

BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

PIASA MOTOR FUELS, INC.,)	
Petitioner,)	
v.)	PCB 2018-54
)	(LUST Permit Appeal)
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
Respondent.)	

NOTICE OF FILING AND PROOF OF SERVICE

TO:	Carol Webb, Hearing Officer	Melanie Jarvis
	Illinois Pollution Control Board	Division of Legal Counsel
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PLEASE TAKE NOTICE that I have today electronically filed with the Office of the Clerk of the Illinois Pollution Control Board, pursuant to Board Procedural Rule 101.302(d), Petitioner's Motion for Summary Judgment, 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 18th of November, 2019. The number of pages in the e-mail transmission is 25 pages.

Respectfully submitted,
PIASA MOTOR FUELS, INC.,
Petitioner,

BY: LAW OFFICE OF PATRICK D. SHAW

BY: /s/ Patrick D. Shaw

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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PIASA MOTOR FUELS, INC.,)	
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PETITIONER'S MOTION FOR SUMMARY JUDGMENT

NOW COMES Petitioner, PIASA MOTOR FUELS, INC. (hereinafter "Piasa"), pursuant to Section 101.516 of the Pollution Control Board's procedural regulations (35 Ill. Adm. Code § 101.516), and hereby moves for summary judgment, stating as follows:

STATEMENT OF UNDISPUTED FACTS

Piasa was the owner or operator of a service station known as Campus 76 Kwick Shop, in the City of Glen Carbon, County of Madison, Illinois. (R.0003 - R.0004) On August 17, 1999, a release was reported from the seven underground storage tanks at the facility, which the Illinois Emergency Management Agency (hereinafter "IEMA") assigned as Incident Number 99-1940. (R.0019) In November of 1999, all tanks were removed in the presence of a representative of the Office of the State Fire Marshal (hereinafter "OSFM"), who observed evidence of releases on the tank floors, resulting in a second incident being reported to the IEMA, which was assigned Incident Number 99-2577 and treated as a re-reporting of the earlier incident. (R.0020) OSFM determined that Piasa was eligible for reimbursement from the Leaking Underground Storage Tank Fund for the incident. (R.0001)

Subsequently, site classification and investigation work was performed. (R.0022 -

R.0024) Based upon the analysis of soil and groundwater contamination, a corrective action plan was submitted for the excavation and disposal of contaminated soils exceeding the applicable site remediation objective. (R.0388) The surface area of the excavation would be roughly fifty feet by one hundred and ten feet, which was calculated to be 5,271 square feet. (R.0400) The excavation would extend twenty-three feet below ground, but the top nine feet of soils would be stockpiled on-site and considered to be “clean” and suitable to be used as a portion of the backfill. (R.0399) The associated budget provided the following estimates:

Excavation, Transportation, and Disposal of contaminated soil . . .:

Number of Cubic Yards	Cost per Cubic Yard (\$)	Total Cost
2,870.00	66.69	\$191,400.30

Backfilling the Excavation:

Number of Cubic Yards	Cost per Cubic Yard (\$)	Total Cost
2,870.00	23.40	\$67,158.00

Overburden Removal and Return:

Number of Cubic Yards	Cost per Cubic Yard (\$)	Total Cost
1,845.00	7.61	\$14,040.45

(R.0549)

The number of cubic yards were calculated in the corrective action plan. (R.0400) The cost per cubic yard were taken from the IEPA’s Maximum Payment Amounts from July 1, 2012 through June 30, 2013. (Exhibit A)¹

¹ Petitioner is not aware of any material issues regarding the relevant maximum payment amounts, but for purposes of clarity, Petitioner asks the Board to take official notice of Exhibit

On March 5, 2013, the IEPA approved the corrective action plan and budget without modifications. (R.0572) Thereafter, the work was performed. (R.1212 - R.1215 (pictures of excavation)) On March 14, 2014, Petitioner's consultant submitted a Corrective Action Documentation Report & Budget Amendment. (R.0581) The purpose of this submittal was to document the field work performed, as well as to request an amendment to the previous budget in order to replace four monitoring wells that may have been destroyed as a result of the large amounts of overburden stockpiled on limited space available at the site. (R.0583 - R.0587) The field report also stated that the area of excavation ended up being only 4,566 square feet of surface area, though areas below 23 feet were excavated in locations where initial sample results showed applicable site remediation objectives were still exceeded. (R.0584) The report attached tickets and manifests, showing that 3,629.74 tons of contaminated soil was disposed at Roxana Landfill (R.0591 - R.1097) and 3,287.09 tons of clean backfill material were deposited in the excavation (R.1098 - R.1146).

On April 29, 2014, the Agency approved the requested budget amendment for the additional costs for replacing the four monitoring wells. (R.1246)

On March 14, 2014, Petitioner's consultant submitted an application for payment for corrective action activities in the amount of \$300,744.45. (R.1356) In relevant part, the application for payment sought \$230,943.00 for the various non-consultant field activities incurred in excavating, removing and returning backfill or overburden to the excavation:

A, which is page one of said document which can be downloaded from the IEPA's website: <https://www2.illinois.gov/epa/topics/cleanup-programs/lust/budget-and-billing-forms/Pages/default.aspx> (downloaded September 16, 2019). (35 Ill. Adm. Code 101.630)

Excavation, Transportation, and Disposal of contaminated soil . . . :

Number of Cubic Yards	Cost per Cubic Yard (\$)	Total Cost
2,435.00	66.69	\$162,381.58

Backfilling the Excavation:

Number of Cubic Yards	Cost per Cubic Yard (\$)	Total Cost
2,435.00	23.40	\$56,979.00

Overburden Removal and Return:

Number of Cubic Yards	Cost per Cubic Yard (\$)	Total Cost
1,522	7.61	\$11,582.42

(R.1368)

In support of these expenses, the application for payment contained an invoice from the subcontractor who performed the work, Heartland Drilling & Remediation, Inc. (hereinafter “HDR”) (R.1435), and the invoice from the landfill. (R.1403 - R.1434)

On May 2, 2014, Cathy Elston, of the UST claims unit, e-mailed Petitioner’s consultant stating that the Agency only has 2,419.83 cubic yards of contaminated soil invoiced to the landfill, and they lack any invoices for the backfill material purchased. (R.1287) The consultant replied by explaining that the documents support more than 2,435 cubic yards of contaminated soils using the formula in the Board’s regulations. (R.1286 - R. 1287) Furthermore, he explained there were no invoices because the subcontractor provided the backfill material, but that the backfill material was weighed to verify the quantities supplied. (R.1286)

The majority of the backfill was clean soil excavated and hauled by HDR from a site owned by the property owner. Portable scales were rented to document the weights. There is no purchase invoice. I’m not aware of any

provisions that require that all backfill must be purchased from a quarry. The costs were incurred as a result of providing the equipment, labor and transportation of the backfill from the other property to the site, as well as placing the backfill into the excavation. Rob Mileur [IEPA field inspector] made a couple visits out to the site during completion of the work. He should be able to verify that there's not a gaping hole remaining out there.

(R.1286)

On May 19, 2014, Elston replied that there is no requirement that the backfill material must be purchased, but in order to reimburse backfilling work the Agency would need a time and materials breakdown, as well as any weight tickets or other documentation. (R.1306)

Furthermore, she stated apparently in reference to contaminated soil excavation that “the conversion from tons to cubic yards is in section 734.825(a).” (R.1306) On May 19, 2014, Petitioner’s consultant re-submitted the backfill documentation from the March 14, 2014 Corrective Action Documentation Report. (R.1306, R.1308 - R.1355) On May 20, 2014, Petitioner’s consultant asked further questions, to which Elston responded that she was directing these to her supervisor, Brian Bauer. (R.1283) There is no communication from Bauer in the record.

On June 6, 2014, Petitioner’s consultant wrote to Elston and Hernando Abarracin, the Manager of the Leaking Underground Storage Tank Section, objecting to a requirement of a time and materials breakdown from subcontractors for work performed below Subpart H rates.

(R.1294)

On July 10, 2014, the Agency issued its decision letter that repeated the Agency’s contentions in Elston’s May 2, 2014, e-mail, namely that the Agency only calculates 2,419.83 cubic yards of contaminated soil was landfilled, and the backfill costs were not supported by time and materials breakdowns. (R.1274 - R.1275) As a result, the Agency approved reimbursement

for all but \$57,982.12 of those costs due to lack of supporting documentation. (R.1274) Specifically, it only reimbursed the cost of excavating, transporting and disposing of 2,419.83 cubic yards of contaminated soil, thereby cutting \$1,003.12, and it further determined that because Subpart H rates did not apply, Petitioner was required by Section 734.850, to seek payment for backfilling on a time and materials basis, which it failed to do. (R.1274 - R.1275)

On August 19, 2014, a second application for payment was submitted for the remaining \$57,982.12 with additional supporting documentation. (R.1473) This documentation included a time and materials breakdown of backfill costs from HDR, which itemized \$64,836.57 in time and materials, although the subcontractor was only being paid \$56,979.00 based upon a flat rate per cubic yard. (R.1510 - R.1512) The time and materials submittal was made in the interest of seeking to avoid an appeal to the Board, and included rates the Agency had found reasonable at another site. (R.1479) On December 11, 2014, the Agency issued its decision, approving \$45,181.47 and cutting the rest for lack of supporting documentation. (R.1459) The Agency found that the time and materials breakdown only documented 2,191.39 cubic yards of backfill material was used, and accordingly only \$45,181.47 for backfilling activities was approved. (R.1461) The decision letter contained no explanation of how these numbers were derived, nor specify what documentation was deemed lacking. (R.1461)

Thereafter, the Petitioner's consultant conducted a Freedom of Information Act inquiry to ascertain the reasons why these items were not approved. (R.1528) The results of this investigation disclosed that despite stating that the Section 734.825(a) formula applies, it was repeatedly (and without any explanation) failing to multiply the volume by a factor of 1.05 as required in that rule. (R.1529) Furthermore, the internal Agency notes indicated that Bauer

“assumed” that the subcontractor labor on December 10, 2013 through December 13, 2013 was actually for handling the overburden. (R.1566) Consequently, he cut the \$19,655.10 for all labor and equipment costs from the time and materials itemization and approved \$45,181.47 for backfilling. (R.1566)² In addition, Bauer appears to have examined an alternative theory based upon the Subpart H rates that he deemed inapplicable from which the 2,191.39 cubic yard of backfill material derived. (R.1567)³

On July 19, 2017, Petitioner’s consultant submitted a third application for payment of the \$12,800.65 for removal of contaminated soils and replacement of backfill. (R.1528) In addition, the claim requested payment of handling charges in the amount of \$7,976.22 not previously requested. (R.1532) The payment application explained inter alia that the subcontractor’s work in December of 2013 were “associated with excavating and stockpiling soils on the adjacent property, prior to them being hauled to the site for use as backfill. Much like a quarry has a cost associated with unearthing the materials it sells, the soil used as backfill had to be excavated.” (R.1532) The application also referenced records in the file showing that overburden removal took place between November 18-20, 2013. (R.1532; see also R.0583 (Corrective Action Documentation Report))

On November 27, 2017, the Agency denied most of the payment application (R.1579), as

² As stated supra, the time and materials submission totaled \$64,836.57 in backfilling costs, for which only \$56,979.00 was requested. Other than the assumption about the \$11,582.42 in labor costs incurred in December, there is no evidence of any dispute in the record as to the remaining \$53,251.15 in labor and materials costs documented.

³ In the Agency’s denial of the first application for payment, it calculated 2,358.11 cubic yards of backfill. (R.1275) In the notes to the Agency’s denial of the third application for payment, it repeated that figure. (R.1589)

follows:

1. Denying all \$1,003.12 of costs for excavation, transportation and disposal costs for contaminated soil, which lack supporting documentation. “Supporting documentation from Roxana Landfill added up to 2,419.83 cubic yards, and the total requested reimbursement was for 2,435 yards.” (R.1581)
2. Denying all \$11,797.53 of costs for the excavation of backfill material, for exceeding the minimum requirements, being unreasonable and being unapproved in the budget. (R.1581 - R.1582)
3. Denying \$255.80 in handling charges associated with the deductions identified in paragraphs 1 and 2 supra. (R.1582)

Thereafter, Petitioner timely filed this appeal.

ARGUMENT

The remaining costs of excavating, transporting and disposing of contaminated soil (\$1,003.12), as well as backfilling the excavation (\$11,797.53) are within approved budget, and therefore the Agency was without authority to re-review those costs. Furthermore, the Agency has repeatedly violated the Board’s regulations which require a “swell factor” to be used in computing the volume of materials (contaminated soil and backfill) for reimbursement purposes. Finally, the Agency erroneously refused to reimburse the costs associated with excavating backfill material because of an unsupported assumption that this work related to overburden removal and return.

SUMMARY JUDGMENT STANDARD

"Summary judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law." Outboard Marine Corp. v. Liberty Mut. Ins. Co., 154 Ill. 2d 90, 102 (1992). "Moreover, the mere allegation that material factual disputes exist does not create a triable issue of fact." (Id.) "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 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 owner/operator's burden of proof in these proceedings is subject to the preponderance of evidence standard. Prime Location Properties v. IEPA, PCB 09-67, slip op. at 29 (Aug. 20, 2009) The Board must ultimately 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. 8 (Nov. 5, 2015).

I. EXCAVATION, TRANSPORTATION AND DISPOSAL OF CONTAMINATED SOILS

A. THE AGENCY EXCEEDED ITS PERMISSIBLE SCOPE OF REVIEW OF THE PAYMENT APPLICATION.

On March 5, 2013, the Agency approved the relevant corrective action plan and budget, bringing the total amount of approved costs to \$440,362.95 (R.0574; R.1282), including \$191,400.30 for the excavation, transportation, and disposal of contaminated soil. (R.0549) Thereafter, Petitioner excavated, transported and disposed of the contaminated soil in a landfill, and submitted an application for payment for \$300,744.45 (R.1362), including \$162,381.58 for

the costs of excavation, transportation, and disposal of contaminated soil. (R.1368)

Because the amounts requested were below budget, the Agency was without the authority to review those costs at the payment stage:

Agency approval of any plan and associated budget . . . 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))

In 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. . . .

(415 ILCS 5/57.8(a)(1))

When, as here, a billing package is submitted for costs within the budget, the Agency is without authority to deny payment. Evergreen FS, Inc. v. IEPA, PCB 11-51 & 12-61, at pp. 20-21 (June 21, 2012). "[T]he Agency, having approved a . . . plan and budget, cannot later reconsider the merits of the approved tasks and costs just because the reimbursement application is submitted." T-Town Drive Thru v. IEPA, PCB 07-85, at pp. 24-25 (2008).

The Agency's impermissible reconsideration is obvious from the denial reason given: "Therefore, such costs are not approved pursuant to Section 57.7(c)(3) of the Act because they may be used for site investigation or corrective action activities in excess of those required to meet the minimum requirements of Title XVI of the Act." (R.1581 (emphasis added)) Section 57.7 of the Act contains the legal standards applicable to review of corrective action plans and

budgets. (415 ILCS 5/57.7) The Agency's authority to review payment applications is contained in Section 57.8 of the Act. (415 ILCS 5/58) The Agency's denial reason admits that it engaged in an impermissible re-review of the budget.

Indeed, the work required a slightly smaller excavation than originally estimated in order to remove soils contaminated in excess of applicable site remediation objectives. (R.0584) This was reported to the Agency's technical reviewer assigned to the project, who noted no problem with this (R.1235 - R.1236), nor does it seem possible that such efforts at efficiency could ever be characterized as exceeding minimum requirements in any technical review. In any event, the Act is clear that costs within budget cannot be re-reviewed on the purported grounds that they exceed the requirements of the Act.

B. THE AGENCY FAILED TO COMPLY WITH BOARD REGULATIONS BY OMITTING TO UTILIZE THE REQUIRED 'SWELL' FACTOR.

The payment of costs associated with the disposal of contaminated soil is governed by Section 734.825(a)(1) of the Board's Subpart H regulations:

Payment for costs associated with the removal, transportation, and disposal of contaminated soil exceeding the applicable remediation objectives . . . must not exceed a total of [\$66.69] per cubic yard.

- 1) **Except as provided in subsection (a)(2) of this Section [dealing with early action activities], the volume of soil removed and disposed must be determined by the following equation using the dimensions of the resulting excavation:**

(Excavation Length x Excavation Width x Excavation Depth) x 1.05.

A conversion factor of 1.5 tons per cubic yard must be used to convert tons to cubic yards.

(35 Ill. Adm. Code § 734.825(a); see also Exhibit A (establishing \$66.69 as applicable rate))

Accordingly, this Subpart H rate reimburses on a cubic-yard basis using the dimensions of the resulting excavation, multiplied by a factor of 1.05. When earthen materials are excavated, the volume of those materials "swell" by virtue of transitioning from a highly-compacted state in the ground to a loosened condition when stockpiled on the ground and loaded onto the backs of trucks. As a consequence, the Board adopted a "'swell factor' to account for the larger volume occupied by the excavated soil as compared to in-situ soil." In re Proposed Amendments to: Regulations of Petroleum Leaking Underground Storage Tanks (35 Ill. Adm. Code 732 & 734), R04-22, at p. 73 (Feb. 17, 2005) (First Notice). The "swell factor" is actually equivalent to a twenty percent increase in the volume of contaminated soil during transportation, but the Agency successfully lobbied for a single multiplier that would be used for excavation, transportation and disposal. (Id. at p. 74; see also R.1480 (excerpt of Agency explanation of formula in rulemaking))⁴

⁴ The Board accepted the Agency's "swell factor" over two categories of objections. First, there was testimony that the "swell factor" commonly used by engineers for earthen materials was 25%. (R04-22, at p. 40 (Feb. 17, 2005) (First Notice))) Second, the "swell factor" did not take into consideration "either small amounts of soil or remote locations." (Id. at pp. 42 & 73) While testimony urged that express allowance be given for these concerns as unusual or extraordinary circumstances (Id. at p. 40), the Board was unconvinced that delineation of atypical situations would be helpful (Id. at p. 73).

In Petitioner's relevant budget, its consultant demonstrated for the Agency how the number of cubic yards was calculated using the Part 734.825(a) formula:

Contaminated Soil for Landfill Disposal

$$5,271 \text{ ft.}^2 \times 14 \text{ ft.} = 73,794 \text{ ft.}^3 \div 27 \text{ ft.}^3/\text{yd.}^3 = 2733 \text{ yd.}^3 \times 1.05 \text{ contingency} = 2870 \text{ yd.}^3$$

(R.0400)

This calculation was then entered into the Agency's budget form:

Excavation, Transportation, and Disposal of contaminated soil . . .:

Number of Cubic Yards	Cost per Cubic Yard (\$)	Total Cost
2,870.00	66.69	\$191,400.30

(R.0549)

The Agency approved the costs (R.0572), which is not surprising since this is the correct calculation.

When the plan was performed, the number of cubic yards excavated was slightly smaller, only 2,435 cubic yards, without utilizing the swell factor, which would have swollen the maximum payment amount to the equivalent of 2,556.75 cubic yards. (R.0585) Ultimately, the subcontractor invoiced only 2,435 cubic yards of contaminated soil (R.1435 (subcontractor's invoice), and reimbursement in the billing form was only sought for that amount:

Excavation, Transportation, and Disposal of contaminated soil . . .:

Number of Cubic Yards	Cost per Cubic Yard (\$)	Total Cost
2,435	66.69	\$162,381.58

(R.1368 (billing form))

Instead of observing that the amounts requested were under budget, the Agency

apparently took the landfill tickets, which totaled 3,629.74 tons, and used a conversion factor of 1.5 found in Part 734.825(a) to conclude that only 2,419.83 cubic yards were disposed. (R.1368 (Agency notes). In other words, the Agency did not utilize the “swell factor” at all.

The Subpart H rates provides for payment of costs on the basis of “the volume of soil removed and disposed . . . determined by the following equation using the dimensions of the resulting excavation: (Excavation Length x Excavation Width x Excavation Depth) x 1.05.” (35 Ill. Adm. Code § 734.825(a)(1)) There is no ambiguity in the Board’s regulations, payment of costs requires utilization of the “swell factor.” The regulatory history shows that the “swell factor” was introduced to increase the effective volume of soil for reimbursement purposes in order to account for the increased cost of handling loosened soil during transportation. The concept of the swell factor doesn’t apply to disposal costs because landfills charge on the basis of tonnage, whether or not a project takes one truck or one-hundred, whether driving one mile or one-hundred. Similarly, excavating a hole is a matter of the hole’s size which is determined by multiplying length, width and height. This excavation pit was 2,435 cubic yards in volume, creating a maximum payment amount that assumes **2,556.75** cubic yards. On the other hand, converting the tons weighed at the landfill utilizing the 1.5 conversion factor suggests approximately 2,419.83 cubic yards was disposed, which would create a maximum payment amount that assumes **2,540.82** cubic yards. (R.1530) Reimbursement was requested based upon 2,435 cubic yards, which is below whichever approach is used to calculating the maximum payment amount utilized.

“[A]dministrative rules and regulations have the force and effect of law, and must be construed under the same standards which govern the construction of statutes.” Northern Illinois

Auto. Wreckers and Rebuilders Ass'n v. Dixon, 75 Ill.2d 53, 58 (1979). The most fundamental rule of statutory construction is “to ascertain and effectuate legislative intent.” Bethania Ass'n v. Jackson, 262 Ill.App.3d 773, 776 (1st Dist. 1994). Here, the Board’s intentions were clearly to recognize that while the same soil is being excavated, transported and disposed, the effective volume of the soil during transportation is at least 20% greater, and therefore the volume of contaminated soil for reimbursement purposes must be determined by multiplying length, width and height by 1.05. In re Proposed Amendments to: Regulations of Petroleum Leaking Underground Storage Tanks (35 Ill. Adm. Code 732 & 734), R04-22, at p. 73 (Feb. 17, 2005) (First Notice). “Another fundamental rule of statutory construction disfavors finding surplusage and requires courts to give each provision some reasonable meaning, if possible.” Bethania Ass'n, 262 Ill.App.3d at 777. The Agency’s sole reliance upon landfill tonnage to determine the maximum payment amount rendered the “swell factor” completely irrelevant; it may as well not exist according to the billing staff. In contrast, the Agency’s instructions for the billing form expressly require usage of the “swell factor.” (Exhibit B, at p. 8)⁵ Of course, courts will avoid “a construction that would defeat the statute's purpose or yield absurd or unjust results.” Dew-Becker v. Wu, 2018 IL App (1st) 171675, ¶ 18. Here, utilizing the swell factor only to increase the amount of the budget defeats the statutory purpose of giving cost-certainty that reimbursement will be available if costs are below budget.

Finally, the consultant pointed to the unchallenged fact that the Agency’s process is

⁵ Petitioner asks the Board to take official notice of Exhibit B, which is the Instructions for the Budget and Billing Forms, which can be downloaded from the IEPA’s website: <https://www2.illinois.gov/epa/topics/cleanup-programs/lust/budget-and-billing-forms/Pages/default.aspx> (downloaded November 12, 2019). (35 Ill. Adm. Code 101.630)

inconsistent with other sites:

King's 66 site documented 11,052.92 tons of contaminated soil disposal. Dividing that total by the conversion factor of 1.5 would yield a volume of 7,368.13 cubic yards. The Agency approved payment of 7,387 cubic yards with no deductions. Both claims were reviewed by the same Agency personnel.

(R.1530)

Since this is not an interpretation of the Board's regulations that existed until recently, and while the Agency's interpretation of the Board's regulations are not owed any deference in any event, the lack of consistency or duration in the Agency's novel approach weighs against its legality. Illinois Consol. Telephone Co. v. Illinois Commerce Com'n, 95 Ill.2d 142, 153-54 (1983).

Therefore, in the event that the Board finds that the Agency could re-review costs incurred within the budget, the Agency's failure to utilize the "swell factor" in calculating the costs of excavating, transporting and disposing of contaminated soil violated Board regulations and the associated cuts should be reinstated.

C. Petitioner submitted a complete application for payment.

The application for payment was complete, including all documentation required by the Illinois Environmental Protection Act (415 ILCS 5/57.8(a)(6)) and the Board's regulations (35 Ill. Adm. Code 734.605(b)). In particular, the application included a paid invoice to the subcontractor for excavating, transporting and disposing of 2,435 cubic yards of contaminated soil. (R.1562)

The Agency is required to review each application for payment to determine whether all

of the elements and supporting documentation required by Section 734.605(b) of the Board's LUST regulations are contained. (35 Ill. Admin. Code § 734.610(a)(1)) If the application is deficient, the Agency must explain "the specific type of information" that the Agency believes is lacking. (35 Ill. Admin. Code § 734.610(d)(1)) The Agency has neither identified the specific type of information required, nor explained which regulation may be violated and the specific reasons why. (35 Ill. Admin. Code § 734.610(d)) In either case, the documentation required an application for payment can only be found in Section 734.610(b) of the Board's LUST regulations, which is not cited in the decision letter directly or indirectly.

II. BACKFILLING THE EXCAVATION.

A. THE AGENCY EXCEEDED ITS PERMISSIBLE SCOPE OF REVIEW OF THE PAYMENT APPLICATION.

On March 5, 2013, the Agency approved the relevant corrective action plan and budget, bringing the total amount of approved costs to \$440,362.95, (R.0574; R.1282), including \$67,158.00 for backfilling the excavation. (R.0549) Thereafter, Petitioner backfilled the excavation and submitted an application for payment for \$300,744.45 (R.1362), including \$56,979.00 for the costs of backfilling the excavation. (R.1368) Subsequently, the Agency has reimbursed \$45,181.47 through subsequent submittals, leaving \$11,797.53 unpaid. (R.1459)

Because the amounts requested were below budget, the Agency was without the authority to review those costs at the payment stage:

Agency approval of any plan and associated budget . . . 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))

In 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. . . .

(415 ILCS 5/57.8(a)(1) (emphasis added))

When, as here, a billing package is submitted for costs within the budget, the Agency is without authority to deny payment. Evergreen FS, Inc. v. IEPA, PCB 11-51 & 12-61, at pp. 20-21 (June 21, 2012). "[T]he Agency, having approved a . . . plan and budget, cannot later reconsider the merits of the approved tasks and costs just because the reimbursement application is submitted." T-Town Drive Thru v. IEPA, PCB 07-85, at pp. 24-25 (2008).

That the Agency challenged the budget is clear from the Agency's denial reasons which repeatedly cite Section 57.7 of the Act in support of non-payment of this claim:

Costs associated with site investigation and corrective action activities and associated materials or services exceeding the minimum requirements necessary to comply with the Act are not eligible for payment from the Fund pursuant to Section 57.7(c)(3) of the Act and 35 Ill. Adm. Code 734.630(o).⁶

. . .

Such costs are ineligible for payment from the Fund pursuant to Section

⁶ Section 734.630(o) paraphrases Section 57.7(c)(3) of the Act: "Costs for corrective action activities and associated materials or services exceeding the minimum requirements necessary to comply with the Act." (35 Ill. Adm. Code 734.630(o))

57.7(c)(3) of the Act and 35 Ill. Adm. Code 734.630(dd).⁷

...

Such costs are ineligible for payment from the Fund pursuant to Section 57.7(c)(3) of the Act and 35 Ill. Adm. Code 734.510(b) and 35 Ill. Adm. Code 734.605(a).

(R.1581-R.1582)

Section 57.7 contains the legal standards applicable to review of corrective action plans and budgets. (415 ILCS 5/57.7) The Agency's authority to review applications for payment is contained in Section 57.8. (415 ILCS 5/58) The Agency's denial reasons concede that it engaged in an impermissible re-review of the budget.

The only issue raised in the Agency's denial letter that does not constitute an impermissible re-review of the budget is the false allegation that "the costs were not approved in a budget." (R1581) The Agency clearly approved \$67,158.00 for backfilling the excavation. (R.0549) Since the cost of backfilling the excavation was less than eighty-five percent of the amount approved in the budget, the Agency was not authorized to re-review the costs approved in the budget.

B. THE COST OF BACKFILLING INCLUDES THE TIME AND EQUIPMENT TO EXTRACT THE BACKFILL MATERIAL.

The Agency's justification for the cuts is unclear and appears to be directly contrary to its prior payment application decisions. As such, the sequence of events needs to be considered:

- The budget approved \$67,158.00 for backfilling the excavation based upon

⁷ Section 734.630(dd) does not apply to payment applications: "Costs proposed as part of a budget that are unreasonable." (35 Ill. Adm. Code 734.630(dd))

2,870.00 cubic yards at Subpart H rates. (R.0549)

- The size of the necessary excavation was ultimately smaller, requiring only 2,435.00 cubic yards of clean backfill. (R.0025 - R.0026)⁸
- Because not all of the backfill material was purchased from a vendor, but mostly was clean soil hauled from another site, the Agency determined that Subpart H rates do not apply and costs “incurred as a result of providing the equipment, labor and transportation of the backfill from the other property to the site, as well as placing the backfill into the excavation” must be submitted on a time and materials basis. (R.1274 - R.1275)
- Petitioner then submitted the time and materials costs of \$64,836.57 for backfilling the excavation though only \$56,979.00 was sought for reimbursement. (R.1479; R.1510 - R.1512)
- The Agency agreed to pay \$45,181.47, allegedly because Petitioner only “documents 2,191.39 cubic yards were used for backfill.” (R.1461) The denial letter contained no explanation of what documentation was deemed lacking or how the 2,191.39 cubic yard figure was generated.
- Petitioner discovered through a Freedom of Information Act request that Brian Bauer erroneously believed that the time and materials breakdowns for work performed from December 10, 2014 to December 13, 2014, arose from removing and returning overburden, which had previously been reimbursed. (R.1566) As a

⁸ The formula for calculating the cost of backfilling the excavation is the same as for calculating the cost of excavation, transportation and disposal of contaminated soil in all respects except for the cubic yard rate. See 35 Ill. Adm. Reg 734.825(a) & (b).

result, he subtracted \$19,655.10 for work itemized on these dates. (Id.) The 2.191.39 cubic yard figure in the denial letter appears to have had no relevance.

- Thereafter, Petitioner submitted a payment application explaining that the work performed in December of 2014 was for excavating and stockpiling clean soils on other property for eventual use as backfill (R.1532), while the work of removing the overburden took place between November 18 and 20, 2013. (Id. see also R.0583 (original report referenced in the payment application))
- Brian Bauer's notes appear to indicate that the Agency was going back to a theory that Subpart H rates do apply and that only 2,358.11 cubic yards were documented, (R.1275; R.1589), but ultimately the reviewer, Melissa Owens, kept the same deduction as the previous decision letter with new denial reasons and without any explanation. (R.1581 - R.1582)

Payment for the costs associated with the purchase, transportation and placement of backfill material is governed by 35 Ill. Adm. Code 734.825(b). Agency instructions clarify these costs include all aspects of the work other than the work of consulting personnel, including, but are 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.

(Exhibit B, at p. 9 (Agency Instructions))

All of these costs are reimbursed on a flat rate per cubic yard, regardless of whether any individual aspect is particularly great or small. (35 Ill. Adm. Code 734.825(b)) These

regulations presume that higher costs of some items would be offset by lower costs of another item. Here, for example, obtaining free backfill material from nearby would have reduced cost of purchasing backfill material and travel costs, but increased labor and equipment costs from excavating the clean soil. As the Agency stated in the record: “There is nothing [in the Board regulations] that states the backfill must be purchased from a quarry.” (R.1283) It is ultimately the consultant and contractors which determine means and methods of performing the plan, and they do so with the legal assurance that so long as they are under budget, their approach won’t be second-guessed.

However, the Agency took the position the Subpart H rates for backfilling the excavation did not apply because the materials were not purchased from a quarry, and therefore, the maximum payment amount must be based upon a time and materials basis. (35 Ill. Adm. Code 734.850) Petitioner does not agree with this, but in the spirit of trying to reach an agreeable resolution submitted the requested breakdowns, which demonstrated costs that were thirteen percent higher than the invoice. (R.1510 - R.1512) No specific issue was ever raised with any of the breakdowns, other than that found in Brian Bauer’s notes in which he thought the excavation work was associated with the removal and return of overburden. (R.1566) Frustratingly, the time and materials break downs were required because “the majority of the backfill was clean soil excavated and hauled” by the subcontractor. (R.1274) And yet, Bauer erroneously assumed that any and all excavation costs were associated with handling the overburden.

At this point, its clear that the cost reductions for backfilling are baseless moving targets, with the most recent Agency decision letter consisting of a thin to non-existent explanation of the reasons for the cuts intended to give the IEPA the flexibility of strategic ambiguity in the

anticipated Board proceeding. The current deductions were made because of an erroneous assumption or an unwillingness to pay for costs of excavating backfill that the Agency insisted were reimbursable on a time and materials basis. Those deductions should be reversed as unsupported by the Board's regulations and the record.

III. HANDLING CHARGES

The Agency cut \$255.80 in handling charges solely due to the cuts discussed in Sections II and III of this Motion for Summary Judgment. To the extent the Board agrees that the aforementioned cuts should be reserved, Petitioner requests the associated handling charges be reversed as well.

CONCLUSION

WHEREFORE, Petitioner, PIASA MOTOR FUELS, INC., prays that the Board reverse the Agency's determination in its entirety and direct the Agency to approve the payment application in total, authorize it to petition the Board for an award of its attorney's fees, and grant Petitioner such other and further relief as it deems meet and just.

PIASA MOTOR FUELS, INC.,
Petitioner

By its attorneys,
LAW OFFICE OF PATRICK D. SHAW

By: /s/ Patrick D. Shaw

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Maximum Payment Amounts July 1, 2012 through June 30, 2013

	<u>Maximum Total Amount</u>
Drilling:	
Hollow-stem auger	\$26.91 per foot
Direct-push platform for sampling or other non-injection	\$21.06 per foot
Direct-push platform for injection	\$17.55 per foot

If the costs associated with a round of drilling are less than \$1,403.96 for direct-push platform or \$1,754.95 for hollow-stem auger, a charge of \$1,403.96 or \$1,754.95, respectively, can be requested.

Monitoring/Recovery Wells:

Monitoring well installation via hollow-stem auger	\$19.31 per foot
Monitoring well installation via direct-push platform	\$14.62 per foot
4" or 6" recovery well installation	\$29.25 per foot
8" or greater recovery well installation	\$47.97 per foot
Monitoring well abandonment	\$11.70 per foot

Excavation, Transportation, and Disposal of Contaminated Soil: \$66.69 per cubic yard

Backfilling the Excavation: \$23.40 per cubic yard

Overburden Removal and Replacement: \$7.61 per cubic yard

Groundwater or Free Product Removal and Disposal (per round): \$0.80 per gallon

If the removal, transportation, and disposal costs associated with each round of free product removal via hand bailing or a vacuum truck are less than \$233.99, a charge of \$233.99 may be requested. If the removal, transportation, and disposal costs associated with each round of groundwater removal via hand bailing or a vacuum truck are less than \$233.99, a charge of \$233.99 may be requested.

Drum Disposal:

Purchase, transportation, and disposal of drum of solid waste	\$292.50 per drum
Purchase, transportation, and disposal of drum of liquid waste	\$175.50 per drum

If the costs associated with the purchase, transportation, and disposal of 55-gallon drums containing waste (solid and liquid) are less than \$584.98, a charge of \$584.98 may be requested.

UST Removal:

UST volume 110 to 999 gallons	\$2,456.92 per UST
UST volume 1,000 to 14,999 gallons	\$3,685.39 per UST
UST volume ≥15,000 gallons	\$4,796.85 per UST

Replacement of Concrete, Asphalt, and Paving:

asphalt @ 2" depth: \$1.93 per square foot	asphalt @ 3" depth: \$2.17 per square foot
asphalt @ 4" depth: \$2.79 per square foot	asphalt @ 6" depth: \$3.60 per square foot
concrete @ 2" depth: \$2.87 per square foot	concrete @ 3" depth: \$3.43 per square foot
concrete @ 4" depth: \$3.99 per square foot	concrete @ 5" depth: \$4.55 per square foot
concrete @ 6" depth: \$5.11 per square foot	concrete @ 8" depth: \$6.21 per square foot

Concrete, Asphalt, and Paving Installed as an Engineered Barrier:

asphalt @ 2" depth: \$1.93 per square foot	asphalt @ 3" depth: \$2.17 per square foot
asphalt @ 4" depth: \$2.79 per square foot	concrete @ any depth: \$2.79 per square foot

Destruction or Dismantling and Reassembly of Above Grade Structures: \$10,



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 a



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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, invoice(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
W-9 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

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.

When submitting an application for payment, you must always include a completed and signed W-9 form. In an effort to speed up review of your claim, it is suggested that the W-9 form always be submitted with every application for payment. As noted on the form, your name should be entered as shown on your income tax return.

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:

- “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

734	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:

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

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:

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 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. 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.
- 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, 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

(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.

- 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, subcontracted services, and fees provided by the professional consulting service (that is, the primary consulting firm) including but not limited to lodging and per diems, mileage, private utility locator, permit fees, well survey fees, NFR Letter recording fees, and other equipment and supplies (such as PID, FID, explosimeter, DO/ORP/pH meters, survey equipment, peristaltic pump, purge pump, rope, bailers, transducer, data logger, water level indicator/interface probe, and plastic tubing).

- 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 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.

Subcontract and Field Purchase Cost	Eligible Handling Charges as a Percentage of Cost
\$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

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)