

ILLINOIS POLLUTION CONTROL BOARD  
February 22, 2018

CITY OF BENTON FIRE DEPARTMENT,	)	
	)	
Complainant,	)	
	)	
v.	)	PCB 17-01
	)	(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 K. Papadimitriu):

The City of Benton Fire Department (Benton Fire) filed a petition asking the Board to review a June 10, 2016 determination of the Illinois Environmental Protection Agency (Agency). The Agency's determination concerns Benton Fire's leaking underground storage tank (UST) site located at 107 North Maple Street in Benton, Franklin County. The Agency approved Benton Fire's Site Investigation Completion Report and approved its Stage 1 Site Investigation Actual Costs with modifications that reduce the consultant's materials costs to zero. The Agency denied these costs because they: (1) lacked supporting documentation; (2) could be unreasonable; and (3) could have included indirect costs. Benton Fire believes the Agency erred in its decision and asks that the Board direct the Agency to approve the Benton Fire's application for payment from the UST Fund as submitted.

This opinion briefly summarizes the case's procedural, factual, and legal background before analyzing the issues on appeal. The Board finds that the Agency's review of Stage 1 Site Investigation Actual Costs was premature. The Board finds that the actual costs were not submitted as part of the application for payment. Because the Agency cannot approve or modify actual costs of stage 1 site investigation before an application for payment is submitted, the Board denies Benton Fire's request that the Board direct the Agency to approve the actual costs as submitted. The Board, thus, strikes the parts of the Agency's determination approving the Stage 1 Site Investigation Actual Costs with modification. The Board issues its decision today as an interim opinion and order because before the Board issues its final order, the parties must have the opportunity to make filings concerning Benton Fire's legal fees.

## **PROCEDURAL BACKGROUND**

On July 18, 2016, Benton Fire timely filed a petition (Pet.) asking the Board to review the Agency's June 10, 2016 determination. On August 11, 2016, the Board accepted the petition for hearing. On April 19, 2017, the Agency filed the record (R.). On August 17, 2017, the Board denied both parties' motions for summary judgment and directed the hearing officer to proceed to hearing. On October 18, 2017, the Board held a hearing. The hearing transcript became available on October 23, 2017 (Tr.). During the hearing, the hearing officer admitted three exhibits into the record: the Agency's Instructions for the Budget and Billing Forms (Exh. 1); and the Agency's email correspondence with Chase Environmental Group, Inc. (Chase) on January 13 and 19, 2017 (Ag. Exh. 1), and on January 26, 2017 (Ag. Exh. 2) concerning an unrelated UST site.

On November 13, 2017, Benton Fire filed a post-hearing brief (Br.). On November 28, 2017, the Agency filed its post-hearing brief (Ag. Br.), and on December 6, 2017, Benton Fire filed a reply brief (Reply Br.). The Board received no public comments.

With its post-hearing brief, Benton Fire filed the Agency's August 12, 2015 determination, which approves Benton Fire's Stage 1 Site Investigation Plan and Budget (Exh. 2) and the Agency's Budget and Billing Form for Leaking Underground Storage Tank Sites (Exh. 3). Benton Fire asks the Board to take administrative notice of the Agency's August 12, 2015 determination. Br. at 1 (footnote). Finding no material prejudice, the Board takes administrative notice of the Agency's determination, as a document created by the Agency and available from the Agency's website. *See* 35 Ill. Adm. Code 101.630; *see also* McAfee v. IEPA, PCB 15-84, slip. op. at 2 (Mar. 5, 2015); *see also* People v. Young, 355 Ill. App. 3d 317, 321 (2nd Dist. 2005).

## **FACTUAL BACKGROUND**

On October 24, 2014, Benton Fire reported a release from two 500-gallon USTs (one filled with diesel fuel and one with gasoline) located at its site (Incident #20141215). R. at 25. On August 12, 2015, the Agency approved Benton Fire's Stage 1 Site Investigation Certification that represents its plan and budget. Exh. 2 at 1. The approval states that "costs must not exceed the amounts set forth in 35 Illinois Administrative Code 734 Subpart H, Appendix D and Appendix E." Exh. 2 at 1.

After completing the site investigation, on February 9, 2016, Benton Fire's consultant, Chase, submitted to the Agency Benton Fire's Site Investigation Completion Report (Completion Report) and Stage 1 Site Investigation Actual Costs (Actual Costs), with all costs totaling \$20,119.05. R. at 19.

Before making the determination, the Agency's Leaking UST Section Project Manager, Michael Piggush, corresponded with Chase on June 6, 8, and 9, 2016, to request additional information and an extension of the 120-day review period. R. at 12-18. On June 9, 2017, Chase's Marvin Johnson replied, answering Mr. Piggush's questions and denying the requested

extension. *Id.* Regarding the consultant's materials costs, Mr. Johnson's answers indicate that Chase believes it submitted all required information with its application and used "rates that have consistently been approved in [their] clients Budgets and Reimbursement requests." *Id.*

On June 10, 2016, the Agency issued its determination approving the Completion Report, and approving Actual Costs with modifications. R. at 5-7. The modifications reduce consultant's materials cost to zero. *Id.* The Agency determination indicated that the costs are ineligible for payment for three reasons: (1) under Section 734.630(cc) of Board rules, because they lack supporting documentation; (2) under Section 57.7(c)(3) of the Act and Section 734.630(dd) of the Board rules, because "[t]hese costs may not be reasonable"; and (3) under Section 734.630(v) of the Board rules, because [t]hese cost may include indirect corrective action costs." *Id.*

### **LEGAL BACKGROUND**

The Agency's determination may be appealed to the Board under Section 40 of the Act. *See* 415 ILCS 5/40, 57.7(c) and 57.8(i) (2016). In reviewing the determination, the Board must decide whether Benton Fire's application to the Agency would not violate the Act and the Board rules. 415 ILCS 5/40 (2016)); *see Abel Investments, LLC. v. IEPA*, PCB 16-108, slip op. at 3 (Dec. 15, 2016); *Kathe's Auto Service Center v. IEPA*, PCB 96-102, slip op. at 13 (Aug. 1, 1996); *see also Browning Ferris Industries of Illinois v. PCB*, 179 Ill. App. 3d 598 (2nd Dist. 1989). The Board must decide whether the application, as submitted to the Agency, demonstrates compliance with the Act and Board regulations. *Kathe's*, PCB 96-102, slip op. at 12. The Agency's denial letter frames the issue on appeal. *Id.* The burden of proof is on the petitioner, who must provide accounting of all costs and show that the costs are reasonable. 415 ILCS 5/40(a)(1) and 57.7(a)(2) (2016); *see also Platolene 500, Inc. v. IEPA*, PCB 92-9, slip op. at 2, 8 (May 7, 1992).

The Board's review is generally limited to the record before the Agency 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 Illinois Ayers*, PCB 03-214, slip op. at 15 ("the Board does not review [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").

The standard of proof in UST appeals is the "preponderance of the evidence." *Freedom Oil*, PCB 03-54 at 59, *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.").

### **BOARD DISCUSSION**

Benton Fire argues that the Agency's Determination should be reversed, because: (1) the application was legally complete; (2) the requested costs are reimbursable as direct costs; (3) they are based on the rates consistently approved by the Agency; and (4) they do not exceed

maximum amounts set in Subpart H of Part 734 of the Board rules. Pet. at 2-3. Benton Fire also alleges that the Agency's request for information was not proper and that no statutory or regulatory provisions would be violated by approving requested consultant's materials costs. *Id.* at 3. In its petition, Benton Fire is asking that the Board "direct the Agency to approve the application for payment as submitted." *Id.*

Both parties seem to agree that the main issue in this appeal is whether the Agency properly disapproved the consultant's material costs based on the information submitted to the Agency. The Board, however, finds that the main issue in this appeal is whether the Agency's review of the Actual Costs, that include consultant material costs, was *timely*.

The Board finds below that review and approval of the costs as submitted would violate the Act and Board rules. For the reasons provided below, the Board concludes that the Agency prematurely reviewed the Actual Costs and consultant material costs. The Board strikes parts of the Agency determination that approve the Actual Costs with modifications. The Board finds that the Agency does not have authority to review actual costs of Stage 1 site investigation until Benton Fire submits its request for reimbursement. Because the Board finds that the Agency's review was not timely, the Board need not consider whether the Agency properly disapproved the consultant's materials costs.

### **The Agency Must Review Stage 1 Site Investigation Actual Costs at Reimbursement Stage**

Benton Fire submitted its Actual Costs on February 9, 2016, while the Completion Report was approved on June 10, 2016. The Agency approved Benton Fire's Actual Costs in the same Agency determination that approved the Completion Report. *See* Pet. at 2.

Section 57.7(a)(5) of the Act lists information and documents that the UST owner or operator must provide to the Agency in its site investigation completion report. 415 ILCS 5/57.7(a)(5) (2016). The list does not require a UST owner or operator to submit, at this stage, any financial information—such as summary of actual costs or any supporting documents for any of the costs. The first time the Act requires UST owner or operator to address the actual costs, is when submitting application for payment under Section 57.8(a)(6). 415 ILCS 5/57.8(a)(6) (2016). It is at this stage that the UST owner or operator must confirm that the "amounts actually sought" are expended in conformance with the budget. *Id.*

In its budget certification for Stage 1 site investigation, a UST owner or operator certifies that it will not exceed the maximum amounts set forth in Subpart H of Part 734. 35 Ill. Adm. Code 734.310(b); *see also* Abel, PCB 16-108 at 2. Subpart H provides specific methods for determining the maximum amounts for payment from the UST Fund. *Id.* It also indicates that "[i]n some cases the maximum amounts are specific dollar amounts, and in other cases the maximum amounts are determined on a site-specific basis." 35 Ill. Adm. Code 734.800(a)(1).

Professional consulting services costs, including consultant's materials costs, are reimbursed on a "time and material basis." 35 Ill. Adm. Code 734.845. Maximum payment amounts for costs reimbursed on "time and material basis" that do not have maximum amounts set in Subpart H are determined by the Agency on site-specific basis under Section 734.850(b).

35 Ill. Adm. Code 734.310(b). Section 734.850(b) requires UST owners or operators to demonstrate to the Agency that the amounts they seek for reimbursement of such costs are reasonable. 35 Ill. Adm. Code 734.850(b). The Agency must then determine the maximum payment amounts based on such demonstrations. *Id.*

Because neither the Act nor the Board regulations require a UST owner or operator to address its actual costs in its site investigation completion report, but rather in an application for payment, the Agency must determine the actual costs' reasonableness required by Section 734.850(b) when it receives the application for payment.

### **Knapp Oil and T-Town are Not Dispositive**

The Agency has authority to review both budgets and applications for payment. *See* 415 ILCS 5/57.7(c), 35 Ill. Adm. Code 734.500, 734.600. A budget review aims to establish that the costs sought are *reasonable*; such review is subject to Section 57.7 of the Act and Part 734 Subpart E of the Board rules. *See* 415 ILCS 5/57.7(a)(2); 35 Ill. Adm. Code 734.505(a). A review of an application for payment, on the other hand, determines whether the approved costs have *actually been expended*; it is subject to Section 57.8 of the Act and Part 734 Subpart F of the Board rules. *See* 415 ILCS 5/57.8(a)(6); 35 Ill. Adm. Code 734.605(b).

The Board has denied the Agency authority to reexamine reasonableness of the costs in a previously-approved budget: the Agency may not modify costs at the payment stage. *See Knapp Oil Company v. IEPA*, PCB 16-103, slip op. at 9 (Sep. 22, 2016) (*citing Evergreen FS v. IEPA*, PCB 11-51, 12-61 (cons.), slip op. at 21 (June 21, 2012)). After approving a budget, the Agency cannot later reconsider its merits and “second guess whether the requested reimbursement was reasonable”. *See id.* (*quoting T-Town Drive Thru v. IEPA*, PCB 07-85, slip op. at 24-25 (Apr. 3, 2008)). The Board previously ruled that the Agency may not ask for more supporting documentation at the reimbursement stage. *See Knapp Oil*, PCB 16-103 at 9. The Board noted that the Agency may communicate with the owner or operator to address any issues it may have with the proposed budget and request any supporting documentation it needs before approving the budget. *See Knapp Oil*, PCB 16-103 at 9.

The cited cases, however, do not apply here. They do not address the same type of Agency determination: in *Knapp Oil*, the Agency determination concerns Stage 1 itemized budget (*Knapp Oil*, PCB 16-103, slip op. at 4); and *T-Town* concerns an application for reimbursement following an approved corrective action plan and budget (*T-Town*, PCB 07-85, slip op. at 3). Benton Fire's Actual Costs submittal is neither an itemized budget, nor an application for reimbursement, as concluded below. Unlike this proceeding, in both *Knapp Oil* and *T-Town*, the Agency already determined that requested costs are reasonable when approving the underlying budgets. In this proceeding, the Agency only approved a certification that the costs will not exceed maximum amounts set in the Board rules and did not have a chance to determine whether the costs are reasonable as required in Section 734.850(b) of Board rules. Thus, because the Agency is examining the costs here for the first time at payment stage, the Board's prior decisions, finding that the Agency cannot request additional information and reexamine costs at the application for payment, do not apply.

### **Benton Fire Did Not Submit Actual Costs in an Application for Payment**

A Stage 1 site investigation budget consists only of the UST owner or operator's certification that the costs of the Stage 1 site investigation will not exceed the maximum amounts set forth in Subpart H of Part 734. 35 Ill. Adm. Code 734.310(b). No cost breakdown is provided to the Agency at this stage. The first time the Agency is presented with an itemized break-down of costs is in an "actual costs summary". See Tr. at 40; see also Abel, PCB 1 at 2. Neither the Act nor the Board rules require an "actual costs summary" with a Stage 1 Site Investigation Completion Report. It is required only by the Agency forms and instructions. See Exh. 1 at 2. Because an "actual costs summary" follows a certification, rather than a detailed line-item budget—as in Stages 2 or Stage 3—there appears to be an uncertainty about how the Agency must review it—as a budget, a budget modification, or an application for payment.

The record indicates that there is some confusion between the parties too. The parties provide conflicting statements as to whether Benton Fire submitted its Actual Costs as part of a request for payment or as a budget review request. Benton Fire's petition states that the application was legally complete, containing all the information required by Section 57.8(a)(6) of the Act and Sections 734.605 of the Board regulations (Pet. at 3), which apply to applications for payment. Later, however, Benton Fire states that it "is not at the payment stage" and that Section 734.605(b)(9) does not apply. Br. at 11. On the other hand, Benton Fire has not amended its petition that is asking the Board to "direct the Agency to approve the application for payment as submitted." Pet. at 3. Meanwhile, at hearing the Agency noted that it believes it is reviewing a budget for the actual cost of stage 1 site investigation. Tr. at 40. At the same time, Agency's post-hearing brief notes that "[i]n reimbursement appeals, of which this matter is, the applicant for reimbursement has the burden to demonstrate that alleged costs are related to corrective action, properly accounted for, and reasonable." Ag. Br. at 2.

Under 734.605(h), an application for payment of stage 1 site investigation costs may not be submitted *prior* to the approval of either an investigation plan for the next stage or a site investigation completion report. 35 Ill. Adm. Code 734.605(h). Here, Benton Fire submitted the Actual Costs *before* the Agency approved its Completion Report. The record indicates that the Actual Costs were *not* accompanied with any of the documents required of a complete application for payment under Section 57.8(a)(6) of the Act and Section 734.605(b) of the Board rules. 415 ILCS 5/57.8(a)(6) (2016); 35 Ill. Adm. Code 734.605(b). Instead, the Actual Costs were annexed to the Completion Report. R. at 24. Following the Board's review of the record, the Board concludes that Benton Fire's Actual Costs were not submitted as part of the "application for payment" under Section 57.8(a)(6) of the Act and Section 734.605(b) of the Board rules.

The Board, thus, concludes that the Agency reviewed the Actual Costs prematurely. The Agency cannot review Stage 1 Site Investigation Actual Costs before they are submitted as part of an application for payment. Only as part of a such review, the Agency has authority to determine reasonableness of consultants' materials costs that do not have maximum amounts set in Subpart H of Part 734 of the Board rules and request information to demonstrate their reasonableness.

### **Legal Fees**

Benton Fire requests that the Board “award payment of attorney’s fees.” Pet. at 4. The Act gives the Board discretion to authorize payment of legal fees if the UST owner or operator prevails before the Board. 415 ILCS 5/57.8(1); *see also* 35. Ill. Adm. Code 734.630(g). The record, however, does not contain a request for a specific amount of legal fees. Benton Fire also did not justify why the Board should exercise its discretion under Section 57.8(1) in this case. The Board directs Benton Fire to file a statement of eligible legal fees and justify why the Board should use its discretion to reimburse those fees under Section 57.8(1) of the Act. Benton Fire must file its statement by March 22, 2018. The Agency may file response by April 5, 2018.

### **CONCLUSION**

The Board denies Benton Fire’s request that the Board direct the Agency to approve the application for payment as submitted. The Board finds that approval of the Benton Fire’s Stage 1 Site Investigation Actual Costs together with the approval of its Stage 1 Site Investigation Completion Report violate the Act and the Board rules. The Board finds that the Agency cannot review Stage 1 Site Investigation Actual Costs before they are submitted as part of an application for payment. The Board finds that, Stage 1 Site Investigation Actual Costs were not submitted as part of an application for payment, and concludes that the Agency reviewed and modified them prematurely. The Board, therefore, strikes parts of the Agency’s determinations that approve Benton Fire’s Stage 1 Site Investigation Actual Costs with modifications.

### **ORDER**

1. The Board denies Benton Fire’s request to direct the Agency to approve the application for payment as submitted because the approval violates the Act and Board rules.
2. The Board strikes as premature the parts of the Agency’s June 10, 2016 determination that approve Stage 1 Site Investigation Actual Costs with modifications.
3. The Board directs Benton Fire to file by March 22, 2018 a statement of legal fees that may be eligible for reimbursement and justification why the Board should exercise its discretion to reimburse those fees under Section 57.8(1) of the Act.

IT IS SO ORDERED.

I, Don A. Brown, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion and order on February 22, 2018 by a vote of 5-0.



Don A. Brown, Clerk  
Illinois Pollution Control Board