

ILLINOIS POLLUTION CONTROL BOARD
January 22, 2004

TODD'S SERVICE STATION,)
)
 Petitioner,)
)
 v.) PCB 03-2
) (UST Fund)
 ILLINOIS ENVIRONMENTAL)
 PROTECTION AGENCY,)
)
 Respondent.)

ROBERT M. RIFFLE, OF ELIAS, MEGINNES, RIFFLE & SEGHETTI, P.C., APPEARED ON BEHALF OF PETITIONER, and

JOHN J. KIM, OF THE ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, APPEARED ON BEHALF OF RESPONDENT.

OPINION AND ORDER OF THE BOARD (by N.J. Melas):

Todd's Service Station (Todd's) seeks review of a determination by the Environmental Protection Agency (Agency) that modified Todd's proposed budget amendment for the high priority corrective action plan regarding a leaking underground storage tank (UST) site at 1303 Washington Road, Washington, Tazewell County. Todd's challenges the Agency's determination that some of the hourly rates and number of hours for personnel charges for which payment was requested were unreasonable. For the reasons below, the Board finds that the record supports the Agency's decision to modify Todd's budget amendment.

PROCEDURAL BACKGROUND

On October 17, 2002, the Board accepted this matter for hearing. The Agency filed the administrative record on November 19, 2002. Todd's waived the statutory decision deadline. Board Hearing Officer Carol Sudman held a hearing on July 15, 2003. Todd's submitted a post-hearing brief on August 22, 2003. The Agency submitted a post-hearing brief on September 15, 2003, and Todd's replied on September 26, 2003.

FACTS

Todd's Service Station is located at 1303 Washington Road, Washington, Tazewell County. Todd's notified the Illinois Emergency Management Agency (IEMA) of a release at the site on May 27, 1998. The site was classified as high priority due to contamination at the site above the Agency generic cleanup standards (AR, at 13). IEMA assigned the site incident number 981257. Pet. at Exh. A.

Todd's retained Midwest Environmental Consulting & Remediation Services, Inc. (Midwest) to remediate the site. Midwest began by preparing an initial High Priority Site Investigation Corrective Action Plan (HPCAP) that proposed a phased remediation approach in accordance with the Tiered Approach to Corrective Action Objectives (TACO). Pet. Br. at 1; Tr. at 7; AR, at 2. The Agency received the HPCAP, accompanied by a proposed budget, on September 20, 2000. AR, at 2. The HPCAP indicated that five USTs were removed from the site on November 4, 1998. Two tanks contained gasoline (10,000 and 6,000 gallons), one tank contained diesel fuel (6,000 gallons), one contained kerosene (1,000 gallons), and one was used for waste oil (500 gallons). AR, at 13. The gasoline UST was leaking at the time of removal, due to product line leaks, spills, and overfills. *Id.* The HPCAP also indicated that closure strategy at the site would likely include a highway authority agreement (HAA) with the Illinois Department of Transportation (IDOT), but that additional investigation would be necessary to determine the extent of soil contamination. AR, at 17, 19.

The Agency approved the proposal in a letter dated November 1, 2000. Tr. at 7; AR, at 98. The Agency approved \$21,028.75 of \$21,640.75 of Todd's proposed original corrective action plan budget. Tr. Resp. Exh. 1. Specifically, the Agency approved \$14,529 of \$15,101 that Todd's requested for personnel costs. *Id.*

After review of a High Priority Corrective Action Completion Report (CACR) that Midwest prepared and submitted on behalf of Todd's, the Agency issued Todd's a No Further Remediation (NFR) Letter on December 4, 2001. AR, at 102.

The final corrective action plan detailed TACO calculations and groundwater modeling as well as HAAs and engineered barriers. The final plan required additional personnel time beyond that which the Agency originally budgeted for costs associated with site closure. Pet. Br. at 1. Todd's contends the Agency orally authorized Midwest to perform the additional work. Pet. Br. at 2.

Midwest submitted a budget amendment, dated April 18, 2002, to the Agency asking for an additional \$7,483.58 to cover additional personnel costs for site closure. Pet. Br. at 2; Pet. at Exh. A. The budget amendment indicated the costs were associated with conducting a more thorough TACO evaluation and acquiring the necessary HAAs. Pet. at Exh. A. The Agency rejected Midwest's budget amendment in a letter dated May 23, 2002 (AR, at 128), because it was submitted after the Agency issued a No Further Remediation (NFR) letter for the site. Pet. at Exh. B; AR, at 128. The budget rejection letter indicated that, pursuant to 35 Ill. Adm. Code 732.405(d), a budget must be submitted before issuance of an NFR letter. *Id.*

Midwest and the Agency discussed the Agency's rejection and the Agency indicated in a memo dated June 3, 2002, that it would reconsider the budget amendment denial if it received a written request to do so. Pet. Br. at 2; AR, at 131. Midwest submitted a request for reconsideration the next day, on June 4, 2002, and the Agency, on June 7, 2002, approved part of the amendment and rejected the rest. Pet. Exh. D. Specifically, the Agency approved \$2,806.08 of the \$7,483.58 requested. Agency notes regarding the budget amendment reflect that the original HPCAP budget approved on November 1, 2000 included hours for TACO calculation and reimbursement; these are activities that Midwest accounted for again in the budget

amendment. The June 7, 2002 letter indicated it was a final and appealable Agency order. *Id.* At hearing, counsel for the Agency, John Kim, testified the final total amount approved should read \$3,056.08 rather than \$2,806.08 due to a mathematical error in calculating the number of professional engineering hours approved. Tr. at 5-6.

Three witnesses testified, and each party filed one exhibit at hearing. Mr. Allen Green, president of Midwest, testified on behalf of the petitioner. Mr. Green testified that Midwest's preliminary investigation of Todd's site revealed contamination around the USTs located on the site. Tr. at 14. Mr. Green stated that Midwest proposed a phased approach to assessing and remediating Todd's site that the Agency approved. Tr. at 15. Under this approach, stated Mr. Green, Midwest would conduct a preliminary investigation of the site, determine the next course of action, then submit a plan and budget for the subsequent course of action. *Id.* Mr. Green also explained the time he and his staff spent obtaining the two HAAs. Tr. at 18. In formulating a corrective action plan, Mr. Green stated that Midwest discovered the off-site contamination at Todd's extended underneath and on the other side of the highway, onto property owned jointly by IDOT and the City of Washington. Tr. at 16; 37. Mr. Green explained Midwest had to obtain HAAs from both IDOT and the City of Washington to perform corrective action on the property. Tr. at 18. According to Mr. Green, the initial budget did not include the Highway Authority Agreements, but the agreements were included in the amended budget. Tr. at 19. Mr. Green stated that the corrective action plan budget amendment Midwest submitted accurately lists the total number of hours Midwest spent for the TACO and tier two modeling and calculations, obtaining the HAAs, the final closure documentation, the report to the Agency, and the final reimbursement for that work. Tr. at 24-25.

Mr. Todd Birky also testified on behalf of the Todd's. Mr. Birky is an environmental geologist with Midwest. Tr. at 30. Mr. Birky testified that the Agency suggested doing off-site sampling across a highway, which significantly increased the cost of the project. Pet. Br. at 3.

Mr. Harry Chappel, manager of a unit in the Leaking Underground Storage Tank Section, Bureau of Land, testified on behalf of the Agency. Tr. at 47, 48. Mr. Chappel testified that he signed the June 7, 2002 letter that modified the budget amendment. Tr. at 51.

APPLICABLE LAW

The Environmental Protection Act provides that in order to seek reimbursement from the Fund, an owner or operator must submit an accounting of costs:

Any owner or operator intending to seek payment from the Fund shall submit to the Agency for approval a corrective action budget that includes, but is not limited to, an accounting of all costs associated with the implementation and completion of the corrective action plan. 415 ILCS 5/57.7(b)(3) (2002).

The Act also requires the Agency to determine whether costs associated with a plan are reasonable:

In approving any plan submitted pursuant to subsection (a) or (b) of this Section, the Agency shall determine . . . that the costs associated with the plan are reasonable, will be incurred in the performance of site investigation or corrective action, and will not be used for site investigation or corrective action activities in excess of those required to meet the minimum requirements of this Title. 415 ILCS 5/57.7(c)(3) (2002).

The Board's procedural rules regarding costs reimbursable from the Fund provide:

Costs ineligible for payment from the Fund include but are not limited to: . . . costs proposed as part of a budget plan that are unreasonable. 35 Ill. Adm. Code 732.606(hh).

BURDEN OF PROOF

Section 105.112(a) provides the burden of proof is on the petitioner. 35 Ill. Adm. Code 105.112(a). The burden is on the petitioner for reimbursement to demonstrate that the costs incurred are related to corrective action, properly accounted for, and reasonable. Beverly Malkey, as Executor of the Estate of Roger Malkey d/b/a Malkey's Mufflers v. IEPA, PCB 02-104 slip op. at 9 (Apr. 17, 2003). When requesting reimbursement from the fund, the owner or operator must provide an accounting of all costs associated with the implementation and completion of the corrective action plan. *Id.*; 415 ILCS 5/57.7(b)(3).

STANDARD OF REVIEW

The standard of review under Section 40 of the Act is whether the application, as submitted to the Agency, would not violate the Act and Board regulations. Ted Harrison Oil Co. v. IEPA, PCB 99-127, slip op. at 5 (July 24, 2003); *citing* Browning Ferris Industries of Illinois v. PCB, 179 Ill. App. 3d 598, 534 N.E.2d 616 (2nd Dist. 1989). The Board will not consider new information not before the Agency prior to its final determination regarding the issues on appeal. Kathe's Auto Service Center v. IEPA, PCB 95-43, slip op. at 14 (May 18, 1995). The Agency's denial letter frames the issues on appeal. Pulitzer Community Newspapers, Inc. v. EPA, PCB 90-142 (Dec. 20, 1990).

DISCUSSION

Todd's challenges the Agency's June 7, 2002 decision to deny a total of \$4,427.50 of Todd's high priority corrective action plan budget amendment for personnel costs it deemed unreasonable. Todd's appeals deductions the Agency made relating to both hourly rates and the number of hours of work performed. Specifically, the Agency approval reduced the number of hours for the following personnel: (1) senior project manager; (2) environmental hydrogeologist; (3) senior environmental manager; (4) professional engineer; (5) principal; and (6) project manager. The Agency approved reduced hourly rates for the environmental hydrogeologist, the senior environmental manager, and the professional geologist. As discussed below, the Board affirms the Agency's modification of Todd's budget amendment.

Todd's Arguments

Todd's contends that it spent the entire requested \$7,483.58 on personnel time that was spent on the project. Todd's asserts that both the hourly rates and the number of hours were reasonable and necessary for completion of the project and site closure. Pet. at 3. Todd's further asserts the additional work performed was pre-approved by the Agency.

Todd's argues the Agency has no established standard for reviewing budgets. Todd's contends that if the Agency had a standard, the deferential arbitrary and capricious standard might apply to the Agency's decision denying \$4,677.50 of the budget amendment. Pet. Br. at 8; *citing Town of Sugar Loaf v. IEPA*, 305 Ill.App.3d 483, 712 N.E.2d 393, 238 Ill.Dec.671 (5th Dist. 1999). However, Todd's argues that because the Agency's review is purely subjective, an arbitrary and capricious standard should not apply. Todd's moves the Board to reverse the Agency's final determination and allow the additional reimbursement in the amount of \$4,677.50. Pet. Br. at 9.

Agency's Arguments

The Agency argues that the personnel hours and rates of the budget that the Agency denied are excessive and not reasonably necessary for the work described. Resp. at 2-3. The Agency contends that Todd's claims the additional work was orally approved by the Agency. However, the Agency notes that the budget amendment was submitted after Todd's performed the work itself. The Agency argues that the conversations between Midwest and the Agency do not constitute Agency approval of the hours of work done or the rates charged for the respective personnel. Resp. at 3.

The Agency asserts that it properly reduced the hourly rates in the approved amended budget. Resp. at 6. The Agency approved reduced rates for the hydrogeological engineer, the senior environmental manager, and the professional geologist. The Agency contends that Todd's did not meet its burden of proving that the requested rates were reasonable. For example, the Agency argues, Todd's provided no information that defined how it arrived at the hourly rates, or how the rates were calculated. Resp. at 7. Accordingly, the Agency asks the Board to affirm the Agency's decision to approve reduced hourly rates. Resp. at 8.

The Agency asserts that the Act and Board regulations clearly define the standard of review the Agency applies in reviewing budgets. Section 57.7(c)(4)(C)¹ of the Act provides that the Agency must determine that the costs associated with the budget are reasonable, will be incurred in performing corrective action, and will not be used for activities in excess of those required to meet the minimum requirements of Title XVI of the Act. The Agency notes that Section 732.505 of the Board's regulations provides the same standard of review that is found in

¹ This citation was provided by the Agency in its final decision regarding the budget amendment and references the applicable section of the Act in effect at the time of the Agency's final decision. 415 ILCS 5/57.7(c)(4)(C) (2000).

the Act. 35 Ill. Adm. Code 732.505(c). In addition, the Agency contends, Section 732.606 lists costs that are ineligible for payment from the UST Fund. 35 Ill. Adm. Code 732.606.

The Agency contends it also properly reduced the hours of work at issue. The Agency approved reduced hours of work for work performed by a Senior Project Manager, Environmental Hydrogeologist, Senior Environmental Manager, Professional Engineer, Principal and Project Manager. AR, at 80. The Agency argues that except for a line item task description, Midwest did not breakdown how many hours were attributable to each of the listed tasks in the budget amendment. The Agency asserts the budget amendment contains no explanation of how the figures were calculated, how many hours were spent on each activity, or what specific actions were included in the tasks. The Agency contends that in reducing the number of hours, Mr. Chappel considered three factors: (1) his experience in reviewing submittals for similar tasks; (2) experience from having personally done those tasks; (3) the specific information provided in the application by the applicant. Resp. at 9; Tr. at 79.

Mr. Chappel also stated there were certain tasks in the budget amendment that the Agency had already approved or referenced in part in the original budget. For example, Todd's asserts there were difficulties in obtaining the HAAs for the site. However, the Agency argues there was no information or documentation within the proposed amended budget that described any of the difficulties claimed by Midwest. Resp. at 11.

In conclusion, the Agency argues that given the lack of information that Midwest provided, its final decision is correct. Resp. at 11. The Agency argues it acted in accordance with its statutory and regulatory obligations and guidelines. Accordingly, the Agency asks the Board to affirm the June 7, 2002 reimbursement determination.

BOARD ANALYSIS

After careful review of the record in this proceeding, the Board is persuaded that the Agency correctly denied reimbursement for certain amounts of, and rates regarding, personnel time in Todd's budget amendment. The Board has held that the purposes of the UST Fund are narrow. Rantoul Township High School Dist. No. 193 v. IEPA, PCB 03-42, slip op. at 13 (Apr. 17, 2003); *citing Strube v. PCB*, 242 Ill. App. 3d 822, 610 N.E.2d 717, 851 (3rd Dist. 1993). The Act establishing the UST Fund limits reimbursement for high priority sites to corrective action that mitigates any threat to human health, human safety or the environment resulting from a UST release. 415 ILCS 5.57.7(b)(2) (2002).

The standard the Agency must apply when reviewing budgets is found in the Act and Board rules. In reviewing a corrective action plan budget, the Agency must consider whether the costs are reasonable and not incurred for corrective action in excess of that which is necessary to meet the minimum requirements of the Act and Board regulations. 415 ILCS 57.7(c)(4)(C); 35 Ill. Adm. Code 732.505(c).

The Agency claims the personnel costs denied are not reasonable. Pet. Exh. D. The Agency also provided that Todd's could submit additional information and/or supporting documentation to demonstrate that the costs submitted are reasonable. While approximately

\$250 of the reduction relates to a reduction in hourly rates, most of the controversy revolves around the number of hours authorized for the budget amendment. Tr. at 9-10.

Regarding the hourly rates, the Board finds no explanation in either the budget amendment or hearing testimony of how Midwest calculated personnel rates or why they are reasonable. In approving Todd's original corrective action plan budget in 2000, the Agency similarly reduced the approved rate for the environmental hydrogeologist from \$98 to \$85. Todd's did not appeal the Agency's decision at that time.

The Board also finds the Agency properly approved a limited number of hours of work for certain Midwest personnel that performed corrective action at the Todd's site. Resp. at 8; Resp. Exh. 1. Todd's argues that the hours accounted for in the budget amendment were actually spent on the tasks indicated. However, the hours actually spent on the tasks indicated is irrelevant to whether the number of hours expended are reasonable. Resp. at 10.

The Board finds the record supports the Agency's approval of reduced rates and number of hours of Todd's amended budget. Line item descriptions of the work performed by each professional do not provide enough information for the Agency to determine whether the number of hours and rates charged are appropriate and reasonable. A more specific breakdown of the tasks performed and how many hours were spent on each task is necessary for the Agency to make this determination. Also, Todd's did not present any testimony at hearing explaining how the Agency record demonstrates that the costs are reasonable.

The Agency's June 7, 2002 letter approves \$2,806.08 in personnel costs. However, as discussed above, at hearing the Agency modified this total due to an error in calculating the approved hours and rates for the professional engineer. The Agency testified that the amount approved should total \$3,056.08. Accordingly, the Board affirms the Agency's June 7, 2002 approval of a reduced number of hours and rates as modified, totaling \$3,056.08.

This opinion constitutes the Board's findings of fact and conclusions of law.

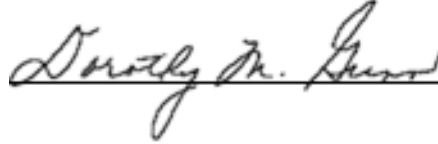
ORDER

The Board affirms the Agency's June 7, 2002 determination, as modified.

IT IS SO ORDERED.

Section 41(a) of the Environmental Protection Act provides that final Board orders may be appealed directly to the Illinois Appellate Court within 35 days after the Board serves the order. 415 ILCS 5/41(a) (2002); *see also* 35 Ill. Adm. Code 101.300(d)(2), 101.906, 102.706. Illinois Supreme Court Rule 335 establishes filing requirements that apply when the Illinois Appellate Court, by statute, directly reviews administrative orders. 172 Ill. 2d R. 335. The Board's procedural rules provide that motions for the Board to reconsider or modify its final orders may be filed with the Board within 35 days after the order is received. 35 Ill. Adm. Code 101.520; *see also* 35 Ill. Adm. Code 101.902, 102.700, 102.702.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion and order on January 22, 2004, by a vote of 5-0.

A handwritten signature in cursive script, reading "Dorothy M. Gunn", is written over a solid horizontal line.

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board