

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

WEBB & SONS, INC.,)	
)	
Petitioner,)	
)	PCB No. 07-24
vs.)	(UST Appeal)
)	
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Respondent.)	

NOTICE OF FILING

TO: Ms. Dorothy Gunn
Clerk of the Board
Illinois Pollution Control Board
100 W. Randolph Street
Suite 11-500
Chicago, IL 60601

PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Illinois Pollution Control Board an original and nine copies of an Petitioner's Brief, copies of which are herewith served upon you.

Respectfully Submitted

WEBB & SONS, INC.,
Petitioner

BY: /S/
Jeffrey W. Tock

Dated: December 29, 2006

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PETITIONER'S BRIEF

NOW COMES the Petitioner, WEBB & SONS, INC., by its attorneys, Harrington & Tock, and, for its Brief in support of its Petition for Review of Illinois Environmental Protection Agency's Decision To Deny Petitioner's High Priority Corrective Action Plan Budget, states as follows:

I. Issue on Appeal

Were all or any portion of the Personnel Costs contained in Section G of the Petitioner's proposed Corrective Action Plan Budget reasonable and, therefore, in compliance with the Illinois Environmental Protection Act?

II. Standard of Review

The Agency's denial letter of September 12, 2006 in which it denied all personnel costs as unreasonable frames the issue on appeal. *Pulitzer Community Newspapers, Inc. vs. EPA*, PCB 90-142 (December 20, 1990). The Board's review of the decision of the Agency to deny all personnel costs is based upon the administrative record, the transcript of the December 11, 2006 hearing, the exhibits admitted at the hearing and public records

available to the Board. It is the obligation of the Board to review the entirety of the record to determine whether or not the Petitioner's proposed Corrective Action Plan Budget was in compliance with the Act. *Illinois Ayers Oil Company vs. IEPA*, PCB 03-214, slip op. at 15 (April 1, 2004). The Board does not review the Agency's decision using a deferential manifest weight of the evidence standard. *IEPA vs. PCB*, 115 Ill.2d 65, 70, 503 N.E.2d 343, 345 (1986).

III. Applicable Statutes and Regulations

415 ILCS 5/57.7 (as amended by P.A. 92-735, sec. 5)

(c) Corrective Action.

(1) High Priority Site.

(B) If the owner or operator intends to seek payment from the Fund, prior to performance of any corrective action beyond that required by Section 57.6 and subsection (a) of Section 57.7, the owner or operator shall submit to the Agency for the Agency's approval or modification a corrective action plan budget which includes, but is not limited to, an accounting of all costs associated with the implementation and completion of the corrective action plan.

(4) Agency review and approval.

(C) In approving any plan submitted pursuant to Part (E) of this paragraph (4), the Agency shall determine, by a procedure promulgated by the Board under item (7) of

subsection (b) of Section 57.14, that the costs associated with the plan are reasonable, will be incurred in the performance of corrective action, and will not be used for corrective action activities in excess of those required to meet the minimum requirements of this title.

(E) For purposes of this Title, the term “plan” shall include:

(iv) Any corrective action plan budget submitted pursuant to subsection (c)(1)(B) of this Section.

35 Ill. Adm. Code 732.503(b) The Agency shall have the authority to approve, reject or require modification of any plan, budget plan, or report it reviews. If the Agency rejects a plan, budget plan or report, or requires modifications, the written notification shall contain the following information, as applicable:

- (1) an explanation of the specific type of information, if any, that the Agency needs to complete the review;
- (2) an explanation of the sections of the Act or regulations that may be violated if the plan, budget plan, or report is approved; and,
- (3) a statement of specific reasons why the cited sections of the Act or regulations may be violated if the plan, budget plan or report is approved.

35 Ill. Admin. Code 732.505(c) A full financial review shall consist of a detailed review of the costs associated with each element necessary to accomplish the goals of the

plan as required pursuant to the Act and regulations. Items to be reviewed shall include, but not be limited to, costs associated with any materials, activities or services that are included in the Budget Plan. The overall goal of the financial review shall be to assure that costs associated with materials, activities and services shall be reasonable, shall be consistent with the associated technical plan, shall be incurred in the performance of corrective action activities, and shall not be used for corrective action activities in excess of those necessary to meet the minimum requirements of the Act and regulations.

35 Ill.Admin.Code 732.606 Ineligible Corrective Action Costs.

(hh) Costs proposed as part of a Budget Plan that are unreasonable.

IV. Statement of Facts

By letter dated August 18, 2006, HDC Engineering, as engineers for the Petitioner, submitted to the Agency (hereinafter referred to as the "Agency") the High Priority Corrective Action Plan and Budget for the Petitioner's property. (Admin. Record at Page 025.) The Budget was prepared on forms provided by the Agency. Section G of the Budget pertains to personnel costs and consists of pages G-1 through G-3. (Admin. Record at Pages 054 through 056; Petitioner's Exhibit 1.) Section G is further broken down in subgroups as follows: High Priority Investigation and Preliminary Costs; CAP Implementation (dig and haul); Additional Well Monitoring/Well Replacement/TACO Sample Collection; and CACR Report/HAAs/Reimbursements. Each one of those sub-categories is further broken down by tasks to be performed by each described position, the number of hours to perform those tasks, the hourly rate each position shall be paid to

perform those tasks, and the total of each position cost as determined by multiplying the hourly rate by the total number of hours.

By letter dated September 12, 2006, Harry Chappel, by and on behalf of the Agency, notified the Petitioner that the Corrective Action Plan had been conditionally approved with the Agency's modifications as designated in that letter and further notified the Petitioner that the Corrective Action Plan Budget had also been modified.

(Petitioner's Exhibit 3; Admin. Rec. at Pages 001-005.) The letter of September 12, 2006 stated: "Based on the modifications listed in Section 2 of Attachment A, the amounts listed in Section 1 of the Attachment A have been approved." The budget amounts actually approved as stated in Attachment A were as follows:

\$ 4,329.97	Investigation Costs
\$ 1,779.47	Analysis Costs
\$ 0.00	Personnel Costs
\$ 1,000.00	Equipment Costs
\$132,827.87	Field purchases and other costs

The explanation for not approving any personnel costs is set forth in paragraph 3 of Section 2 of Attachment A to the Agency's letter of September 12, 2006. That explanation is as follows:

"\$103,360.00 for personnel costs deemed unreasonable. Such costs are ineligible for payment from the Fund pursuant to 35 Ill. Adm. Code 732.606(hh). The Agency is requesting an hourly breakdown of each task performed by each job title in order to make a more thorough review of the proposed personnel costs."

The Petitioner has accepted the Plan modifications and Budget modification as to investigation costs and field purchases and other costs and is not appealing those

modifications. The Petitioner's appeal involves only the Agency's denial of all personnel costs.

Mr. Kevin Saylor testified at the hearing on December 11, 2006. Mr. Saylor is a professional engineer employed by HDC Engineering. (Hrg.Trans. at Pages PP7-8.) Mr. Saylor has prepared for submission to the Illinois EPA over fifty proposals for plans and budgets. (Hrg.Trans. at Page 8.) Of those fifty budgets, only three of them were rejected by the Agency in total as to personnel costs. Those three were this present appeal, a previous Webb appeal (PCB 2005-183) and the Richard Gooden site (PCB 06-139). (Hrg.Trans. at Page 9.)

Mr. Saylor identified Petitioner's Exhibit 1 as Section G of the Corrective Action Plan Budget proposal that had been submitted to the Agency. That Budget had been prepared by Mr. Saylor. (Hrg.Trans. at Page 10.) Mr. Saylor testified that the hourly rates for each personnel classification listed in Petitioner's Exhibit 1 (Section G of the Budget) were within the range of rates authorized by the Agency for each such position. (Hrg.Trans. at Page 11.) When asked if the tasks to be performed by each position in Exhibit 1 were similar for all corrective action plan projects and differ only by the size of the project, Mr. Saylor replied that they were. Variations from one corrective action plan budget to another depend upon the extent of the contamination, how many agreements you may need and how much soil you are digging out. (Hrg.Trans. at Page 12.) There was nothing unique or unusual about the field work involved with this corrective action plan compared to other corrective action plans that Mr. Saylor has been involved with. (Hrg.Trans. at Page 15.)

Mr. Saylor has been involved with the preparation of five other corrective action plans that were approved by the Agency. The units costs, the costs of doing the dig and haul, the high priority investigation, preliminary costs, and the various categories contained in Exhibit 1 were substantially similar for each of the approved corrective action plans and budgets and substantially similar to the proposed corrective action plan and budget for the Webb site. (Hrg.Trans. at Page 16.) The budgets for those other plans were approved by the Agency with some modification but, in each case, the Agency did not totally reject all personnel costs (Hrg.Trans. at Page 17.)

Mr. Saylor testified that there have been two previous appeals involving the Webb site. The first appeal involved a submission to the Agency for reimbursement of tank removal and soil excavation under Section 731. The Agency denied reimbursement of \$77,000.00 of the cost submitted for reimbursement. The denial by the Agency of \$77,000.00 was appealed and, as a result of the appeal, the entire \$77,000.00 was recovered from the Agency. (Hrg.Trans. at Page 19-20.)

A second Webb appeal involved site investigation. A plan and budget was submitted to the Agency for approval of Stage II site investigation. The plan was approved by the Agency as well as most of the budget, but no personnel costs were approved. At the request of the Agency, Mr. Saylor provided an exhaustive hourly by task and by person breakout of the personnel costs for the Agency's review. Once those hourly breakouts were submitted to the Agency, the Agency cut roughly half of the proposed personnel costs. Consequently, a second appeal was filed to regain the personnel costs that were cut from the Stage II site investigation budget. As a result of

that appeal, all but \$1,000.00 was funded for the personnel costs as originally proposed in the budget. (Hrg.Trans. at Pages 21-22.)

Mr. Saylor referred to the request by the Agency as set forth in its letter of September 12, 2006 denying all personnel costs as unreasonable (Petitioner's Exhibit 3) and testified that he was concerned that, even if he provided the hourly breakdown as requested, the personnel costs would still be rejected as they had been for the Stage II site investigation budget. Consequently, Mr. Saylor recommended appeal of the Agency's decision since, in his opinion, providing the hourly breakdown would not result in approval of all personnel costs and the matter would end up being appealed anyway. (Hrg.Trans. at Pages 29-30.) Mr. Saylor was also concerned about receiving approval from Mr. Chappel as the unit manager to which the Webb case has been assigned. Of the 54 plans and budgets that Mr. Saylor had submitted to the Agency, 40 of those plans were submitted to units other than Mr. Chappel's and none of those units had ever requested a breakdown of personnel costs on an hourly basis. (Hrg.Trans. at Page 32.)

Mr. James Malcom also testified at the December 11, 2006 hearing. Mr. Malcom is employed by the Agency and has been so employed for 8 years as a project manager in the LUST section. Mr. Malcom had reviewed the plans and budget for the corrective action plan for Webb and prepared the LUST Technical Review Notes for that submittal identified as Petitioner's Exhibit 4. (Hrg.Trans. at Page 40.) Mr. Malcom felt that the overall hours for the personnel as proposed in the budget were excessively high and requested input from his unit manager, Mr. Chappel. (Hrg.Trans. at Page 41.) Although Mr. Malcom actually prepared the September 12, 2006 letter from the Agency to Doris

Webb (Petitioner's Exhibit 3), the content of that letter came from Harry Chappel and other unit managers. (Hrg.Trans. at Pages 42-43.)

When Mr. Malcom was initially asked if he had an opinion as to what number of hours should have been allowed under the corrective action plan budget for the position of Senior Project Manager, his response was "not off-hand, but compared to other sites, it ... it was excessive." The following exchange then took place:

"Q: You said compared to other sites, how do you do your review of a budget to determine whether or not it's an appropriate budgeted amount and not too much?

A: The ... the rates are set and the hours, you get a feel for what's normal or what you see on, you know, I've done lots and you can get a feel for what's the norm. (Hrg.Trans. at Page 44.)

Mr. Malcom also testified that he felt that the 84 hours proposed for the Professional Engineer and the Engineer III were excessive based upon his experience. Mr. Malcom also found excessive the number of hours proposed for Scientist III on page G3 and felt that the hours should be reduced from 16 hours to 2 hours. (Hrg.Trans. at Page 47.)

Mr. Malcom testified that there were acceptable ranges for the different personnel positions identified in the Petitioner's proposed budget. For the project review and oversight and supervision to be performed by the Senior Project Manager, Mr. Malcom would have approved the budget for those tasks in a range from 60 to 100 hours. The acceptable range of hours for the Professional Engineer for this project would have been 20 to 40 hours. The acceptable range for an Engineer III would have been under 50 hours. (Hrg.Trans. at Page 51.) The following exchange then took place with Mr. Malcom:

"Q: You've identified four categories of personnel that were excessive ...

A: Uh huh.

Q: ... why not approve all of the other categories and either reduce the hours for these four individuals and ask for an hourly breakdown on just the four?

A: Because I wasn't sure the hours associated with the appeals.

.....

Q: There were about sixteen other line item personnel costs that you found to be acceptable?

A: Sure, uh huh.

Q: Why not approve those sixteen and ask for additional breakdown in terms of hours for the four personnel that you found objectionable?

A: It was Harry Chappel's and the other supervisor's decision.

Q: If it had been your decision, which way would you have done it?

A: I would have denied the ... the four and approved the ... the others."
(Hrg.Trans. at Pages 53-54.)

This PCB Case No. 07-24 is actually the third appeal by the Petitioner pertaining to actions taken by the Agency relative to LPC #0290255079 relative to the Petitioner's property at 1201 Dewitt Avenue, Mattoon, Illinois. Petitioner's first appeal of a decision of the Agency was filed as Case No. 04-105. As stated in the Petition for Review of LUST Fund Reimbursement Decision in that matter on file with the Illinois Pollution Control Board, the Petitioner requested review of the decision by the Agency regarding reimbursement of the cost of removing soil during early action site remediation. The Petitioner appealed the Agency's decision to deduct \$70,167.22 in expenses that the Agency felt the Petitioner had failed to demonstrate were reasonable. That appeal was settled between the parties and the case dismissed by Order of the Board entered September 16, 2004.

The Petitioner's second appeal was filed April 6, 2005 as Case No. 05-183. (Petitioner's Exhibit 2.) That appeal involved the Agency's failure to approve as submitted the Petitioner's Budget for Stage II Site Investigation Activities. The Petitioner's engineers, HDC Engineering, had submitted to the Agency by letter dated January 20, 2005 a proposed Site Investigation Stage II Budget. That Budget included

personnel costs of \$17,610.00 under Section G and \$1,500.00 for a survey under Section I. By letter dated February 8, 2005, the Agency, by and through its unit manager, Harry A. Chappel, informed the Petitioner that the proposed Stage II plan had been approved, but that the budget had been modified. As shown on Attachment A to the February 8, 2005 letter, the Agency modified the Budget by not approving any personnel costs and by deleting the cost of a survey.

By letter dated February 15, 2005, HDC Engineering, on behalf of the Petitioner, responded to Mr. Chappel's letter of February 8, 2005 by providing the requested justification as to both the need for a survey and the breakdown of hours of work to be performed by each designated person by title. By letter dated March 2, 2005, the Agency, by and through Mr. Chappel, responded to HDC's Amended Site Investigation Plan Budget by approving a portion of the hours proposed for three personnel by title and deleting three identified personnel all together. The Agency, by and through Mr. Chappel, approved \$9,704.00 of the original \$17,610.00 in personnel costs requested by the Petitioner's engineers. Consequently, the Petitioner filed its Petition as Case No. 05-183 seeking approval on appeal of all of the personnel costs that had been proposed in the Site Investigation Stage II Budget. As testified by Mr. Kevin Saylor, that appeal was settled with the Petitioner's Budget being approved in nearly the total amount of the personnel costs as originally requested. Case 05-183 was dismissed by Order of the Board on August 4, 2005 in response to the Petitioner's Motion to Voluntarily Dismiss. (Hrg.Trans. at Page 22.)

V. Argument

B. The Agency denied all the requested personnel costs pursuant to 35 Ill.Admin.Code 732.606(hh) as being “unreasonable”. Neither the Act nor the regulations define what is meant by “reasonable”. The Agency took the position as stated in the denial letter of September 12, 2006 that the Petitioner would have to expend additional time and expense to provide an hourly breakdown of all of the work to be performed by each one of the twenty personnel listed in section G of the Corrective Action Plan Budget submitted by the Petitioner. (Petitioner’s Exhibit 1.) The Agency stated that it could not make a determination as to whether or not the personnel costs were reasonable with just the description of the tasks to be performed by each person with the hourly rate and number of hours stated.

Except for those personnel identified as having been involved in the prior Webb appeals (the Senior Project Manager, the Professional Engineer and the Engineer III as listed under the sub-heading High Priority Investigation and Preliminary Costs), the Agency had sufficient information within the Budget and the Plan to determine that all other personnel costs were reasonable and should have been approved. (Except for the Scientist III under the CACR Report who Mr. Malcom would have reduced from 16 hours to 2 hours.) In order to approve a CAP budget, the Agency must determine that the costs set forth in the budget are reasonable. (415 ILCS 5/57.7(c)(4)(C).) Except for the limited personnel stated above, the personnel costs submitted by Petitioner were reasonable and the personnel costs as so modified should have been approved without further review by the Agency.

The “request” by Mr. Chappel for an hourly breakdown of each task performed by each job title in order to make a more thorough review of the proposed personnel costs was warranted only as to the Senior Project Manager, the Professional Engineer and the Engineer III because the description of tasks for each such position included compensation for the two previous Webb appeals. Although nothing in the applicable statutes or regulations prohibited compensation for such activity from the LUST Fund, Petitioner acknowledges that a breakdown of the hours allocated to the appeals would be appropriate. Once the appeal hours are broken out, the total hours allocated strictly to the CAP can be identified and approved by the Agency.

As to a determination of whether the personnel costs are reasonable for all other positions and tasks identified in the Petitioner’s Exhibit 1, the Agency has admitted that they are. Mr. Malcom, the manager assigned to the Petitioner’s project by the Agency, has testified that he would have approved all personnel costs except the Senior Project Manager, the Professional Engineer, the Engineer III under High Priority Investigation and the Scientist III under CACR. (Hrg.Trans. at Page 54.) Mr. Malcom also testified that he would approve the following range of hours for the rejected personnel:

Senior Project Manager	60-100 hours
Professional Engineer	20-40 hours
Engineer III	under 50 hours
Scientist III	2 hours

If Mr. Malcom can determine what is reasonable without an hourly breakdown of each and every position, why can’t his supervisor, Mr. Chappel?

A definition of “reasonable” is “not excessive or extreme”. According to the testimony of Mr. Chappel and Mr. Clay on behalf of the Agency that was filed in Pollution Control Board cases R04-22 and R04-23, these men and the Agency have a tremendous amount of experience in reviewing and analyzing budgets to determine what is “reasonable” and what is “excessive or extreme”. The following statements of Mr. Harry Chappel were contained in the testimony that he filed in the above rulemaking case on March 8, 2004:

- He is a unit manager in the Leaking Underground Storage Tank Section with the Bureau of Land of the Illinois Environmental Protection Agency and has held that position since March of 2002.
- He was employed by the Agency from 1976 to 1995 and was the manager of the LUST Section from 1991 to 1994.
- He received a B.S. degree in civil engineering from the University of Missouri at Raleigh in 1975, and M.S. in thermal and environmental engineering from Southern Illinois University at Carbondale in 1979 and became a registered professional engineer in Illinois in 1979.
- From 1995 to 2001 he was in private practice as a co-owner in two environmental consulting firms located in Springfield, Illinois. (Petitioner’s Exhibit 8, Page 1.)

Mr. Chappel further testified pertaining to proposed modifications to Section 732.845 – Professional Consulting Services, as follows:

“This section provides limits for the fees that consultants may be reimbursed for various tasks conducted as part of Leaking UST remediation. The Illinois EPA has coordinated with the Consulting Engineers Council of Illinois (CECI) to develop the activities that

are conducted by the consultant in each step of the process and the estimated personnel time (hours) required for each activity within a task. Once the hours required to perform a task and/or activity were determined, the Illinois EPA developed an average hourly rate to establish the limits specified in this section.” (Petitioner’s Exhibit 8 at Page 5 and 6.)

Mr. Douglas W. Clay also submitted an affidavit of his testimony in the Pollution Control Board cases R04-22 and R04-23. In the written testimony of Mr. Clay filed with the Board on March 8, 2004, Mr. Clay testified to the following facts:

- Mr. Clay was the manager of the Leaking Underground Storage Tank section within the Bureau of Land of the Illinois Environmental Protection Agency and had held that position since September of 1994.
- There is a tremendous amount of time spent reviewing budgets and reimbursement packages. The majority of plan and report denials, amendments to plans and reports submitted by consultants, and appeals before the Illinois Pollution Control Board are related to budget and reimbursement issues, as opposed to technical issues.
- The proposed cost in subpart (H) were developed with input from the consulting industry and other trade organizations plus nearly fifteen years of agency experience administering the Leaking Underground Storage Tank Reimbursement Program and are generally consistent with the rates the Agency currently approves for reimbursement.
- Over the past fifteen years, the Agency has approved over one-half billion dollars for reimbursement which involved reviewing over 12,800 budgets and over 18,300 applications for payments. (See Petitioner’s Exhibit 7, Pages 1-3.)

Mr. Clay again testified by affidavit before the Pollution Control Board in cases R04-22(B) and R04-23(B). That testimony was filed March 1, 2006. Mr. Clay's testimony contains the following statement:

“Attached as part of my testimony (Attachments 1 and 2) are two spreadsheets that include the scopes of work, the title of the personnel that may perform the work, a reasonable number of hours for the identified personnel to perform the work, and a comment field.

To develop this Attachment, the Agency convened a workshop made up of the five LUST section unit managers, five senior LUST section project managers, two senior LUST claims unit reviewers, and myself. This work group has a combined 140 years of experience reviewing and evaluating LUST sites. The information in Attachments 1 and 2 represent the consensus of the work group.” (Petitioner's Exhibit 8, Page 3.)

Although the Board found in the above rulemaking cases that the record did not support proceeding with maximum lump sum payment amounts for professional consulting fees associated with the clean-up of sites with leaking underground storage tanks, dismissed the proceeding and closed the rulemaking docket by Order entered June 21, 2006, the testimony of Mr. Clay and Mr. Chappel is offered for the purpose of showing the expertise and experience within the Agency. Specifically, within the last fifteen years the Agency has reviewed over 12,800 budgets and over 18,300 applications for payment and the senior management of the LUST section has a combined 140 years of experience in reviewing and evaluating LUST sites. Considering all of that experience, it was arbitrary, capricious and unconscionable for Mr. Chappel to have failed to determine that each of the individual personnel costs identified in Section G of the Petitioner's Corrective Action Plan Budget (Petitioner's Exhibit 1) were reasonable based upon the CAP Budget as submitted, except as to the Senior Project Manager, the Professional Engineer and the Engineer III as to the previous appeals. It was reasonable

for Mr. Chappel to have requested an hourly breakdown only of the appeal work performed by the Senior Project Manager, the Professional Engineer and the Engineer III in order to make a more thorough review of the proposed personnel costs as to those individuals.

VI. Conclusion

The Corrective Action Plan Budget submitted by Petitioner did not violate the Illinois Environmental Protection Act. A determination could have been made and should have been made by the Agency based upon the CAP and the budget that all personnel costs in Section G of the Budget were reasonable as required by statute (415 ILCS 5/57.7(c)(4)(C)) except for the Senior Project Manager, the Professional Engineer and the Engineer III under sub-heading High Priority Investigation and the Scientist III under sub-heading CACR. There is absolutely no justification to “request” (demand) an hourly breakdown of each task by each job title, except for those personnel seeking payment for previous appeals.

WEBB & SONS, INC.,
Petitioner,

By: /S/
Jeffrey W. Tock

Dated: [December 29, 2006](#)

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