BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

CITY OF BENTON FIRE DEPARTMENT, Petitioner,	)	
v.	)	PCB 2017-001
	)	(LUST Permit Appeal)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, Respondent.	)	

NOTICE OF FILING AND PROOF OF SERVICE

TO: Carol Webb, Hearing Officer
Illinois Pollution Control Board
1021 N. Grand Avenue East
P.O. Box 19274
Springfield, IL 62794-9274
(Carol.Webb@illinois.gov)

Melanie Jarvis
Division of Legal Counsel
1021 North Grand Avenue East
P.O. Box 19276
Springfield, IL 62794-9276
(Melanie.Jarvis@illinois.gov)

PLEASE TAKE NOTICE that I have today electronically filed with the Office of the Clerk of the Illinois Pollution Control Board, Petitioner's Post-Hearing Brief, copies of which are herewith served upon the above persons.

The undersigned hereby certifies that I have served this document by e-mail upon the above persons at the specified e-mail address before 5:00 p.m. on the 13th of November, 2017. The number of pages in the e-mail transmission is 24 pages.

Respectfully submitted,

CITY OF BENTON FIRE DEPARTMENT,
Petitioner

BY: LAW OFFICE OF PATRICK D. SHAW

BY: /s/ Patrick D. Shaw

Patrick D. Shaw
LAW OFFICE OF PATRICK D. SHAW
80 Bellerive Road
Springfield, IL 62704
217-299-8484
pdshaw1law@gmail.com

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

CITY OF BENTON FIRE DEPARTMENT, Petitioner,	)	
v.	)	PCB 2017-001 (LUST Permit Appeal)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, Respondent.	)	

PETITIONER'S POST-HEARING BRIEF

NOW COMES Petitioner, CITY OF BENTON FIRE DEPARTMENT, pursuant to the Hearing Officer's Scheduling Order, for its Post-Hearing Brief, states as follows:

STATEMENT OF UNDISPUTED FACTS.

On October 24, 2014, a release was reported from two 500 gallon underground storage tanks, one containing diesel fuel and the other gasoline at the property of the City of Benton Fire Department located at 107 North Maple Street in Benton, Illinois. (R.025) These tanks were subsequently removed and a soil sample taken for analysis. (Id.)

On August 12, 2015, the Agency approved a Stage One Site Investigation Plan and Budget. (R.026) A true and correct copy of this decision is attached hereto as Petitioner's Exhibit 2.[1] Thereafter, groundwater samples were collected and analyzed, and the well risers surveyed to determine the direction of groundwater flow and gradient at the site. (R.026) An analysis of soil samples taken when the tanks were removed along with the subsequent

[1] Pursuant to 35 Ill. Adm. Code 101.630, Petitioner asks the Board to take official notice of an Agency decision downloaded from the Agency's website. See McAfee v. IEPA, PCB 15-84, at p. 2 (March 5, 2015).

groundwater analysis indicated that no further site investigation is necessary. (R.029)

On Feburary 9, 2016, Petitioner's consultant submitted the Site Investigation Completion Report, which was received by the Agency on February 11, 2016. (R.019) This report contained a description of the site investigation activities, as well as actual costs of performing the Stage 1 Site Investigation and reporting the results in the Site Investigation Completion Report. (R.019 - R.082) The actual costs totaled $20,119.05. (R.066)[2]

The actual cost budget included the following consultant's materials costs:

Vehicle and mileage (sum of two entries)	$282.40
Survey Equipment	$150.00
Copies (sum of two entries)	$150.00
Photoionization detector (PID)	$135.00
Bailers	$125.00
Water level indicator	$60.00
Camera	$30.00
Latex gloves	$16.80
Ice	$8.06
Plastic bags	$2.75
TOTAL:	**$960.01**

(R.075-076)

[2] Technically, some of these activities ($2,134.96) are traditionally part of early action, but could not be completed within the required time frame and therefore were submitted as part of the Stage 1 actual cost budget. (R.072) There does not appear to be any issue related to this.

On June 6, 2016 at 4:31 p.m., the Illinois EPA reviewer, Michael Piggush, e-mailed Petitioner's consultant asking numberous lengthy questions and requesting an extension of time because the 120-day decision deadline was June 10, 2016. (R.018) The issues specifically relevant to this appeal are contained in number 4 on the list:

> **4. For each of the items which are listed on the Consulting Materials Costs Form, please provide the following information:**
>
> **a. Please indicate if the item is owned or rented.**
>
> **i. If the item is owned, then please provide a mathematical financial derivation for how the unit rate for the item was determined. Include such variables (as applicable) as purchase costs (including receipts), operation & maintenance costs, estimated product usage, and estimated product life.**
>
> **ii. If the item is rented, then please provide a written cost estimate from the rental company for how the rental rate for the item was determined.**
>
> **b. Please discuss if it is appropriate for the item to be charged as a direct project cost (versus as an indirect cost of doing business).**

(R.018)

On the morning of June 9, 2016, Marvin Johnson of Chase Environmental Group, Inc. Responded in relevant part:

> **Chase has included all information required and in accordance with the Illinois EPA forms and instructions existing at the time of submittal. The rates proposed within the Consulting Materials Form are rates that have consistently been approved in our clients Budgets and Reimbursement requests.**
>
> **. . .**
>
> **No items within this section have been rented and the idea that a consultant should ask a rental company how they determine their rates is unreasonable. A conversation was conducted with Reis Equipment on June 9, 2016 and they would not disclose how the[ir] rental rates were determined**

but did comment that they were in business to make money.

. . .

Since no promulgated definitions are provided, Chase has used standard accounting practices and believe all items included are direct costs.

(R.010 (questions omitted))

Johnson testified at hearing that his entire response took approximately three hours and he bills at the rate of $125 an hour as a senior project manager. (Hrg. Trans. at pp. 11-12)

On June 10, 2016, the Agency approved the Stage 1 Site Investigation Report and modified the Stage 1 Site Investigation Actual Costs Budget by removing all consultant's materials costs. (R.001 & R.005) The Agency stated the costs are ineligible:

a. These costs lack supporting documentation. Such costs are ineligible for payment from the Fund pursuant to 35 Illinois Administrative Code 734.630(cc).

b. These costs may not be reasonable. Such costs are ineligible for payment from the Fund pursuant to Section 57.7(c)(3) of the Act and 35 Illinois Administrative Code 734.630(dd).

c. These costs may include indirect corretive action costs for personnel, materials, service, or equipment charged as direct costs. Such costs are ineliglbe for payment from the Fund pursuant to 35 Illinois Administrative Code 734.630(v).

(R.005)

The letter also indicated that the consultant was requested to provide "a mathematical financial derivation for how the unit rate for [each] item was determined" and a discussion of whether each item is appropriately a direct project cost, and that this information was not provided. (R.006) The Agency further stated it "may be willing to reconsider" these cuts if the information could be provided. (R.006)

From this letter, Petitioner timely filed this appeal. See Order of Board dated August 11, 2016.

At hearing, Marvin Johnson, the manager for underground storage tank service for Petitioner's consultant, Chase Environmental Group, testified. (Hrg. Trans. at p. 7) He has worked in underground storage tank remediation since 2000, and currently working on approximately 80 Sites. (Id.) As part of his job, he has become familiar with rates charged by other consultants who perform underground storage tank remediation. (Hrg. Trans. At pp. 7-10) There were no difficulties with reimbursement at the early action stage. (Hrg. Trans. at p. 11) The e-mail he received from Piggush was the first and only time he has been asked for a mathematical financial derivation, and as part of trying to formulate a response he unsuccessfully asked a rental company for assistance in explaining how they set equipment rental rates. (Hrg. Trans. at p. 12) He spent approximately 3 hours in putting together a response and would not have been able to get all of the information that week even if he knew where to find it. (Hrg. Trans. at pp. 11 & 20) Based upon his experience working in underground storage tank program, the rates for consulting materials in the submittal were reasonable and consistent with rates that have historically been approved by the Agency. (Hrg. Trans. at p. 13)

Also, Michael Piggush, a project manager for the Agency, testified at hearing. (Hrg. Trans. at p. 31) He has been employed at that position for 25 years and has never worked in the private sector. (Hrg. Trans. at p. 31 & 38) He did not review the billing packages for the early action work. (Hrg. Trans. at p. 39) He has approved PID meters in budgets for probably as long as there have been budgets and until a recent directive from the new Unit Manager, never asked for invoices for PID meters. (Hrg. Trans. at p. 41)

LEGAL ANALYSIS

The question before the Board is "whether the application, as submitted to the Agency, would not violate the Act and Board regulations." Metropolitan Pier and Exposition Authority v. IEPA, PCB 10-73, at p. 51 (July 7, 2011). The Board must decide whether the petitioner's submittal to the Agency demonstrated compliance with the Act and the Board's regulations. Burgess v. IEPA, PCB 15-186, at p. (Nov. 5, 2015) "The Agency's denial letter frames the issues on appeal." Dickerson Petroleum v. IEPA, PCB No. 9-87, at p. 74 (Feb. 4, 2010).

The issues in this appeal can be roughly divided into two groups: (i) potential substantive objections on the basis of reasonableness or the presence of indirect costs, and (ii) a procedural objection regarding the refusal to provide a mathematical financial derivation and a discussion of indirect versus direct costs. In reality, it is really the second set of issues that is determinative, as the Agency did not actually conclude that any costs were unreasonable or indirect, but complained that the lack of supporting documentation prevented it from making the substantive determination.

I. NONE OF THE PROVISIONS CITED IN THE DECISION LETTER WOULD BE VIOLATED IF CONSULTANT'S MATERIAL COSTS ARE REIMBURSED.

A. REASONABLENESS.

The Agency decision letter claims that it needed to remove all consulting material costs from reimbursement because these costs "may not be reasonable." (R.005) In support of this explanation, the letter cites the following statutory provision:

> **In approving any plan submitted pursuant to subsection (a) or (b) of this Section, the Agency shall 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 by site investigation or corrective action activities in excess of those required to meet the minimum requirements of this Title.**

(415 ILCS 5/57.7(c)(3) (emphasis added))

The Agency letter further cites to the following Board regulation:

> **Costs ineligible for payment from the Fund include . . . [c]osts proposed as part of a budget that are unreasonable.**

(35 Ill. Adm. Code § 734.630(dd))

The Agency letter does not state that the costs are unreasonable, but that they "may not be" reasonable. Piggush testified that he believed the information requested was necessary to make a reasonableness determination. (Hrg. Trans. at p. 35) Since the Agency did not find that any costs were actually unreasonable, the justification is not supported by the statutory or regulatory provisions cited by the Agency.

Furthermore, it is incontrovertible that the "rates proposed within the Consulting Materials Form are rates that have consistently been approved in our clients['] Budgets and Reimbursement requests." (R.011) Johnson testified that these rates are reasonable and reflect rates that the Agency reimburses based upon his experience and review of Agency files. (Hrg. Trans. at p. 13) This is the same type of analysis historically conducted by the Agency to determine whether costs are reasonable. See City of Roohouse v. IEPA, PCB 92-31, at p. 8 (Sept. 17, 1992) (Agency relies on comparisons with similar job sites derived from audits over the last two years involving hundreds of reimbursements); see also Malkey v. IEPA, PCB 92-

104, at p. 5 (March 11, 1993) (the Agency appropriately reduced the reimbursement rate to $142 per day for a photoionization detector, which was consistent with observed market prices). That the rates are those customarily charged by the consultant and reimbursed by the Agency is sufficient to establish by a preponderance of evidence that those rates are reasonable. This need not have been the last word; the Agency is charged with responsibility to constantly review market rates (35 Ill. Adm. Code § 734.875), and it could have reviewed other documents in its file. (R.006) It did not dispute that the rates are customary, and the record entirely supports Petitioner.

B. DIRECT COSTS

The Agency letter also states that the consultant's materials costs "may include indirect corrective action costs . . . charged as direct costs." (R.005) In support, the Agency letter cites the following Board regulation:

> **Costs ineligible for payment from the Fund include . . . [i]ndirect corrective action costs for personnel, materials, service, or equipment charged as direct costs**.

(35 Ill. Adm. Code § 734.630(v))

Again, the Agency letter does not state that any item is an indirect cost, just that one or more of them "may" be. Therefore, the justification is not supported by the regulatory provision cited. In comparison, in Knapp Oil Co. v. IEPA, PCB 16-103, at p. 6 (Sept. 22, 2016), the decision letter affirmatively stated that "this is an indirect cost billed as a direct cost."

Professional consulting services are reimbursed in the LUST Program on a "time and materials" basis. (35 Ill. Adm. Code § 734.845) For those items not expended during the work,

"a reasonable rate may be charged for the usage of such materials, supplies, equipment, or tools." (35 Ill. Adm. Code § 734.630(h)) However, insurance, finance and interest costs are indirect costs that cannot be charged. (35 Ill. Adm. Code § 734.630(t) & (u)) In Knapp Oil, the Board considered the Agency's "Instructions for the Budget and Billing Forms"[3] which give examples of the types of equipment and materials that are reimbursable:

> **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/ORPH/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).**

(Petitioner's Ex. 1, at p. 15 (emphasis added) (brackets in original))

With the exception of two bags of ice used for "sample preservation," (R.076), each of the materials, equipment or field purchase listed are identified as items to be charged separately. Two bags of ice costing a total of $8.06 is a field purchase made in the course of site investigation, needed to preserve samples until they can be shipped to the laboratory. There is no relevant distinction between the two bags of ice and items like plastic bags and gloves. All of the items cut by the Agency are used at the site to perform the site investigation plan.

At the hearing, Piggush opined that equipment like a PID meter, a measuring wheel or a digital camera are analogous to the equipment used by a plumber that is covered by the hourly rate. (Hrg. Trans. at p. 36) Piggush' opinion is contrary to the Board's regulations that

[3] The Instructions for Budget and Billings Forms were admitted into evidence as Petitioner's Exhibit 1.

specifically authorize usage of equipment to be charged at a reasonable rate (35 Ill. Adm. Code § 734.630(h)), and the Board's rulings. Knapp Oil Co. v. IEPA, PCB 16-103, at p. 6 (Sept. 22, 2016) (camera and PID are direct costs); Abel Investments v. IEPA, PCB 16-108, at p. (Dec. 15, 2016) (measuring wheel is direct cost). Nor does Piggush's opinion apply to other itemized costs such as photocopying charges. (Hrg. Trans. at p. 42) Finally, removing all material costs pursuant to Piggush's preference should not be done in isolation from increasing the hourly rates to cover those costs, which would necessitate rulemaking before the Board.

The underlying decision was made prior to the Board's rulings in Knapp and Abel, but the Agency's decision to ignore these rulings is inexplicable.

C. SUPPORTING DOCUMENTATION

The Agency denial letter states that the submittal lacked supporting documentation in contravention of the following regulation:

> **Costs ineligible for payment from the Fund include . . . [c]osts that lack supporting documentation.**

(35 Ill. Adm. Code § 734.630(cc))

"Supporting documentation" is required for payment applications:

> **A complete application for payment must consist of the following elements:**
>
> **. . .**
>
> **9) An accounting of all costs, including but not limited to, invoices, receipts, and supporting documentation showing the dates and descriptions of the work performed;**

(35 Ill. Adm. Code § 734.605(b)(9) (emphasis added))[4]

Pursuant to the language of Section 734.605(b)(9), Board decisions have allowed the Agency to request invoices from subcontractors as "supporting documentation" in applications for payment and reject the application to the extent those documents are not subsequently provided. T-Town Drive Thru v. IEPA, PCB 07-85 (April 3, 2008) (laboratory invoices); Friends of the Environment v. IEPA, PCB 16-102 (July 21, 2016) (sub-subcontractor invoices). These require invoices from subcontractors (direct or indirect) that worked on the cleanup at the payment stage. Petitioner is not at the payment stage, and these precedents do not apply.

In the present case, the Agency denial letter cites to the following provision as a source of its authority to demand discussion and a mathematical financial derivation:

> **The Agency may review any or all technical or financial information, or both, relied upon by the owner or operator or the Licensed Professional Engineer or Licensed Professional Geologist in developing any plan, budget, or report selected for review. The Agency may also review any other plans, budgets, or reports submitted in conjunction with the site.**

(35 Ill. Adm. Code § 734.505(a) (emphasis added))

While this provision applies to budgets, it does not authorize the Agency to require the owner or operator to create a supporting document. It allows the Agency to review "technical or financial information" relied upon by the owner or operator or (in this case) the licensed professional engineer in developing the submittal. The word "rely" means "to be dependent," as to be dependent on well water. See Merriam Webster's Collegiate Dictionary (10th ed. 1993). In the context of the LUST Program, experts may develop plans and budgets that reference

[4] In addition, Board regulations expressly list the "supporting documentation" required in a 45-day report in the event that applicable remediation objectives have been met, i.e. a no-further-remedation letter is to be issued. (35 Ill. Adm. Code § 734.210(h)(3)(B))

information relied upon, but which are only mentioned, listed or presented in summary form. For example, a corrective action plan may include "references and data sources relied upon in the report." (35 Ill. Adm. Code § 734.335(a)(8)) Information referenced or listed in a report would be suitable to request as it was expressly incorporated in the report the Agency is evaluating. The same reasoning applies to requests for invoices at the application for payment stage because the submittal is based in part upon bills from third-parties. In reviewing payment applications, the Agency may review any "supporting documentation relied upon by the owner or operator in developing the application for payment, including but not limited to a review of invoices or receipts supporting all claims." (35 Ill. Adm. Code § 734.610 (c)) Agency forms often require information to be summarized in a form convenient for Agency reviewers, which is in turn based upon information that is not submitted unless requested as in the T-Town decision.

The Agency form no longer requires this sort of information. Prior to the current budget forms, the Agency required the applicant to identify whether each piece of equipment used was owned or rented. (Petitioner's Ex. 3)[5] Beginning with the simplified process that introduced the Subpart H regulations, the requirement to inform the Agency whether the equipment was owned or rented was removed as no longer relevant or necessary.

Piggush opined that invoices of equipment purchases would be useful to set rates for consultants (Hrg. Trans. at p, 34), so that a consultant who purchased a $1,000 piece of equipment and used it once could charge $1,000, while a consultant that used it a thousand times

[5] This is an excerpt from the old "Budget and Billing Form for Tank Sites" available at http://www.epa.illinois.gov/topics/cleanup-programs/lust/budget-and-billing-forms/index (downloaded on Nov. 13, 2017). Pursuant to 35 Ill. Adm. Code 101.630, Petitioner asks the Board to take official notice of Agency forms downloaded from the Agency's website. See McAfee v. IEPA, PCB 15-84, at p. 2 (March 5, 2015).

could charge $1. The Agency does not have ratemaking authority. (5 ILCS 100/1-65 ("ratemaking" is the "exercise of control over the rates or charges for the products or services of any person, firm, or corporation") If it did, it would be required to "establish by rule, not inconsistent with the provisions of law establishing its ratemaking jurisdiction, the practice and procedures to be followed in ratemaking activities before the agency." (5 ILCS 100/5-25) The Agency simply cannot set rates on an ad hoc basis for charges made by consultants, and if it wished to do so, the Board is the rulemaking authority that would need to develop the procedures from which the Agency could create forms consistent with the regulatory requirements.

The Illinois EPA has emphasized that it "may review any or all technical or financial information, or both, relied upon . . . in developing any plan, budget, or report selected for review." (Mot. at p. 6 (quoting 35 Ill. Adm. Code § 734.505(a)) (emphasis in original)) However, the Agency has not requested an existing document relied upon by the owner or licensed professional engineer, but asked the consultant to provide a legal analysis of the indirect cost issue and a mathematical financial derivation using factors invented by the Agency reviewer. This exceeds the authority in 35 Ill. Adm. Code § 734.505(a), which does not authorize the Agency to deny a budget on the basis of failing to submit a document that does not exist.

There are a number of additional problems that arise under Board regulations in asking for the creation of legal or mathematical analysis. The Agency is required to make its decision within 120 days (415 ILCS 5/57.7(c)(2)), and Section 734.505(a) should be interpreted in a way to make this possible. If the information requested during this period was actually "relied upon" by the owner or licensed professional engineer, then the time limits would be manageable. In most permitting procedures, the Agency is subject to a deadline for completeness review to avoid

the problem of additional information being sought a few days before the deadline. Prior to adoption of the Part 734 rules, the Agency had 45 days to determine whether "all information and documentation required by the Agency form for the particular plan are present." (35 Ill. Adm. Code 732.502 (adopted in In the Matter of: Regulation of Petroleum Leaking Underground Storage Tanks, R94-2(A) (Sept. 15, 1994)) This requirement was eliminated in Part 734, which adapted a streamlined approach that would require less time for consultants, but also "less time required for Agency review." T-Town Drive Thru, at p. 25. To broaden the scope of Section 734.505(a) to authorize the Agency to require the creation of legal analysis or a mathematical derivation as a supporting document would "un-streamline" the process and be contrary to the assumptions made when the completeness review requirement was eliminated.

In summary, the Agency lacks authority under the Act or the Board's regulations to require creation of a discussion or mathematical analysis as a condition for reviewing a budget.

II. ALTERNATIVELY, REVIEW OF STAGE 1 SITE INVESTIGATION ACTUAL COSTS BUDGETS IS LIMITED TO IDENTIFYING COSTS THAT EXCEED AMOUNTS EXPRESSLY SET FORTH IN SUBPART H.

Pursuant to the Illinois Environmental Protection Act, reimbursement for site investigation work is premised on the approval of a plan and budget. (415 ILCS 5/57.7(a)(1) & (2)) The budget provides an important safeguard from incurring costs the Agency later might try to dispute. "Agency approval of any plan and associated budget, as described in subsection (c), shall be considered final approval for purposes of seeking and obtaining payment from the Underground Storage Tank Fund if the costs associated with the completion of any such plan are less than or equal to the amounts approved in such budget." (415 ILCS 5/57.7(c)(1))

Pursuant to Board regulations, Stage 1 Site Investigation work is treated differently than other site investigation activity. A Stage 1 Site Investigation plan must consist of a certification that the work will be conducted in accordance with Section 734.315 of the Board's regulations. (35 Ill. Adm. Code 734.315(b)) Furthermore, "[a] budget for a Stage 1 site investigation must consist of a certification signed by the owner or operator, and by a Licensed Professional Engineer or Licensed Professional Geologist, that the costs of this Stage 1 site investigation will not exceed the amounts set forth in Subpart H of this Part." (35 Ill. Adm. Code 734.310(b) (emphasis added))

In other words, Stage 1 Site Investigation activities are set forth with sufficient detail in the Board's regulations that drafting an actual plan for Agency review would be a cost disproportionate to its value. Similarly, the limited nature of the soil and groundwater investigation makes the cost in both time and money of preparing a State 1 Site Investigation budget disproportionate to its value. Still, the Act requires a plan and budget with the limitation that there can be no further review beyond "the amounts approved in such budget." (415 ILCS 5/57.7(c)(1)) The budget approved herein states that:

> **The budget, if applicable, is approved, and costs must not exceed the amounts set forth in 35 Illinois Administrative Code 734 Subpart H, Appendix D, and Appendix E.**

(Ex. A)

This language largely tracks the Board regulations. (35 Ill. Adm. Code 734.310(b)) The amounts approved are contained in Subpart H, though special attention is given in the Agency budget approval to two appendices that are incorporated into Subpart H and will contain most of the costs for Stage 1 Site Investigation: Appendix D (Sample Handling and Analysis) and

Appendix E (Personnel Titles and Rates). See 35 Ill. Adm. Code 734.835 (incorporating Appendix D into Subpart H); 35 Ill. Adm. Code 734.850(b) (incorporating Appendix E into Subpart H).

For consultant's materials, there are currently no amounts set forth in Subpart H. (35 Ill. Adm. Code 734.850) The Agency approved the budget, pursuant to 35 Ill. Adm. Code § 734.310(b), on the condition that costs do not exceed any amount set forth in Subpart H, and accordingly the Agency cannot reject consultant's materials costs as unreasonable pursuant to 415 ILCS 5/57.7(c)(1). This interpretation is consistent with the purpose of Part 734, which was to create a streamlined approach that would avoid case-by-case reasonableness determinations. T-Town Drive Thru v. IEPA, PCB 07-85, at p. 25 (April 3, 2008). The Agency cannot second-guess costs "that are at or under the amounts of Subpart H," although this does preclude the Agency from requesting "documentation demonstrating that the costs were actually incurred for approved work." Id.; see also 415 ILCS 5/57.8(a)(1) ("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.")

The appropriateness of this conclusion is demonstrated by the record herein. A few days before the expiration of the 120-day decision deadline, Michael Piggush purports to have no knowledge of whether any of the consultant's material costs are reasonable or unreasonable, direct or indirect, and believes he is compelled to require a discussion of these issues in order to perform his job. The streamlining approach of Part 734 was intended to require less time for consultants, but also "less time required for Agency review." T-Town Drive Thru, at p. 25.

Nothing in here precludes the Agency from initiating the setting of rates for consulting

materials thru rulemaking before the Board. Rates for consulting materials were proposed in the Part 734 rulemaking, but appear to have been ignored. See United Science Industries Proposal dated Sept. 14, 2005 in Proposed Revisions to Leaking Underground Storage i'ank Regulations Part 732 and 734, R2004-22(A). There would be nothing onerous in doing so as the Illinois EPA is already charged with constant vigilance in ascertaining the adequacy of Supart H. (35 Ill. Adm. Code § 734.875 ("No less than every three years the Agency must review the amounts set forth in this Subpart H and submit a report to the Board on whether the amounts are consistent with the prevailing market rates.")

The Illinois Environmental Protection Act protects the owner/operator from incurring costs that the Agency later decides not to reimburse through the process of budgets. Where, as here, the Agency precludes the use of proposed budgets (Ex. B, at p. 6), fundamental fairness and statutory intent require Agency review of costs to be limited to restrictions clearly itemized in the Board's regulations.

In summary, since none of the consulting materials exceeded any amounts actually set forth in Subpart H, the Agency exceeded its authority in striking the consulting materials.

WHEREFORE, Petitioner, CITY OF BENTON FIRE DEPARTMENT, prays for summary judgment restoring all of the consultant materials' costs to the budget, an order directing Petitioner to submit proof of its legal costs, and such other and further relief as the Board deems meet and just.

CITY OF BENTON FIRE DEPARTMENT,
Petitioner

By its attorneys,
LAW OFFICE OF PATRICK D. SHAW

By: /s/ Patrick D. Shaw

Patrick D. Shaw
LAW OFFICE OF PATRICK D. SHAW
80 Bellerive Road
Springfield, IL 62704
217-299-8484
pdshaw1law@gmail.com