

**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**

T-TOWN DRIVE THRU, INC.,	)	
<i>Petitioner,</i>	)	
	)	
v.	)	PCB No. 07-085
	)	(LUST Appeal)
ILLINOIS ENVIRONMENTAL	)	
PROTECTION AGENCY,	)	
<i>Respondent.</i>	)	

**PETITIONER'S MOTION FOR RECONSIDERATION**

Pursuant to 35 ILL. ADM. CODE §§ 101.520 and 101.902, petitioner T-Town Drive Thru, Inc. ("Petitioner"), by its attorneys, The Sharp Law Firm, P.C., moves the Board to reconsider its *Opinion and Order of the Board* dated April 3, 2008 ("Order").

The grounds for this motion are that in rendering the Order the Board misapplied applicable law and, in proceeding into areas not addressed by the parties, drew inferences of fact which were mistaken. Because those errors were essential to the result reached, the Order should be reconsidered and reversed.

In further support, Petitioner states as follows.

**I. INTRODUCTION.**

Seeking to remediate a Leaking Underground Storage Tank ("LUST") site pursuant to the Environmental Protection Act ("Act"), Petitioner filed a corrective action plan and budget which the Illinois Environmental Protection Agency ("Agency") approved after modifying them in modest respects. The approved budget called for analysis costs of \$15,867.57. After completion, Petitioner sought reimbursement for \$8,109.02 in analysis costs for services rendered in connection with tests which are subject to the unit-price reimbursement rates set forth in 35 ILL. ADM. CODE Part 732

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Appendix D. In each case, the amount sought was the approved amount set forth in that appendix, adjusted for inflation under 35 ILL. ADM. CODE § 732.870.

The Agency denied the analysis costs claim in its entirety, claiming there was “no supporting documentation” of the costs. In fact, Petitioner had submitted with the application an October 20, 2006 invoice to Petitioner from its remediation contractor with attachments detailing \$7,787 of the costs at issue and an October 11, 2006 invoice from that contractor with attachments itemizing the additional \$322.02 at issue. However, the Agency had insisted that Petitioner submit invoices *from a subcontracting lab* for the portion of the services performed by it and that reimbursement be limited to those invoices. The Agency disregarded the contractor’s invoices, as well as sworn certifications as to the propriety of the expenses at issue.

Petitioner appealed, and filed its *Petitioner’s Motion for Summary Judgment* (“Motion”). Petitioner argued (a) that because there was no dispute that the work in fact had been done and because the reimbursement application was consistent with the approved budget, the Agency, on reimbursement application, had attempted to revisit and reverse its budget findings, which was improper (Motion at 7-11); (b) that the Agency was attempting to pay only what a subcontracting laboratory had charged for part of the services at issue, which also was improper (*id.* at 12-17); and (c) that Petitioner had in fact submitted adequate documentation to support payment of the amount claimed (*id.* at 17-19).

The Agency responded with its *Response to Petitioner’s Motion for Summary Judgment and Respondent’s Cross-Motion for Summary Judgment* (“Cross-Motion”). It contended it “had no choice” but to deny payment because “the burden is on

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applicants to demonstrate that incurred costs are related to corrective action, properly accounted for, and reasonable”, which, it said, requires “an accounting of all costs” even when a unit price is set by regulation and budget approval (Cross-Motion at 2, 4). Comprising only 4½ pages, the Cross-Motion was a plainly inadequate rebuttal of Petitioner’s Motion and reflected the attitude that, as one Agency employee warned Petitioner’s contractor, “The Agency always wins.”

In its Order, the Board has sided with the Agency. In so doing, it went far beyond the points argued by the Agency and construed matters far beyond the arguments and showings of either of the parties. While it may be said that the entry into uncharted waters was necessitated by the inadequate Cross-Motion showings, the result was that the Board’s inferences and conclusions in those waters were untested by the adversarial process which is essential to the discovery of truth. As a result the Board erred. Moreover, in some respects it appears the Board overlooked applicable law. These errors are particularly important because, as shown previously, the issue raised herein applies in a significant number of cases with an aggregate value far beyond the \$8,109.02 at issue here,<sup>1</sup> and because, as the Order notes at 1, this is the Board’s first adjudicatory interpretation of the Part 732, Subpart H rules. In light of those aspects, we are confident that the Board wants to get its decision right, and we submit the following points and authorities to assist in that regard.

### **II. THE BOARD’S INFERENCE THAT THE CONTRACTOR WAS ATTEMPTING DOUBLE-DIPPING WAS ERRONEOUS.**

In the Order, the Board recognized that the sum sought was “both within the approved budget amount and equal to the Subpart H maximum payment amounts”

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<sup>1</sup> See *Petitioner’s Motion to Consolidate* filed September 12, 2007.

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and hence “reasonable” (Order at 21, 22), and that the claimed work was in fact done (*id.* at 24). It also recognized that under the law approval of the budget “*shall be considered final* approval for purposes of seeking and obtaining payment” from the Fund “*if the costs associated with the completion of any such plan are less than or equal to the amounts approved in such budget.*” *Id.* at 22, *quoting* Act § 57.7(c)(1) as amended by P.A. 92-554 (Board’s emphasis).<sup>2</sup>

The Board further agreed that where a contractor and a subcontractor both contribute to a Subpart H item, how the fixed amount “might be allocated between contractor and subcontractor is irrelevant”. Order at 22. However, it said that that principle was not controlling here because there was no showing that Petitioner’s contractor had contributed any services to the bundle of services that was entitled to the unit price. *Id.* at 24. Drawing conclusions not urged by the Agency, and dealing with changed reimbursement protocols which it apparently did not appreciate (see pp. 6-8 below), the Board inferred that Petitioner’s contractor was fully reimbursed for its services through separate charges for consulting services and was in essence attempting to double-dip. *Id.* It further inferred that the contractor was attempting to evade limits on handling charges which apply when a subcontractor does all the work at issue. See Order at 25. Under those circumstances, it said, the contractor cannot be entitled to the greater price under Subpart H just because that sum is reasonable and was approved in the budget; to allow such would be to emasculate the regulations on handling charges. *Id.*

The key to the Board’s decision, and to its error, was the inference that this was

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<sup>2</sup> Act § 57.7(c)(4)(A) as amended by P.A. 92-651, P.A. 92-735 and P.A. 92-574 is similar.

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a situation “[w]here a contractor, not seeking a handling charge, *adds no work* to a task that is performed by a subcontractor for less than the Subpart H maximum”. Order at 25 (emphasis added). It inferred that that situation applied – again a position not urged by the Agency – because in the record submitted by the Agency the only evidence the Board could find of sample-related work by the contractor was work which had been submitted under – and paid as – consulting services, apart from the Subpart H category for sample handling and analysis. Order at 24.

To allow a contractor to be compensated for the same work under both 35 ILL. ADM. CODE §§ 732.845 and 732.850 (governing payment for consulting services on a time-and-materials basis) and under 35 ILL. ADM. CODE §§ 732.835 and Appendix D (governing costs associated with sample handling and analysis) would be manifestly improper. Petitioner in no way contends otherwise. However, no double-dipping was attempted here because the work which the Board seized upon in its Order<sup>3</sup> was not the work which is relevant in the sample handling and analysis charges.

The scope of work for the Sample Handling and Analysis task is initially defined at 35 ILL. ADM. CODE § 732.835, which reads:

Payment for costs associated with sample handling and analysis must not exceed the amounts set forth in Section Appendix D of this Part. Such costs must include, but are not limited to, those associated with the transportation, delivery, preparation, and analysis of samples, and the reporting of sample results.

Consistent therewith, the Agency’s “Analytical Cost Form” for the Sample Handling

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<sup>3</sup> The Order called into question \$5,479.62 in costs associated with professional consulting services. Of this amount \$4,539.36 was for professional consulting time and \$940.26 was for consultants’ materials. The Board erroneously inferred that these costs were for “sample handling and analysis” tasks conducted pursuant to § 732.835. All of these charges were for “sampling”, a field activity, or for other field activities conducted pursuant to § 732.845. See Rec. 030, 032, 056, 060, 134, 136, 138 and 139.

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and Analysis task contains the following instructions (Rec. 024, emphasis added):

The laboratory analysis charge includes all cost associated with the transportation and/or delivery and analysis of each applicable sample. The charge includes but is not limited to costs associated with laboratory personnel, *sample handling*, transportation and/or delivery of samples to the laboratory, *sampling equipment*, *sampling containers*, sample disposal and *all aspects of the applicable laboratory analysis*. Please enter the number of samples for each analysis and the actual cost per analysis up to the maximum cost per analysis.

Absent from the matters to be included under either of those descriptions is sample *collection*, the work which led the Board to infer that Petitioner's consultant was attempting double-dipping (Order at 24). This is so because sample *collection* is performed in the field, and 35 ILL. ADM. CODE § 732.845 defines the professional consulting task to include that work, stating (emphasis added):

Payment for costs associated with professional consulting will be reimbursed on a time and materials basis pursuant to Section 732.850. Such costs must include, but are not limited to, those associated with project planning and oversight; *field work*; field oversight; travel; per diem; mileage; transportation; vehicle charges; lodging; meals; and the preparation, review, certification, and submission of all plans, budget plans, reports, applications for payment and other documentation.

See *also* the "Personnel Title Description and Duties and Summary" listing on the Agency's website, stating for persons covered as professional consulting:

### **Technician I, II, III, IV, and Senior Technician**

Provides a variety of *field* and office *work* including mapping, *sampling*, surveying, and equipment maintenance. A college degree is not generally required. Performs routine labor tasks related to *on-site* installation, maintenance, and repair of machinery and equipment and *sampling activities*.

<http://www.epa.state.il.us/land/lust/forms/budget-forms/forms-1/titles-and-duties.html>,

copy attached as Exhibit A; emphasis added to material in italics. Also relevant are the "Instructions for Budget & Billing Forms" posted on the Agency's website.

Regarding the Analytical Costs Form they provide:

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Include in the “*Cost (\$) per Analysis*” charge *all costs* associated with sample handling and analysis of each sample including but not limited to laboratory personnel, sample handling, sample preparation, all aspects of the laboratory analysis, *sample jars*, and *other sampling containers, sample kits*, sample disposal fees, and reporting of sampling results. Include the number of samples for each parameter and the actual cost per analysis (up to the maximum total amount per sample listed in Appendix D of 35 Ill. Adm. Code 732 or 734.) . . .

Include in the *soil sampling equipment* charge *all costs associated* with sampling equipment including but not limited to EnCore sampler, purge and trap sampler, or equivalent sampling device.

Include in the *sample shipping charge* all costs associated with sample shipping including but not limited to transportation and/or delivery of samples to the laboratory (e.g. FedEx, UPS, or any other courier service), *ice, coolers, and bubble wrap*. The maximum total amount per sample listed in Appendix D is the maximum total amount for shipping all samples (soil and groundwater) collected in a calendar day.

<http://www.epa.state.il.us/land/lust/forms/budget-forms/forms-1/instructions.pdf>, copy attached as Exhibit B, at 8; emphasis added.

Thus, under Agency policy manifested to remediation contractors, “sample handling and analysis” does *not* include sample collection work. Sample *collection* is treated as professional consulting, whereas other sample-related services – whether performed by the contractor, a laboratory or any combination of service providers – are included in sample *handling* and analysis.

Although it plainly is easy to confuse the “sample handling and analysis” task and the “sampling” or “sample collection” task, the distinction is clear in public-record documents which the Agency has created, and the distinction is manifested in the regulations which the Board has adopted. While one might question the logic or wisdom of that distinction,<sup>4</sup> the indisputable facts are that the distinction originated

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<sup>4</sup> Finding the distinction illogical or unwise would not justify disregarding it here. As the Agency repeatedly stressed during the Subpart H rulemaking, the rates stated in Subpart H were based on the Agency’s empirical experience with costs in the various proposed classifications. Because sample *collection* was not treated as sample *handling and analysis* when the Subpart H rates

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with the Agency, not with Petitioner's contractor, and that Petitioner's contractor attempted no double-dipping or other evasion of the rules in following that distinction. That fact was not disputed by the Agency below, and its failure to dispute the matter was not an oversight. ***If the Agency did not recognize the distinction between "sampling" and "sample handling" as proper, it would not have approved compensation of the sampling work as professional consulting.*** The remedy would have been to disallow *that* item, *not* the sample handling and analysis charge.

### **III. THE BOARD ERRED IN INFERRING THERE WAS NO "EVERYTHING ELSE" IN THIS CASE.**

Not only did the Board mistake professional consulting costs incurred for "sampling" as costs incurred for "sample handling and analysis", it erroneously inferred from the record submitted by the Agency that there were no costs or work, other than the laboratory's analysis, properly includable under sample handling and analysis. These mistakes are understandable, because the Subpart H rules are new and because, plainly unbeknownst to the Board, Agency procedures and protocols tell the applicant not to submit documentation of the many miscellaneous services included in the per-analysis charge.

For example, the instructions for completion of the "Analytical Cost Form" *require* the owner/operator to "[i]nclude in the 'Cost (\$)' per Analysis' charge all costs associated with" the handling of the samples. The requirement to incorporate "all costs" associated with the task into the unit rate forces the applicant *to omit* any details associated with such costs. Not only do the forms fail to provide any place for

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were researched, proposed and found reasonable, it cannot now be added to that task without reconsideration as to what rate would be reasonable for that task as amended. See also 35 ILL. ADM. CODE § 102.702.

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the detailing of the non-laboratory work provided, the instructions tell the applicant *not* to provide a separate itemization of such work and costs. ***The result is that the administrative record, by design of the Agency, will never provide specificity as to all the costs included in the unit price and will never provide the full accounting which the Order faults Petitioner for not providing.***

In short, if there was nothing in "Sample Handling and Analysis" besides sample analysis, the task would not be titled as it is; its definition in § 732.835 would not be stated as it is; and the Agency would not have issued the instructions which it has. However, lest there be any doubt, Petitioner, in cooperation with its contractor, has prepared the following explanation of the services at issue and who provided them:

**(a) Cost-per-Analysis Charges:** The per-analysis charges imposed by the contractor pursuant to § 732.835 included both items provided by the contractor (and treated as "stock items") and items provided by a third party:

(i) "Stock Items": Petitioner's contractor assembles and stocks a variety of materials and supplies included within the sample handling and analysis task. It provides these items for the benefit of its client without separate charge. The Agency and Subpart H require that the costs of the labor and materials provided by the contractor as well as the costs of subcontractor services be incorporated into the per-analysis rate, instead of being delineated in detail or separately charged to the owner/operator. The contractor adhered to these requirements in this instance. Costs associated with items provided by the contractor as part of the per-analysis charge include the labor and material costs to procure, assemble, stock, manage and provide the following stock items, among others:

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Sample Jars  
Sampling Kits<sup>5</sup>  
Sample Containers  
Chain-of-Custody Records

(ii) Third-Party Services: Petitioner's contractor subcontracted the actual analysis to a laboratory and incurred a cost per sample for this subcontracted component of the bundled services. The contractor did not assess a handling charge for the lab analysis costs because those costs were, by definition, only one component of the more inclusive sample handling *and* analysis task.

(iii) Explanation of Petitioner's Cost: Per the Agency's instructions, the total cost-per-analysis charged to Petitioner by the contractor included all the cost items listed above. The contractor's rates to Petitioner for these services have been found to be reasonable by the Board. Indeed, the Agency routinely reimburses analytical laboratories the same rate charged by the contractor here.

(b) Soil Sampling Equipment Charges. Consistent with the regulations, some costs are reimbursable in addition to the per-analysis charges. The contractor stocks and provides TerraCore Samplers or equivalent sampling devices. The contractor charged Petitioner a reasonable rate pursuant to Subpart H.<sup>6</sup>

(c) Sample Shipping Charges. Sample shipping charges, also imposed pursuant to the regulations separate from the per-analysis charge, also include elements provided by the contractor as well as items provided by a third party. The

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<sup>5</sup> Sampling kits consist of three separate vials and a jar. The contractor purchases the vials and obtains the jars from the laboratory. The individual components (vials and jars) are then assembled by the contractor from inventory and charged to the client as part of the per-analysis price.

<sup>6</sup> The description of the sampling equipment on the "Stock Items" form provided by the contractor here erroneously listed the Terracore Samplers as "Soil Sample Collection-VOA Sampling Preservation Kit". This was a clerical error on the contractor's part.

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contractor assembles and stocks a variety of materials and supplies which are included within the per-unit cost of the sample-shipping task. The Agency, and Subpart H, require that the costs of such materials and services provided by the contractor be incorporated into the rate-per-day for shipping. Costs treated as “stock items” and provided by the contractor as part of the per-shipping-event charge include, but are not limited to, the labor and material costs to procure, stock, manage and provide the following items and services:

- Bubble Wrap
- Coolers
- Ice
- Shipping Bags and Liners
- Packing Tape and Labels

Petitioner's contractor also coordinates with third parties which transport the samples coolers to the laboratory. Per the Agency's instructions, the total sample shipping charge per day assessed to Petitioner by the contractor included all the costs associated with the items and services listed above. The contractor's rates to Petitioner for these services have been found to be reasonable by the Board. Indeed, the Agency routinely reimburses these charges in other contexts.

In short, the finding that there was no “everything else” here was erroneous due to a misleading record dictated by the Agency. That finding should be vacated, and because how the previously-approved sums are split between the contractor and the subcontractors is irrelevant, those sums should be allowed.

#### **IV. THE BOARD ERRED IN RELYING UPON INAPPLICABLE PORTIONS OF ACT § 57.7.**

Also critical to the Board's result were the premises that “if some portion of the claimed \$8,109.02 in costs cannot be accounted for, then those costs were surely not

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'used for . . . corrective action activities . . . required to meet the minimum requirements of this Title (XVI)'" and that hence such costs must be denied (Order at 25, *quoting* Act § 57.7(c)(3) as amended by P.A. 92-554). In this regard, the Board adopted the only rationale voiced by the Agency in denying the claim. Rec. 003.

Indisputably, Act § 57.8 governs reimbursement applications and provides that

[i]n the case of any approved plan and budget for which payment is being sought, the Agency shall make a payment determination within 120 days of receipt of the application. Such determination shall be considered a final decision. The Agency's review shall be limited to generally accepted auditing and accounting practices. ***In no case shall the Agency conduct additional review of any plan which was completed within the budget, beyond auditing for adherence to the corrective action measures in the proposal.*** If the Agency fails to approve the payment application within 120 days, such application shall be deemed approved by operation of law and the Agency shall proceed to reimburse the owner or operator the amount requested in the payment application. However, in no event shall the Agency reimburse the owner or operator an amount greater than the amount approved in the plan.

§ 57.8(a)(1) (emphasis added). In denying reimbursement here, the Agency relied on "Section 57.7(c)(4) of the Act because [the requested reimbursements] may be used for corrective action activities in excess of those required to meet the minimum requirements of Title XVI of the Act". Parroting that sub-section as contained in the version of § 57.7 as amended by P.A. 92-574, 92-651 and 92-735,<sup>7</sup> the Agency twice spoke of the corrective action activities in the future tense (Rec. 003), a conceptual error which Petitioner pointed out in the Motion but the Board dismissed as "quibbl[ing] with the denial letter's grammar" (Order at 25).

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<sup>7</sup> As amended by P.A. 92-574, 92-651 and 92-735, § 57.7(c)(4)(C) provides:

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.

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However, grammar was *not* the essence of Petitioner's objection to the reason invoked by the Agency (which reason was supposed to limit the Board's review on appeal). The point was that § 57.7(c)(4)(C) cited by the Agency does not apply at the reimbursement application stage. By its express terms, § 57.7(c)(4)(C) applies only to "any plan submitted pursuant to Part (E) of this paragraph (4)", and Part (E) does not include reimbursement applications within its scope. Rather, § 57.7(c)(4)(E) limits the "plans" subject to § 57.7(c)(4)(C) to:

- (i) Any physical soil classification and groundwater investigation plan submitted pursuant to item (1)(A) of subsection (a) of this Section, or budget under item (2) of subsection (a) of this Section;
- (ii) Any groundwater monitoring plan or budget submitted pursuant to subsection (c)(2)(B) of this Section;
- (iii) Any corrective action plan submitted pursuant to subsection (c)(1)(A) of this Section; or
- (iv) Any corrective action plan budget submitted pursuant to subsection (c)(1)(B) of this Section.

Hence *budgets* submitted under § 57.7 are subject to review for whether they *will* result in use for corrective action activities in excess of those required to meet the minimum requirements of this title; *reimbursement applications* under § 57.8 are *not*. Agency objection to going beyond the minimum requirements of the Act is statutorily authorized *only* at the budget stage.<sup>8</sup>

Section 57.7(c)(3) as amended by P.A. 92-554 – the comparable provision cited in the Order – leads to no different result. It provides that "[i]n approving *any plan submitted pursuant to subsection (a) or (b) of this Section*, the Agency shall

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<sup>8</sup> The Board also felt that compliance with Subpart H and an approved budget was insufficient to entitle one to payment because "whether the costs requested have been properly accounted for . . . , so as to warrant reimbursement, is addressed not in Subpart H ('Maximum Payment Amounts'), but rather in Subpart F ('Payment from the Fund')." Order at 22. However, to the extent Subpart F is interpreted in conflict with the language of Act §§ 57.7 and 57.8, the Board's conclusions are improper as a matter of law.

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determine, by a procedure promulgated by the Board under Section 57.14, that the costs associated with the plan are reasonable, will be incurred in the performance of site investigation or corrective action, and will not be used for site investigation or corrective action activities in excess of those required to meet the minimum requirements of this Title” (emphasis added). Reimbursement applications are submitted pursuant to § 57.8 and are not plans submitted pursuant to §§ 57.7(a)-(b).

Not only is the § 57.7(c)(4)(C) (or § 57.3(c)(3)) test statutorily inapplicable on reimbursement review, it is impractical. If the Agency requires that a monitoring well be installed and then the well detects no contaminant in excess of permitted amounts, can the Agency then disallow the cost of the well because it exceeded “minimum requirements of [the Act]”? If a site must be remediated because of leaks from one or more of four tanks on the site, and an after-the-fact examination reveals that two of the four tanks had not leaked, are costs to be denied because their removal exceeded minimum requirements of the Act? The examples could go on and on. Pulling a standard from § 57.7 and applying it under § 57.8 is not only statutorily unauthorized, it opens the door to widespread *post-hoc* second-guessing of decisions the Agency is supposed to make before the work is done.

### **V. THE BOARD ERRED BY WEIGHING CONTRACTOR COSTS RATHER THAN OWNER-OPERATOR COSTS.**

The Order also erred by conflating Petitioner and its contractor and focusing on the costs to the contractor rather than to the owner-operator. This is statutorily wrong. *E.g.*, § 57 (purpose to “establish requirements for eligible owners and operators . . . to seek payment for any costs associated with . . . corrective action”); § 57.1 (Act applies to owners and operators); § 57.8(a) (“The owner or operator may

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submit an application for payment”); § 57.8(e) (limits on payments for “costs of corrective action incurred by such owner or operator”); §§ 57.8(d), 57.8(g) (similar); § 57.9(a) (the “Fund shall be accessible by owners and operators”).

Moreover, the error again opens the door to wholesale *post-hoc* second-guessing of matters the Agency and the Board have previously approved. If the Agency can demand proof (an “accounting”) that the contractor’s services plus the lab charge equal the previously-agreed rate under Appendix D, what is to prevent revisiting any other Subpart H rate?<sup>9</sup> If the Agency after-the-fact can say that services such as summarized in Part III above do not equal the approved Appendix D rate less the out-of-pocket paid to the lab, what is to prevent the Agency from auditing a well-drilling reimbursement request and determining that because the rig actually utilized was acquired “used” and was fully depreciated, and because the operator actually operating the rig was less experienced and paid less than the average operator, the Subpart H rate was not “actually incurred” by the contractor and was not necessary to meet the minimum requirements of the Act?

Many other examples could, of course, be offered, but the point hopefully is made. The costs which are to be examined under the Act are the costs charged to the owner-operator. If those costs have been previously approved in the budget as reasonable and have been actually incurred,<sup>10</sup> they are supposed to be paid. To

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<sup>9</sup> Indeed, the premise that out-of-pocket expenses plus the value of contract or labor equals the reimbursable amount converts Appendix D pricing into the very time-and-materials system which the Agency and the Board said Subpart H abolished.

<sup>10</sup> No one contends that mere budget approval of, for example, 20 tests would require payment for 20 tests when only 16 tests had proven sufficient, but that is not the issue. Rather, the issue is what sort of an accounting is appropriately required when the Agency, the owner-operator and

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after-the-fact review whether the contractor actually incurred costs equal to that charged the owner is not the statutory test and is improper.

With all due respect, the former statutes and regulations have never been interpreted to require that the contractor document and account for all of *its* expenses, and 35 ILL. ADM. CODE § 732.601(b)(9), relied upon in the Order, cannot be so interpreted either. See 35 ILL. ADM. CODE § 732.601(a) (twice making clear that the application at issue is from the owner or operator); *Proposed Rule: First Notice* in R04-22A and R04-23A, at 63 (rejecting proposal for contractors to be made “UST Remediation Applicants” because “only the owner or operator may seek reimbursement from the UST program”); *Proposed Rule: Second Notice* in R04-22A and R04-23A, at 71 (modifying auditing proposal because “[t]he owner/operator is the individual who will be reimbursed” and bears the responsibility for recordkeeping).

### **VI. CONCLUSION.**

Whatever the reason, the Order went far beyond the arguments submitted on the cross-motions for summary judgment and drew inferences of fact and conclusions of law which were erroneous. Although in many cases the Board's mistakes were understandable, they were nonetheless mistakes. The Board was right that when both the contractor and a subcontractor contribute to a bundle of services which is subject to a lump-sum rate under Subpart H, how that payment is divided between them is irrelevant. The Board was manifestly wrong, however, in inferring that the contractor here contributed nothing to the bundle of services at issue. The Agency did not deny reimbursement because the contractor was double-dipping or

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the contractor have agreed that the work is to be done on a per-unit basis. The proper inquiry is the number of units performed, not an attempt to renegotiate the agreed unit price.

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attempting to evade the handling-charge rule, and it did not argue such in support of its Cross-Motion. It thus was procedurally improper for the Board to draw those inferences, and, as shown herein, factually wrong as well.

In approving the budget the Agency determined that the rates approved therein were necessary to meet the minimum requirements of the Act and were reasonable; there is no dispute that the work was done in conformance with the Plan and budget; and there is no dispute that the contractor has invoiced the Petitioner in accordance therewith. The requirements for payment under § 57.8 were met, the Agency's decision was wrong, and accordingly the Board's affirmance thereof should be vacated and judgment granted to the Petitioner.

May 8, 2008

T-TOWN DRIVE THRU, INC.

By: \_\_\_\_\_

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**CERTIFICATE OF SERVICE**

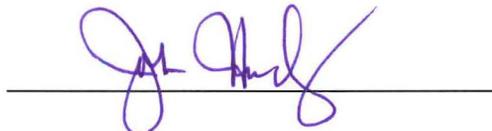
I, the undersigned attorney at law, hereby certify that I served the foregoing document upon all persons entitled to same by causing copies to be deposited in the United States Post Office mailbox at 14th and Main Streets, Mt. Vernon, IL, before 6:00 p.m. this date, in envelopes with proper first- class postage affixed, addressed as follows:

Dorothy M. Gunn, Clerk  
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*Counsel for Petitioner T-Town Drive Thru, Inc.*

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## **Personnel Title Descriptions and Duties Summary**

### **Engineer I, II, and III**

Performs assessment of remedial activities, compiles and analyzes environmental data, designs remediation systems, prepares corrective action plans and completion reports, and is responsible for on-site supervision of the installation of remediation systems. May oversee drilling and monitoring well installation.

### **Professional Engineer and Senior Professional Engineer**

Must be a professional engineer licensed in the State of Illinois. Is generally limited to performing final report review, senior design, and complex data analysis. May supervise or direct the work activities of lower level professionals and technicians. Will perform very limited fieldwork and have limited involvement in projects. Duties include reviewing reports, developing strategies, and attending client meetings. Is responsible for approving designs, reports, plans, and specifications before submittal to clients and regulatory agency.

### **Geologist I, II, and III**

Performs routine tasks related to remediation system design and aquifer testing. Conducts assessment and remedial activities including drilling and monitoring well installation, sampling, and compiling data. May oversee drilling and monitoring well installation.

### **Professional Geologist and Senior Professional Geologist**

Is generally limited to performing final report review, senior design, and complex data analysis. May supervise or direct the work activities of lower level professionals and technicians. Will perform very limited fieldwork and have limited involvement in projects. Duties include reviewing reports, developing strategies, and attending client meetings. Is responsible for approving designs, reports, plans, and specifications before submittal to clients and regulatory agency.

### **Scientist I, II, III, IV, and Senior Scientist**

Performs assignments related to site assessment, gathering general site data, well searches and plotting, and analytical data reduction.

### **Project Manager and Senior Project Manager**

Supervises and assigns tasks to staff member working on contracted projects. Is generally responsible for all major decisions involving the project. Is responsible for gathering field data and competent at data analysis. Serves as on-site technical expert and may do hydrological site characterization and writes corrective action plans and completion reports.

### **Technician I, II, III, IV, and Senior Technician**



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Provides a variety of field and office work including mapping, sampling, surveying, and equipment maintenance. A college degree is not generally required. Performs routine labor tasks related to on-site installation, maintenance, and repair of machinery and equipment and sampling activities.

**Account Technician I, II, III, IV, and Senior Account Technician**

Prepares reimbursement packages and budgets.

**Administrative Assistant I, II, III, IV, and Senior Administrative Assistant**

Operates computer for word processing, spreadsheets, and statistical typing, prepares correspondence, generate reports, and performs general office work, typing, copying, and filing.

**Draftsperson/CAD I, II, III, IV, and Senior Draftsperson/CAD**

Is responsible for developing scaled maps, engineering drawings, and contour maps of professional quality using CAD computer programming.

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Updated December 2007

## Instructions for the Budget and Billing Forms

The Illinois Environmental Protection Agency (Illinois EPA) has revised the *Budget and Billing Forms* for payment from the Underground Storage Tank Fund (Fund). The Illinois EPA's new forms shall be used for all budgets and applications for payment for all sites subject to 35 Illinois Administrative Code (35 Ill. Adm. Code) 734, 732, or 731, except as noted below. The *Budget and Billing Forms* reflect the amendments to 35 Ill. Adm. Code 732 and the adoption of 35 Ill. Adm. Code 734. When using these forms, please follow the instructions for each particular form that pertains to your site.

### Maximum Payment Amounts

The Illinois EPA will only approve payment from the Fund for corrective action costs actually incurred up to the maximum amounts listed in Subpart H, Appendix D, and Appendix E of 35 Ill. Adm. Code 732 or 734—unless bidding is used or the unusual or extraordinary circumstance provisions are followed. The Subpart H, Appendix D, and Appendix E maximum payment amounts will be adjusted for inflation each year on the first day of July of that year. The first adjustment was made on July 1, 2006. The maximum amounts that are applicable for costs submitted in a budget are the amounts in effect on the date the Illinois EPA receives the budget. Please note that, once the Illinois EPA approves a cost, the applicable maximum payment amount for that cost may not be increased by proposing the cost in a subsequent budget (35 Ill. Adm. Code 732.870(d) or 734.870(d)). The maximum amounts that are applicable for costs not approved in a budget by the Illinois EPA, such as early action costs, are the amounts in effect on the date the costs were incurred.

### Signature Requirements

For owners and operators other than individuals, a duly authorized representative must sign the forms on behalf of the owner or operator. For the following entities, the duly authorized representative must be one of the following persons:

1. For a corporation, a principal executive officer of at least the level of vice president, or a person authorized by a resolution of the board of directors to sign the applicable document if a copy of the resolution, certified as a true copy by the secretary of the corporation, is submitted with the document.
2. For a sole proprietorship, the sole proprietor.
3. For a partnership, a general partner.
4. For a municipality, state, federal, or other public agency, the head of the agency or a ranking elected official.
5. For a limited liability company, a member for a member-managed company and either a manager or a member for a manager-managed company.
6. For a land trust, a beneficiary of the land trust who meets the definition of "owner" or "operator" under 35 Ill. Adm. Code 731, 732, or 734.

### Budgets

Title XVI of the Environmental Protection Act requires owners or operators to submit a budget prior to seeking payment from the Fund, except in the case of costs associated



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with early action activities. Owners or operators of sites subject to 35 Ill. Adm. Code 731 are not required to submit budgets.

For owners or operators conducting site investigation pursuant to 35 Ill. Adm. Code 734, the certification that the costs of the Stage 1 investigation will not exceed the amounts set forth in Subpart H, Appendix D, and Appendix E serves as the budget for the Stage 1 site investigation. The actual costs for conducting the Stage 1 site investigation must be submitted on budget forms concurrently with the results of the Stage 1 site investigation and the next *Site Investigation Plan* and budget (submitted on its own budget forms) or with the *Site Investigation Completion Report* if the site investigation is complete. Likewise, the actual costs for conducting the Stages 2 and/or 3 site investigation must be submitted on budget forms concurrently with the results of the previous site investigation and the next *Site Investigation Plan* and budget (submitted on its own budget forms) or with the *Site Investigation Completion Report* if the site investigation is complete. When preparing budget forms, complete and submit only the pages that apply. If multiple budgets are included in one submittal, only one budget certification form is required.

Budget amendments to an approved budget must be submitted on the same forms as the original budget was submitted. Any new budgets for new activities shall be submitted on the Illinois EPA's new *Budget and Billing Forms*. These new forms should not be combined with other versions of *Budget and Billing Forms* and vice versa.

An original and one copy of the complete **budget** for sites subject to 35 Ill. Adm. Code 734 or 732 must be submitted with an associated plan. The forms may be copied; however, one form must include original signatures. The original and one copy should be mailed to:

Illinois Environmental Protection Agency  
Bureau of Land - #24  
Leaking UST Section  
1021 North Grand Avenue East  
Post Office Box 19276  
Springfield, Illinois 62794-9276

### **Applications for Payment**

If an owner or operator has received approval of a budget on old forms, the corresponding application for payment must be submitted on the old forms. Any new budgets for new activities and corresponding applications for payment shall be submitted on the Illinois EPA's new *Budget and Billing Forms*. These new forms should not be combined with other versions of *Budget and Billing Forms* and vice versa.

When submitting an application for payment, an accounting of all costs must be provided (i.e., invoices and receipts). Invoices and receipts must contain enough documentation to support the amount requested for payment from the Fund. Any costs not substantiated by invoices or receipts will not be paid. Invoices and receipts must include the date the work was performed and a breakdown of all costs with documentation of activities conducted and materials purchased. For example, an invoice from the accredited laboratory noting the date of sample collection, number of samples analyzed, amount charged, etc. is required for payment of analytical costs. If

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the invoices and receipts do not contain detailed information, additional documentation must be submitted providing the required information. Invoices and receipts must also provide adequate documentation that the work approved in the applicable plan and budget was conducted.

Proof of payment of subcontractor costs can be shown in one of three ways:

1. Cancelled checks – photocopy of fronts and backs of cancelled checks.
  - a. One payment per site to one payee for the entire amount of one invoice with a note indicating the date of the invoice and the invoice number being paid.
  - b. One payment per site to one payee for the entire amount of several invoices with a note indicating the dates of the invoices, invoice numbers, and the amounts being paid on said invoices.
  - c. Payment to one payee for multiple sites for the entire amount of several invoices with a note indicating the sites involved, including incident numbers, dates of the invoices, invoice numbers, and the amounts being paid on said invoices.
2. Lien waivers with the name of the company, invoices(s) being paid, date payment took place, and the amount(s) paid on said invoice(s) along with necessary signatures.
3. Affidavits with the name of the company, invoice(s) being paid, date payment took place, and the amount(s) paid on said invoice(s) along with necessary signatures.

Please note that an application for payment for site classification pursuant to 35 Ill. Adm. Code 732 cannot be submitted until a *Site Classification Completion Report* has been approved or approved with modifications by the Illinois EPA. Likewise, an application for payment for the previous stage of site investigation pursuant to 35 Ill. Adm. Code 734 cannot be submitted until either a *Site Investigation Plan* and budget for the next stage of investigation or a *Site Investigation Completion Report* (if further investigation is not required) has been approved or approved with modifications by the Illinois EPA.

The complete **application for payment** with original signatures for sites subject to 35 Ill. Adm. Code 734, 732, or 731 should be mailed to:

Illinois Environmental Protection Agency  
Bureau of Land - #24  
Leaking UST Claims Unit  
1021 North Grand Avenue East  
Post Office Box 19276  
Springfield, Illinois 62794-9276

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Pursuant to:	732 734	732 734	732 734	732 734	731 732 734	732	732	732 734	731 732 734
A complete budget or application for payment must include all of the forms listed below, as applicable:	Early Action Bill Package	Free Product Removal Budget	Free Product Removal Bill Package	Site Investigation or Classification Budget	Site Investigation or Classification Bill Package	Low Priority Budget	Low Priority Bill Package	Corrective Action (High Priority) Budget	Corrective Action (High Priority) Bill Package
General Information for the Budget and Billing Forms	P	B	P	B	P	B	P	B	P
Budget Summary		B		B		B		B	
Billing Summary	P		P		P		P		P
Drilling and Monitoring Well Costs Form	P	B	P	B	P			B	P
Analytical Costs Form	P	B	P	B	P	B	P	B	P
Remediation and Disposal Costs Form	P	B	P	B	P	B	P	B	P
Non-Consulting Personnel Costs Summary Sheet	P	B	P					B	P
Remediation Materials Costs Summary Sheet	P	B	P					B	P
UST Removal and Abandonment Costs Form	P		P					B	P
Paving, Demolition, and Well Abandonment Costs Form	P		P					B	P
Consulting Personnel Costs Form	P	B	P	B	P	B	P	B	P
Consultant's Materials Costs Form	P	B	P	B	P	B	P	B	P
Bid Summary and Contractor Certification Forms	P	B		B		B		B	
Handling Charges Form	P		P		P		P		P
Owner/Operator and Professional Engineer/Geologist Budget Certification Form		B		B		B		B	
Eligibility and Deductibility Determination	P	B	P	B	P	B	P	B	P
Payment Certification Form	P		P		P		P		P
Owner/Operator and Professional Engineer/Geologist Billing Certification Form	P		P		P		P		P
Private Insurance Coverage Questionnaire	P		P		P		P		P
Private Insurance Affidavit	P		P		P		P		P
Federal Taxpayer Identification Form	P		P		P		P		P
Women and Minority Business Enterprises Form	P		P		P		P		P
Copies of all bills and receipts for which payment is sought	P		P		P		P		P

P = Application for Payment only  
 B = Budget only

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## General Information for the Budget and Billing Forms

Complete the form with the requested information.

On the first page of the form, there is an area to designate the applicable regulations and the site activities for which the package is being submitted. If the site activities involved are those of a Stage 1 site investigation pursuant to 35 Ill. Adm. Code 734, the only submittal is that of actual costs. If the site activities involved are those of a Stage 2 and/or 3 site investigation pursuant to 35 Ill. Adm. Code 734, you must select from the drop-down box whether the submittal is that of actual costs (for work done during the previous stage of investigation) or a proposed budget.

On the second page of the form, include information pertaining to payment from the Fund (if eligible), such as where payment checks should be sent. Please note that only owners or operators of USTs are eligible for payment from the Fund. Therefore, payment can only be made to an owner or operator of the USTs. The Illinois EPA is not required to and will not recognize an assignment or other delegation of payment as justification for issuing payment to anyone other than the owner or operator. The address, as completed on this form, will be used as the mailing address for payment checks and any final determination letters regarding payment from the Fund.

Lastly, at the end of page 2 is a table to be completed by listing tanks that have ever been or are presently located at the site. Please note that there is only enough space for entry of one incident number. Therefore, if more than one incident number was assigned to a particular tank, multiple lines of the table must be used to list the additional incident numbers (as well as to indicate whether there was a release and, if so, the type of release associated with that incident number). For a tank with multiple incident numbers, it should somehow be indicated that the information pertains to the same tank. An example follows:

Product Stored in UST	Size (gallons)	Did UST have a release?	Incident No.	Type of Release Tank Leak / Overfill / Piping Leak
unleaded gasoline	10,000	Yes <input checked="" type="checkbox"/> No <input type="checkbox"/>	888888	overfill
(same UST as above)		Yes <input checked="" type="checkbox"/> No <input type="checkbox"/>	999999	piping leak
(same UST as above)		Yes <input checked="" type="checkbox"/> No <input type="checkbox"/>	20000000	tank leak
diesel fuel	500	Yes <input checked="" type="checkbox"/> No <input type="checkbox"/>	20000000	tank leak

Click, as instructed, if additional rows of the table are needed.

## Budget Summary

Select the regulations (either Part 734 or Part 732) that apply to the owner or operator of the USTs for which the release was reported. The corresponding column headings will appear.

PART 734:

If Part 734 is selected, in each column, as appropriate, select from the drop-down box one of the following:

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- “Proposed” if the budget is a proposed budget,
- “Actual” if the budget is a summary of actual costs incurred during the previous stage of site investigation, or
- “N/A” (not applicable) if the budget doesn't apply to that particular column heading.

Enter budget summary information in only the columns that apply to the budget at-hand. For example, if the proposed budget pertains to Stage 2 Site Investigation costs and accompanying it are actual costs of the Stage 1 Site Investigation, then “N/A” should be selected for columns labeled “Free Product,” “Stage 3 Site Investigation,” and “Corrective Action.” Then, under the column labeled “Stage 1 Site Investigation,” “Actual” should be selected from the drop-down box, and actual costs of the Stage 1 site investigation should be entered on the appropriate lines. Under the column labeled “Stage 2 Site Investigation,” “Proposed” should be selected from the drop-down box, and proposed costs for Stage 2 of the site investigation should be entered on the appropriate lines. Following is an example, in part:

Choose the applicable regulation:       734       732

<b>734</b>	Free Product	Stage 1 Site Investigation	Stage 2 Site Investigation	Stage 3 Site Investigation	Corrective Action
	N/A	Actual	Proposed	N/A	N/A
Drilling and Monitoring Well Costs Form	\$	\$ 2,000.00	\$ 2,000.00	\$	\$
Analytical Costs Form	\$	\$ 1,000.00	\$ 1,000.00	\$	\$

Stage 1 site investigation budgets must always be submitted as actual costs incurred. The actual costs must be submitted with a proposed Stage 2 Site Investigation Plan, a Stages 2 and/or 3 Site Investigation Plan, or a Site Investigation Completion Report (if no additional site investigation is required after Stage 1).

The actual costs of Stage 2 (if Stage 2 was needed) must be submitted with the proposed Stage 3 Site Investigation Plan or Site Investigation Completion Report (if no additional work is required after Stage 2). The actual costs of Stage 3 (if Stage 3 was needed) must be submitted with a Site Investigation Completion Report. Please note that, if contingency work is proposed (to either complete a stage or carry out the next stage), costs of the contingency work must be submitted as proposed costs. See the Site Investigation Process flowchart and accompanying explanation for information about the various combinations of stages that may be encountered.

List the total dollar amount from each of the forms listed, as applicable. The “Total” will be automatically calculated.

PART 732:

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If Part 732 is selected, budget summary information should be entered in only the column that applies to the budget at-hand. List the total dollar amount from each of the forms listed, as applicable. The "Total" will be automatically calculated.

### **Billing Summary**

The total amounts from each individual form should be entered in the appropriate box. Please note that early action activities or corrective action conducted pursuant to 35 Ill. Adm. Code 731 neither requires nor allows for pre-approval of costs in a budget. Therefore, the first column of this form "\$ Amount Approved in the Budget" will not be completed for Part 731 or early action applications for payment.

### **Drilling and Monitoring Well Costs Form**

#### **Section 1 – Drilling**

Include in the "Rate per Foot (\$)" drilling charge for advancement of a boring or the installation of a well all costs associated with advancing the boring including but not limited to all drilling labor (including driller, driller assistant or laborer, etc.), drill rig time, drill rig and operator travel time and per diem, driller mileage, mobilization, decontamination, Shelby tubes, soil boring abandonment, all remediation compound injection costs (including slurry preparation and mixing equipment), bentonite, boring surface patches, and concrete saw.

An indication must be made as to why each boring is being advanced (i.e., defining the extent of contamination, classification boring, installation of monitoring wells, investigation of migration pathways, injection of a remediation compound) and the drilling type (either hollow-stem auger/conventional [HSA], push-driven technologies [PUSH], or Injection).

If the Subpart H minimum payment amount applies, then the box should be checked indicating such. Upon doing so, the field for "Total Drilling Costs" zeroes out so that the total drilling costs can be entered manually. In addition, an asterisk appears, indicating that the total drilling costs have been adjusted to reflect one or more Subpart H minimum payment amounts. (More than one might apply if the proposed budget or actual costs budget includes more than one round of drilling.)

When the Subpart H minimum payment amount box is not checked, the "Total Drilling Costs" are automatically calculated.

#### **Section 2 – Monitoring/Recovery Wells**

Include in the "Rate per Foot (\$)" charge all costs associated with the installation of a monitoring or recovery well (excluding drilling) including but not limited to costs associated with labor to install wells, all well materials (such as well casings, risers, screens, caps and plugs, filter packs, annular seals, surface seals, sand, gravel, bentonite, concrete, well covers, and locks), and labor and equipment (including groundwater pump) for well development done by the driller.

### **Analytical Costs Form**

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Include in the "Cost (\$ per Analysis" charge all costs associated with sample handling and analysis of each sample including but not limited to laboratory personnel, sample handling, sample preparation, all aspects of the laboratory analysis, sample jars and other sampling containers, sample kits, sample disposal fees, and reporting of sampling results. Include the number of samples for each parameter and the actual cost per analysis (up to the maximum total amount per sample listed in Appendix D of 35 Ill. Adm. Code 732 or 734).

For laboratory analyses not included in Appendix D, the Illinois EPA will determine reasonable maximum payment amounts on a site-specific basis.

Include in the soil sampling equipment charge all costs associated with sampling equipment including but not limited to EnCore sampler, purge-and-trap sampler, or equivalent sampling device.

Include in the sample shipping charge all costs associated with sample shipping including but not limited to transportation and/or delivery of samples to the laboratory (e.g., FedEx, UPS, or any other courier service), ice, coolers, and bubble wrap. The maximum total amount per sample listed in Appendix D is the maximum total amount for shipping all samples (soil and groundwater) collected in a calendar day.

### **Remediation and Disposal Costs Form**

#### **Section A – Conventional Technology**

##### **Excavation, Transportation, and Disposal of contaminated soil and/or the 4-foot backfill material removal during early action activities:**

Include in the "Cost per Cubic Yard (\$)" all costs associated with the excavation, transportation, and disposal of contaminated soil and/or backfill material exceeding the applicable remediation objectives including but not limited to all non-consulting personnel (subcontractors); trucker/equipment operator labor; trucker/equipment operator travel and per diems; truck charges; visqueen truck liner; backhoe charges; equipment (including concrete breaker); equipment mobilization; skid steer; concrete/asphalt excavation, transportation, and disposal; landfill charges; decontamination; barriers; cones; tape; permit fees; traffic control; and other materials and related expenses.

The volume of soil removed and disposed must be determined by the following equation using the dimensions of the resulting excavation:

Soil [(Excavation Length in feet x Excavation Width in feet x Excavation Depth in feet of contaminated soil) ÷ 27] x 1.05 bulking factor

A conversion factor of 1.5 tons/cubic yard will be used to convert tons to cubic yards.

The volume of soil removed from within four feet of the outside dimensions of the UST and disposed pursuant to early action provisions must be determined in accordance with Appendix C of 35 Ill. Adm. Code 732 or 734.

##### **Backfilling the Excavation:**

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Include in the "Cost per Cubic Yard (\$)" all costs associated with the purchase, transportation, and placement of clean material used to backfill the excavation resulting from the removal and disposal of soil, including but not limited to all non-consulting personnel (subcontractors), trucker/equipment operator labor, trucker/equipment operator travel and per diems, truck charges, visqueen truck liner, backhoe charges, equipment, equipment mobilization, backfill material (clay, sand, gravel), barriers, cones, tape, permit fees, traffic control, and other materials and related expenses.

The volume of backfill material must be determined by the following equation using the dimensions of the backfilled excavation:

Soil [(Excavation Length in feet x Excavation Width in feet x Excavation Depth in feet of contaminated soil) ÷ 27] x 1.05 bulking factor

A conversion factor of 1.5 tons/cubic yard will be used to convert tons to cubic yards.

The volume of backfill material used to replace soil removed from within four feet of the outside dimensions of the UST and disposed pursuant to early action provisions must be determined in accordance with Appendix C of 35 Ill. Adm. Code 732 or 734.

### **Overburden Removal and Return:**

Include in the "Cost per Cubic Yard (\$)" all costs associated with the removal and subsequent return of soil that does not exceed the applicable remediation objectives but whose removal is required in order to conduct corrective action, including but not limited to all non-consulting personnel (subcontractors), trucker/equipment operator labor, trucker/equipment operator travel and per diems, truck charges, visqueen truck liner, backhoe charges, equipment, equipment mobilization, barriers, visqueen, cones, tape, permit fees, traffic control, and other materials and related expenses.

The volume of soil removed and returned must be determined by the following equation using the dimensions of the excavation resulting from the removal of soil:

Overburden Soil [(Excavation Length in feet x Excavation Width in feet x Excavation Depth in feet of non-contaminated soil) ÷ 27]

A conversion factor of 1.5 tons/cubic yard will be used to convert tons to cubic yards.

### **Section B – Alternative Technology**

This section must be used for any remediation technology other than conventional technology. Alternative technology includes but is not limited to soil vapor extraction, land-farming, bio-piles, low-temperature thermal desorption, air sparging, bio-sparging, in-situ bioremediation, chemical oxidation, or dual-phase extraction. Other alternative technologies may be proposed.

Include a time and materials breakdown of all costs. Include in the "Total Cost of the System" all costs including but not limited to all non-consulting personnel (subcontractors), equipment, materials, construction, installation, operation and maintenance, system shutdown and closure, and other expenses of the proposed

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remediation system. Maximum payment amounts for costs associated with alternative technology will be determined by the Illinois EPA on a site-specific basis.

Also include the information listed in the *Remediation System Information* document.

The volume of soil to be treated in-situ must be determined by the following equation:

Soil [(Length in feet x Width in feet x Depth in feet of contaminated soil) ÷ 27]

A conversion factor of 1.5 tons/cubic yard will be used to convert tons to cubic yards.

All materials, equipment, field purchases, and subcontractor costs must be listed on the *Remediation Materials Costs Summary Sheet* and *Non-Consulting Personnel Costs Summary Sheet*, and the totals from those forms should be placed on the "Total Cost of the System" line in Section B. All professional consultant time (design time, oversight time, etc.) must be listed on the *Consulting Personnel Costs Form*.

### **Section C – Groundwater Remediation and/or Free Product Removal System**

This section must be used if a groundwater remediation and/or free product removal system (such as pump-and-treat or dual-phase vapor extraction) is proposed in a plan.

Include a time and materials breakdown of all costs. Include in the "Total Cost of the System" all costs including but not limited to all non-consulting personnel (subcontractors), equipment, materials, construction, installation, operation and maintenance, system shutdown and closure, and other expenses of the proposed removal system. Maximum payment amounts for costs associated with the proposed removal system will be determined by the Illinois EPA on a site-specific basis.

Also include the information listed in the *Remediation System Information* document.

All materials, equipment, field purchases, and subcontractor costs must be listed on the *Remediation Materials Costs Summary Sheet* and *Non-Consulting Personnel Costs Summary Sheet*, and the totals from those forms should be placed on the "Total Cost of the System" line in Section C. All professional consultant time (design time, oversight time, etc.) must be listed on the *Consulting Personnel Costs Form*.

### **Section D – Groundwater and/or Free Product Removal and Disposal**

This section must be used if groundwater or free product is removed via vacuum truck or other similar method from a groundwater monitoring well, recovery well, or container (such as a drum).

Include in the "Cost per Gallon (\$)" all costs associated with the removal, transportation, and disposal of free product or contaminated groundwater including but not limited to all non-consulting personnel (subcontractors), truck driver labor, mobilization, vac truck, mileage, equipment, materials, disposal fees, and other related expenses.

If the Subpart H minimum payment amount applies, then the box should be checked indicating such. Upon doing so, the field for "Total Cost" zeroes out so that the total groundwater and/or free product removal and disposal cost can be entered manually.

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In addition, an asterisk appears, indicating that the total groundwater and/or free product removal and disposal cost has been adjusted to reflect the Subpart H minimum payment amount. (More than one might apply if the proposed budget or actual costs budget includes more than one round of groundwater and/or free product removal and disposal.)

When the Subpart H minimum payment amount box is not checked, the "Total Cost" is automatically calculated.

### Section E – Drum Disposal

This section must be used whenever a solid or liquid waste generated as a result of corrective action (e.g., soil borings, water bailed for well development or sampling, or hand-bailed free product) is disposed in a 55-gallon drum.

Include in the "Cost per Drum (\$)" all costs associated with drum disposal including but not limited to drum purchase, drum dolly, transportation, truck charge and mobilization, truck driver labor, and disposal fees.

If the Subpart H minimum payment amount applies, then the box should be checked indicating such. Upon doing so, the field for "Total Drum Disposal Costs" zeroes out so that the total drum disposal costs can be entered manually. In addition, an asterisk appears, indicating that the total drum disposal costs have been adjusted to reflect the Subpart H minimum payment amount. (More than one might apply if the proposed budget or actual costs budget includes more than one round of drum disposal.)

When the Subpart H minimum payment amount box is not checked, the "Total Drum Disposal Costs" are automatically calculated.

### Non-Consulting Personnel Costs Form

(Note: For this form to function properly, Adobe Reader 8.0 is required.)

This form should only be used to list personnel costs that are not associated with professional consulting services. Professional consulting services (that is, services performed by the primary consulting firm) must be listed separately on the Consulting Personnel Costs Form. Do not include costs that are part of maximum payment amounts listed in the *Maximum Payment Amounts* sheets.

- a. **Employee Name** – List the name of the employee (required for application for payment only).
- b. **Personnel Title** – List the title of the employee. Personnel titles must be comparable to the task being performed.
- c. **Hours** – List the number of hours worked or proposed to be worked for that particular task.
- d. **Rate (\$)** – List the hourly rate of the employee. Personnel costs must be based upon the work being performed, regardless of the title of the person performing the work.

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- e. **Total Cost** – Enter the total dollar amount requested for each task (Hours X Rate).
- f. **Task** – Complete an individual line item for each task conducted. The following are some examples of tasks: remediation system installation, operation and maintenance, or alternative technology remediation construction. Provide additional details to supplement this information; for example, the details may include the number of trips for operation and maintenance, number of hours for each trip, and how often trips are proposed.
- g. **Cumulative Total of Non-Consulting Personnel Costs Summary Sheet(s)** – Enter the total non-consulting personnel costs (the sum of all tasks).

### Remediation Materials Costs Summary Sheet

(Note: For this form to function properly, Adobe Reader 8.0 is required.)

Include all costs for materials, equipment, and field purchases associated with a groundwater remediation and/or free product removal system and/or alternative technology. Such costs include but are not limited to remediation compounds, nutrients for in-situ bioremediation, and soil vapor extraction equipment.

- a. **Materials, Equipment, or Field Purchase** – List all the materials, equipment, and field purchases used or proposed to be used that are not part of maximum payment amounts listed in the *Maximum Payment Amounts* sheets.
- b. **Time or Amount Used** – List, if applicable, the amount of time or the number of individual items used.
- c. **Rate (\$)** – List the rate at which an item is charged.
- d. **Unit** – List the unit of the rate charged, which may be hourly, daily, weekly, monthly, yearly, etc. or may be based upon an activity such as per foot, cubic yard, square foot, gallon, etc.
- e. **Total Cost/Item** – List the total cost of the material, equipment, or field purchase.
- f. **Subcontractor** – If a service is provided by a subcontractor, list the name of the subcontractor.
- g. **Cumulative Total of Remediation Materials Costs Summary Sheet(s)** – Enter the total cost of all materials, equipment, and field purchases.

### UST Removal and Abandonment Costs Form

This section applies to UST removal, abandonment, and disposal activities.

Include in the "Cost (\$)" all costs associated with the excavation, removal, disposal, and/or abandonment of UST systems including but not limited to all non-consulting personnel (subcontractors), mobilization, equipment, materials, decontamination,

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barriers, cones, tape, PID, slurry, disposal fees, permit fees, and other related expenses.

Please list all tanks that have been removed from or abandoned at the site for which payment from the Fund is requested. The maximum total amount payable per UST is based on the UST volume, as prescribed in the regulations.

### **Paving, Demolition, and Well Abandonment Costs Form**

#### **Section A – Concrete and Asphalt Placement/Replacement**

This section must be used for costs associated with concrete, asphalt, and paving installed as an engineered barrier, as well as for costs associated with the replacement of concrete, asphalt, and paving.

Include in the "Cost (\$)" per Square Foot" all costs associated with concrete, asphalt, and paving placement or replacement, including but not limited to all non-consulting personnel (subcontractors), placement or replacement labor, per diems, equipment, materials and delivery, base preparation/compaction/leveling, surface preparation and equipment, forms, and other related expenses. In addition, include in the accompanying plan or report documentation of the material (either asphalt, paving, or concrete), the depth of material, and the square footage of the asphalt, paving, or concrete being placed or replaced.

#### **Section B – Building Destruction or Dismantling and Canopy Removal**

This section must be used for costs associated with the destruction or the dismantling and reassembly of above grade structures.

Include in the "Unit Cost (\$)" all costs including but not limited to all personnel (primary consultant and subcontractors), per diems, equipment, mobilization, truck charges, backhoe charges, materials, asbestos abatement, barriers, cones, tape, permit fees, and other related expenses. Payment will be determined on a time and materials basis.

The total cost for the destruction or the dismantling and reassembly of above grade structures must not exceed \$10,000 per site. A time and materials breakdown of all costs must be submitted with the application for payment.

#### **Section C – Well Abandonment**

This section must be used for the abandonment of monitoring or recovery wells that are abandoned pursuant to regulations promulgated by the Illinois Department of Public Health at 77 Ill. Adm. Code 920.120. Please note that each monitoring well must be listed individually.

Include in the "Cost (\$)" per Foot" all costs including but not limited to all personnel (primary consultant and subcontractors), labor, per diems, transportation, equipment (including jackhammer), mobilization, bentonite, concrete, and other related expenses.

### **Consulting Personnel Costs Form**

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(Note: For this form to function properly, Adobe Reader 8.0 is required.)

Include all costs associated with professional consulting services (that is, services provided by the primary consulting firm). Personnel not directly part of the primary consulting firm must be listed on the *Non-Consulting Personnel Costs Form*.

In the "Personnel Title" fields, use the titles listed at Appendix E of 35 Ill. Adm. Code 732 or 734. The highest maximum hourly rate for each personnel title listed in Appendix E may be proposed in the budget, but the amount billed in the application for payment must be based upon the degree, licensing, and experience requirements identified in Appendix E.

Include in the "Rate (\$)" the costs associated with professional consulting services provided by the primary consulting firm including but not limited to plan, budget, and report preparation, application-for-payment preparation, certifications, project oversight, and field activities.

A separate line should be used for each employee performing tasks in each remediation category.

- a. **Employee Name** – List the name of the employee (required for application for payment only).
- b. **Personnel Title** – Select the title of the employee using the personnel titles listed in Appendix E of 35 Ill. Adm. Code 732 or 734 (also listed in the *Maximum Payment Amounts/Personnel Titles and Requirements* document). Personnel titles must be comparable to the task being performed.
- c. **Hours** – List the number of hours worked or proposed to be worked for that particular task.
- d. **Rate (\$)** – List the hourly rate of the employee. The rate may not exceed the maximum hourly rate listed in the applicable *Maximum Payment Amounts/Personnel Titles and Requirements* document. Personnel costs must be based upon the work being performed, regardless of the title of the person performing the work.
- e. **Total Cost** – Enter the total dollar amount requested for each task (Hours X Rate).
- f. **Remediation Category** – Select the appropriate remediation category abbreviation from the *Remediation Categories List* document that is applicable to each phase of corrective action that has been or is proposed to be performed.
- g. **Task** – Complete an individual line item for each task conducted. The following are some examples of tasks: preparation of CAP and budget, site investigation fieldwork, operation and maintenance, alternative technology oversight, or alternative technology remediation design. Provide additional details to supplement this information; for example, the details may include the number of trips for operation and maintenance, number of hours for each trip, and how often trips are proposed.

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- h. **Cumulative Total of Consulting Personnel Costs Form(s)** – Enter the total consulting personnel costs (the sum of all tasks).

Multiple pages of the form must be used if additional space is needed.

### Consultant's Materials Costs Form

(Note: For this form to function properly, Adobe Reader 8.0 is required.)

Include on the form the costs associated with materials provided by the professional consulting service (that is, the primary consulting firm) including but not limited to lodging and per diems, mileage (or vehicle), private utility locator, permit fees, well survey fees, NFR Letter recording fees, manifests, copies, and other equipment and supplies (such as PID, FID, explosimeter, DO/ORP/pH meters, hand augers, cameras/photo development, gloves, plastic bags, decon kit [for consultant's nondisposable field equipment], equipment to survey wells, peristaltic pump, purge pump, rope, bailers, measure wheel, transducer, data logger, water level indicator/interface probe, plastic tubing, metal detector, and barricades).

- a. **Materials, Equipment, or Field Purchase** – List all the materials, equipment, and field purchases used or proposed to be used that are not part of maximum payment amounts listed in the *Maximum Payment Amounts* sheets.
- b. **Time or Amount Used** – List, if applicable, the amount of time or the number of individual items used.
- c. **Rate (\$)** – List the rate at which an item is charged.
- d. **Unit** - List the unit of the rate at which an item is charged, if applicable. The unit may be hourly, daily, weekly, monthly, yearly, etc. The unit and unit rate may also be based on an activity such as per foot, cubic yard, square foot, gallon, etc.
- e. **Total Cost** – List the total cost of materials, equipment, or field purchase.
- f. **Remediation Category** – Enter the appropriate remediation category abbreviation from the *Remediation Categories List* document that is applicable to each phase of corrective action that has been or is proposed to be performed.
- g. **Description/Justification** – Enter a description of the materials, equipment, or field purchase and/or justification for its use.
- h. **Cumulative Total of Consultant's Materials Costs Form(s)** – Enter the total costs of all materials, equipment, and field purchases.

Multiple pages of the form must be used if additional space is needed.

### Bid Summary Form

As an alternative to the maximum payment amounts set forth in Subpart H, Appendix D, and Appendix E of 35 Ill. Adm. Code 734 or 732, one or more payment amounts may be determined via bidding in accordance with 35 Ill. Adm. Code 734.855 or 732.855. Each

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bid must cover all costs included in the maximum payment amount that the bid is replacing.

The following items must be provided to the Illinois EPA with the associated budget:

1. A copy of the scope of work provided to the subcontractors requesting bids;
2. Copies of **all** bids received (a minimum of three bids is required unless unusual or extraordinary circumstances apply), accompanied by completed and signed *Contractor Certification Forms* and bid details; and
3. A completed and signed copy of the *Bid Summary Form*.

### Contractor Certification Form

Whenever a job is bid, completed and signed *Contractor Certification Forms* must accompany the *Bid Summary Form*. Bid details should be attached.

### Handling Charges Form

Handling charges for field purchases and subcontractor billings must be calculated based on the table below. **Handling charges do not need to be submitted in a budget.** Submit copies of invoices and/or receipts of the subcontractor charges and/or field purchase with an application for payment. Include a breakdown of the date the work was conducted, as well as documentation of all activities and materials purchases, with invoices and/or receipts. If the invoices and receipts do not contain this information, submit additional documentation providing this information.

<b>Subcontract and Field Purchase Cost</b>	<b>Eligible Handling Charges as a Percentage of Cost</b>
\$1 - \$5,000	12%
\$5,001 - \$15,000	\$600 + 10% of amt. over \$5,000
\$15,001 - \$50,000	\$1,600 + 8% of amt. over \$15,000
\$50,001 - \$100,000	\$4,400 + 5% of amt. over \$50,000
\$100,001 - \$1,000,000	\$6,900 + 2% of amt. over 100,000

### Miscellaneous Forms

The following forms should be completed, signed, and submitted, as applicable:

- Owner/Operator and Licensed Professional Engineer/Geologist Budget Certification Form
- Owner/Operator and Licensed Professional Engineer/Geologist Billing Certification Form
- Payment Certification Form
- Private Insurance Coverage Questionnaire and Private Insurance Affidavit
- Federal Taxpayer Identification Number and Legal Status Disclosure Certification Requirements
- Women and Minority Business Enterprises Form
- Personnel Weekly Work Sheet
- Materials Weekly Work Sheet

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## **Reference Documents**

The following reference documents should be used, as applicable, when completing budgets and/or applications for payment:

- Personnel Title Descriptions and Duties Summary
- Remediation Categories List
- Remediation System Information
- Maximum Payment Amounts (March 1, 2006 through June 30, 2006)
- Maximum Payment Amounts (July 1, 2006 through June 30, 2007)
- Maximum Payment Amounts (July 1, 2007 through June 30, 2008)