

ILLINOIS POLLUTION CONTROL BOARD  
February 15, 2007

WEBB & SONS, INC.,	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB 07-24
	)	(UST Appeal)
ILLINOIS ENVIRONMENTAL	)	
PROTECTION AGENCY,	)	
	)	
Respondent.	)	

INTERIM OPINION AND ORDER OF THE BOARD (by A.S. Moore):

Webb & Sons, Inc. (Webb) seeks the Board's review of a determination by the Illinois Environmental Protection Agency (Agency) that modified Webb's proposed budget for the high priority corrective action plan (CAP) for a leaking underground storage tank (UST) site at 1201 DeWitt Avenue, Mattoon, Coles County. Webb challenges the Agency's determination to reject all proposed personnel costs as unreasonable. For reasons described below, the Board affirms the Agency's rejection of Webb's proposed budget for personnel for four specified job titles. Also for reasons described below, the Board reverses the Agency's rejection of Webb's proposed budget for the 16 remaining job titles in Webb's proposed personnel budget. The Board also grants Webb's motion to incorporate specified documents by reference into the record of this proceeding and reserves ruling on Webb's request for the reimbursement of fees.

**PROCEDURAL HISTORY**

On October 13, 2006, the Board received from Webb a petition seeking the Board's review of a September 12, 2006 determination of the Agency. In an order dated November 2, 2006, the Board accepted Webb's petition for hearing. The Agency filed the administrative record (R.) on November 28, 2006.

The Board conducted a hearing (Tr.) on December 11, 2006. Mr. Kevin Saylor and Mr. James Malcom testified for Webb. At hearing, Webb filed eight exhibits (Exh.), each of which was admitted. Tr. at 63-67. Webb filed a post-hearing brief (Webb Br.) on December 29, 2006, and the Agency filed a post-hearing brief (Agency Br.) on January 12, 2007.

On December 13, 2006, Webb filed a motion to incorporate documents by reference (Mot.). Accompanying the motion were the documents that Webb seeks to incorporate into the record of this proceeding.

**FACTUAL BACKGROUND**

Webb owns real property located at 1201 DeWitt Avenue, Mattoon, Coles County (Site). R. at 1, 28. On May 3, 1993, Webb reported a release from USTs at the Site to the Illinois Emergency Management Agency (IEMA). R. at 28. In a letter dated July 12, 2002, the State Fire Marshal responded to Webb's Reimbursement Eligibility and Deductible Application by determining that Webb was eligible to seek payment of costs in excess of \$15,000 with regard to six specified USTs and in response to IEMA Incident Number 9301126. R. at 67. Webb removed all tanks from the Site in October 2002. R. at 28. The resulting Incident Number 20021577 re-reports the Incident Number 931126. *Id.*

By a letter dated August 18, 2006, HDC Engineering (HDC) submitted a High Priority Corrective Action Plan (CAP) and Budget to the Agency on behalf of Webb. R. at 25 (referring to UST Incident No. 931126/021577); *see* R. at 47-66 (budget and billing form). On August 23, 2006, the Agency received the proposed plan and budget. *See* R. at 1. Webb's proposed budget divides personnel costs into the following four categories: High Priority Investigation and Preliminary Costs, CAP Implementation (dig and haul), Additional Well Monitoring/Well Replacement/TACO [Tiered Approach to Corrective Action Objectives] sample collection, and CACR [Corrective Action Completion Report] Report/HAA's [Highway Authority Agreements]/Reimbursement. R. at 54-56. Within those four categories, Webb lists job titles for specified personnel, tasks to be performed by each title, the number of hours attributed to the tasks performed by each title, the hourly rate paid to each title, and the total personnel costs attributable to each title. *Id.* Under High Priority Investigation and Preliminary Costs, the proposed budget attributes an unspecified number of hours to the Senior Project Manager, Professional Engineer, and Engineer III for tasks performed with regard to two UST project appeals. R. at 54.

In a letter dated September 12, 2006, and signed by Harry A. Chappel, P.E., the Agency notified Webb that it had modified Webb's proposed budget. R. at 2, citing 415 ILCS 5/57.7(b)(3), 57.7.(c) (2004); 35 Ill. Adm. Code 734.505(b), 734.510(b). Specifically, the Agency approved total personnel costs of \$0.00. R. at 5. In its September 12, 2006 letter, the Agency stated that it modified Webb's proposed budget in the amount of "\$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." R. at 5.

Two witnesses, Mr. Kevin Saylor and Mr. James Malcom, testified at hearing on behalf of Webb. Mr. Saylor testified that he is a licensed professional engineer employed by HDC as an environmental division manager. Tr. at 7. Mr. Saylor further testified that he prepared the corrective action budget, including personnel costs, for the Site. Tr. at 10; *see* R. at 47-66.

Mr. Saylor testified that, in addition to this proceeding, there have been two previous appeals involving remediation of the Site. Tr. at 19. Mr. Saylor further testified that the first of those two appeals involved a request by Webb for reimbursement of the costs of tank removal and soil excavation under Part 731 of the Board's UST regulations. *Id.*; *see* 35 Ill. Adm. Code 731.101 *et seq.* Specifically, Webb appealed the Agency's determination to deduct approximately \$70,000 from Webb's reimbursement for those expenses. Tr. at 19; *see Webb &*

Sons, Inc. v. IEPA, PCB 04-105 (Mar. 26, 2004). Mr. Saylor testified that this first appeal successfully recovered those costs (Tr. at 19), and the Board ultimately granted Webb's voluntary motion to dismiss its proceeding. Webb & Sons, Inc. v. IEPA, PCB 04-105 (Sept. 16, 2004). Mr. Saylor further testified that this 2004 appeal to the Board did not provide any way to recover the cost of the time spent by HDC personnel performing work necessary to pursue the appeal. Tr. at 20. Mr. Saylor further testified that this work was in addition to what it would have performed if the Agency had approved its budget as submitted. Tr. at 22.

Mr. Saylor testified that the second appeal involved a request by Webb for the Agency's approval of a budget for Stage II site investigation activities. Tr. at 21; *see* Webb & Sons, Inc. v. IEPA, PCB 05-183 (Apr. 6, 2005). Specifically, Webb appealed the Agency's deduction of \$17,610 in personnel costs, the entire amount of personnel costs requested in that budget. Tr. at 21; *see* Webb & Sons, Inc. v. IEPA, PCB 05-183 (Apr. 6, 2005). Mr. Saylor further testified that, in response to the Agency's determination, HDC listed the hours of work performed on each task by each title listed in the personnel budget. Tr. at 21. After the Agency approved approximately half of the personnel budget requested by HDC, Mr. Saylor testified that Webb filed the second appeal in order to restore the amounts deducted from its Stage II site investigation budget. Tr. at 22; *see* Webb & Sons, Inc. v. IEPA, PCB 05-183 (Apr. 6, 2005). Mr. Saylor testified that this appeal successfully recovered approximately 90% of those requested costs (Tr. at 22), and the Board ultimately granted Webb's voluntary motion to dismiss its proceeding. Webb & Sons, Inc. v. IEPA, PCB 05-183 (Aug. 4, 2005).

Mr. Malcom testified that the Agency has employed him for eight years as a project manager in the leaking UST section. Tr. at 39. Mr. Malcom further testified that he reviewed the corrective action plan and budget for the Site and that he prepared the technical review notes regarding Webb's submission to the Agency. Tr. at 40; *see* R. at 8-9. Mr. Malcom further testified that he believed that Webb's budget proposed overall an excessive number of hours for personnel and that he sought additional review by his unit manager, Harry Chappel. Tr. at 41. Mr. Malcom further testified that Mr. Chappel and the Agency's three other unit managers reviewed Webb's proposed budget and reached the final determination reflected in the Agency's September 12, 2006 letter to Doris Webb. Tr. at 43; *see* R. at 1-5. Mr. Malcom further testified that the unit managers determined to seek a breakdown of personnel costs from Webb. Tr. at 52; *see* R. at 5.

Mr. Malcom testified that, under the category of high priority investigation and preliminary costs, the 453 hours attributed to a senior project manager were excessive in comparison with the 60 hours he considered to be the average for that title. Tr. at 43-45; *see* R. at 54. Mr. Malcom further testified that the 84 hours attributed to a professional engineer in that category were excessive based on his experience and in comparison with the 20 hours he considered to be the average for that job title. Tr. at 45; *see* R. at 54. Mr. Malcom further testified that the 68 hours attributed to an engineer III were excessive and that the tasks assigned to that job title would probably require 35 hours. Tr. at 45; *see* R. at 54. Mr. Malcom further testified that Webb sought reimbursement for UST appeals only for these three job titles. Tr. at 45-46. Mr. Malcom further testified that the Agency had not ever directly reimbursed costs associated with previous UST appeals. R. at 60-61. In addition, Mr. Malcom testified that, under the category of CACR Report/HAA's/Reimbursement, the 16 hours attributed to the

scientist III were excessive in comparison with the two hours he would have approved. Tr. at 47; *see* R. at 56.

### **STATUTORY AND REGULATORY PROVISIONS**

Section 732.606(hh) of the Board's petroleum UST regulations, addressing releases reported between September 23, 1994 and June 23, 2002, provides in pertinent part that "[c]osts ineligible for payment from the Fund include but are not limited to . . . [c]osts proposed as part of a budget plan that are unreasonable." 35 Ill. Adm. Code 732.606(hh).

Section 734.660(dd) of the Board's petroleum UST regulations, addressing releases reported on or after June 24, 2002, provides in pertinent part that "[c]osts ineligible for payment from the Fund include, but are not limited to . . . [c]osts proposed as part of a budget that are unreasonable." 35 Ill. Adm. Code 734.660(dd).

### **MOTION TO INCORPORATE DOCUMENTS**

#### **Webb's Motion**

On December 13, 2006, Webb filed a motion to incorporate documents by reference. Webb states that the Board's procedural rules provide that, "upon the written request of any person, the Board . . . may incorporate documents from the record of another Board docket into any proceeding. The person seeking incorporation must demonstrate to the Board . . . that the material to be incorporated is authentic, credible, and relevant to the proceeding." Mot. at 1, citing 35 Ill. Adm. Code 101.306(a). Webb's motion addresses five specific documents.

First, Webb seeks to incorporate its own petition for review from a separate UST appeal regarding this Site. Mot. at 1. In that separate appeal, Webb requested the Board's review of the Agency's determination to deny Webb's site investigation budget. Mot. at 1; *see Webb & Sons, Inc. v. IEPA*, PCB 05-183 (Apr. 6, 2005) (2005 Webb Appeal). Second, Webb seeks to incorporate excerpts from the administrative record filed by the Agency in that separate appeal. Mot. at 1; *see Webb & Sons, Inc. v. IEPA*, PCB 05-183 (May 27, 2005) (2005 Webb Record). Webb states that it obtained this petition and these excerpts from its attorney's files and that they are "true and accurate copies" of the documents filed with the Board. Mot. at 2.

Third, Webb seeks to incorporate testimony offered by Douglas W. Clay, manager of the UST section in the Agency's Bureau of Land, in a recent UST rulemaking docket. Mot. at 2; *see Proposed Amendments to Regulation of Petroleum Leaking Underground Storage Tanks (35 Ill. Adm. Code 732, 734)*, R04-22(B), R04-23(B) (cons.) (Mar. 1, 2006) (2006 Clay Testimony). Fourth, Webb seeks to incorporate excerpts of Clay's testimony from a separate UST rulemaking docket. Mot. at 2; *see Proposed Amendments to Regulation of Petroleum Leaking Underground Storage Tanks (35 Ill. Adm. Code 732)*, R04-22 (Mar. 8, 2004) (2004 Clay Testimony). Fifth, Webb seeks to incorporate testimony offered by Harry A. Chappel, a unit manager in the UST section in the Agency's Bureau of Land, in that separate UST rulemaking docket. Mot. at 2; *see Proposed Amendments to Regulation of Petroleum Leaking Underground Storage Tanks (35 Ill.*

Adm. Code 732), R04-22 (Mar. 8, 2004) (2004 Chappel Testimony). Webb states that it obtained these three documents from the Board's on-line e-library. Mot. at 2.

Webb argues that “[a]ll of these materials are relevant to the Petition to review the Agency’s denial of all personnel costs in Petitioner’s CAP budget.” Mot at 2. Specifically, Webb argues that the materials show the vast experience the Agency has obtained from reviewing over 12,800 budgets in 15 years.” Mot. at 2 (2004 figures). Webb further argues that the testimony offered by Agency managers in the UST rulemaking dockets “show[s] the Agency’s detailed analysis of personnel costs required for the creation and implementation of all corrective action plans.” Mot. at 2. Concluding, Webb claims that these documents filed with the Board “show that the Agency has such a vast knowledge of corrective action plan budgets that it could have made a determination of the reasonableness of the Petitioner’s proposed personnel costs without requesting additional break-downs of the hours to be expended by each person identified as having a role in the preparation and implementation of the Petitioner’s Corrective Action Plan.” *Id.*

### **Board Analysis**

The Board notes that the Agency did not file a reply to Webb’s motion to incorporate documents by reference. Under the Board’s procedural rules, “[i]f no response is filed, the party will be deemed to have waived objection to the granting of the motion, but the waiver of objection does not bind the Board or the hearing officer in its disposition of the motion.” 35 Ill. Adm. Code 101.500(d).

In its motion, Webb first seeks to incorporate the 2005 Webb Appeal. Mot. at 1; *see Webb & Sons, Inc. v. IEPA*, PCB 05-183 (Apr. 6, 2005). Second, Webb’s motion seeks to incorporate the 2005 Webb Record. Mot. at 1; *see Webb & Sons, Inc. v. IEPA*, PCB 05-183 (May 27, 2005). The Board notes that the hearing officer admitted these documents into the record at hearing as Exhibits 2 and 5, respectively. R. at 64-65. The Agency had no objection to their admission but objected to their relevance to this proceeding. R. at 64. Responding to that objection, the hearing officer stated that, because they pertained to the same location within a short period of time of this appeal, they were relevant as background information of which the Agency should have been aware in making its determination. R. at 64-65.

Third, Webb seeks to incorporate the 2006 Clay Testimony. Mot. at 2; *see Proposed Amendments to Regulation of Petroleum Leaking Underground Storage Tanks (35 Ill. Adm. Code 732, 734)*, R04-22(B), R04-23(B) (cons.) (Mar. 1, 2006). Fourth, Webb seeks to incorporate of the 2004 Clay Testimony. Mot. at 2; *see Proposed Amendments to Regulation of Petroleum Leaking Underground Storage Tanks (35 Ill. Adm. Code 732)*, R04-22 (Mar. 8, 2004). Fifth, Webb seeks to incorporate the 2004 Chappel Testimony. Mot. at 2; *see Proposed Amendments to Regulation of Petroleum Leaking Underground Storage Tanks (35 Ill. Adm. Code 732)*, R04-22 (Mar. 8, 2004). The Board notes that the hearing officer admitted these documents into the record at hearing as Exhibits 6, 7, and 8, respectively. R. at 65-67. The Agency had no objection to their admission but objected to their relevance to this proceeding. *Id.* Responding to that objection, the hearing officer stated that the Board would be able to take

notice of public records such as the three documents that formed part of the record of one of the Board's own regulatory proceedings. R. at 65-66.

The Board notes that this appeal is to be decided on the basis of the record before the Agency when it made its decision. Alton Packaging Corp. v. IEPA, PCB 84-145, slip op. at 3 (Apr. 24, 1986); see 35 Ill. Adm. Code 105.412. The Board also notes that Webb seeks to incorporate only public Board records related either to the Site or to the Board's UST regulations generally. Granting Webb's motion would not incorporate new data into the Agency record but would only incorporate documents of which the Board can take notice. See 35 Ill. Adm. Code 101.630. Because the Agency has waived any objection to the granting of the motion to incorporate documents by reference, and because the hearing officer has admitted as hearing exhibits each of the five documents that Webb seeks to incorporate, the motion is granted, and the five specified documents are incorporated into the record of this proceeding. See 35 Ill. Adm. Code 101.306.

### **WEBB'S PETITION FOR REVIEW**

Webb states that it was the owner of USTs formerly located at the Site. Pet. at 1. Webb further states that, on August 18, 2006, it submitted a CAP and budget for the Site to the Agency. Pet., Exh. A (budget). Webb further states that the Agency on September 12, 2006 approved the CAP with modification. Pet. at 1. Webb further states that "[n]o appeal is being taken as to the approval of the CAP with modifications." *Id.*

Webb states the Agency's September 12, 2006 determination also modified the budget proposed for the Site. Pet. at 2; Pet., Exh. B. Webb further states that it "accepts and does not appeal the budget modifications made by the Agency for Investigation Costs, Field Purchases and Other Costs, and Handling Charges." Pet. at 2. Webb further states that it "does appeal the Agency's rejection of *all* personnel costs." *Id.* (emphasis in original). Webb further states that the Agency rejected the proposed personnel costs as "unreasonable" and ineligible for payment from the Fund. Pet. at 3; Pet., Exh. B, citing 35 Ill. Adm. Code 732.606(hh). In its denial letter, the Agency requested from Webb "an hourly breakdown of each task performed by each job title in order to make a more thorough review of the proposed personnel costs." Pet. at 3; Pet., Exh. B.

Webb claims that its proposed budget on pages G-1 and G-2 contains a detailed breakdown for the personnel associated with its High Priority Investigation and Preliminary Costs. Pet. at 3; Pet., Exh. A at G-1-G-2. Webb further claims that "[t]hat category is broken down among eight different personnel, a description of the specific tasks to be performed by each person, the number of hours attributable to each person the hourly rate of that person, and total dollars allocated to each person." Pet. at 3; see Pet., Exh. A at G-1-G-2. Webb further claims that "[t]he hourly rate for each designated person is *less* than the hourly rate approved by the Agency pursuant to the Agency's Rate Sheet." Pet. at 3 (emphasis in original); Pet., Exh. C (Personnel Titles and Requirements).

Webb also claims that its proposed budget on page G-2 contains a detailed breakdown for the personnel associated with its CAP Implementation costs. Pet. at 3; Pet., Exh. A at G-2.

Webb further claims that “[t]hat category is broken down among five different personnel, a description of the specific task to be performed by each person, the number of hours attributable to each person and the hourly rate and total dollars allocated to each person.” Pet. at 3-4; *see* Pet., Exh. A at G-2. Webb further claims that “[t]he hourly rate for each designated person is *less* than the hourly rate approved by the Agency pursuant to the Agency’s Rate Sheet.” Pet. at 4 (emphasis in original); Pet. at 3, Exh. C (Personnel Titles and Requirements).

Webb also claims that its proposed budget on pages G-2 and G-3 contains a detailed breakdown for the personnel associated with its Additional Well Monitoring/Well Replacement/TACO Sample Collection Costs. Pet. at 4; Pet., Exh. A at G-2–G-3. Webb further claims that “[t]hat category is broken down into three different personnel categories with a description of the services to be performed by each person, the number of hours allocated to each person and the hourly rate and the total cost of services for each person.” Pet. at 4; *see* Pet., Exh. A at G-2–G-3. Webb further claims that “[t]he hourly rate for each designated person is *less* than the hourly rate approved by the Agency pursuant to the Agency’s Rate Sheet.” Pet. at 3 (emphasis in original); Pet., Exh. C (Personnel Titles and Requirements).

Webb also claims that its proposed budget on page G-3 contains a detailed breakdown for the personnel associated with its CACR Report/HAA/Reimbursement costs. Pet. at 4; Pet., Exh. A at G-3. Webb further claims that “[t]hat category is broken down into four different personnel categories with a description of the services to be performed by each person, the number of hours allocated to each person and the hourly rate and the total cost of services for each person.” Pet. at 4; *see* Pet., Exh. A at G-3. Webb further claims that “[t]he hourly rate for each designated person is *less* than the hourly rate approved by the Agency pursuant to the Agency’s Rate Sheet.” Pet. at 4 (emphasis in original); *see* Exh. C (Personnel Titles and Requirements).

Webb claims that the Agency has approved “numerous projects” when HDC Engineering LLC, Webb’s engineers on this project, used this method to provide a breakdown of the costs and hours associated with various personnel. Pet. at 5. Webb argues that “[i]t was arbitrary and capricious of the Agency to reject Petitioner’s Budget proposal based upon an alleged lack of a detailed breakdown of all hours associated with each task, given the level of detail stated in the proposed Budget.” *Id.* Webb further argues that “[i]t was arbitrary and capricious of the Agency to reject Petitioner’s Budget proposal based upon the Agency’s objection to an alleged lack of detail when the Agency has approved this same format as used in proposed budgets for other project.” *Id.*

Webb requests that the Board find that the Agency’s September 12, 2006, rejection of all of the personnel costs in the proposed budget for the Site “was arbitrary and capricious and without statutory authority” and that the Board reverse the Agency’s decision to reject those costs. Pet. at 5. Accordingly, Webb requests that the Board “[r]emand this matter to the Agency with instructions to approve the Petitioner’s Budget proposal as submitted, except for the modifications for Investigation Costs, Field Purchases and Other Costs, and Handling Charges.” Pet. at 6. Webb also asks that the Board award Webb its engineer’s fees, attorney fees and expenses incurred in bringing this action. *Id.*

### **BURDEN OF PROOF**

The Board's procedural rules provide that, in appeals of final Agency determinations, "[t]he burden of proof shall be on the petitioner." 35 Ill. Adm. Code 105.112(a). Specifically, the burden is on Webb to demonstrate that the costs incurred are related to corrective action, properly accounted for, and reasonable. Beverly Malkey, as Executor of the Estate of Roger Malkey d/b/a Malkey's Mufflers v. IEPA, PCB 02-104, slip op. at 9 (Apr. 17, 2003). When requesting reimbursement from the fund, the owner or operator must provide a budget including an accounting of all costs associated with the implementation and completion of the corrective action plan. *Id.*; 415 ILCS 5/57.7(b)(3) (2004).

### **STANDARD OF REVIEW**

The standard of review under section 40 of the Environmental Protection Act (Act) (415 ILCS 5/40 (2004)) is whether the application, as submitted to the Agency, would not violate the Act and Board regulations. Ted Harrison Oil Co. v. IEPA, PCB 99-127, slip op. at 5 (July 24, 2003); citing Browning Ferris Industries of Illinois v. PCB, 534 N.E.2d 616 (2nd Dist. 1989). The Board will not consider new information that was not before the Agency prior to its final determination regarding the issues on appeal. Kathe's Auto Service Center v. IEPA, PCB 95-43, slip op. at 14 (May 18, 1995). The Agency's denial letter frames the issues on appeal. Pulitzer Community Newspapers, Inc. v. IEPA, PCB 90-142 (Dec. 20, 1990).

### **WEBB'S POST-HEARING BRIEF**

Webb argues that the Agency has stated that it 'could not make a determination as to whether 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.' Webb Br. at 12. Webb contends that the Agency now requires additional time and money to specify the hours committed to each task listed for each of the twenty job titles listed in the proposed budget. *Id.*, *see R.* at 54-56.

Webb states that the Agency must determine that the costs proposed in a CAP budget are reasonable before it can approve that budget. Webb Br. at 12, citing 415 ILCS 5.57.7(c)(4)(C) (2004). After noting that neither the Act nor the Board's regulations defines "reasonable" (*see* 415 ILCS 5/57.2 (2004), 35 Ill. Adm. Code 732.103), Webb claims that the term may be defined as "not excessive or extreme." Webb Brief at 14 (providing no citation to definition). Webb argues that, except for the three personnel involved in the two previous Webb appeals and the scientist II filing the No Further Remediation (NFR) letter, "the Agency has sufficient information within the Budget and the Plan to determine that all other personnel costs *were reasonable* and should have been approved." Webb Br. at 12 (emphasis in original).

Webb acknowledges that the Agency was warranted in seeking a breakdown of the tasks to be performed by the senior project manager, the professional engineer, and the engineer III, because the proposed reimbursement for those job titles included compensation for the two previous appeals related to the Site. Webb Br. at 13. Webb states 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.” *Id.* Webb claims that the Agency has admitted that the personnel costs for all of the other titles and tasks are reasonable. *Id.*; *see* R. at 54-56.

Webb further argues that, in Mr. Malcom’s testimony at hearing, he stated that he would approve 60-100 hours for the senior project manager, 20-40 hours for the professional engineer, and up to 50 hours for the engineer III. Webb Br. at 13. Webb queries why, if Mr. Malcom can determine a reasonable hourly breakdown for these titles, Mr. Chappel as his supervisor is not able to do so. *Id.* Webb claims that Mr. Chappel has a “tremendous amount of experience in reviewing and analyzing budgets to determine what is ‘reasonable’ and what is ‘excessive or extreme.’” Webb Br. at 14, citing Proposed Amendments to Regulation of Petroleum Leaking Underground Storage Tanks, R04-22, slip op. at 1 (Mar. 8, 2004). Based on this experience, Webb argues that “it was arbitrary, capricious and unconscionable” for Mr. Chappel to have failed to determine that Webb’s personnel costs were reasonable as submitted, with the exceptions of the senior project manager, professional engineer, and engineer III under High Priority Investigation and the scientist III under the CACR category. Webb Br. at 16-17. “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 II in order to make a more thorough review of the proposed personnel costs as to those individuals.” Webb Br. at 17.

### **AGENCY’S POST-HEARING BRIEF**

The Agency notes that Agency Project Manager James Malcom testified at hearing regarding his review on Webb’s proposed CAP and budget. Agency Br. at 3. The Agency argues that Malcom’s training and experience led him to conclude with regard to the budget that “the overall hours were excessively high, specifically for the job titles of Senior Project Manager, Professional Engineer, and Engineer III for High Priority Investigation and Preliminary Costs, and Scientist III for CACR Report/HAA/Reimbursements.” *Id.*, citing Tr. at 44-45, 47, 49. The Agency further argues that the tasks listed for the first three of those four job titles include previous leaking UST appeals for the Site. Agency Br. at 3. The Agency further argues that Malcom had never before approved reimbursement for expenses of that nature and had never seen a request for their reimbursement. *Id.*, citing Tr. at 45, 61. The Agency claims that, because the overall hours in Webb’s proposed budget were excessive, it was not unusual to request a breakdown of the hours requested for each job title. Agency Br. at 3, citing Tr. at 48, 52.

The Agency claims that there are “several flaws” in Webb’s position in this appeal. Agency Br. at 3. First, the Agency notes that Webb’s petition for review asked the Board to instruct the Agency to approve the proposed budget as submitted. *Id.*; *see* Pet. at 6. The Agency further notes that Webb is “now conceding that the Illinois EPA needed additional information to review the hours of the Senior Project Manager, Professional Engineer, and Engineer III for High Priority Investigation and Preliminary Costs.” Agency Br. at 3; *see* Pet. Br. at 16-17.

Second, the Agency argues that Webb has referred to the job titles of Senior Project Manager, Professional Engineer, and Engineer III as “limited” and has suggested that the hours

and costs associated with them are not significant. Agency Br. at 3-4; *see* Webb Br. at 12. The Agency states that “[t]his is simply not the case. These three job titles account for almost 48% of the total hours and 54% of the total personnel costs presented in the budget.” Agency Br. at 4. The Agency argues that, even if Webb identifies the hours for those three job titles that are attributable to the previous UST appeals for the Site, “the remaining hours will still have to be scrutinized to determine if they satisfy the statutory and regulatory requirements for reimbursement.” *Id.* The Agency notes that Malcom characterized the number of hours requested for the Senior Project Manager as “really excessive.” *Id.*, citing Tr. at 44-45. Comparing its situation to facing “an unfinished jigsaw puzzle,” the Agency states that it could not prudently have approved reimbursement for the other job titles in the budget as long as it could not determine whether a majority of the personnel costs submitted were eligible for reimbursement. Agency Br. at 4.

Third, the Agency cautions that Webb’s emphasis on the Agency’s expertise and experience in reviewing UST plans and budget is a “double-edged sword.” Agency Br. at 4. The Agency suggests that it is inconsistent for Webb to chastise Harry Chapell for failing to approve its personnel budget and not to submit the hourly breakdown sought by the Agency in its September 12, 2006 decision letter. *See* Agency Br. at 4. The Agency further argues that Webb’s emphasis on the Agency’s expertise “is further weakened by Webb’s concession that additional information was appropriate for three job titles.” Agency Br. at 4.

The Agency argues that the Board confronted a reduction of requested personnel hours in the case of Todd’s Service Station v. IEPA, PCB 03-2 (Jan. 22, 2004). The Agency claims that, although Todd’s had the opportunity to submit additional information about the reasonableness of its proposed costs, the Board ultimately upheld the Agency. Agency Br. at 5, citing Todd’s Service Station v. IEPA, PCB 03-2, slip op. at 7 (Jan. 22, 2004). The Agency argues that, although Webb also had the opportunity to submit additional information, “Webb instead elected to pursue this appeal.” Agency Br. at 5. The Agency argues that this appeal is similar to Todd’s Service Station in that “there was little, if any, testimony explaining how the Illinois EPA’s Administrative Record demonstrated that the costs of the Senior Project Manager, Professional Engineer, and Engineer III for High Priority Investigation and Preliminary Costs were reasonable.” Agency Br. at 5. The Agency argues accordingly that “Webb has failed to meet its burden of proof in this matter” and “respectfully requests that the Board affirm its September 12, 2006 decision.” Agency Br. at 6.

### **BOARD DISCUSSION**

After careful review of the record in this proceeding, the Board is persuaded that the Agency correctly rejected specific amounts of personnel time for certain job titles in Webb’s proposed budget, as described in detail below. Specifically, the Agency correctly rejected personnel time under the category of High Priority Investigation and Preliminary Costs for the positions of senior project manager, professional engineer and engineer III and under CACR Report/HAA/Reimbursements for the position of Scientist II. However, the Board reverses the Agency’s rejection of all personnel time for all of the other job titles in Webb’s proposed budget, also as described in detail below.

The Board has stated that “the purposes of the UST Fund are narrow.” Todd’s Service Station v. IEPA, PCB 03-2, slip op. at 6 (Jan. 22, 2004) (citation omitted). The Act restricts a corrective action plan to the mitigation of any threat to human health, human safety, or the environment resulting from a UST release. 415 ILCS 5/57.7(c)(1)(A) (2004). In an earlier UST appeal, the Board stated that “[t]he definition of corrective action does not encompass the recovery of moneys from the Fund. . . . We find nothing in the definition of corrective action that links those actions with actions taken to seek access to the Fund.” Chuck and Dan’s Auto Service v. IEPA, PCB 92-203, slip op. at 14 (Aug. 26, 1993), citing State Bank of Whittington v. IEPA, PCB 92-152, slip op. at 20 (June 3, 1993). In reviewing a corrective action plan budget, the Agency must consider whether the costs are reasonable and are not incurred for corrective action in excess of that which is necessary to meet the minimum requirements of the Act and Board regulations. 415 ILCS 5/57.7(c)(4)(C) (2004). Applying this standard, the Board determines whether Webb’s proposed budget, as submitted to the Agency with regard to specific positions, would not violate the Act and Board regulations. *See* 415 ILCS 5/40 (2004).

### **Senior Project Manager, Professional Engineer and Engineer III**

In its proposed budget for High Priority Investigation and Preliminary Costs, Webb sought the Agency’s approval for 453 hours at \$98.00 per hour, or \$44,394.00 for five tasks attributed to a senior project manager. These five tasks include those related to “two LUST project appeals.” R. at 54. Webb also sought approval for 84 hours at \$87.00 per hour, or \$7,308.00 for seven tasks attributed to a professional engineer. These seven tasks include those related to “two LUST project appeals.” *Id.* Webb also sought approval for 68 hours at \$77.00 per hour, or \$5,236.00 for five tasks attributed to an engineer III. These five tasks include those related to “two LUST project appeals.” *Id.* The proposed budget did not allocate a specific number of hours to any of the tasks attributed to any of those job titles. Citing 35 Ill. Adm. Code 732.606(hh), the Agency rejected these costs in their entirety as unreasonable. The Agency then requested that Webb itemize the hours associated with each task performed by each job title.

Webb’s witness, Mr. Malcom, testified with regard to recovering costs associated with prior UST appeals at the same site. In eight years as an Agency project manager reviewing technical plans and budgets, Mr. Malcom had not seen an owner/operator attempt to recover those appeal costs as an itemized task in a personnel budget. Tr. at 45. In addition, he had never approved direct reimbursement of that cost. Tr. at 61.

Mr. Malcom further testified that the total number of hours requested for the job titles of senior project manager, professional engineer, and engineer II were “excessive.” Tr. at 44-45. Under High Priority Investigation and Preliminary Costs, Webb sought approval of 453 hours for the senior project manager, while Mr. Malcom considered 60 hours as the average time required for the tasks listed in the proposed budget for senior project manager, 20 hours as the average for the professional engineer, and 35 hours as the average for the engineer III. Mr. Malcom acknowledged that, for the senior scientist job title also listed under High Priority Investigation and Preliminary Costs, Webb’s proposed personnel budget did not seek approval of hours for previous UST appeals. For that job title, Webb sought approval of 150 hours, which Malcom characterized as “a little excessive, but not unusual.” Tr. at 46.

In its post-hearing brief, Webb acknowledges that the Agency was warranted in seeking an hourly breakdown of each task listed under High Priority Investigation and Preliminary Costs for the job titles of senior project manager, professional engineer, and engineer III. Pet. Brief at 13. Webb suggests that this breakdown is appropriate because the specific number of hours attributable to previous UST appeals and ineligible for reimbursement can be identified. *Id.*

With regard to these three job titles, the Board finds no persuasive explanation either in the proposed budget itself or in the testimony at hearing that the total number of hours proposed is reasonable. Without a more specific breakdown of the number of hours allocated to each of the tasks to be performed by these three job titles, particularly the two earlier UST appeals relating to this site, the Agency lacks sufficient information to determine whether the proposed personnel costs are reasonable and properly accounted for as corrective action. *See* 415 ILCS 5/57.2 (2004). Accordingly, Webb has failed to meet its burden of proving that its application, as submitted to the Agency, would not violate the Act and Board regulations. The Board therefore affirms the Agency's September 13, 2006 determination to reject the proposed personnel budget under High Priority Investigation and Preliminary Costs for the senior project manager, professional engineer, and engineer III.

### **Scientist III**

In its proposed budget for CACR Report/HAA/Reimbursements, Webb sought the Agency's approval of 16 hours at \$71.00 per hour, or \$1,136.00 for filing an NFR letter and decommissioning groundwater monitoring wells by a scientist III. The proposed budget did not allocate the requested 16 hours between those two tasks. Citing 35 Ill. Adm. Code 732.606(hh), the Agency rejected these costs in their entirety as unreasonable. The Agency also requested that Webb itemize the hours associated with this job title.

Webb's own witness, Mr. Malcom, testified that "16 hours would seem excessive for filing of the NFR and closing up seven wells." Tr. at 47. Mr. Malcom elaborated that the work relating to wells would be reimbursed on a per-foot basis and not on the basis of personnel. *Id.* For filing an NFR, Mr. Malcom stated that the task "surely" wouldn't require 16 hours. *Id.* He further stated that budget proposals generally attribute one or two hours to that task and that he would have approved two hours for its completion. *Id.*

With regard to this job title, the Board finds no persuasive explanation either in the proposed budget itself or in the testimony at hearing that the 16 proposed hours requested under CACR Report/HAA/Reimbursements for the scientist III are reasonable. Without a more specific breakdown of the number of hours allocated to the two tasks to be performed by the scientist III, the Agency lacks sufficient information to determine whether the proposed personnel costs are reasonable. Accordingly, Webb has failed to meet its burden of proving that its application, as submitted to the Agency, would not violate the Act and Board regulations. The Board therefore affirms the Agency's September 13, 2006 determination to reject the proposed personnel budget under CACR Report/HAA/Reimbursements for the scientist III.

### **All Remaining Job Titles**

In addition to the four job titles addressed above, Webb's proposed budget includes hours for five other job titles under the category of High Priority Investigation and Preliminary Costs: 150 hours at \$83.00 per hour, or \$12,450.00 for a senior scientist; 102 hours at \$67.00 per hour, or \$6,834.00 for a scientist III; 21 hours at \$55.00 per hour, or \$1,155.00 for a scientist I; six hours at \$50.00 per hour, or \$300.00 for a draftsman, and 9.5 hours at \$40.00 per hour, or \$380.00 for a technician I.

Webb's proposed budget also includes hours for five job titles under the category of CAP Implementation (dig and haul): eight hours at \$100.00 per hour, or \$800.00 for a senior project manager; four hours at \$100.00 per hour, or \$400.00 for a professional engineer; 16 hours at \$87.00 per hour, or \$1,392.00 for a senior scientist; 30 hours at \$71.00 per hour, or \$2,130.00 for a scientist III; and 70 hours at \$45.00 per hour, or \$3,150.00 for a technician I.

Webb's proposed budget also includes hours for three job titles under the category of Additional Well Monitoring/Well Replacement/TACO sample collection: 8 hours at \$87.00 per hour, or \$696.00 for a senior scientist; 42 hours at \$71.00 per hour, or \$2,982.00 for a scientist III; and 42 hours at \$45.00 per hour, or \$1,890.00 for an environmental technician I.

Webb's proposed budget also includes hours for three other job titles under the category of CACR Report/HAA/Reimbursements: 8 hours at \$100.00 per hour, or \$800 for a senior project manager; 32 hours at \$100.00 per hour, or \$3,200.00 for a professional engineer; and 92 hours at \$87.00 per hour, or \$8,004.00 for a senior scientist. R. at 54-56. The proposed budget did not allocate a specific number of hours to any of the tasks attributed to any of those sixteen job titles. *See id.* Significantly, none of these 16 positions listed prior UST project appeals among the tasks to be performed in the requested personnel hours. Citing 35 Ill. Adm. Code 732.606(hh), the Agency also rejected these costs in their entirety as unreasonable. The Agency then requested that Webb itemize the hours associated with each task performed by each job title.

At hearing, Mr. James Malcom testified on behalf of Webb. Mr. Malcom has eight years of experience as a project manager in the Agency's UST section and states that he has reviewed "hundreds" of submitted budgets. Tr. at 39, 49. In his testimony, Mr. Malcom stated that he was uncertain about the number of hours attributable to three job titles for previous UST appeals for the site but found the hours proposed for 16 other job titles "acceptable." Tr. at 53. Although Mr. Malcom acknowledged that his work is subject to review by supervisors, he stated he would have approved the hours submitted for those 16 personnel and rejected the hours proposed for the other 4 job titles. Tr. at 54.

With regard to these 16 personnel, the Board finds that Webb has provided persuasive evidence that the hours proposed for them are reasonable. Not one of these job titles lists work associated with the previous UST appeals regarding this site among the tasks to be performed. An Agency employee has characterized the hours proposed for these 16 job titles as "acceptable" and not inconsistent with other budgets he has reviewed and approved. Tr. at 47. Accordingly, Webb has met its burden of proving that its application, as submitted to the Agency with regard to these 16 job titles, would not violate the Act and Board regulations. The Board therefore reverses the Agency's September 13, 2006 determination to reject the proposed personnel budget for these 16 job titles.

### **FEES**

In its petition for review, Webb requested that the Board award it “engineer’s fees, attorney’s fees, and expenses incurred in bringing this action.” Pet. at 6. Section 732.606(g) of the Board’s UST regulations provides that “[c]osts ineligible for payment from the Fund include but are not limited to . . . [l]egal fees or costs, including but not limited to legal fees or costs for seeking payment under this Part unless the owner or operator prevails before the Board and the Board authorizes payment of such costs.” 35 Ill. Adm. Code 732.606(g).

The record does not now include the amount of any legal fees or costs incurred by Webb in this proceeding in which it has partially prevailed before the Board, and the Board today reserves ruling on the issue of fees.

Webb is directed to file on or before March 8, 2007, 21 days from the date of this order, a statement of its legal fees and costs that may be eligible for reimbursement and its argument why the Board could exercise its discretion to direct the Agency to reimburse from the UST Fund those costs relating to this docket, Webb & Sons, Inc. v. IEPA, PCB 07-24. See 35 Ill. Adm. Code 732.606(g). The Agency may respond to this filing by filing its response with the Board on or before March 29, 2007.

### **CONCLUSION**

On the bases described above, the Board affirms the Agency’s rejection of Webb’s proposed budget for personnel for the job titles of senior project manager, professional engineer, and engineer III under the category of High Priority Investigation and Preliminary Costs and the job title of scientist III under the category of CACR Report/HAA/Reimbursements. The Board also affirms the Agency’s modifications to Webb’s budget for Investigation Costs, Field Purchases and Other Costs, and Handling Charges, which Webb has not appealed. Also on the bases described above, the Board reverses the Agency’s rejection of Webb’s proposed budget for the 16 remaining job titles in Webb’s personnel budget.

This opinion constitutes the Board’s interim findings of fact and conclusions of law in this matter.

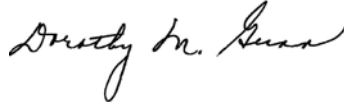
### **ORDER**

1. The Board affirms the Agency’s rejection of Webb’s proposed budget for personnel for the job titles of senior project manager (453 hours), professional engineer (84 hours), and engineer III (68 hours) under the category of High Priority Investigation and Preliminary Costs and the job title of scientist III (16 hours) under the category of CACR Report/HAA/Reimbursements.
2. The Board reverses the Agency’s rejection of Webb’s proposed budget for the 16 remaining job titles in Webb’s personnel budget. Specifically, under the category of High Priority Investigation and Preliminary Costs, the Board reverses the Agency’s

- rejection of Webb's proposed personnel budget for the job titles of senior scientist (150 hours), scientist III (102 hours), scientist I (21 hours), draftsman (6 hours), and technician I (9.5 hours). Under the category of CAP Implementation (dig and haul), the Board reverses the Agency's rejection of Webb's proposed personnel budget for the job titles of senior project manager (8 hours), professional engineer (4 hours), senior scientist (16 hours), scientist III (30 hours), and technician I (70 hours). Under the category of Additional Well Monitoring/Well Replacement/TACO sample collection, the Board reverses the Agency's rejection of Webb's proposed personnel budget for the job titles of senior scientist (8 hours), scientist III (42 hours), and environmental technician I (42 hours). Under the category of CACR Report/HAA/Reimbursements, the Board reverses the Agency's rejection of Webb's proposed personnel budget for the job titles of senior project manager (8 hours), professional engineer (32 hours), and senior scientist (92 hours).
3. Webb is directed to file on or before March 8, 2007, 21 days from the date of this order, a statement of its legal fees and costs that may be eligible for reimbursement and its argument why the Board could exercise its discretion to direct the Agency to reimburse those costs. The Agency may respond to this filing by filing its response on or before March 29, 2007.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above interim opinion and order on February 15, 2007, by a vote of 4-0.



Dorothy M. Gunn, Clerk  
Illinois Pollution Control Board