BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

DERSCH ENERGIES, INC., Petitioner,	)	
v.	)	PCB 2017-003
	)	(LUST Permit Appeal)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, Respondent.	)	

NOTICE OF FILING AND PROOF OF SERVICE

TO: Carol Webb, Hearing Officer
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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, Petitioner's Motion for Summary Judgment, copies of which are herewith served upon the above persons.

The undersigned hereby certifies that a true and correct copy of this Notice of Filing, together with a copy of the documents described above, were today served upon the Hearing Officer and Division of Legal Counsel by electronic-mail, this 30th day of November, 2020. The number of pages of this filing, other than exhibits, is 39.

DERSCH ENERGIES, INC.,

BY: LAW OFFICE OF PATRICK D. SHAW

BY: /s/ Patrick D. Shaw

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PETITIONER'S MOTION FOR SUMMARY JUDGMENT

NOW COMES Petitioner, DERSCH ENERGIES, INC., by its undersigned counsel, moves for summary judgment pursuant to Section 101.516(b) of the Board's Procedural Rules (35 Ill. Adm. Code § 101.516(b)), as follows:

STATEMENT OF UNDISPUTED FACTS.

This appeal arises from a former underground storage tank site known as Croslow's Shell, located in Lawrenceville, Illinois. (R.033) In 2005, Dersch Energies, Inc. (hereinafter "Dersch"), which owned the tanks, reported a release to the Illinois Emergency Management Agency, which assigned it Incident Number 2005-0374. (R.032) Shortly thereafter, all four underground storage tanks were removed, as well as 443 tons of hydrocarbon impacted soil as part of early action activities. (R.033)

On February 23, 2007, Dersch's consultant, Applied Environmental Technologies, Inc., submitted a Site Investigation Plan for Stage II and III. (R.226) The plan discussed analytical results that it planned to use to determine site-specific physical parameters. (R.242 - R.244)[1]

[1] As of March 1, 2006, reimbursement from the LUST Fund was limited to costs that achieve cleanup pursuant to Tier 2 objectives of Tiered Approach to Corrective Action

Soil samples were taken from a boring advanced on the north side of the property initially believed to be outside the area of contamination, but subsequent laboratory analysis identified the presence of petroleum impacts, albeit below remediation objectives. (R.243 - R.244) The consultant identified the potential issue with using impacted soil sample to determine site-specific characteristics and asked: "Should the agency believe that the results of this analysis are not satisfactory for use in modeling, please advise in the agency response and during the next phase of investigation an effort will be made to collect this sample from another on site area if possible." (R.244) The results were accepted by Brad Dilbaitis, the Illinois EPA reviewer, as the site specific TACO parameters (Petitioner's Ex. A, at p. 2 "Leaking UST Technical Review Notes"), and on April 17, 2007, the site investigation plan was approved with a small modification for an additional soil boring for purposes of further delineating the extent of contamination, not for purposes of resampling for site specific TACO parameters. (Petitioner's Ex. B (IEPA Approval Letter))

Because there was no budget submitted for the Stage 2 and 3 Site Investigation plan (R.226 - R.420), on June 11, 2013 Dersch's new consultant, CWM Company, submitted a budget to perform Stage II and III activities. (R.040; Petitioner's Ex. C ("Budget for Stage 2/3 Site Investigation Activities) The budget was approved on July 30, 2013. (R.040; Petitioner's Ex. D (IEPA Approval Letter)

On March 27, 2014, CWM Company initiated off-site drilling activities in order to define off-site impacts. (R.034) On May 18, 2015, a Site Investigation Completion Report was

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Objectives ("TACO") (35 Ill. Adm. Code 734.630(aaa)), and these remediation objectives must be developed using site-specific soil parameters (35 Ill. Adm. Code 734.410).

submitted to the Agency, demonstrating that the soil and groundwater plume had been defined and that the clean-up objectives for the site had been exceeded and are not contained within the property boundaries. (Petitioner's Ex. E, at p. 12 ("Site Investigation Completion Report"); R.032) On June 5, 2015, the Illinois EPA approved the Site Investigation Completion Report, as well as the corresponding budget for site investigation activities. (Petitioner's Ex. F (IEPA Approval Letter; R.032)

A Corrective Action Plan was submitted in 2015, which proposed additional on-site soil sampling and excavation of on-site soils that exceeded TACO Tier 2 objectives. (R.109) Residual contamination would be addressed using an industrial/commercial use restriction and a groundwater use restrictions. (R.109) In total, $52,569.72 was budgeted to perform this Corrective Action Plan. (R.142)

On January 21, 2016, the Illinois EPA rejected the plan because remediation objectives had not been developed based upon site-specific parameters for soil bulk density, soil particle density and organic carbon content. (R.090 (citing 35 Ill. Adm. Code 734.410)) In e-mail correspondence, Dilbaitis explained that a TACO boring would be needed:

> **I checked back in the file to see that these parameters were analyzed from B-2 back in October 2006 but the sample showed some (below Tier 1 SROs) contamination in the boring and the consultant did TOC analysis on the sample. It looks like we're going to need to do another geotechnical boring and analyze for the 734.410 parameters.**

(R.097)

A new Corrective Action Plan was submitted on March 23, 2016, for purposes of obtaining another soil sample to be analyzed for site-specific physical parameters. (R.0.28; R.035) Once site-specific parameters were analyzed, the plan contemplated a subsequent

corrective action plan that would be submitted to address on-site soils that exceed applicable remediation objectives, as well as institutional controls for any residual contamination. (R.039)

The Corrective Action Plan included a budget to prepare the submittal, to perform the field work for drilling and sample collection, to analyze the samples pursuant to TACO regulations, and to apply for reimbursement for the work. (R.083 - R.087) In total, $23,187.55 was budgeted for this Corrective Action Plan. (R.079)

On June 14, 2016, Brad Dilbaitis e-mailed Petitioner's consultant to raise numerous questions about consultant's time and material costs. (R.022) On June 28, 2016, Petitioner's consultant sent a lengthy e-mail with equipment rental rates and other cost support. (R.017 - R.021; R.023 - R.027) On July 1, 2016, Brad Dilbaitis provided a lengthy reply. (R.015 - R.017)

On July 12, 2016, the Illinois EPA issued its decision letter, approving the corrective action plan, and modifying the budget by cutting approximately one-third from consultant's personnel costs ($6,650.99), and approximately three-fourths of consultant's materials costs ($598.00). These cuts include all of the personnel costs to design and prepare the corrective action plan the Agency approved, as well as the personnel costs to analyze the TACO boring as pursuant to the approved plan. (R.003- R.004) In addition almost all of the consultant material cost because the Agency did not agree to the equipment rental rates were appropriate, nor the photocopying charge. (R.004 - R.009)

On August 18, 2016, Dersch filed a timely Petition for Review. (Board Order of Aug. 25, 2016)

LEGAL STANDARDS AND SCOPE OF REVIEW

The Agency's denial or modification of a corrective action plan and associated budget may be appealed to the Board. See 415 ILCS 5/57.7(c)(4). Such Agency action must accompanied by an explanation of the legal provisions that may be violated if the plan is approved, a statement of specific reasons why the legal provisions might be violated, and an explanation of the specific type of information the Agency deems the applicant did not provide. (415 ILCS 5/57.7(c)(4)) On appeal to the Board, the Agency statements and explanation frame the issues. Abel Investments v. IEPA, PCB 16-108, slip op. at 3 (Dec. 15, 2016) The Board must decide whether Dersch's submittal to the Agency demonstrated compliance with the Act and the Board's rules. Id.

Petitioner has the burden of proof in these proceedings. Abel Investments v. IEPA, PCB 16-108, slip op. at 3 (Dec. 15, 2016). The standard of proof in UST appeals is a "preponderance of the evidence." Id. ("A proposition is proved by a preponderance of the evidence when it is more probably true than not."). "The Board's review is generally limited to the record before IEPA at the time of its determination." Id. However, the purpose of this proceeding is to provide petitioners an opportunity to challenge the underlying decision pursuant to principles of fundamental fairness by submitting evidence and argument. EPA v. PCB , 138 Ill. App. 3d 550, 552 (3rd Dist. 1985) (the Board hearing "includes consideration of the record before the [Agency] together with receipt of testimony and other proofs under the panoply of safeguards normally associated with a due process hearing"). Accordingly, the Board has considered information outside the administrative record even though the Agency asserted it did not rely upon them. See Estate of Slightom v. IEPA, PCB 11-25, slip op. at p. 6 (Jan. 19, 2012) (denying

agency motion to reconsider order directing the Agency to file all of its documents, including those the Agency purports to not have relied upon in making its decision); KCBX Terminals Co. v. IEPA, PCB 10-110; PCB 11-43 (Consolidated), slip op. at pp. 5-7 (May 19, 2011) (accepting documents in the Agency file that IEPA did not rely upon, so long as they were in existence at the time of the Agency decision).

Accordingly, the nature of these proceedings are well suited for disposition by motion for summary judgment as they primarily concern documentation requirements for both parties. In addition to those mentioned above, all plans, budgets, and reports must be submitted to the Agency on forms prescribed and provided by the Agency. (35 Ill. Adm. Code § 734.135(a)) If the Agency needs more information, it can ask for it. See Knapp v. IEPA, PCB 16-103, slip op. 9 (Sept. 22, 2016) The Agency can also deny the submittal by providing "an explanation of the specific type of information, if any, which the Agency deems the applicant did not provide the Agency," (415 ILCS 5/57.7(c)(4)(C). If such a denial is appealed, the issues are framed by whether the "specific type of information" was provided or legally required.

The Illinois Pollution Control Board has promulgated rules for summary judgments: "If the record, including pleadings, depositions and admissions on file, together with any affidavits, shows that there is no genuine issue of material fact, and that the moving party is entitled to judgment as a matter of law, the Board will enter summary judgment." (35 Ill. Adm. Code § 101.516(b)) This motion for summary judgment is based upon the record filed by Agency, accompanied by documents identified in the next section of which Petitioner requests the Board to take official notice. A party opposing a motion for summary judgment may not rest on its pleadings, but must "present a factual basis which would arguably entitle [it] to a judgment."

Gauthier v. Westfall, 266 Ill. App. 3d 213, 219 (2d Dist. 1994).

OFFICIAL NOTICE

Pursuant to 35 Ill. Adm. Code 101.630, Petitioner requests that the Board take Official Notice of the following Exhibits filed with this motion:

Ex. A: Leaking UST Technical Review Notes regarding Site Investigation Plan at R.226 - R420 (4/11/2007)

Ex. B: Stage 2 and 3 Site Investigation Plan (4/17/2007)

Ex. C: Stage 3 Site Investigation Plan (6/11/2013)

Ex. D: IEPA Decision Letter regarding Ex.C (7/30/2013)

Ex. E: Site Investigation Completion Report (5/18/2015)

Ex. F: IEPA Decision Letter regarding Ex. E (6/5/2015)

Ex. G: IEPA Instructions for the Budget and Billing Forms (4/2009)

Ex. H: CPI Inflation Calculator Printout (Nov. 23, 2020)

Pursuant to Section 101.630 of the Board's regulations, the Board may take official notice of "matters of which the circuit courts of this State may take judicial notice; and generally recognized technical or scientific facts with the Board's specialized knowledge." (35 Ill. Adm. Code § 101.630(a))

Exhibits A through G were downloaded from the Agency's website.[2] The Board has previously taken official notice of "documents created by the Agency and available from the

[2] Exhibits A through F were downloaded from the Agency's Document Explorer webpage by entering the Bureau of Land Identity Number 1010155024. See https://external.epa.illinois.gov/DocumentExplorer (Last checked Nov. 23, 2020)

Agency's website." McAfee v. IEPA, PCB 15-84, slip op. at 2 (March 5, 2015); see also City of Benton Fire Department v. IEPA, PCB 17-01, slip op. at p. 2 (Feb. 22, 2018) (taking official notice of IEPA decision letter in LUST file). Exhibits A through F are documents in the Agency file that were created after the Site Investigation Plan and Budget dated February 23, 2007 (R.226 - R420) and the next oldest document filed in the Administrative Record, which is the November 9, 2015 Corrective Action Plan. (R.098 - R.225) In other words, Exhibits A through F fill in gaps in the Administrative Record. Furthermore, Exhibits B through F were expressly incorporated by reference in the Corrective Action Plan under review here. (R.040)

Exhibit G was also downloaded from the Agency website and is the Agency's Instructions for the Budget and Billings form that was admitted into evidence in at least three previous Board decisions. City of Benton Fire Department v. IEPA, PCB 17-01, slip op. at p. 2 (Feb. 22, 2018); Abel Investments v. IEPA, PCB 16-108, slip op. at 11 (Dec. 15, 2016); Knapp v. IEPA, PCB 16-103, slip op. 2 (Sept. 22, 2016).[3] While the Instructions for the Budget and Billing Forms appear to have been admitted in each of those cases without the Board taking official notice, the Board has taken official notice of budget and billing forms. See Knapp, PCB 16-103, slip op. at 8 FN2 (Sept. 22, 2016) (Analytical Costs Form). While Agency forms cannot supersede Board regulations, they "have regulatory weight" because Board regulations require use of forms prescribed and provided by the Agency. Id. at p. 6 (citing 35 Ill. Adm. Code

[3] Exhibit G was downloaded from the Agency's Budget and Billing Forms page. See https://www2.illinois.gov/epa/topics/cleanup-programs/lust/budget-and-billing-forms (last downloaded June 27, 2016). While older instructions remain on the Agency's website, the particular Instructions dated 2009 appear to have been removed and replaced with Instructions dated October 2016. The 2009 Instructions would have been the version in place when the Agency made its determination in July of 2016.

734.135(a)).

Exhibit H is different in that it is a printout of a Consumer Price Index calculator maintained by the U.S. Bureau of Labor Statistics.[4] The Board has previously taken notice of documents by government bodies other than the Agency. See PAK-AGS v. IEPA, PCB 2015-14, slip op. at 2-3 (Dec. 4, 2014) (taking official notice of printouts from webpages of the Office of the State Fire Marshal, as well as the Madison County Assessor's Office); see also People v. Young, 355 Ill. App. 3d 317, 321 (2nd Dist. 2005) ("we may take judicial notice of information that the Department of Corrections has provided on its website.")) Furthermore, Exhibit H demonstrates the calculation of the effect of inflation on costs. The Board is a technically qualified body (415 ILCS 5/5(a)) which can use its own experience, technical competence and specialized knowledge in evaluating evidence (35 Ill. Adm. Code § 101.630(c)), and may take notice of matters not typical in circuit courts (Id. § 101.630(a)(2)) Inflation factors are well within the Board's expertise as they play a role in the LUST regulations. (35 Ill. Adm. Code § 734.870) Accordingly, Exhibit H is either typical of information which circuit courts take notice as it information provided on a government website for public use, or it illustrates technical calculations within the Board's specialized knowledge.

These exhibits are consistent with documents of which the Board has previously taken official notice, subject to the opportunity for the opposing party to contest that material. 35 Ill. Adm. Code 101.630(b) For the most part these exhibits should clarify evidence in the administrative record and remove any suggestion of any disputed facts.

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[4] Exhibit H was downloaded from the U.S. Bureau of Labor Statistics. See https://www.bls.gov/data/inflation_calculator.htm (accessed on Sept. 14, 2020)).

ARGUMENT

There are three substantive grounds for the Agency to reject or modify a plan or budget:

> **In approving any plan submitted pursuant to . . . this Section, the Agency shall, determine, by a procedure promulgated by the Board under Section 57.14, that the costs associated with the plan are reasonable, will be incurred in the performance of . . . corrective action, and will not be used for . . . corrective action activities in excess of those required to meet the minimum requirements of this Title.**

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

Here, the corrective action plan was approved *in toto* as "[t]he activities proposed in the plan are appropriate to demonstrate compliance with Title XVI of the Act." (R.001) For all its uninformative length, most of the cuts identified essentially only raise issue with whether the costs are reasonable and in some cases combined with the procedural issue of the presence of the "specific type of information" needed to evaluate reasonableness. The Board regulations require the budget to include "an estimate of all costs associated with the development, implementation, and completion of the corrective action plan, excluding handling charges." (35 Ill. Adm. Code § 734.335(b)) "In repeated cases the word 'estimate' has been held to be synonymous with 'opinion.'" Sampen v. Dabrowski, 222 Ill.App.3d 918, 925 (1st Dist. 1991).

There were numerous communications between Dilbaitis and the consultant that resolved questions underlying these estimates which should not be ignored entirely. But this appeal relates to the conflicts remaining which primarily involved two separate approaches that violate the legal framework of this program. With respect to consulting personnel time, Dilbaitis rejected time that was "only an estimate" and directed the consultant to resubmit the time in the subsequent corrective action plan when the hours to perform the task "are known." (R.004) He

also rejected all of the personnel time to prepare and design the Corrective Action Plan he approved because he believed the plan wasn't really necessary, and any personnel time that was necessary could be made part of a future Corrective Action Plan. (R.015) As discussed in detail herein, delaying review of costs until those costs incurred is not a procedure promulgated by the Board, nor authorized by the Act.

Second, most of the materials costs arise from the Agency's decision to set rates for equipment for each consultant, (R.016 (PID)) and disallow entirely categories of equipment by a separate internal rule (R.022 (cameras and measuring wheels). As discussed in detail herein, the Agency does not have ratemaking or rulemaking authority, and the rental rates for the equipment were demonstrated to be reasonable by a preponderance of evidence through proof of rental rates for the equipment.

The Agency made twelve cuts to consultants time and materials in the budget, each of which will be addressed in turn here. Cuts which pose similar issues to those previously discussed will be so identified to avoid repetition.

I. Consultant's Personnel Costs.

A. Cost of preparing Corrective Action Plan.

1. "Consulting Personnel Costs . . . by a Professional Geologist which lack supporting documentation [so that] the Illinois EPA cannot determine that costs will not be used for activities in excess of those necessary to meet the minimum requirements of Title XVI of the Act [and] this request is not reasonable as submitted," citing 35 Ill. Adm. Code 734.630(cc); 415 ILCS 5/57.7(c)(3); 35 Ill. Adm. Code 734.630(dd). (R.003)

Professional Geologist, Corrective Action Plan Design and Preparation (R.083)	~~30.00 hours~~ **0 hours**	$111.76 per hour	~~$3,352.80~~ **$0.00**

While the Illinois EPA approved the Corrective Action Plan, it refused to reimburse the costs of designing and preparing it. The Illinois EPA's primary objection is that the consultant "didn't need to submit this Corrective Action Plan. You could have just added the costs for the boring, analysis, personnel (etc.) into your next Corrective Action Plan and budget." (R.015) An owner or operator cannot be required nor coerced into performing work without a pre-approved plan and budget. Board regulations and precedent are clear that an owner or operator who proceeds without a pre-approved plan and budget does so with the very real risk of receiving no payment from the UST Fund if the plan is denied. Illico Independent Oil Co v. IEPA, PCB 17-84, slip op. at p. 8 (Dec. 20, 2018).

Once a site investigation completion report is approved, "the owner or operator shall submit to the Agency for approval a corrective action plan designed to mitigate any threat to human health, human safety, or the environment resulting from the underground storage tank release." (415 ILCS 5/57.7(b)(2)) The owner or operator did so, but the plan was denied for the necessity to redo work previously approved by the Illinois EPA, necessitating a new corrective action plan.

Every corrective action plan, no matter how small or large must include all of the information required by the Act (415 ILCS 5/57.7(b)(2)), the Board's regulations (35 Ill. Adm. Code § 734.335(a)) and presumably the Agency's form (R.043 - R.046). A complete corrective

action plan essentially contemplates all of the activities ultimately necessary to achieve a No Further Remediation Letter, including "at a minimum" current and projected uses of the property, and institutional controls. 415 ILCS 5/57.7(b)(2)) The original corrective action plan contained all of that information, and after it was denied, that information was used to prepare the new corrective action plan.

Nonetheless, Dilbaitis either believed that an approved plan was notr necessary, or that the preparation costs should be submitted in a subsequent corrective action plan:

> **The time submitted to design and prepare the plan is too much (e.g. 30 hours for a PG for Corrective Action Plan design and preparation). This Corrective Action Plan has nothing to do with the Corrective Action Plan that was denied. None of the information from the previous Corrective Action Plan has anything to do with this Corrective Action Plan.**

(R.015)

As previously explained, both corrective action plans were legally required to contain certain common information, in addition to specific information relating to the specific task. The consultant's approach to the budget was reasonable: apportion common elements between the current and future plans and apply specific tasks to the specific plan:

> **Information gathered and prepared for the November 2015 CAP was used to prepare the current CAP adding the TACO boring; thus, a portion of the time from that original submittal was prorated and utilized for the current CAP (i.e. the base and information of the design document). The time to prepare and design the further soil sampling portion from the previous submittal was removed from the current budget. Conversely, the time for the preparation and design of the additional TACO boring was then added to the current CAP and budget.**

(R.018)

Ultimately, multiple, sequential corrective action plans will result in certain additional

fixed costs being incurred for each plan that could be avoided with a single plan. The consultant offered the alternative of approving the original plan with a modification requiring the additional TACO boring. (R.018) The consultant could then submit a small budget amendment for the additional work. (R.018) Dilbaitis responded that "I won't do that" since he wants to know the site specific parameters to review the rest of the plan. (R.015) This is his choice, but the direct implication of his choice are multiple corrective action plans will be required at additional time and cost. That he wants to review the progress incrementally means that the consultant will similarly need to incrementally review and update each submittal as well.

Thus, as to the specific issue at hand, the consultant budgeted 30 hours for the professional geologist to design and prepare the Corrective Action Plan. (R.083) The Illinois EPA cut these costs completely because Dilbaitis erroneously believed that the Corrective Action Plan he approved was unnecessary at this stage. His approach would not satisfy the minimum requirements of the Act and Board regulations, and should be rejected. The consultant's approach to apportioning costs between the current and future plans is reasonable, while apportioning no costs to prepare the plan and budget is entirely unreasonable.

B. The Costs of Preparing the Maps for the Corrective Action Plan.

2. "Consulting Personnel Costs associated with drafting the Corrective Action Plan which lack supporting documentation . . . [and] exceed the minimum requirements necessary to comply with the Act," citing 35 Ill. Adm. Code 734.630(cc); 415 ILCS 5/57.7(c)(3); 35 Ill. Adm. Code 734.630(o). (R.004)

Draftsperson/CAD IV, Drafting for Corrective Action Plan (R.083)	~~6.00 hours~~ **1 hour**	$66.81 per hour	~~$400.86~~ **$66.81**

The Corrective Action Plan approved by the Agency included twelve maps. (R.049 - R.060)[5] The Agency decision letter stated that this corrective action plan only "requires one map, the proposed soil boring map. The additional 11 maps that were submitted are not needed and exceed the minimum requirements necessary to comply with the Act." (R.004) It is difficult to know what to make of this since Dilbaitis does not think a plan was required at all, and if one was required it would not need to meet all of the statutory and regulatory requirements for a corrective action plan. For the reasons stated in the previous section, this position is contrary to the statutory and regulatory language.

Furthermore, the decision letter does not claim that the number of hours are unreasonable, but that they exceed the minimum legal requirements. Neither Board regulations nor the Agency form limit the number or nature of the site maps required for corrective action plans. The Agency's form expressly requires "Site map(s) meeting the requirements of 35 Ill. Adm. Code 732.110(a) or 734.440." (R.045) This is a corrective action plan that needs to address all elements of corrective action, including maps typically found in corrective action plans, a proposition that Dilbaitis disagreed with. Nor does the decision letter identity the "specific type

[5] The index of maps indicates that one of the maps that was intended to be included in the corrective action plan was a groundwater elevation map (R.048), however it appears that a second groundwater analytical results map was submitted instead. (R.055; R.060) Given the Agency's justification for cutting these costs it does not appear that the mistake is material.

of information" that the Agency deems the applicant did not provide the Agency (415 ILCS 5/57.7(c)(4)(C)) and as such this claim appears to be mere surplusage and without merit.

C. The Cost of Analyzing the data pursuant to TACO regulations.

3. "Consulting Personnel Costs associated with preliminary contaminant transport modeling and TACO calculations which lack supporting documentation [and] the Illinois EPA cannot determine that the costs will not be used for activities in excess of those necessary to meet the minimum requirements of Title XVI," citing 35 Ill. Adm. Code 734.630(cc); 415 ILCS 5/57.7(c)(3). (R.004)			
Senior Project Manager, Contaminant Transport Modeling / Oversight / Technical Compliance (R.086)	~~6.00 hours~~ **0.00 hours**	$121.49 per hour	~~$728.94~~ **$0.00**
Professional Geologist, Preliminary Contaminant Transport Modeling & TACO Calculations (R.086)	~~20.00 hours~~ **0.00 hours**	$111.76 per hour	~~$2,235.20~~ **$0.00**

The Agency cut all costs associated with analyzing the data acquired from the soil boring in order to develop site-specific physical parameters. There can be no dispute that this analysis is required, the Agency decision letter states that "the soil sample needs to be collected for

analysis." (R.003) Instead, the Agency does not want to approve the budget until after the work is completed so that an actual cost determination could be made, not an estimate:

> **This is only an estimate on how long it will take the consultant to perform the modeling. The costs associated with the modeling and the determination of the site-specific Tier 2 soil remediation objectives should be submitted in the amended Corrective Action Plan that will be submitted to apply the modeling calculations. If the Consulting Personnel Costs associated with the Tier 2 calculations are submitted in the amended plan to address the results of this plan, the costs will be known and it will not be necessary to approve costs in excess of what is needed for the task or to approve additional costs if the original estimate did not include enough hours to complete the tasks.**

(R.004 (emphasis added))

A budget is an estimate. According to Board regulations, a "budget must include, but is not limited to, . . . an estimate of all costs associated with the development, implementation, and completion of the corrective action plan, excluding handling charges." (35 Ill. Adm. Code § 734.335(b) (emphasis added)) The approved corrective action plan calls for "site-specific physical characteristics of the soil be determined by collecting a soil sample from the property and having it analyzed for the required TACO parameters." (R.037) This budget includes an estimate of the costs of analyzing the sample for the required TACO parameters.

The Agency's justification here is the same as the "actual cost budgets" that the Agency erroneously used to require until the Board ruled that the Agency was not authorized to review actual costs until the reimbursement stage. City of Benton Fire Department v. IEPA, PCB 17-01, slip op. at p. 6 (Feb. 22, 2018). While understandably actual costs budgets made it easier for the Agency to evaluate budgets, requiring actual costs in a budget is clearly not authorized by the Act or the Board regulations.

Since the Agency approved a corrective action plan providing for analyzing an additional soil sample, the Agency was required to review and approve the estimates of completing these tasks. The justification given that these items can be shifted to a subsequent corrective action plan after they have been incurred is not supported by the Act or Board regulations. The Agency decision position does not meet the minimum requirements of Title XVI. Nor does the decision letter identity the "specific type of information" that the Agency deems the applicant did not provide the Agency (415 ILCS 5/57.7(c)(4)(C)) and as such this claim appears to be mere surplusage and without merit.

II. Consultant's Materials Costs

A. Photoionization Detector (PID).

4. "Consultant's Materials Costs associated with the use of a PID, which lack supporting documentation, [so that] the Illinois EPA cannot determine that costs will not be used for activities in excess of those necessary to meet the minimum requirements of Title XVI of the Act [and] the owner/operator must demonstrate to the Agency the amounts sought for reimbursement are reasonable," citing 35 Ill. Adm. Code 734.630(cc); 415 ILCS 5/57.7(c)(3); 35 Ill. Adm. Code 734.850(b). (R.005)			
PID Rental, to detect VOC levels in soil samples (R.088)	~~1.00 Day~~ **0.00 Day**	$148.00 per day	~~$148.00~~ **$0.00**

In the Agency's initial e-mail, Dilbaitis requested justification for the need to use a PID, as well as for the rate charged for its use. (R.022) Dilbaitis withdrew the question about the

necessity for the PID. (R.021) The consulting material costs utilize rates that have been approved by the Agency for decades:

> **The rates we use were originally developed from what others were charging in this field in the distant past (approximately 1991), adjusted for inflation a few times. In the preparation of this response, we did some checking online to compare our rates, and find them to be less than true rental rates. We are attaching a price list from one supplier we found because it has a comprehensive list of environmental equipment for rent, and the rates were similar to others we were finding. We searched and found many suppliers, this one just had the largest variety of equipment available in a single listing. Shipping, taxes, and the time we would have to spend ordering, cleaning and returning the items is obviously not included in these prices.**

(R.019)

With respect to the specific justification for the reasonableness of the rate charged for the PID, the consultant submitted an equipment rental rate sheet from Envirotech. (R.023 - R.024) The model of the PID used by the consultant "is similar to the 3000 model from RAE" in that it measures in parts-per-billion (R.019), i.e. the ppBRAE 3000 which rents for $150.00 per day, plus additional fees and costs. (R.023)

The consultant further explained:

> **After doing some quick on-line research, all of our rental items rates appear to be comparable to significantly less than available rental rates for comparable equipment, especially once taxes, shipping, and the time required to locate, order, and return the item. For the items other than the PID, our time would cost more than the item rented. For instance, for us to rent a comparable PID from the attached pricelist, the daily rental rate for a ppb capable PID is $150 plus the cost of the calibration kit of $15, plus taxes and shipping. Just the rental rate alone is more than our requested rate.**

(R.020)

Pursuant to Board regulations, a "reasonable rate may be charged for the usage of [non-expendable] materials, supplies, equipment, or tools." (35 Ill. Adm. Code §734.630(h)) Rent is

defined as "the compensation or fee paid, usually periodically, for the use of any rental property, land, buildings, equipment, etc." See Black's Law Dictionary (6th ed. 1990). The consultant's explanation and supporting documentation is sufficient to establish that the $148 per day charge is a reasonable charge for the use of the equipment.

Furthermore, in 1991, the Agency determined that a $142.00 per day was a reasonable charge for use of a PID based upon a "comparison to market prices," and the Board subsequently affirmed the Agency's decision. Malkey v. IEPA, PCB 92-104, slip op. at p. 5 (March 11, 1993). Notably, the owner's consultant indicated that he had observed IEPA reimbursing charges up to $150.00 per day, which is what that consultant began charging thereafter. Id. This is consistent with the consultant's statements quoted above that its rates were based upon market rates extending back to the early 1990s, adjusted for inflation from time to time. Based upon the consumer price index, $142.00 in 1991 was worth approximately $250.00 in 2016. (Ex. H (U.S. Bureau of Labor Statistics CPI Inflation Calculator)

Dilbaitis never identified a different market rate as had his predecessor in Malkey, but instead claimed that market rates from rental companies are inappropriate to determine a reasonable daily rate for using equipment. (R.016 - R.017) Instead, Dilbaitis stated:

> **It seems to me that the best way to determine a rate for a piece of equipment (PID) would be to take the initial price of the equipment, add in any expected indirect costs (batteries, expected costs for calibration, repairs, thorough cleaning from an equipment company, if applicable) then divide that total by the number of years the equipment is expected to last, then divide that by the number of days of expected use during a year.**

(R.016)

In other words, a consultant who purchased a $1,000 piece of equipment and used it once

could charge $1,000, while a consultant that used it a thousand times could charge $1. Beyond the practical absurdities of this standard, the Agency does not have ratemaking authority. (5 ILCS 100/1-65 ("ratemaking" is the "exercise of control over the rates or charges for the products or services of any person, firm, or corporation") If it did, it would be required to "establish by rule, not inconsistent with the provisions of law establishing its ratemaking jurisdiction, the practice and procedures to be followed in ratemaking activities before the agency." (5 ILCS 100/5-25) The Agency cannot set rates, it can only propose rates to the Board through rulemaking. (415 ILCS 5/57.14A)

The Agency exceeded its statutory authority in seeking to create consultant-specific rates. The only question for the Agency is whether the "costs associated with the plan are reasonable." (415 ILCS 5/57.7(c)(3)) Reasonable costs are not the lowest costs that could be ascertained under the most favorable circumstances, but simply costs that are "fair, proper, just, moderate, suitable under the circumstances," though "[n]ot immoderate or excessive." (Black's Law Dictionary, 6th ed. 1990). In other words, reasonableness is a qualitative assessment that admits a permissible range of costs, but singles out those that stand out such as the Malkin consultant's charge of $310 per day for use of a PID. The Board has similarly never sought to set an hourly rate when reviewing the reasonableness of attorney fees. E.g., Dickerson Petroleum, Inc. v. IEPA , PCB 09-87, slip op. at pp. 8-9 (Dec. 2, 2010) (finding $165 to $295 per hour reasonable to be a reasonable rate).

In summary, the Agency requested information to support the reasonableness of the rate charged and the consultant supplied it. The rate charged was also reasonable under Board precedent in Malkin. Either demonstrate by a preponderance of evidence that $148.00 per day is

a reasonable rate.

B. Measuring Wheel

5. "[I]ndirect corrective action costs for a measuring wheel charged as direct costs [and] are not reasonable," citing 415 ILCS 5/57.7(c)(3) of the Act; 35 Ill. Adm. Code 734.630(v). (R.005)			
Measuring Wheel, mapping sampling locations (R.088)	~~1.00 Day~~ **0.00 Day**	$21.00 per day	~~$21.00~~ **$0.00**

The Agency deducted $21.00 for a measuring wheel because it considered this to be an indirect cost. (R.005) As Dilbaitis explained:

> **Cameras and measuring wheels are now considered indirect costs and are not being approved as Consultant's Materials Costs. The indirect cost classification for the camera and measuring wheel use is because their respective purchase costs are so low that a daily rate for their use is no longer appropriate.**

(R.022)

Shortly after the Agency issued its decision herein, the Board ruled in Abel Investments v. IEPA, PCB 16-108 (Dec. 15, 2016), that a measuring wheel is not an indirect cost and reversed the Agency's cuts of up to $21 per day for use of a measuring wheel, pointing out that the Agency's own instructions treat equipment and supplies as items to be charged separately as consultant's material costs.[6] Id. at pp. 10-11; Petitioner's Ex. G, at p. 15 (Instructions for the

[6] Specifically, the Board held that it "approves $54 in the Stage 1 actual costs and $21 in the Stage 2 budget for using a measuring wheel," which reflected a rate change of $18 per day at

Budget and Billing Forms). While Abel Investments specifically addressed the issue of indirect costs, the gravamen of the Agency's complaint about the measuring wheel was similarly that it is a relatively inexpensive item that should be treated as overhead. Id. at p. 11. Unlike other consultant's material costs, consultant was not asked to justify the rate because the Agency had determined as a standard of general applicability that measuring wheels can never be approved. (R.022) To the extent that the Agency believes the costs of the measuring wheel use are unreasonable for any other reason it was required to specify its reasons are be precluded from raising that issue. Environmental Protection Agency v. Pollution Control Board, 86 Ill.2d 390, 405 (1981) (interpreting a provision analogous to 415 ILCS 5/57 (c)(4)(D) concerning the requirements of an Agency denial letter). Otherwise, petitioner is prejudiced by the inability to submit proof of rental costs of a PID as the petitioner sought to do in its post-hearing briefs in Abel.

Since the underlying decision was entered, the Board has determined in Abel that measuring wheels are direct costs and cannot be barred from reimbursement as a class due to the allegation that the costs of measuring wheels is low.

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the time of Stage 1 to $21 per day at the time of Stage 2. Abel Investments, slip op. at p. 11. That case involved the same consultant as here.

C. Gloves

6. "Consultant's Materials Costs associated with gloves which lack supporting documentation [so that] the Illinois EPA cannot determine that costs will not be used for activities in excess of those necessary to meet the minimum requirements of Title XVI of the Act [and] the owner/operator must demonstrate to the Agency the amounts sought for reimbursement are reasonable," citing 35 Ill. Adm. Code 734.630(cc); 415 ILCS 5/57.7(c)(3); 35 Ill. Adm. Code 734.850(b). (R.005)			
Disposable Gloves for soil sampling (R.088)	~~1.00 box~~ **0.00 box**	$16.00 per box	~~$16.00~~ **$0.00**

Unlike PIDs, gloves are materials purchased by the consultant that are expended in performing corrective action. The Agency's own forms state that the cost of gloves should be included on the form as materials provided by the consulting firm. Ex. G (Instructions for the Budget and Billing Forms); see also Knapp Oil Co. v. IEPA, PCB 16-13, slip op. at p. 6 (Sept. 22, 2016) (relying on same Instructions in finding that costs associated with camera are a reimbursable cost because Agency forms "have regulatory weight").

Dilbaitis requested information concerning the gloves as follows:

> **The Consultant's Materials Costs request the use of 1 box of gloves at $16.00 per box. We need to know what brand of gloves you're using and how big the box of gloves is. We'd prefer to see the invoice/receipt for the gloves you usually use to help determine the appropriate rate. Also, an entire box of gloves should not be used for the collection of a geotechnical sample. I would actually expect only 1 pair of gloves to be used.**

(R.022)

Before getting to the response, it is worth remembering that this is a budget for costs to be incurred in the future and only after the work is completed and reimbursement is sought are "invoices" or "receipts" submitted to the Agency. (35 Ill. Adm. Code § 734.605(b)(9))

> **On item 3, we cannot argue that we would use more than a couple of pairs of gloves, so just cut the entire cost, or pay the full retail price as a field purchase. Although not necessarily the brand and type we will use, but our most common glove used is Ansell model 69-210 in size large, which were purchased from Grainger. On the Grainger website, a box of those particular gloves are listed for $15.93, which doesn't include the sales tax and shipping, or any of our time to order the gloves. We requested $16.00. To count and document the number and type of gloves actually used on the project will cost more than $16.00.**

(R.020; see also R.025 (printout from Grainger website))

Historically, the Agency has paid for items such as disposable gloves as stock items, which are treated differently from field purchases in part because they are not eligible for handling charges. In other words, the Agency reimbursed the cost of stocking the items, not individual purchases. As the consultant explained:

> **We stock items like gloves, bailers, string, etc. We do not purchase these items specifically for a particular project. For instance, we stock multiple sizes and types of gloves, as some of our employees are allergic to latex, and a specific type of glove may not be able to withstand certain chemicals or concentrations of chemicals. We buy them by the case, and frequently find that when we go to reorder, a particular model is no longer available. To try to predict which brand and size of gloves that will be used on a particular project (or what were used and which order or orders they came from) is not practical. To purchase them individually, rather than provide them as stock items, would drive up the costs, and be a logistical nightmare (who has the partial box of gloves left for Croslow Shell and will they even fit me?). To do a fair assessment and to provide the real cost of a box of gloves, they cannot be provided as a stock item. They will be treated as a field purchase, and will be ordered, invoiced, shipped and tracked with documentation., along with all the appropriate time to do so. The invoice will be included in the reimbursement claim. There is no other way to provide you with the information you requested. Please note that the benefits of bulk purchasing**

are lost.

(R.019)

For purposes of this appeal, the information provided is sufficient to document costs of gloves for budget purpose. At the payment application stage, the gloves will be treated as individual field purchases, at which point the cost of the specific type, quantity and size of individual glove purchases will be documented with invoices and receipts. It is simply erroneous as a matter of law to require an invoice of glove purchases in a budget.

D. Water Level Indicator

7. "Consultant's Materials Costs associated with a water level indicator which lack supporting documentation [so that] the Illinois EPA cannot determine that costs will not be used for activities in excess of those necessary to meet the minimum requirements of Title XVI of the Act [and] the owner/operator must demonstrate to the Agency the amounts sought for reimbursement are reasonable," citing 35 Ill. Adm. Code 734.630(cc); 415 ILCS 5/57.7(c)(3); 35 Ill. Adm. Code 734.850(b). (R.005 - R.006)			
Water Level Indicator for measuring groundwater depths	~~1.00 day~~ **0.00 day**	$28.00 per day	~~$28.00~~ **$0.00**

As with the PID Meter, the rate for a water level indicator has been approved by the Agency for decades. (R.019) Since the legal issues are the same as with the PID Meter, they will not be repeated in this section. The same equipment rental sheet evidences that the cost of renting a water level indicator ranged from $30.00 to $75.00 per day (R.023), plus "shipping,

taxes, and the time we would have to spend ordering, cleaning and returning the items is obviously not included in these prices." (R.019) The consultant has several water level indicators, none of which have receipts, and is not certain which one they will end up using. (R.019, R.020) Given that the consultant's rate is below the lowest rental rate in evidence, the costs are reasonable regardless.

E. Slug

8. "Consultant's Materials Costs associated with a slug used in hydraulic conductivity determination which lack supporting documentation [so that] the Illinois EPA cannot determine that costs will not be used for activities in excess of those necessary to meet the minimum requirements of Title XVI of the Act [and] the owner/operator must demonstrate to the Agency the amounts sought for reimbursement are reasonable," citing 35 Ill. Adm. Code 734.630(cc); 415 ILCS 5/57.7(c)(3); 35 Ill. Adm. Code 734.850(b). (R.006)			
Slug to conduct slug test	~~1.00 day~~ **0.00 day**	$36.00 per day	~~$36.00~~ **$0.00**

As with the PID Meter, the rate for a slug to conduct a slug test has been approved by the Agency for decades. (R.019) Since the legal issues are the same as with the PID Meter, they will not be repeated in this section. The same equipment rental sheet evidences that the cost of renting a slug for a day was $60.00 (R.023 ("Solinist Levelogger"), plus "shipping, taxes, and the time we would have to spend ordering, cleaning and returning the items is obviously not included in these prices." (R.019) The consultant has several slugs, none of which have receipts, and is

not certain which one they will end up using. (R.019, R.020) Given that the consultant's rate is below the lowest rental rate in evidence, the costs are reasonable regardless.

F. Mileage.

9. "Consultant's Materials Costs associated with mileage costs which lack supporting documentation [so that] the Illinois EPA cannot determine that costs will not be used for activities in excess of those necessary to meet the minimum requirements of Title XVI of the Act [and] the request is not reasonable as submitted," citing 35 Ill. Adm. Code 734.630(cc); 415 ILCS 5/57.7(c)(3). (R.006 - R.007)			
Mileage, One round trip from Springfield Office for Drilling	310.00 miles	~~$0.65 per mile~~ **$0.54 per mile**	~~$201.50~~ **$167.40**

Without requesting supporting documentation (R.022), the Agency unilaterally reduced the mileage rate to $0.54 as the Agency has adopted an unpromulgated rule requiring the Federal mileage rate to be utilized in all cases. (R.017)

First, the modification is legally erroneous because it improperly imposes a rate without undergoing rulemaking. (5 ILCS 100/1-65 ("ratemaking" is the "exercise of control over the rates or charges for the products or services of any person, firm, or corporation") An agency wishing to establish a rate must do so "by rule, not inconsistent with the provisions of law establishing its ratemaking jurisdiction, the practice and procedures to be followed in ratemaking activities before the agency." (5 ILCS 100/5-25) The Agency cannot set rates, it can only propose rates to the Board for rulemaking. (415 ILCS 5/57.14A)

Moreover, while this particular rate is commonly adopted by other administrative agencies through rulemaking, the rate is simply not applicable to heavy trucks. For example, Central Management Services (hereinafter "CMS") has adopted the federal mileage rate for reimbursing government employees for use of their privately-owned vehicle on government business. (80 Ill. Admin. Code § 3000.300(f)(2); see also 80 Ill. Admin. Code Appendix A ("Auto" reimbursement). In turn, the federal rule incorporated by CMS authorizes "[t]he Administrator of General Services [to] prescribe the mileage reimbursement rates for use on official business of privately owned airplanes, privately owned automobiles, and privately owned motorcycles while engaged on official business." (5 U.S. Code § 5707(b)(1)) (emphasis added)[7] Federal regulations define "privately owned automobiles" as "[a] car or light truck (including vans and pickup trucks) that is owned or leased for personal use by an individual." 41 CFR § 300-3.1 (emphasis added).

The rate imposed by the Agency via an unpromulgated rule was established to reimburse government employees for the use of the typical personal vehicle that employees might use to commute to work from home, not the type of heavy commercial vehicles used to bring equipment to drilling and excavation job sites. The distinction is exemplified by Congress' instructions to the Administrator of General Services to investigate separate rates for motorcycles, which are also common personal vehicles, but may differ in numerous factors that needed to be considered, including:

(i) depreciation of original vehicle cost;

[7] This rate is also the "standard mileage rate" used by the Internal Revenue Service (5 U.S. Code § 5707(b)(2)(A)(I)), though not the exclusive rate.

(ii) gasoline and oil (excluding taxes);

(iii) maintenance, accessories, parts, and tires;

(iv) insurance; and

(v) State and Federal taxes.

(5 U.S.C. § 5707(b)(1)(B))

All of these factors impose greater costs on heavy commercial trucks in comparison to standard passenger vehicles, and were the federal government to investigate rates for heavy trucks they would certainly arrive at higher reimbursement rates for employees. However, the purpose of the federal rate has never been to set market rates for business purposes.

Moreover, Subpart H rates for travel are not limited to mileage reimbursements, but include payment of all of consultant costs for "travel; per diem; mileage; transportation; [and] vehicle charges." (35 Ill. Adm. Code 734.845) Charging a mileage rate that takes into consideration the nature of the vehicle used for transportation is entirely consistent with the regulations and permits a fair break down of costs in the event work is performed at more than one work site in a given day. See Abel Investments v. IEPA, PCB 16-108, slip op. at p. 9 (Dec. 15, 2016) (consultant may apportion mileage between jobs). Prior to Subpart H regulations, the Agency reimbursed "travel only by automobile . . . at a rate of 50 cents a mile." City of Roodhouse v. IEPA, PCB 92-31, slip op. at p. 8 (Sept. 17, 1992). It is not clear whether this meant that the Agency had a different internal reimbursement rate for trucks, or how much they diverged, but 50 cents a mile is almost double the federal mileage rate in 1991.

The Agency did not give the consultant an opportunity to justify their rates, nor does the decision letter identity the "specific type of information" that the Agency deems the applicant did

not provide the Agency (415 ILCS 5/57.7(c)(4)(C)). Instead, the Agency improperly imposed the federal rate as an unpromulgated rule and therefore Petitioner did not exceed the minimum requirements of the Act because the Act does not impose the federal rate as a rule. Furthermore, the difference of eleven cents per mile is insufficient to establish that the rate charged by Petitioner's consultant was unreasonable on its face given the various additional costs for heavy commercial vehicles such as the cost of the vehicle, fuel, maintenance and taxes.

G. Copying.

10. "Consultant's Materials Costs associated with copies which lack supporting documentation [so that] the Illinois EPA cannot determine that costs will not be used for activities in excess of those necessary to meet the minimum requirements of Title XVI of the Act [and] the request is not reasonable," citing 35 Ill. Adm. Code 734.630(cc); 415 ILCS 5/57.7(c)(3) (R.007)			
Copies of Corrective Action Plan / Draft / Forms	~~800.00 pages~~ **192 pages**	$0.15 per page	~~$120.00~~ **$28.80**
Copies of Corrective Action Budget	~~200.00 pages~~ **56 pages**	$0.15 per page	~~$30.00~~ **$8.40**
Copies of Field/Plan/Maps/ Borelogs	~~100.00 pages~~ **0 pages**	$0.15 per page	~~$15.00~~ **$0.00**

11. "Consultant's Materials Costs associated with copies for the Corrective Action Plan and Budget which lack supporting documentation [so that] the Illinois EPA cannot determine that costs will not be used for activities in excess of those necessary to meet the minimum requirements of Title XVI of the Act [and] the owner/operator must demonstrate to the Agency the amounts sought for reimbursement are reasonable," citing 35 Ill. Adm. Code 734.630(cc); 415 ILCS 5/57.7(c)(3); 35 Ill. Adm. Code 734.850(b).			
Copies of Corrective Action Plan / Draft / Forms	~~800.00 pages~~ **192 pages**	~~$0.15 per page~~ **$0.00 per page**	~~$120.00~~ **$0.00**
Copies of Corrective Action Budget	~~200.00 pages~~ **56 pages**	~~$0.15 per page~~ **$0.00 per page**	~~$30.00~~ **$0.00**
Copies of Field/Plan/Maps/ Borelogs	~~100.00 pages~~ **0 pages**	~~$0.15 per page~~ **$0.00 per page**	~~$15.00~~ **$0.00**
12. "Consultant's Materials Costs associated with copies for the reimbursement claim which lack supporting documentation [so that] the Illinois EPA cannot determine that costs will not be used for activities in excess of those necessary to meet the minimum requirements of Title XVI of the Act [and] the owner/operator must demonstrate to the Agency the amounts sought for reimbursement are reasonable," citing 35 Ill. Adm. Code 734.630(cc); 415 ILCS 5/57.7(c)(3); 35 Ill. Adm. Code 734.850(b). (R.007 - R.008)			
Copies of Corrective Action Reimbursement	1,000.00 pages	~~$0.15 per page~~ **$0.00 per page**	~~$150.00~~ **$0.00**

The Agency cut all of the copying costs in the budget in three steps. First, the Agency cut the number of pages for the corrective action plan, budget and associated maps down to 248

pages, resulting in a total of $127.80 in cuts. Second, the Agency cut the rate charged per page of copying these documents from $0.15 per page to $0.00 per page, resulting in an additional $37.20 in cuts. Third, the Agency also cut the rate charged per page for copies of the reimbursement request from $0.15 per page to $0.00 per page, resulting in an additional $150.00 in cuts.

We will first address the rate cut since it is common to all documents and if the Board is inclined to approve a $0.00 per page reimbursement rate, it really does not matter how many pages are copied. Furthermore, the Agency only asked for the consultant to support the copy rate. (R.022)

In response to the Agency's request for support for its rate, the consultant replied that they are charging the same rate as the Agency. (R.020; R.027) Dilbaitis replied that the Agency doesn't charge for the first 400 copies for Freedom of Information Act requests. (R.016)

While the Agency's rate of fifteen cents per page is sufficient evidence to demonstrate as a factual matter that the consultant's rate is reasonable, the legal nature of the evidence requires further elucidation. The Agency's rules pertaining to access to public records state: "No fees shall be charged for the first 50 pages of black and white, letter or legal sized copies requested by a requester. The fee for black and white, letter or legal sized copies shall not exceed 15 cents per page." (35 Ill. Adm. Code § 1828.602(a)) This language is taken entirely from Illinois' Freedom of Information Act (hereinafter "FOIA"). (5 ILCS 140/6(b)) Whether of not the Agency charges for the first 400 copies as Dilbaitis claims, the Agency's legal position in its rules is that it can charge fifteen cents per page for all but the first 50 pages.

Moreover, FOIA does not purport to set market rates, it sets discounted rates. The overall

purpose of FOIA to provide public access to information "necessary to enable the people to fulfill their duties of discussing public issues fully and freely, making informed political judgments and monitoring government to ensure that it is being conducted in the public interest." (5 ILCS 140/1) Thus, a primary duty of public bodies is to provide such access, "fiscal obligations notwithstanding." (Id.) Accordingly, public bodies cannot charge for the first 50 pages copied (5 ILCS 140/6(b)), must recognize requests for fee waivers or reductions deemed in the public interest (5 ILCS 140/6(c)), and are generally incentivized to maintain public records online so that the public need not be charged at all in most instances. (5 ILCS 140/8.5). The Illinois General Assembly appears to have found fifteen cents per page to be a reasonable rate to balance the compelling interests of broad public access with the costs of administering the FOIA program. Therefore, there is no basis to ignore the fifteen cent rate charged by the Agency because the first fifty pages are free.

Furthermore, the FOIA rates can be exceeded when "otherwise fixed by statute." (5 ILCS 140/6(b)) Thus, the FOIA rates do not apply when the Property Tax Code authorizes the County Assessor to charge a higher rate since the legislature had determined what is reasonable under one statute may be different than what is reasonable in another. Sage Information Services v. Henderson, 397 Ill.App.3d 1060, 1064 (3rd Dist. 2010); see also 35 ILCS 200/14-30 (Property Tax Code requires the Chief County Assessor to make available "all public records of the chief county assessment officer for a fee of 35 cents per page of legal size or smaller and $1 for each larger page.") Another common statutory copying rate not subject to FOIA is in the the Clerks of Courts Act, which authorizes Circuit Clerks to charge for photocopying no more than "(A) $2 for the first page; (B) 50 cents per page for the next 19 pages; and © 25 cents per page for all

additional pages." (705 ILCS 105/27.1b(n)(2))

The most relevant statutory copying rates, however, are those set for professional services outside of the context of government services. The Inspection of Records Act requires health care providers to fulfill patient requests for medical records, charging all reasonable expenses, including "for paper copies 75 cents per page for the first through 25th pages, 50 cents per page for the 26th through 50th pages, and 25 cents per page for all pages in excess of 50." (735 ILCS 5/8-2001(d))[8] Similarly, an attorney is required to provide his or her former client with copies of the client file (other than attorney work product) for the same costs. (735 ILCS 5/8-2005) These rates are analogous to what professional consultants should permissibly be allowed to charge their clients.

The fees established by the legislature and supreme court for copying charges are helpful in examining the reasonableness of fees in this case. Miller v. Pollution Control Board, 267 Ill. App. 3d 160, 173 (4th Dist. 1994) (finding the $4.00 per page charged by court reporter excessive given that the Illinois Supreme Court had only authorized copying charges of $0.50 per page for court reporters). All of these statutes support the conclusion that $0.15 per page for copies is reasonable, as the legislature has authorized charges of up to 75 cents for professional services and there is no basis for exempting the first 50 pages of documents copied that has any relevance outside of the specific statutory objectives of FOIA.

With respect to the number of pages copied, Dilbaitis did not ask for justification from the consultant. However, in the cover letter to the previous corrective action plan and budget that

[8] These copying fees are adjusted annually by the Illinois Comptroller's Office based upon a Consumer Price Index and made available to the public via the Comptroller's official website published on-line. (735 ILCS 5/8-2006)

was rejected, the consultant explained:

> **Finally, please note that the number of copies budgeted for reports and claims are not just the number of pages submitted to the Agency. The number of copies also includes drafts, client copies, and our own copies of reports, budgets, and claims. We trust that you'll give serious weight to our requests and consider the necessity of a reimbursement budget that mirrors the way we work in actuality as does the Agency.**

(R.099)

For further explanation, Board regulations require the owner/operator to maintain a copy of all submittals, including books, records, documents, and other evidence directly pertinent to these submittals. (35 Ill. Adm. Code § 734.655) While the Agency authorized a single copy of the plan and budget to be made for the owner / operator, Board regulations expect additional related documents to be kept at the facility.

With respect to the 100 copies of plans, maps and borelogs expressly designated for field work (R.088), the Agency erroneously treated these as part of the plan and budget submitted. These are copies of documents taken to the site to guide and document the performance of corrective action, and should not have been cut for the erroneous assumption that these are copies submitted to the Agency.

Overall, the number of copies in the budget were estimates sufficient for the budget stage; the actual number of copies will be identified once all the work is performed and reimbursement is sought. The Agency seems to at least have understood it was premature to reject the number of copies estimated for the reimbursement stage, yet all of the paperwork needed for this project are continuous and depend on a variety of circumstances, including how much documentation the Agency reviewer requests.

CONCLUSION

To the extent the consultant was asked to give information supporting the reasonableness of costs, the information supplied by the consultant demonstrated by a preponderance of evidence that the estimates were reasonable. Subpart H of the Board's LUST regulations requires payment of professional consulting services on a time and materials basis. (35 Ill. Adm. Code § 734.845) Postponing review of estimates of consultant's time violates procedures in the program, and poses real risks that such time will not be reimbursed at all. Eliminating reimbursement for materials is just another way of not paying for consulting services. Subpart H was enacted with the obligation that the Agency regularly notify the Board every three years of whether Subpart H is "consistent with the prevailing market rates." (35 Ill. Adm. Code § 734.875) Until such time that the Agency demonstrates compliance with that obligation, the Board should exercise a presumption that the Agency will not be affirmed in striking minor materials cost items since there is now way of knowing that professional consulting services overall are being reimbursed within the prevailing market rates.

WHEREFORE, Petitioner, DERSCH ENERGIES, INC., prays that the Board find the Agency erred in its decision, direct the Agency to approve the budget as submitted, allow Petitioner to submit proof of legal costs, and for such other and further relief as it deems meet and just.

DERSCH ENERGIES, INC.,
Petitioner

By its attorneys,
LAW OFFICE OF PATRICK D. SHAW

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