts "disregarded". *Id*.

The Agency argues that petitioner's inclusion of these facts forces the Board to presume facts not in evidence. Mot. at 5. This unfairly requires the Agency to respond to assertions absent proof that the assertions are valid. *Id*. The Agency maintains that "citing to your own statement as proof that the statement is true, is not valid evidence". *Id*. The Agency opines that the petitioner must provide proof of statements made, and any deficiencies in the proof should be construed against petitioner. *Id*. The Agency offers this is especially the case where petitioner was solely responsible for presenting facts that it wished reviewed and relied upon. *Id*.

The Agency asserts that petitioner's inclusion of these facts prejudices the proceedings and unfairly burdens the Agency. Mot. at 5. The Agency claims that the facts offered by the petitioner are improperly alleged, and must be struck. The Agency further claims that petitioner had the ability to present the facts within either its February 2015 Plan and Budget or testimony or evidence at hearing and petitioner failed to do so. *Id*.

In reply, petitioner argues that the Agency takes issue with information that is in the record, but did not challenge that information in the denial letter. Resp. at 6. Petitioner maintains that the Agency must specify denial reasons in its letter, or the denial reason is waived. Resp. at 2, citing IEPA v. PCB, 86 Ill.2d 390, 405; 427 N.E. 2d 162, 170 (1981). Petitioner opines that the Agency "seeks to shift the burden back to" petitioner, by asserting that no evidence was presented by petitioner at hearing. Resp. at 6. However, the petitioner argues that there is no requirement that evidence be presented at a hearing. *Id*., citing PAK-AGS v. IEPA, PCB 15-14 (Mar. 5, 2015). Petitioner asserts that the motion to strike is "a transparent evasion of the evidence in the record".

At All Times Relevant Hereto, Kankakee County Has Had Prevailing Wage Rates For Truck Drivers, Laborers, And Operators. R. [at] 420-425. (Mot. at 2, Citing Br. at 2.)

The Agency argues that the statement that Kankakee County has a prevailing wage prior to 2015 must be stricken. The Agency states that the only evidence in the record is a copy of Kankakee County's prevailing wage rates in 2015. Mot. at 2-3. Therefore, the Agency argues the statement must be stricken.

Petitioner questions the "materiality" that the Agency places on this fact and argues that if the Agency believed prevailing rates could not have been incurred at some point in the past, the Agency should have included this as a reason for denying the application. Resp. at 2. The petitioner opines that the Agency must specify the denial reasons or those reasons are waived. *Id*., citing PCB, 86 Ill.2d at 405. The petitioner argues that the Agency "cannot as a matter of law plead ignorance" on the existence of prevailing wage in Kankakee County because the Agency has a duty to regularly "investigate and ascertain the prevailing rate of wages". *Id*. at 3, citing 820 ILCS 130/9 (2014). Petitioner notes that the Agency could look at the Illinois Department of Labor website, which is included in one of the exhibits the Agency admitted into evidence. *Id*.

Board Decision

The Board is reviewing the Agency's decision on a budget proposed in 2015, and the Board is unconvinced by the Agency's argument. Therefore, the Board denies the motion to strike.

With Respect to Work Requiring the Use Of Drivers, Laborers, and Operators, the Early Action Costs Incurred Were Far Over the Maximum Allowable Reimbursement Rates Allowed Under Subpart H, and Accordingly the Consultant Reduced the Reimbursement Requests in Order to Receive Payment. (Mot. at 3, Citing Br. at 3.)

The Agency maintains that reductions to the early action costs were not just for labor, but also included payment for equipment. Mot. at 3. The Agency argues that the record is unclear as to whether the costs exceeding Subpart H levels during early action were a result of labor or equipment costs. Further, the Agency asserts that the document relied upon by the petitioner to support its claim, was not a part of the February 2015 Plan and Budget that the Agency reviewed in this case. *Id*. The Agency further asserts that the petitioner could have provided that information to the Agency and did not. *Id*. The Agency claims that "[t]he Early Action documents, as well as the documents for the Site Investigation, are before the Board solely because the Board has requested that documents relating to an incident should to be [*sic*] included in the record on review." *Id*. The Agency opines that petitioner should not benefit from facts and argument that were not before the Agency when it made the decision on the 2015 plan and budget. Mot. at 3-4. Therefore, the Agency argues the statement should be struck.

Petitioner argues that the February 2015 Plan and Budget specifically referenced the Early Action plan. Resp. at 4, citing R. at 308. Petitioner explains that the applicant must document charges, even if those charges are reduced for purposes of reimbursement. *Id*. Petitioner reiterates its claim that if the Agency needed additional information or even a copy of

the Early Action plan, the Agency had a duty to specify what information it was lacking in the denial letter or to deem the application incomplete. *Id*., citing PCB, 86 Ill.2d at 405.

Board Decision

The Board notes that petitioner is correct, the early action was mentioned in the application in a section of the application specifically addressing prevailing wage and project labor agreements. R. at 308. Therefore, the Board denies the Agency's motion to strike.

Because Prevailing Wage Was Incurred at the Site, and Will Incur Again For Further Activities… (Mot. at 4, Citing Br. at 5).

The Agency argues that there has been no evidence submitted that the petitioner paid prevailing wage. Mot. at 4. Further the Agency claims no link was established by petitioner to the actual Kankakee prevailing wage numbers for 2015 and the corresponding amounts incurred during early action has been established. *Id*. Therefore, the Agency argues the reference must be struck.

Petitioner notes that the sentence was taken from the application and the Board must decide if the application as submitted to the Agency would violate the Environmental Protection Act (415 ILCS 5/1 *et. seq*. (2014)) (Act) or Board regulations. Resp. at 4, citing Illinois Ayers v. IEPA, PCB 03-214, at p. 8 (Apr. 1, 2004). Petitioner states: [a]sking to strike a portion of the application is a nonsensical request that illustrates the paucity of the Agency's position." *Id*.

Board Decision

The Board denies the motion to strike as the Board will not strike a provision from the application. The Board notes that the significance of the statement in the application can be argued before the Board.

These Figures Are For Demonstrative Purposes Based Upon A Simple Comparison Of Base Pay, And Does Not Include Non-Wage Benefits Such As Insurance, Pension, Vacation, Training And Overtime Benefits Required For The Prevailing Wage. R. [at] 421. (Mot. at 4, citing Br. at 6.)

The Agency argues that there is nothing in the record that supports this statement and it should be struck. Mot. at 4.

The Petitioner explains that the sentence the Agency seeks to strike is preceded by a chart that includes summaries of figures and the reference the Agency is seeking to strike helps to explain the figures. Resp. at 5.

Board Decision

The Board denies the motion to strike. The Board finds that the Agency is seeking to strike argument and not a factual statement.

This Appeal Deals Directly With The Prevailing Wage Rates Required By The Amendments To The Prevailing Wage Act. (Mot. at 4, citing Br. at 12.)

The Agency argues that while the petitioner talks about paying prevailing wage, there is no proof that prevailing wage was paid. Mot. at 4. Therefore, the Agency argues this statement must be struck.

Petitioner argues that the Agency is seeking to strike a statement in the legal section of the brief and if the Agency needed additional information, the Agency should have identified the information in the denial letter or deemed the application incomplete. Resp. at 5, citing PCB, 86 Ill.2d at 405.

Board Decision

The Board believes the statement is supported by the record and therefore denies the motion to strike.

The Agency Has Declined To Meet With The LUST Advisory Committee To Discuss Making Subpart H Consistent With Prevailing Wage (R. [at] 308) * * *. In Addition, The Agency Has Not Reported To The Board On The Sufficiency Of Subpart H To Meet Prevailing Market rates (R. [at] 308) * * *. (Mot. at 5, citing Br. at 15.)

The Agency asserts that no evidence in the record supports the statement made by petitioner and the assertion should be stricken. Mot. at 5.

Petitioner argues that the statement is supported by the record and an objection that the record is "self-serving" is not a recognized legal objection. Resp. at 6. Petitioner notes that the point of a brief is to identify points of law and evidence in the record to support one's position. *Id*.

Board Decision

The Board finds that the record does support the assertion and denies the motion to strike.

FACTS

Petitioner seeks review of an Agency decision regarding a corrective action plan and budget for the former Fleet Fuel Station at 2835 Highway 52 in Kankakee, Kankakee County (site). R. at 297, 300.

Release and Early Action

A release was reported to the Illinois Emergency Management Agency and assigned incident number 2013-0906. R. at 300, 716. The Office of State Fire Marshal (OSFM) approved a permit to remove the tanks and the tanks were removed on September 18, 2013. R. at 712,

714. OSFM observed contamination and the tanks and contaminated soil were excavated. *Id.*, *see also* R. at 300-01, 322.

On January 3, 2014, petitioner submitted an application for reimbursement for early action activities. R. at 510. Petitioner reduced costs that were over the costs allowed in the Board's rules at 35 Ill. Adm. Code 734.Subpart H (Subpart H). R. at 659-61. On March 7, 2014, the Agency approved the application for reimbursement for early action. R. at 497.

Corrective Action Plan and Budget

On February 20, 2015, petitioner submitted a Corrective Action Plan & Budget (plan) for the site. R. at 297. During early action the soil and groundwater plumes were defined to be on site; therefore, the plan proposed removing the remaining contaminated soil that exceeds applicable remediation objectives. R. at 302. The contaminated soil will be removed and replaced with clean backfill and topped with six inches of coarse aggregate. R. at 305. The estimated volume of the excavation is 455 cubic yards. R. at 306; *see also* R. at 331. Further analytical work will be performed to determine whether contamination spread beyond the proposed excavation area. R. at 303.

The nature of the work to be performed as a part of corrective action, such as excavation, transportation, disposal and backfill activities, is comparable to the work performed at the early action stage. R. at 308. The budget was prepared using the actual rates anticipated for excavation, transportation, disposal and backfill activities. R. at 342. The plan acknowledged that the claim for costs exceeded the amounts allowed under the Board's rules. R. at 308-09.

Agency Denial

On March 19, 2015, the Agency approved the plan but modified the budget. R. at 290-93. The Agency reduced the budget as follows:

1. $11,438.70 for Excavation, Transportation, and Disposal costs that exceed the maximum payment amounts set forth in Subpart H, Appendix D, and/or Appendix E of 35 Ill. Adm. Code 734. Such costs are ineligible for payment from the Fund pursuant to 35 Ill. Adm. Code 734.630(zz). In addition, such costs are not approved pursuant to Section 57.7(c)(3) of the Act because they are not reasonable.

2. $4,013.10 for Backfilling the Excavation costs that exceed the maximum payment amounts set forth in Subpart H, Appendix D, and/or Appendix E of 35 Ill. Adm. Code 734. Such costs are ineligible for payment from the Fund pursuant to 35 Ill. Adm. Code 734.630(zz). In addition, such costs are not approved pursuant to Section 57.7(c)(3) of the Act because they are not reasonable. *Id.*

STATUTORY and REGULATORY BACKGROUND

Section 57.7(c) provides requirements for Agency review and approval of any plan and budget. 415 ILCS 5/57.7(c) (2014). Section 57.7(c)(3) of the Act provides:

> In approving any plan submitted pursuant to subsection (a) or (b) of this Section, 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. The Agency shall also determine, pursuant to the Project Labor Agreements Act, whether the corrective action shall include a project labor agreement if payment from the Underground Storage Tank Fund is to be requested. 415 ILCS 5/57.3(c)(3) (2014).

Section 2 of the Prevailing Wage Act states that the Prevailing Wage Act "applies to the wages of laborers, mechanics and other workers employed in any public works". 820 ILCS 130/2 (2014). Section 2 of the Prevailing Wage Act defines "Public works" to include "any corrective action performed pursuant to Title XVI of the Environmental Protection Act for which payment from the Underground Storage Tank Fund is requested." *Id*. Section 3 of the Prevailing Wage Act "[n]ot less than the general prevailing rate of hourly wages for work of a similar character on public works in the locality in which the work is performed, . . . shall be paid to all laborers, workers and mechanics employed by or on behalf of any public body engaged in the construction or demolition of public works. 820 ILCS 130/3 (2014).

The Board's rules set forth cost which are ineligible for reimbursement and those costs ineligible include:

> Costs that exceed the maximum payment amounts set forth in Subpart H of this Part. 35 Ill. Adm. Code 734.630 (zz).

Subpart H in Part 734 sets forth three methods for determining maximum payment amounts for many tasks associated with corrective action at a leaking UST site. The first is to use the amount set forth in the rules, the second is to allow for bidding, and third applies to unusual or extraordinary circumstances. 35 Ill. Adm. Code 734.800(a)(1) - (3).

Section 734.860 provides:

> If, as a result of unusual or extraordinary circumstances, an owner or operator incurs or will incur eligible costs that exceed the maximum payment amounts set forth in this Subpart H, the Agency may determine maximum payment amounts for the costs on a site-specific basis. Owners and operators seeking to have the Agency determine maximum payment amounts pursuant to this Section must demonstrate to the Agency that the costs for which they are seeking a determination are eligible for payment from the Fund, exceed the maximum payment amounts set forth in this Subpart H, are the result of unusual or

extraordinary circumstances, are unavoidable, are reasonable, and are necessary in order to satisfy the requirements of this Part. 35 Ill. Adm. Code 734.860.

Section 734.875 provides:

No less than every three years the Agency must review the amounts set forth in this Subpart H and submit a report to the Board on whether the amounts are consistent with the prevailing market rates. The report must identify amounts that are not consistent with the prevailing market rates and suggest changes needed to make the amounts consistent with the prevailing market rates. The Board must publish notice of receipt of the report in the Environmental Register and on the Board's web page. 35 Ill. Adm. Code 734.875.

PETITIONER'S ARGUMENTS

Standard of Review

Petitioner argues that under Section 57.7(c) of the Act (415 ILCS 5/57.7(c) (2014)), an applicant may appeal an Agency decision and the Board's standard of review is whether or not the application as submitted to the Agency would violate the Act and Board regulations. Br. at 9, citing Illinois Ayers v. IEPA, PCB 03-214, slip op. 8 (Apr. 1, 2004). Petitioner also reminds that the Agency's denial letter frames the issues on appeal and the denial letter must include:

(A) an explanation of the Sections of this Act which may be violated if the plans were approved;

(B) an explanation of the provisions of the regulations, promulgated under this Act, which may be violated if the plan were approved;

(C) an explanation of the specific type of information, if any, which the Agency deems the applicant did not provide the Agency; and

(D) a statement of specific reasons why the Act and the regulations might not be met if the plan were approved. Br. at 9, quoting 415 ILCS 5/57.4(c)(4) (2014).

Petitioner continues arguing that the Agency has a "duty to specify its reasons" in the denial letter for the denial or modification, and the failure to specify a reason precludes the Agency from raising that reason. Br. at 9, citing PCB, 86 Ill.2d at 405.

Petitioner notes that the Agency's reasons in the denial letter are that the rates are not reasonable and the rates exceed the maximum reimbursement amounts allowed under Subpart H.

Regulatory Background

Petitioner explains that prior to the adoption of payment amounts in the rules, the Agency used a rate sheet to evaluate the reasonableness of costs. Br. at 10. The Agency proposed rules to create a legal framework for reviewing plans and budgets under the UST program. *Id.* referring to Proposed Amendments to: Regulation of Petroleum Underground Storage Tanks, R04-22(A) & R04-23(A) (consol.) (the R04-22 proceedings). Initially the rulemaking included maximum payment amounts, authority for the Agency to set higher maximum payment amounts on a site-specific basis for "unusual or extraordinary" circumstances, and a requirement that the Agency review payment amounts every two years. *Id.*, *see also* Petition in R04-22 at 29, 32, 33. Petitioner continues that the Board found that the rule proposed when taken as a whole, including provisions for extraordinary circumstances, would provide for reimbursement of reasonable remediation costs. Br. at 11, citing R04-22, at slip op. at 1 (Dec. 1, 2005).

Petitioner opines that the maximum payment amounts were the average private sector costs over ten years of reimbursement requests, adjusted for inflation. Br. at 11. Petitioner maintains that attempts were made by participants in R04-22 to clarify what situations would be "unusual" or "extraordinary" but the Board did not adopt a definition of those terms. *Id.* Petitioner:

> suggests that the original framework of the Agency's proposal was analogous to authority for a site-specific or adjusted standard, where "factors relating to that petitioner are substantially and significantly different from the factors relied upon by the Board in adopting the general regulation applicable to that petitioner." 415 ILCS 5/28.1(c). If so, it would be difficult to specify those circumstances not contemplated by the rulemaking, as by their nature they are unforeseen. Ultimately, the purpose of this provision is simply to allow "for reimbursement to exceed the maximum payment amounts under unusual or extraordinary circumstances." R04-22, at slip op. at 16 (Feb. 16, 2006). Br. at 11-12.

Labor Law Amendments 2013

Petitioner notes that the Economic Development Act of 2013 (P.A. 98-109) was adopted, and it includes provisions relating to the leaking UST program. Those provisions included requirements that prevailing wage be paid, allowed for project labor agreements, and increased the resources of the UST Fund. Br. at 12. Petitioner asserts that this appeal directly relates to the prevailing wage rates required by the Prevailing Wage Act. *Id.*, citing 820 ILCS 130/2 (2014). Petitioner argues that prevailing wage requirements are expressly referenced in Section 57.8(a)(6)(F) of the Act (415 ILCS 5/57.8(a)(6)(F) (2014) and implicitly in Section 57.11(f) of the Act (415 ILCS 5/57.11(f) (2014)). Br. at 12.

Petitioner opines that the purpose of the Prevailing Wage Act is to "encourage the efficient and expeditious completion of public works by public bodies by ensuring that workers receive a decent wage. People ex rel. Dep't of Labor v. Sackville Constr. Inc., 402 Ill. App. 3d 195, 930 N.E.2d 1063 (3rd Dist. 2010)." Br. at 12. Petitioner argues that each year a public body must investigate and ascertain the prevailing wage or ask the Illinois Department of Labor

to do so. *Id*. Petitioner maintains that private sector wages cannot be considered in setting prevailing wage. Br. at 12-13, citing Illinois Landscape v. Department of Labor, 372 Ill. App. 3d 912, 866 N.E.2d 592 (2nd Dist. 2007) (holding that Illinois Department of Labor could not consider U.S. Department of Labor determinations in ascertaining the prevailing wage because the federal government uses both public and private hours when determining federal wages).

Petitioner argues that the maximum payment amounts in Subpart H were based on private sector contracts, which is contrary to the Prevailing Wage Act. Br. at 13. Petitioner asserts that the Prevailing Wage Act actually requires that private sector work be excluded in calculating prevailing wage. *Id*., citing Hayen v. Ogle County, 101 Ill.2d 413, 416, 463 N.E.2d 124 (1984). Petitioner notes that the Illinois Supreme Court further pointed out in Hayen, "a public body has independent obligations under the Prevailing Wage Act, the failure of which to perform is sanctionable." *Id*. Petitioner asserts that the Agency's modification of the budget to impose non-prevailing-wage based costs, and ignoring the Department of Labor data submitted with the budget, violated the Prevailing Wage Act. *Id*.

Petitioner provides legislative history, including floor debates to support its argument that prevailing wage must be applied to corrective action at leaking UST sites. Br. at 13-14. Petitioner asserts that the prevailing wage requirement was incorporated into the Act in the Economic Development Act of 2013 (P.A. 98-109) and the Act requires the Agency to propose rule amendments to make the provisions of the Act consistent. Br. at 14. Petitioner also notes that Section 734.875 of the Board's rules requires the Agency to report to the Board on prevailing wages every three years. *Id*., quoting 35 Ill. Adm. Code 734.875. Petitioner maintains that the Agency has failed to adhere to these provisions. Br. at 15.

Petitioner asserts that the standard of review requires only that the petitioner demonstrate that the application does not violate the Act or Board regulations. Br. at 15. Petitioner asserts in this instance, Subpart H violates the law and the Agency is not precluded from approving payment amounts in excess of the Subpart H amounts. *Id*.

Unusual and Extraordinary Circumstances

Petitioner argues that the Agency can approve maximum payment amounts above the rates in Subpart H on a site-specific basis. Br. at 15. Petitioner quotes Section 734.860 and notes that a common feature of regulatory programs is to include a provision for site-specific relief from the rule of general applicability. *Id*. Petitioner maintains that prevailing wage may vary by the county where the work is performed and therefore site-specific relief is reasonable and appropriate. Br. at 15-16.

Petitioner argues that of the factors listed in Section 734.860, only reasonableness was set forth in the Agency's denial letter. Br.at 16. However, petitioner will address each of the factors.

Cost in Excess of Maximum Payment Amounts

Petitioner argues that the site incurred costs in excess of the maximum payment amounts during early action and will incur costs at those same rates in performing corrective action. Br. at 16.

Eligible for Reimbursement

Petitioner maintains that the excavation and reclamation activities are traditional reimbursable costs. Br. at 16, citing to R. at 342. Petitioner explains that the corrective action plan contemplates removal of contaminated soil and replacement with clean backfill. *Id*., citing R. at 305. Further petitioner asserts that the Agency's denial letter did not indicate that the costs were ineligible. *Id*.

Unusual or Extraordinary Circumstances

Petitioner reiterates its position that the maximum payment amounts established under Subpart H were created without reference to prevailing wages, or public sector rates. Br. at 17. Petitioner opines that Subpart H rates establish statewide rates, whereas prevailing wages impose a localized wage floor for specified laborers on a county-by-county basis. *Id*. Petitioner also opines that the Agency failed to perform its duties under the Prevailing Wage Act and the Act to propose new rules to ensure that prevailing wages are paid from the leaking UST Fund. *Id*.

Costs are Unavoidable and Necessary

Petitioner asserts that the Prevailing Wage requirements are unavoidable and necessary because they are statutorily mandated and failure to follow the mandate could result in "civil and criminal sanctions". Br. at 17, citing Hayen 101 Ill.2d at 416.

Costs are Reasonable

Petitioner maintains that costs imposed by the prevailing wage requirements are reasonable because they are legally required. Br. at 17. Further petitioner notes that the Board has previously ruled that actual costs incurred in the past are sufficient to prove that the costs are reasonable. *Id*., citing Illinois Ayers slip op. at 6, 17. Petitioner claims that reimbursement rates were based upon actual costs incurred during early action at this site. *Id*. Petitioner documented the costs in the early action reimbursement package submitted to the Agency. *Id*.

Petitioner's Conclusion

Petitioner maintains that no law will be violated by the budget as submitted to the Agency, because the Agency can approve rates above the maximum rates in the Board's rules. Br. at 18. Petitioner claims the budget evidenced reasonable costs and the Agency did not seek additional information. *Id*. Therefore, petitioner asks that the Agency decision be reversed. *Id*.

AGENCY'S ARGUMENTS

The Agency states that "[t]his matter is rather simple; presenting a rather ordinary fact set and nothing atypical relative to procedural considerations." Ag.Br. at 6. The Agency begins its brief with a discussion of the burden of proof and standard of review and then discusses the February 2015 budget. Next the Agency offers arguments on Subpart H and I and follows with arguments responding to the post hearing brief of petitioner. The Board will summarize each of these arguments below.

Burden of Proof

The Agency reminds that the Board's rules place the burden of proof on the petitioner and require the applicant to demonstrate "that costs are related to corrective action, properly accounted for, and reasonable. Rezmar Corporation v. IEPA, PCB 02-91 slip op. at 9 (Apr. 17, 2003)." Ag.Br. at 7-8, citing 35 Ill. Adm. Code 105.112(a). The Agency opines that the focus of the Board must be on the adequacy of the permit application and the information submitted by the applicant to the Agency. Ag.Br. at 8, citing John Sexton Contractors Company v. IEPA, PCB 88-139, slip op. at 5 (Feb. 23, 1989). The Agency reiterates that "the ultimate burden of proof remains on the party initiating an appeal" of an Agency decision." *Id.*, citing John Sexton Contractors Company v. PCB, 201 Ill. App. 3d 415, 425-426, 558 N.E.2d 1222, 1229 (1st Dist. 1990). The Agency maintains that the petitioner must demonstrate that it satisfied "this high burden" before the Board can reverse the Agency's decision. The Agency asserts that the petitioner cannot meet this burden, because the Agency correctly reduced the budget to Subpart H rates under current law. *Id*. Further the Agency asserts petitioner did not present evidence that the Agency decision is incorrect and therefore, the petitioner failed to meet its burden of proof. *Id*.

Standard of Review

The Agency offers that Section 57.8(i) of the Act grants an individual the right to appeal a determination of the Agency to the Board pursuant to Section 40 of the Act (415 ILCS 5/57.8(i) (2014)). The Agency notes that when reviewing an Agency decision, the Board must decide whether or not the corrective action plan and budget, as submitted to the Agency, demonstrate compliance with the Act and Board regulations. Ag. Br. at 8-9, citing Broderick Teaming Company v. IEPA, PCB 00-187 (Dec. 7, 2000). The Agency explains that the Board will not consider new information not before the Agency and the Agency's final decision frames the issues on appeal. Ag.Br. at 9, citing Todd's Service Station v. IEPA, PCB 03-2 slip op. at 4 (Jan. 22, 2004); Pulitzer Community Newspapers, Inc. v. IEPA, PCB 90-142 (Dec. 20, 1990). The Agency argues that the Board must look to the documents within the administrative record. *Id*.

February 2015 Budget

The Agency argues that the petitioner's sole justification for presenting a budget that exceeds the rates set forth in Subpart H was a "citation to 35 Ill. Adm. Code 734.875". Ag.Br. at 9. The Agency asserts that Section 734.875 requires "at most" that the Agency file a report to

the Board every three years and only that a report be filed. *Id*. at 10. The Agency argues that Section 734.875 does not allow the Agency to set amounts or correct amounts within Subpart H. *Id*. The Agency continues by stating that Section 734.875 does not mention allowing the Agency to review amounts on a case by case basis. Further the Agency maintains that the Board is not required to accept suggestions proposed by the report and there is no requirement that actual amendments to Subpart H be proposed. *Id*. The Agency opines that Section 734.875 is not connected to the petitioner's arguments on prevailing wage. *Id*. at 11.

The Agency argues that as the amendments to the Prevailing Wage Act petitioner is relying upon occurred in 2013, the Agency has at least three years under Section 734.875 to report to the Board under Section 734.875. Ag.Br. at 10-11. The Agency maintains that since that "date" has not yet arrived, this "cannot provide the rationale for a suggestion that the" Agency is required to report to the Board. *Id*. at 11. The Agency opines that the "issue of whether or not" the Agency "filed a report is simply not yet ripe." *Id*.

The Agency also notes that while Section 734.875 expressly discusses consistency with prevailing market rates, the Agency's opinion of what is consistent may not be exact. Ag.Br. at 11. The Agency argues "[t]here may be a difference between a determination that a prevailing market rate is consistent and whether or not prevailing wage applies under the Prevailing Wage Act." *Id*. Therefore, the Agency asserts that there is no support for the petitioner's arguments under Section 734.875. *Id*.

Appendices H and I of the Budget

The Agency argues that even if the Board considers the content of the budget included in appendices H and I (R. at 409-38), petitioner did not provide enough specificity to allow for a determination that budget should be approved. Ag. Br. at 12. The Agency points to the appendices and argues that the information is a "hodgepodge" and is not "instructive whatsoever". *Id*. at 13. The Agency opines that the submittals by the petitioner do not provide a "meaningful basis" to support approval of the requested costs. *Id*.

Response to Petitioner's Brief

Framing the Issue

The Agency argues that petitioner "attempts to argue statutory provision not presented within its budget" to the Agency in order to frame the issue to the Board. Ag.Br. at 14. The Agency states:

> The Board should note that Petitioner conjures up quite of few ghost figures in its attempt to explain itself and the documents submitted for Illinois EPA review. But, each figure is not fully defined and frankly they only cast a longer shadow on the issue Petitioner claims is at hand (*i.e.,* prevailing wage). *Id.*

The Agency first takes issue with "rates" included in the petitioner's brief and claims that the petitioner itself cannot focus on which "rate" is appropriately representative of prevailing wage

for the locality. *Id*. And the Agency asserts, the petitioner actually proposed rates based on the early action work and not prevailing wage. *Id*. Instead the Agency claims the rate requested by petitioner "represents a division of tonnage from total costs of Early Action activities" and includes "no review of prevailing wage for the locality." *Id*.

The Agency maintains that the petitioner fails to identify what prevailing wage is appropriate and based the request for reimbursement on private contracts for early action. Ag.Br. at 15. The Agency urges the Board to recognize that the petitioner did not request actual costs for Early Action, but instead reduced the amount requested to Subpart H figures. *Id*.[1]

Unusual or Extraordinary Circumstances

The Agency argues that petitioner did not include citation to Section 734.860 and did not ask the Agency to determine that there were unusual or extraordinary costs at the site. Ag.Br. at 16. The Agency argues it cannot act on something not requested and in any event the regulation is permissive. *Id*. at 16-17. The Agency is not required to approve rates above the limits and in this instance the activities for which petitioner seeks reimbursement are typical to almost all sites. *Id*. at 17. The Agency opines that because Section 734.860 is limited to unusual or extraordinary circumstances, it does not apply in this instance as these factors do not exists here. *Id*. The Agency maintains that the petitioner did not suggest any unusual or extraordinary circumstances in the plan and the record does not indicate that the application presented any unusual or extraordinary circumstances. *Id*.

The Agency then claims that the petitioner did not demonstrate that the reimbursement amount sought is prevailing wage or that petitioner paid prevailing wage. Ag.Br. at 17. The Agency asserts that petitioner is proposing a unit rate paid in 2013 as prevailing wage for an application filed in 2015. *Id*. at 18. The Agency claims that the only reference to early action is at page 342 of the record and petitioner's reliance on the facts from the Early Action plan and budget is misplaced. *Id*. The Agency argues that there is no proof that the unit rate was the prevailing wage for the locality and petitioner expects a reviewer to presume a private contractual rate is the prevailing wage. *Id*.

The Agency takes issue with the information provided in the record, claiming the information is not presented in any "clear, logical form". Ag.Br. at 18. The Agency argues that petitioner did not provide explanation of the origins of the documents in Appendix H of the application (R. at 409-25) or connect the information to prevailing wage. *Id*. at 19. The Agency expresses confusion with terms in the documents and notes that there is no connection to the rate being requested. *Id*. The Agency maintains that the applicant must demonstrate that the costs are eligible for reimbursement and that the costs were the result of unusual or extraordinary circumstances. *Id*. Even then, the Agency maintains the applicant must also demonstrate the costs are reasonable and necessary to meet the requirements of the Part. *Id*. The Agency maintains that the petitioner has failed to do so in this case. *Id*.

[1] The Board notes that the Agency provides arguments regarding project labor agreements and the fact sheet, but the Board does not summarize those arguments as they are not relevant to the issues in this proceeding.

The Agency maintains that petitioner does not meet a burden of demonstrating that the costs it seeks are eligible as petitioner claims only that the Agency should have higher rates in Subpart H. Ag.Br. at 20. The Agency reiterates that petitioner does not present anything within the Plan to suggest that petitioner is in an unusual situation. *Id*. The Agency asserts that petitioner cannot support the costs as necessary as the claimed reimbursement amount is merely an average cost petitioner paid in Early Action as opposed to prevailing wage rate. *Id*. at 20-21. The Agency reiterates its claim that prevailing rate is not presented in this case other than as a justification for payment of a unit rate based upon Early Action "costs". *Id*. at 21.

Legislative Debate

The Agency discounts petitioner's reliance on the legislative debates relating to the Economic Development Act of 2013 (P.A. 98-109). Ag.Br. at 22.

Bidding as an Alternative to Subpart H

The Agency argues that petitioner never recognizes that as an alternative to the maximum payments in Subpart H, bids can be taken for work. Ag.Br. at 22-23. The Agency notes that the owner or operator must demonstrate that the corrective action cannot be performed for amounts less than or equal to the maximum Subpart H amounts and then bidding can be performed. *Id*. at 23.

Agency Conclusion

The Agency maintains that the case presents no new issues to the Board and there is no basis to reverse the Agency's determination. Ag.Br. at 24. The Agency argues that the petitioner sought reimbursement at rates above the maximum allowed by Board rules and the Agency properly lowered the amounts to those allowed by rule. *Id*.

REPLY

In reply, petitioner sets forth several arguments beginning with argument on the burden of proof. Next, petitioner argues that it is not required to cite legal provisions in the application and then additional argument on Section 734.875 (35 Ill. Adm. Code 734.875). Finally, petitioner addresses competitive bidding. The Board will summarize each of these arguments below.

Burden of Proof

Petitioner argues that in Sexton, the full statement of the burden of proof is:

> To prevail before the Board, Sexton had the burden of establishing that its proposed CPC care plan would not result in any future violations of the Act or the regulations and that the conditions imposed by the Agency were therefore unnecessary to accomplish the purposes of the Act. Once Sexton had established a prima facie case that the conditions were unnecessary, it became incumbent

> upon the Agency to refute the prima facie case. The ultimate burden of proof that the conditions were unnecessary, however, rested upon Sexton. Sexton, 201 Ill. App. 3d at 425-25. Reply at 1 adding emphasis.

Petitioner agrees that the applicant has the initial burden of producing evidence to establish a prima facie case; however, once that evidence is produced the burden shifts to Agency. Reply at 1-2, citing Anderson v. Dept. of Public Property, 140 Ill. App. 3d 772, 489 N.E.2d 12 (4th Dist. 1986). Petitioner asserts that the "burden of persuasion never shifts". *Id*.

Petitioner reminds that the legal and evidentiary issues are established by the Agency's denial letter and that letter must raise specific legal provisions that would be violated by the application. Reply at 2. Petitioner asserts that if the Agency:

> believed that competitive bidding was required by law, then the Agency should have cited the relevant legal provisions for that proposition in the denial letter, or identify evidence of competitive bidding as a specific type of information that was required to approve the application. This provides the applicant the opportunity to choose either to supplement the application or appeal to the Board. *Id*.

Legal Provisions in the Application

Petitioner challenges the Agency's statement that the "sole justification provided" by the petitioner for exceeding Subpart H rates is Section 734.875 (35 Ill. Adm. Code 734.875). Reply at 3, citing Ag.Br. at 9. Petitioner asserts that the justification for exceeding Subpart H rates was included in the application and was that "[b]ecause prevailing wage was incurred at the site, and will incur again for further activities, the excavation and backfilling rates have been updated in the budget to match those of the actual costs from early action." *Id*., quoting R. at 308. Petitioner maintains that the Agency not the petitioner must identify any legal provision that would be violated if the application was granted and the Agency did not include a citation to Section 734.875.

Petitioner opines that the Agency denied the application on the grounds that the Agency did not have the authority to exceed Subpart H rates pursuant to Section 734.630(zz) (35 Ill. Adm. Code 734.630(zz)). Reply at 4. Petitioner argues that denial reason is incorrect as Section 734.860 (35 Ill. Adm. Code 734.860) expressly provides for exceedance of Subpart H rates for unusual or extraordinary circumstances where the owner or operator incurs eligible cost in excess of Subpart H. *Id*. Petitioner maintains that Section 734.860 clearly provides authority for exceeding Subpart H rates and the existence of "unusual or extraordinary circumstances" must be assessed by "the totality of the information submitted in the application". *Id*.

Section 734.875

The petitioner argues that the application sought relief from Subpart H as prevailing wage has been incurred and will be incurred again and the "unusual and extraordinary circumstance is primarily the prevailing wage requirements that did not exist when Subpart H was passed". Reply at 4. Petitioner also argues that the Agency "decided to disregard" requirements that

Subpart H be revised. *Id*. Petitioner argues that the Agency was to provide a triennial review, not a review three years after a particular change. *Id*., citing 35 Ill. Adm. Code 734.875. Petitioner states that the Board "knows whether a report has been received in the last several years." Reply at 5.

Competitive Bidding

Petitioner offers that the Agency referenced two legal provisions in the denial letter and neither of those provisions are discussed in the Agency's brief. Reply at 5. Petitioner explains that the Act requires any competitive bidding process to be "optional" and "[e]ven if the Agency had denied the budget for want of competitive bidding, the reason would be legally insufficient." *Id*. The petitioner argues that there are three ways to determine the maximum amounts that can be paid from the fund. *Id*. at 5-6, quoting T-Town v. IEPA, PCB 07-85 slip op. at 9 (Apr. 3, 2008). The petitioner also notes that a problem with competitive bidding is that it is time-consuming and costly, while a site-specific determination can be employed throughout a project. *Id*. at 6.

Petitioner asserts that the Agency forms, which are required by the Agency, mandate that excavation, transportation, disposal and backfilling costs be proposed on a cost-per-cubic yard basis, no matter what method is used. Reply at 6, citing R. at 342. The Agency's argument that the costs are not broken down in a particular way is not persuasive as the Agency's own form does not allow for breakdown. *Id*. Further if the Agency found the information deficient, then the Agency should have requested additional information in the denial letter. *Id*. Petitioner argues that as a practical matter, prevailing wage requirements impose hourly guarantees to workers and the workers will have to be paid that rate no matter how the budget is approved. *Id*.

Reply Conclusion

Petitioner asserts it has presented a prima facie case that the petitioner incurred or will incur costs that exceed the Subpart H rates as a result of prevailing wage requirements; and that a reasonable budget has been proposed by extrapolating the actual costs incurred and documented during early action for similar work. Reply at 6. Petitioner maintains that the Agency has improperly sought to strike evidence in the Agency's own record to obscure these points and has sought to modify the denial letter with new reasons or new demands for information. The petitioner opines that because it sought approval of a budget, this involves predicting future costs based upon current knowledge. Reply at 6-7. Petitioner maintains that the assumptions utilized were conservative. Reply at 7.

DISCUSSION

The Board will first state the standard of review and burden of proof. Next the Board will frame the issues in this appeal. The Board will then discuss its decision on the issues. Finally the Board will discuss petitioner's request for legal fees.

Standard of Review and Burden of Proof

The Board must decide whether the petitioner's submittal to the Agency demonstrated compliance with the Act and the Board's regulations. *See, e.g.*, Illinois Ayers Oil Co. v. IEPA PCB 03-214, slip op. at 8 (April 1, 2004); Kathe's Auto Service Center v. IEPA, PCB 96-102, slip op. at 13. The Board's review is generally limited to the record before the Agency at the time of its determination. *See, e.g.*, Freedom Oil, PCB 03-54 (consol.), slip op. at 11; *see also* Illinois Ayers, PCB 03-214, slip op. at 15 ("the Board does not review the Agency's decision using a deferential manifest-weight of the evidence standard," but "[r]ather the Board reviews the entirety of the record to determine that the [submittal] as presented to the Agency demonstrates compliance with the Act").

Further, on appeal before the Board, the Agency's denial letter frames the issue (*see, e.g.*, Karlock v. IEPA, PCB 05-127, slip op. at 7 (July 21, 2005)) 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). The standard of proof in UST appeals is the "preponderance of the evidence" standard. Freedom Oil, PCB 03-54, slip op. at 59; *see also* McHenry County Landfill, Inc. v. County Bd. of McHenry County, PCB 85-56, 85-61, 85-62, 85-63, 85-64, 85-65, 85-66 (consol.), slip op. at 3 (Sept. 20, 1985) ("A proposition is proved by a preponderance of the evidence when it is more probably true than not.").

Issues

In this instance, the Agency's denial letter modified the budget by reducing the reimbursement request to levels that coincide with the maximum payment amounts in the Board's rules at Subpart H. Specifically, the Agency indicated that the costs are ineligible because the costs exceeded the maximum amounts in Subpart H (35 Ill. Adm. Code 734.630(zz)) and the costs are not reasonable (415 ILCS 5.57.7(c)(3) (2014)). Thus, the Board must decide if the Agency correctly found that the costs were ineligible because the rates exceeded the maximum amounts in Subpart H and if the costs were not reasonable. In order to affirm the Agency's decision, the Board must find that the application as submitted violated the Act or Board regulations by exceeding the maximum amounts in Subpart H and being unreasonable.

Ineligible for Exceeding Maximum Rates in Subpart H

The Agency's denial letter reduced the amounts requested for reimbursement to the rates set forth in Subpart H. The Agency relies on the provision in the Board's rules that clearly states that costs are ineligible that:

> exceed the maximum payment amounts set forth in Subpart H of this Part. 35 Ill. Adm. Code 734.630 (zz).

However, petitioner claims that the specific amounts in Subpart H are not the only way to establish rates for reimbursement. Specifically, Section 734.860 allows for reimbursement rates to exceed the maximum amounts if eligible costs are a result of unusual or extraordinary circumstances.

The Board agrees with the Agency that some reimbursement amounts requested do exceed the maximum amounts in Subpart H. However, in adopting those rates, the Board also included two other avenues for reimbursement of rates which exceed the maximum rates in Subpart H. *See* 35 Ill. Adm. Code 734.800. Specifically in addition to the maximum rates, there are provisions to allow for competitive bidding and to account for unusual or extraordinary circumstances. *Id*.

Further, since the adoption of the rules setting forth maximum payment amounts and generally addressing potential exceedances of those amounts, the Economic Development Act (P.A. 98-109) was adopted. That Act amended the definition of public works in the Prevailing Wage Act to include "any corrective action performed pursuant to Title XVI of the Environmental Protection Act for which payment from the Underground Storage Tank Fund is requested." 820 ILCS 130/2 (2014). The Prevailing Wage Act requires that "[n]ot less than the general prevailing rate of hourly wages for work of a similar character on public works in the locality in which the work is performed, . . . shall be paid to all laborers, workers and mechanics employed by or on behalf of any public body engaged in the construction or demolition of public works. 820 ILCS 130/3 (2014). Thus, any owner or operator who seeks reimbursement for corrective action at a leaking UST site must pay prevailing wage.

The Board must read its rules to be consistent with the statute. To do otherwise would give no meaning to the amendments that included corrective action at leaking UST sites as public works. Further, the Illinois Supreme Court has stated that "[w]here an administrative rule conflicts with the statute under which it was adopted, the rule is invalid." 224 Ill. 2d 365, 385, 864 N.E.2d 162, 173 (2007). Subpart H maximum rates have not been amended since the adoption by the legislature of the Economic Development Act of 2013 (P.A. 98-109). Thus, the Board's maximum rates in Subpart H may in some cases be inconsistent with prevailing wage rates. Therefore, to insure that the Board's rules are valid and to give meaning to the statutory provisions, the Board will look to the other two methods for establishing rates found in Section 734.800, in order to determine if the reimbursement rates are ineligible for reimbursement.

Competitive Bidding

The Agency suggests in its brief that the petitioner could have sought competitive bidding as a means of establishing rates above the maximum rates set forth in Subpart H. However, the Agency did not deny reimbursement because the petitioner did not undertake competitive bidding. Further, the Board is not convinced that undertaking competitive bidding would be appropriate for an owner or operator that is required to pay prevailing wage rates. Those rates are set and the bidding process could not go below the prevailing wage rates. Thus, the Board finds that competitive bidding is not an appropriate procedure for establishing prevailing wage rates as appropriate reimbursement rates.

Unusual or Extraordinary Circumstances

The Agency maintains that there is nothing unusual or extraordinary in the costs being sought for reimbursement as the activities occur at every site. Petitioner meanwhile suggests that

given that prevailing wage rates may vary by locality, this provision may be the best alternative to ensure that rates paid are prevailing wage rates. As indicated above, the amendment to the statutes resulted in the maximum rates in Subpart H being out of date. The Board finds that because the rules do not address prevailing wage rates and the statutes require that prevailing wage be paid for corrective action, this is an unusual or extraordinary circumstance as contemplated by Section 734.860. Therefore, the Board finds that the reimbursement rates requested may be eligible for reimbursement, even though the rates exceed the maximum amounts in Subpart H. However, the Board finds that rates which exceed the maximum rates in this case are only eligible if those rates are in fact prevailing wage.

Prevailing Wage

The Agency takes issue with the petitioner's failure to cite to legal authority in the application for the exceedance of Subpart H. The Agency also takes issue with the documentation in the record offered by petitioner to establish that the rates requested in the budget are prevailing wage rates. The Board is unconvinced by both of these arguments. First, the plan and budget make clear that the amount being sought is above the maximum amounts in Subpart H. The application states:

> While the quantities for the attached CAP Budget are correct, the amounts Subpart H allows to complete the work are insufficient, based on actual costs incurred during early action activities. R. at 308.

The application then specifically "requests that updated maximum payment amounts in compliance with the current prevailing market rates are used for the current project". R. at 309. The application then cites to the Economic Development Act of 2013 (P.A. 98-109). *Id.* Thus, the Agency was on notice that the budget sought funds in excess of the maximum payment amounts due to the requirements of the Economic Development Act of 2013 (P.A. 98-109). Furthermore, the early action reimbursement request, specifically referenced in the application for reimbursement for corrective action, set forth the differences in costs between Subpart H maximum and actual costs. R. at 659.

The Agency did not deny or modify reimbursement because the amount requested was not prevailing wage; therefore, the Agency cannot now assert that the Agency was unable to determine if the rates were prevailing wage. However, the Board must examine the application to determine if the application would violate the Act or Board regulations. Thus, the Board must determine if the record supports the requested reimbursement amount as prevailing wage.

The Board reviewed the application and finds that petitioner has established that the reimbursement rates reflect prevailing wage rates in Kankakee County. The inclusion of the table with actual prevailing wage rates for Kankakee County in the record (R. at 420-25) along with the comparison of rates from Marion County (R. at 413-19) convinces the Board that the reimbursement rates are consistent with prevailing wage. This is further supported by the Illinois Department of Labor prevailing wage rates (R. at 418), which are consistent with, while lower than, those of Kankakee County.

Section 57.7(c)(3) of the Act

Section 57.7(c)(3) of the Act (415 ILCS 5.57.7(c)(3) (2014)) states that costs associated with the plan are reasonable. Because the Board has found that the reimbursement rates represent prevailing wage, the Board finds that the costs are reasonable. Prevailing wage rates are set by local governments and the Illinois Department of Labor, and the Board believes that those entities would set forth only reasonable costs. Therefore, the Board finds the costs are reasonable.

Legal Fees

In its petition for review, petitioner requested relief including "reimbursement of its reasonable attorney's fees and expenses related to bringing this action pursuant to Section 57.8(l) of the Act." Pet. at 5; *see* 415 ILCS 5/57.8(l) (2014). The record does not now include the amount of these fees or petitioner's argument that they are reimbursable under Section 57.8(l). In its order below, the Board will direct petitioner to file a statement of legal fees that may be eligible for reimbursement and its arguments why the Board should exercise its discretion to direct the Agency to reimburse those fees from the UST Fund. Petitioner must file its statement by December 15, 2015, which is the 30th day after the date of this order. The Agency may file a response within 14 days after being served with petitioner's statement.

CONCLUSION

While the Board agrees with the Agency that the reimbursement rates requested exceed the maximum payment amounts in Subpart H of the Board's rules, the Board is persuaded that the rates can be reimbursed under Section 734.860. The Board finds that the application as submitted does not violate the Act or Board regulations. Specifically, the Board finds that the reimbursement costs are eligible for reimbursement because the costs incurred are a result of unusual or extraordinary circumstances in that the statutes have been amended since the adoption of Subpart H. The amendments to the statutes require that corrective action at leaking UST sites pay prevailing wage rates and the Subpart H maximum payment amounts do not reflect prevailing wage. The Board further finds that petitioner's plan and budget are seeking prevailing wage rates and the rates are reasonable. Therefore, the Board reverses the Agency's finding and remands the case to the Agency to approve the requested amounts.

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

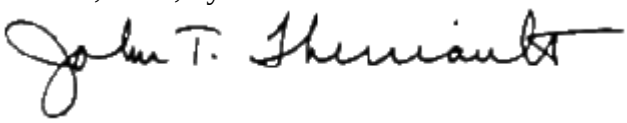
ORDER

1. The Board reverses the Illinois Environmental Protection Agency's (Agency) March 19, 2015 decision modifying the Corrective Action Plan and Budget submitted by Sharon Burgess (petitioner). The Board remands the Corrective Action Plan and Budget to the Agency for issuance with the reimbursement amounts corrected.

2. Petitioner is directed to file a statement of legal fees that may be eligible for reimbursement and its arguments why the Board should exercise its discretion to direct the Agency to reimburse those fees from the UST Fund. Petitioner must file its statement by December 7, 2015, which is the first business day after the 30th day after the date of this order. The Agency may file a response within 14 days after being served with petitioner's statement

IT IS SO ORDERED.

I, John T. Therriault, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion and order on November 5, 2015, by a vote of 5-0.



John T. Therriault, Clerk
Illinois Pollution Control Board