

ILLINOIS POLLUTION CONTROL BOARD
December 15, 2016

ABEL INVESTMENTS, LLC,)	
)	
Petitioner,)	
)	
v.)	PCB 16-108
)	(UST Appeal)
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Respondent.)	

PATRICK D. SHAW, LAW OFFICE OF PATRICK D. SHAW, APPEARED ON BEHALF OF PETITIONER, and

MELANIE JARVIS, SPECIAL ASSISTANT ATTORNEY GENERAL, APPEARED ON BEHALF OF RESPONDENT.

INTERIM OPINION AND ORDER OF THE BOARD (by C.K. Zalewski):

Abel Investments (Abel) owns a gas station in Carbondale where underground storage tanks (USTs) have leaked petroleum. Abel completed the statutory prerequisites to seek reimbursement from Illinois' UST Fund for remediation efforts at the site and hired CW³M to conduct the remediation consulting work. The remediation has begun, but is not complete. As a part of remediation, Abel must submit remediation plans, costs, and budgets to the Illinois Environmental Protection Agency (IEPA or Agency). This case resulted from IEPA modifying Abel's costs and budget for remediation reimbursement.

IEPA modified Abel's Stage 1 actual costs of remediation and the budget for Abel's Stage 2 site investigation plan. Specifically, IEPA modified: 1) consultant fees because the fees were excessive; 2) travel costs because Abel has an office location closer to the site than the one budgeted; and 3) budgeted costs for a measuring wheel because IEPA believes it is an indirect cost. Abel asks the Board to reverse IEPA's determination.

This opinion briefly sets out the procedure of the case and the facts in the record before analyzing the issues on appeal. The Board affirms IEPA in part and reverses IEPA in part. The Board breaks the issues into four categories for discussion. First, the Board affirms IEPA on the consultant fees that the IEPA found excessive and eliminated from Abel's budget. Second, the Board reverses IEPA's determinations that Abel excessively budgeted for a consultant's title rather than for the work performed. Third, the Board reverses IEPA's determination that work at the Carbondale site must be budgeted as being done by CW³M's Marion office, rather than its Springfield headquarters. Fourth, the Board reverses IEPA's determination that a measuring wheel is an indirect cost of remediation and therefore not eligible for reimbursement. This

decision is an interim opinion and order because further information is required before the Board can rule upon Abel's request for legal fees.

FACTS AND PROCEDURE

In 2013, Abel reported a release from its Carbondale gas station. CW³M determined three tanks caused the petroleum leak and removed those tanks from the ground along with approximately 732 tons of contaminated soil. Record (R.) at 9. After IEPA approved CW³M's early remediation efforts at the site (the details of which are not at issue here), Abel submitted its Stage 1 actual costs¹ and Stage 2 proposed budget for IEPA's review on January 8, 2016. R. at 130. In its cover letter, CW³M explained why it assigns "[n]umerous personnel" to work on plans and budgets:

In our opinion, this is a highly efficient work plan that limits mistakes, keeps costs down, and ensures quality work. Please note multiple personnel are listed for the completion of certain tasks. Some reviewers have mistakenly interpreted this as an error or duplication; it is not. *** These hours should be deemed reasonable as more than one person is required to develop plans and budgets and to check for accuracy of the plan, budget, bore logs, reimbursement claims, and analytical, which is needed to finalize the plan and budget. Different personnel contribute to different components of the tasks. *** Multiple personnel touch each letter or plan with different individual tasks on assignments. R. at 1-2.

In its May 10, 2016 determination, IEPA modified both Abel's Stage 1 actual costs and Stage 2 proposed budget. Before listing the specific modifications, IEPA's determination letter states

costs associated with materials, activities, and services must be reasonable, must be consistent with the associated technical plan, must be incurred in the performance of corrective action activities, must not be used for corrective action activities in excess of those necessary to meet the minimum requirements of the Act and regulations, and must not exceed the maximum payment amounts set forth in Subpart H, Appendix D, and Appendix E of Part 734 (Section 57.7(c) of the Act and 35 Ill. Adm. Code 734.510(b)). R. at 119.

For purposes of this case, Abel challenged IEPA's modification of Abel's Stage 1 actual costs and Stage 2 proposed budget in four ways:

¹ A traditional budget is not submitted for a Stage 1 investigation. Instead, before Stage 1 work is performed, the UST owner or operator must submit a certification that costs will not exceed the limits in the rules. *See* 35 Ill. Adm. Code 734.310(b). After the Stage 1 work is performed, the UST owner or operator must submit a budget consisting not of estimates of future costs but rather "actual costs" for the Stage 1 work already performed. Tr. at 10-11.

1. IEPA modified Abel's Stage 1 costs and Stage 2 budget by \$3,192.62 stating that CW³M's budgeting for consultant work was excessive in violation of Section 57.7(c)(3) of the Act (415 ILCS 5/57.7(c)(3) (2014));
2. IEPA reduced Abel's Stage 1 costs and Stage 2 budget by \$2,101.56 stating that Abel budgeted for the consultants' titles rather than the actual work done in violation of Section 734.850 of the Board's UST regulations; (35 Ill. Adm. Code 734.850)
3. IEPA reduced Abel's Stage 2 budget by \$797.93 stating that travel from CW³M's Springfield headquarters for work at the Carbondale site is excessive and unreasonable when CW³M has an office much closer to Carbondale; and
4. IEPA reduced Abel's Stage 1 costs for a measuring wheel by \$75.00 stating that a measuring wheel is an indirect cost of doing remediation work rather than a direct cost.

On June 2, 2016, Abel timely filed a petition asking the Board to review IEPA's May 10, 2016 determination (R. 118-126). 415 ILCS 5/40(a)(1) (2014); 35 Ill. Adm. Code 101.300(b), 105.402, 105.404, 105.406. IEPA filed the administrative record (R.) on July 18, 2016. The September 7, 2016 hearing (Tr.) was held in Springfield rather than in Carbondale on the motion of the parties—there was no known public interest in this case. Tr. at 4. Abel filed its post-hearing brief (Abel Brief) on September 30, 2016 and IEPA filed its brief (IEPA Brief) on October 17, 2016. Abel filed its reply brief (Abel Reply) on October 26, 2016. The Board received no public comment.

STANDARD OF REVIEW AND BURDEN OF PROOF

The Board must decide whether Abel's submittal to IEPA demonstrated compliance with the Act and the Board's rules. 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 (Aug. 1, 1996). The Board's review is generally limited to the record before IEPA at the time of its determination. Freedom Oil Co. v. IEPA, PCB 03-54, 03-56, 03-105, 03-179, 04-04 (cons.), slip op. at 11 (Feb. 2, 2006); *see also* Illinois Ayers, PCB 03-214, slip op. at 15 ("the Board does not review [IEPA'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 [IEPA] demonstrates compliance with the Act").

Further, on appeal before the Board, IEPA's denial letter frames the issue (Karlolock v. IEPA, PCB 05-127, slip op. at 7 (July 21, 2005)), and the UST owner or operator has the burden of proof (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." Freedom Oil Co., slip op. at 59 (Feb. 2, 2006), citing 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 (cons.), 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.").

BASIC REIMBURSEMENT STRUCTURE FOR UST CONSULTANTS

Under the Act, to approve a site investigation budget, IEPA must determine that the costs of the budget “are reasonable, will be incurred in the performance of site investigation . . . and will not be used for site investigation . . . activities in excess of those required to meet the minimum requirements of this Title [the Act’s Title XVI on petroleum USTs].” 415 ILCS 5/57.7(c)(3) (2014). If IEPA disapproves or modifies the budget, IEPA must issue a written determination identifying the provisions of the Act or Board rules that may be violated, with reasons, if the budget were approved. 415 ILCS 5/57.7(c)(4) (2014).

Under the Board’s UST rules, budgets must be prepared under the supervision of, and certified by, a Licensed Professional Engineer or Licensed Professional Geologist. 35 Ill. Adm. Code 734.130, 734.135(d). Reimbursement from the UST Fund for “costs associated with professional consulting services” is on a “time and materials basis pursuant to Section 734.850.” 35 Ill. Adm. Code 734.845. Under Section 734.850, maximum payment amounts for costs associated with activities that “do not have a maximum payment amount” set forth in the rules—which is the case here—must be determined by IEPA on a “site-specific basis, provided, however, that personnel costs must not exceed the amounts set forth in Appendix E of this Part.” 35 Ill. Adm. Code 734.850(b). The amounts set forth in Appendix E are hourly rates for 37 individual personnel titles. 35 Ill. Adm. Code 734.Appendix E. Personnel costs must be based upon “the work being performed, regardless of the title of the person performing the work.” 35 Ill. Adm. Code 734.850(b).

Appendix E lists categories of personnel titles; individual personnel titles and corresponding hourly rates; and any required education, licensing, and experience for each title. Below are four relevant categories (engineer, geologist, project manager, and account technician) from Appendix E, although the hourly rates are outdated as the Board’s rules (35 Ill. Adm. Code 734.870) require annual adjustments for inflation to be posted on IEPA’s website.

Title	Degree Required	Ill. License Req’d.	Min. Yrs. Experience	Max. Hourly Rate
Engineer I	Bachelor’s in Engineering	None	0	\$75
Engineer II	Bachelor’s in Engineering	None	2	\$85
Engineer III	Bachelor’s in Engineering	None	4	\$100
Professional Engineer	Bachelor’s in Engineering	P.E.	4	\$110
Senior Prof. Engineer	Bachelor’s in Engineering	P.E.	8	\$130
Geologist I	Bachelor’s in Geology or Hydrogeology	None	0	\$70
Geologist II	Bachelor’s in Geology or Hydrogeology	None	2	\$75
Geologist III	Bachelor’s in Geology or Hydrogeology	None	4	\$88
Professional Geologist	Bachelor’s in Geology or Hydrogeology	P.G.	4	\$92
Senior Prof. Geologist	Bachelor’s in Geology or Hydrogeology	P.G.	8	\$110
Project Manager	None	None	8 ¹	\$90
Senior Project Manager	None	None	12 ¹	\$100

Account Technician I	None	None	0	\$35
Account Technician II	None	None	2 ²	\$40
Account Technician III	None	None	4 ²	\$45
Account Technician IV	None	None	6 ²	\$50
Senior Acct. Technician	None	None	8 ²	\$55

¹ Equivalent work-related or college level education with significant coursework in the physical, life, or environmental sciences can be substituted for all or part of the specified experience requirements.

² Equivalent work-related or college level education with significant coursework in accounting or business can be substituted for all or part of the specified experience requirements. 35 Ill. Adm. Code 734.Appendix E.

The UST rules also list costs that are ineligible for reimbursement from the UST Fund, including:

Costs proposed as part of a budget that are unreasonable. 35 Ill. Adm. Code 734.630(dd).

Costs for corrective action activities and associated materials or services exceeding the minimum requirements necessary to comply with the Act. 35 Ill. Adm. Code 734.630(o).

Indirect corrective action costs for personnel, materials, service, or equipment charged as direct costs. 35 Ill. Adm. Code 734.630(v).

Purchase costs of non-expendable materials, supplies, equipment, or tools, except that a reasonable rate may be charged for the usage of such materials, supplies, equipment, or tools. 35 Ill. Adm. Code 734.630(h).

BOARD DISCUSSION

In this part of the opinion, the Board addresses five subjects: (1) IEPA eliminating budgeted oversight by CW³M's Senior Project Manager as excessive; (2) IEPA reducing hourly rates for developing, calculating, and preparing a budget; (3) IEPA reducing CW³M's budgeted travel; (4) IEPA eliminating budgeted costs for using a measuring wheel; and (5) the need for more information on Abel's request for legal fees.

Excessive Consultant Fees Violate the Act

IEPA eliminated a budgeted line item for oversight by CW³M's Senior Project Manager in three instances:

- **Stage 1 Non-Field Budget**—IEPA eliminated 12 hours of “Technical Oversight/Compliance/Reimbursement Review” (\$1,457.88).
- **Stage 2 Non-Field Budget**—IEPA eliminated eight hours of “Stage 2 Budget Technical Compliance and Oversight” (\$991.28).

- **Site Investigation Completion Report (SICR) Budget**—IEPA eliminated six hours of “SICR Technical Compliance/Oversight” (\$743.46).

In sum, IEPA eliminated 26 hours of oversight budgeted for the Senior Project Manager, totaling \$3,192.62.

Abel’s accounting for CW³M’s consultant fees is captured in the Consulting Personnel Costs Forms submitted to IEPA. R. at 53-72. In its reply brief, Abel acknowledges this by stating that CW³M “completed the Agency’s budget forms, and there is no complaint herein that some important information is missing from the forms.” Abel Reply at 6. These forms have fields for an employee name and title, followed by hours worked, hourly rate, and the total cost per line item. Overarching fields ask for the remediation category and task.

Regarding the \$1,457.88 line item for a Senior Project Manager to conduct “Technical Oversight/Compliance/Reimbursement Review” at Stage 1, IEPA states that the line item exceeds the minimum requirements of the Act, lacks supporting documentation, and is not reasonable as submitted, citing Section 57.7(c)(3) of the Act and Sections 734.630(o), 734.630(cc), and 734.630(dd) of the Board’s UST regulations. As with the other two items eliminated here, IEPA assumes reviewing “ongoing work on a project to see if it was staying on track” is the duty of a project manager. R. at 122.

In the same section of the form, there is another line item for a Senior Project Manager budgeted eight hours for “Stage 1 Budget Summary Development” and a Senior Professional Engineer budgeted \$473.82 for 3 hours at \$157.94/hour for “Stage 1 Budget Summary Review & Reimbursement Certification.” R. at 55. IEPA argues that the \$1,457.88 for the Senior Project Manager duplicates other line items in the Stage 1 budget. IEPA states, “the number of hours for oversight was extremely inflated.” IEPA Brief at 11. Duplicative consultant fees, IEPA asserts, are excessive and violate the Act. *Id.*; see R. at 122; see also 415 ILCS 5/57.7(c)(3) (2014). The Board agrees with IEPA’s determination—the \$1,457.88 budgeted at Stage 1 for a Senior Project Manager may be duplicative.

Abel counters that CW³M takes a team-work approach to consulting work, with no one person working alone on tasks. R. at 1; Abel Brief at 5. Abel asserts that CW³M has been performing UST remediation work for over 25 years and has been staffing jobs the way it did for Abel since the UST regulations were adopted ten years ago. Abel Brief at 5. Abel has not, however, met its burden of proving that these costs would not violate the Act. While it is true that Abel filled out the necessary forms completely, the Board finds that Abel chose the descriptions of work for each consultant budgeted. Those descriptions leave doubt about whether the Stage 1-Pay work exceeds the minimum requirements of the Act.

One of the consultants budgeted for review and certification work at Stage 1 is a Senior Professional Engineer consistent with the Board’s UST regulations. R. at 55; 35 Ill. Adm. Code 734.130, 734.135. IEPA has retained the costs for a Senior Professional Engineer to oversee and certify Stage 1 tasks. The Senior Project Manager is budgeted for two line items under Stage 1 Pay: “Stage 1 Budget Summary Development” and “Technical

oversight/Compliance/Reimbursement review”. R. at 55. In its determination (as with the following two determinations), IEPA eliminated the costs for Senior Project Manager where that title is budgeted for oversight. The Board agrees with IEPA’s determination on the Stage 1 budget. Abel did not meet its burden of proving that the budget for a Senior Project Manager to conduct Technical Oversight/Compliance/Reimbursement Review was not in excess of the minimum requirements necessary to comply with the Act.

Regarding the second line item, Abel budgeted a Senior Project Manager for \$991.28 for performing “technical compliance and oversight” while also budgeting a Senior Professional Engineer for “budget certification” and three other consultants for budget preparation and development tasks. R. at 66. In addition, Abel budgeted a Professional Geologist for Stage 2 budget tasks. The Board agrees with IEPA’s determination on the Stage 2 budget. The Board notes that the budget preparation was done by a Professional Geologist and certified by a Professional Engineer consistent with the requirements of Sections 734.130 and 734.135 of the Board’s UST regulations. 35 Ill. Adm. Code 734.130, 734.135. Therefore, additional oversight by the Senior Project Manager may be excessive. Abel did not meet its burden of proving that the budgeted amount for the Senior Project Manager for Stage 2 Budget Technical Compliance and Oversight would not violate the Act as exceeding the minimum requirements of the Act. 415 ILCS 5/57.7(c)(3) (2014).

With regard to the third line item, and as with the instances above, Abel budgeted two consultants for review and certification of the SICR process: a Senior Project Manager and a Senior Professional Engineer. IEPA eliminated the Senior Project Manager’s line item in light of Abel also budgeting 40 hours for a Professional Geologist to conduct “SICR Development”. IEPA Brief at 12; R. at 69. The Senior Professional Engineer is charged with supervision and certification in the Board’s regulations, as is the Professional Geologist. IEPA did not eliminate Abel’s budget for those consultants. *See* 35 Ill. Adm. Code 734.130, 734.135. The Board agrees with IEPA’s determination on the SICR budget. Abel failed to meet its burden of proving that budgeting as much as 50 hours for oversight, development, and certification of the SICR would not violate the Act as exceeding the minimum requirements of the Act. 415 ILCS 5/57.7(c)(3) (2014).

The Board notes CW³M’s team-work approach to UST remediation may not lend itself to clearly delineating actual costs and budget items by including an “employee name” on the Consulting Personnel Costs Form. CW³M could, instead, distinguish line items with more specific language in the “task” field of the Consulting Personnel Costs Form or otherwise outside of the Consulting Personnel Costs Form as part of its submittal to IEPA. CW³M’s team-work approach with vague, and in some cases redundant task descriptions, makes it difficult for IEPA to determine what budget requests exceed the minimum requirements of the Act. Abel’s argument that it completely filled out the IEPA budget forms falls short if the completed forms fail to demonstrate that the budget costs do not exceed the minimum requirements of the Act.

IEPA is charged with the role of ensuring that remediation work exceeding the minimum requirements of the Act is not reimbursed from the UST Fund in violation of the Act. The Board affirms IEPA’s determination that it “cannot determine that costs will not be used for activities in excess of those necessary to meet the minimum requirements” of the Act. R. at 122-124. IEPA

acknowledges that Abel is “afforded the opportunity to resubmit the [consultant budgeting] information with documentation that would explain what is being performed.” IEPA Brief at 13.

**Abel’s Budgeted Consultant Fees For Budget Preparation, Development
and Calculation Do Not Violate the Act**

IEPA reduced the costs of budget-related tasks to reflect the hourly rate of a Senior Account Technician (\$66.81) rather than the higher rates of technical staff at CW³M. Specifically, IEPA reduced three line items:

- **Stage 1 Non-Field Budget**—IEPA reduced the budgeted total (from \$2,186.82 to \$1,202.58) for 18 hours of “Stage 1 Budget Calculations/Preparation” by rejecting Abel’s proposed application of the Engineer III’s hourly rate (\$121.49) and instead applying the Senior Account Technician’s lower rate.
- **Stage 2 Non-Field Budget (Licensed Professional Geologist)**—IEPA reduced the budgeted total (from \$1,595.86 to \$935.34) for 14 hours of “Stage 2 Budget Preparation/Calculation” by rejecting Abel’s proposed application of the Licensed Professional Geologist’s hourly rate (\$113.99) and instead applying the Senior Account Technician’s lower rate.
- **Stage 2 Non-Field Budget (Engineer III)**—IEPA reduced the budgeted total (from \$991.28 to \$534.48) for eight hours of “Stage 2 Budget Development” by rejecting Abel’s proposed application of the Engineer III’s hourly rate (\$123.91) and instead applying the Senior Account Technician’s lower rate.

In sum, IEPA reduced budgeted consultant fees for budget-related work by \$2,101.56 (from \$4,773.96 to \$2,672.40).

These consultant costs were found excessive under IEPA’s assumptions about which consultant should be doing what kind of work. Tr. at 45. As discussed above, Part 734 of the Board’s UST regulations sets hourly rates based on titles of consultants. Aside from the supervision and certification duties assigned to Licensed Professional Engineers and Licensed Professional Geologists in Sections 734.130 and 734.135, IEPA and owners and operators are left with little regulatory guidance about what title of remediation consultant can perform specific remediation work.

In the first two of the following three modifications, IEPA asserts that “personnel costs must be based upon the work being performed, regardless of the title of the person performing the work.” R. at 122, 123; 35 Ill. Adm. Code 734.850. In all three instances, IEPA stated that the costs exceed the minimum requirements of the Act and were “unreasonable and lacked supporting documentation.” R. at 123.

IEPA argues that budgeting a Professional Geologist for budget preparations/calculations “exceeded the minimum requirements necessary to comply with the Act.” IEPA Brief at 8. The Board finds that developing and preparing a budget for site investigation is logically intertwined

with the site investigation's technical work, which is planned and carried out by technical staff. This conclusion is consistent with Section 734.850 of the Board's UST regulations. 35 Ill. Adm. Code 734.850. IEPA erred in determining that budget development is to be performed only by accounting staff.² The Board is unwilling to take duties away from consultants in the few instances where the Board's UST regulations speak to those duties. Geologists and engineers have an assigned role in the budget process. The Board reverses IEPA's reduction of Abel's costs for a Professional Geologist to conduct budget preparation and calculations.

Abel budgeted for an Engineer III to conduct budget calculations and preparation and budget development. R. at 55, 66. The Board disagrees with IEPA's argument that calculating, preparing and developing a budget is outside a geologist's or engineer's scope of work. licensed Professional Geologists and Licensed Professional Engineers are specifically tasked with supervising such work by the Board's UST regulations. 35 Ill. Adm. Code 734.130; 35 Ill. Adm. Code 734.AppendixE. It is not logical to prevent an unlicensed geologist or engineer from performing budget and accounting work, for example, when a Licensed Professional Geologist or Licensed Professional Engineer must supervise and certify all work, including applications for payment. Therefore, the Board cannot find a legal basis for IEPA's reduction. The requested budget items for the Engineer III would not violate the Act.

The Board reverses IEPA's determination with regard to the \$2,101.56 in Professional Geologist and Engineer III costs.

Abel's Budget Request For Travel Does Not Violate The Act

IEPA's determination letter states that the \$797.93 submitted for travel time "appear[s] to exceed the minimum requirements [of the Act] since there is an [CW³M] office located in the vicinity of the site." R. at 124; *see* R. at 137 ("1 person driving from [S]pringfield" is noted next to the \$797.93 amount). IEPA states that the budget request for travel is unreasonable, lacks supporting documentation, and exceeds the minimum requirements of the Act. *Id.* Abel argues that the travel costs were deducted from the proposed budget "under the erroneous belief" that CW³M has an office in Marion that will be able to handle "on-site drilling/sampling and monitoring well sample/survey/perform slug test" at the Carbondale site. Pet. at. 2; R. at 67.

At hearing, CW³M's Carol Rowe stated that CW³M "always develop[s] our travel time from the Springfield office." Tr. at 22. She indicated that CW³M has only one employee based in the Marion office. *Id.* Ms. Rowe clarified, however, that "if the work is done from Marion, reimbursement is not sought for travel to and from Springfield," and that actual mileage is determined from an odometer reading. *Id.* at 23. IEPA's Shirlene South testified that the reduction reflected her assumption that CW³M's Marion employee would be conducting the work at the Carbondale site. Tr. at 48; R. at 67. As a result, seven hours of travel time—reflecting a roundtrip between Springfield and Carbondale—was deducted from the requested 23 hours in this line item. R. at 67.

² IEPA did not reduce the Senior Project Manager's budgeted time for "Stage 1 Budget Summary Development," for example. Rec. at 55

Reimbursement for travel costs is the subject of Section 734.845 of the Board's regulations. 35 Ill. Adm. Code 734.845. Section 734.845 provides that travel, like other costs associated with consulting services, "will be reimbursed on a time and materials basis pursuant to Section 734.850." *Id.* Section 734.850(b) sets out the maximum amounts that may be paid on a time and material basis and, for personnel costs, refers to Appendix E of Part 734. 35 Ill. Adm. Code 734.850(b).

The specific reason for the modification, that "there is an office located in the vicinity of the site," does not explain why the budget request would violate the Act or Board regulations. To the contrary, Abel has justified the budgeted amount for employees to travel from Springfield to Carbondale to conduct the necessary on-site drilling and monitoring well sampling. R. at 67. The budget line item is for a Professional Geologist to conduct "[o]n-site Drilling/Sampling and Monitoring Well Sample/Survey/Perform Slug Test." *Id.* After Abel's budget was submitted, in a number of telephone calls, IEPA established that one of CW³M's consultants working on the Abel site is housed in CW³M's Marion office. R. at 131-133, 137. The Board finds nothing in the record, however, indicating that the Marion CW³M consultant is the consultant who will perform the budgeted work. As noted above, travel is reimbursed on a time and material basis. IEPA eliminated the amount of the budget item for travel.

Section 57.7(c)(1) of the Act indicates that IEPA's review and approval of a budget is considered a final approval for purposes of seeking and obtaining payment . . . *if* the costs associated with the completion of any such plan are less than or equal to the amounts approved. 415 ILCS 5/57.7(c)(1) (2014) (emphasis added). With its headquarters in Springfield, and this budgeted work occurring sometime in the future, it does not violate the Act for Abel to budget for employees to travel from Springfield to conduct the necessary work.

Based on the record before it, the Board cannot determine how IEPA could assign which CW³M consultant will be conducting the future work in Carbondale. IEPA's determination in this case essentially strips CW³M of the decision to assign work among its consultants, regardless of where those consultants are housed. The Board finds that Abel's budget request for travel to and from the site would not violate the Act. The Board reverses IEPA's modification and approves the budget for CW³M's Professional Geologist to travel to Carbondale from CW³M's Springfield headquarters for the necessary work at the site.

**Budgeted Charges for Using a Measuring Wheel Are Not Indirect Costs
Ineligible for Reimbursement**

In the determination letter, IEPA states that it "considers a measuring wheel to be an indirect cost of doing business". R. at 122. In its petition, Abel asserts that IEPA deducted the measuring wheel as an indirect cost "based upon a new position taken by the IEPA that is [sic] not supported by the regulations." Pet at 2. Abel cites Knapp Oil Company v. IEPA where the Board recently found for petitioner on a similar question involving a digital camera. Knapp Oil Company v. IEPA, PCB 16-103, slip op. at 6-7 (Sept. 22, 2016). Abel argues that in Knapp Oil, the Board found that "the cost of a camera was not an indirect cost, relying in part on Agency

guidance that identified cameras and photo development as typical direct costs.” Abel Brief at 14; Abel Reply at 2.

For the reasons below, the Board finds that the budgeted charges for using the measuring wheel are not indirect costs ineligible for reimbursement. Under Board rules, “[i]ndirect corrective action costs for . . . equipment charged as direct costs” are ineligible for reimbursement. 35 Ill. Adm. Code 734.630(v). IEPA likens a measuring wheel to overhead and maintains that “[a] measuring wheel is a one-time cost for a piece of equipment that can be used multiple times. It is a tool and is not disposable.” IEPA Br. at 7.

In its recent Knapp Oil decision, the Board found that a \$30 daily charge for using a digital camera to document site investigation activities is not ineligible as an indirect cost billed as a direct cost. Knapp Oil, PCB 16-103, slip op. at 4, 6-7. In that case, the Board observed that under its rules, the cost of purchasing non-expendable equipment is listed as ineligible, except that “a reasonable rate may be charged for the usage of such . . . equipment . . .” *Id.* at 6, quoting 35 Ill. Adm. Code 734.630(h). The Board distinguished the camera charge from interest, finance, and insurance costs billed as direct costs, which are ineligible. Knapp Oil, PCB 16-103, slip op. at 6, citing 35 Ill. Adm. Code 734.630(t), (u). The Board found further support for reversing IEPA’s determination to deny the camera charge as an indirect cost:

The Agency’s own forms consider a camera as a reimbursable cost. Its “Instructions for the Budget and Billing Forms” list “cameras/photo development” as equipment and supplies that can be included with the Consultant’s Materials Costs Form. The contents of this form have regulatory weight because the budget must be submitted to the Agency “on forms prescribed and provided by the Agency.” 35 Ill. Adm. Code 734.135(a). Though Agency forms do not supersede Board regulations when determining what costs may be reimbursed, the forms show what is typically considered a direct cost. Knapp Oil, PCB 16-103, slip op. at 6 (record citations omitted).

Here, Abel introduced the same IEPA instructions into evidence without objection. Tr. at 39-40. Those instructions list a “measure wheel” in the same category as “cameras/photo development.” Abel Exh. 1 at 15. The Board agrees with Abel that the issue here of the measuring wheel charge is substantively identical to the camera charge in Knapp Oil. Abel Br. at 14. Accordingly, the Board reverses IEPA’s determination to eliminate Abel’s budgeted costs of \$75 for a measuring wheel. The Board therefore approves \$54 in the Stage 1 actual costs and \$21 in the Stage 2 budget for using a measuring wheel.

The Board Needs Additional Information Before Awarding Legal Fees

Section 57.8(l) of the Act addresses reimbursement from the UST Fund and provides that “[c]orrective action does not include legal defense costs. Legal defense costs include legal costs for seeking payment under this Title unless the owner or operator prevails before the Board in which case the Board may authorize payment of legal fees.” 415 ILCS 5/57.8(l) (2014); *see* 35 Ill. Adm. Code 734.630(g).

Abel requests that “the Board award payment of attorney’s fees.” Pet. at 3; *see* 415 ILCS 5/57.8(1) (2014). Abel renewed this request in its post-hearing brief and its reply. Abel Brief at 19; Abel Reply at 13. The record does not now include the amount of these fees or Abel’s arguments that they are reimbursable under Section 57.8(1) of the Act. In its order below, the Board directs Abel 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. Abel must file its statement by January 17, 2017. The Agency may file a response by January 31, 2017.

CONCLUSION

The Board affirms IEPA on eliminating Abel’s costs for consultants where those costs exceeded the minimum requirements of the Act. Abel’s consulting personnel forms failed to demonstrate that more than one consultant was not being budgeted for the same work. Therefore, those costs violate the Act as exceeding the minimum requirements. 415 ILCS 5/57.7(c)(3) (2014).

The Board, however, reverses IEPA’s reduction of Abel’s consulting costs in three instances where IEPA stated Abel budgeted unreasonably, excessively, or for the title of the consultant rather than the work performed. On this issue, Abel met its burden of proving that budgeting those consultants for the work described would not violate the Act.

The Board reverses IEPA’s determination that travel for a Professional Geologist from CW³M’s Springfield headquarters to the Carbondale site is unreasonable. Abel’s budget request for travel to and from the site would not violate the Act. Finally, the Board reverses IEPA’s determination that a measuring wheel is an indirect cost and, as such, may not be reimbursed. Seventy-five dollars in costs for using a measuring wheel would not violate the Act or Board regulations.

The Board directs Abel to submit a statement of legal fees that may be reimbursable and allows IEPA to respond. This interim opinion and order constitutes the Board’s findings of fact and conclusions of law.

ORDER

1. The Board affirms the Illinois Environmental Protection Agency’s (IEPA) determination with regard to the following deductions from Abel Investment’s (Abel) Stage 1 Actual Costs and Stage 2 Proposed Budget:
 - a. \$1,457.88 for a Senior Project Manager to conduct Stage 1 Technical Oversight, Compliance and Reimbursement review;
 - b. \$991.28 for a Senior Project Manager to conduct Stage 2 Budget Technical Compliance and Oversight; and
 - c. \$743.46 for a Senior Project Manager to conduct Site Investigation Completion Report Technical Compliance and Oversight.

2. The Board reverses IEPA's determination with regard to the following reductions from Abel's Stage 1 actual costs and Stage 2 proposed budget:
 - a. \$984.24 for an Engineer III to conduct Stage 1 Budget Calculations and Preparation;
 - b. \$660.52 for a Professional Geologist to conduct Stage 2 Budget Preparation and Calculations; and
 - c. \$456.80 for an Engineer III to conduct Stage 2 Budget Development.
3. The Board reverses IEPA's determination to deduct travel costs from Abel's Stage 2 proposed budget.
4. The Board reverses IEPA's determination to deduct the costs of using a measuring wheel from Abel's Stage 1 actual costs and Stage 2 proposed budget.
5. Abel 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 reimburse those fees from the UST Fund under Section 57.8(1) of the Act. 415 ILCS 5/57.8(1) (2014). Abel must file its statement and arguments by January 17, 2017, which is the first business day following the 30th day after the date of this order. IEPA may file a response by January 31, 2017.

IT IS SO ORDERED.

I, John T. Therriault, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above interim opinion and order on December 15, 2016, by a vote of 4-0, Member Santos voted Present.



John T. Therriault, Clerk
Illinois Pollution Control Board