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

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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 Post-Hearing Reply Brief, 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 29th day of October, 2021. The number of pages of this filing, other than exhibits, is 11 pages.

DERSCH ENERGIES, INC.,

BY: LAW OFFICE OF PATRICK D. SHAW

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PETITIONER'S POST-HEARING REPLY BRIEF

NOW COMES Petitioner, DERSCH ENERGIES, INC. (hereinafter "Dersch"), by its undersigned counsel, for its post-hearing brief pursuant to Section 101.610(k) of the Pollution Control Board's Procedural Rules (35 Ill. Adm. Code § 101.610(k)), states as follows:

I. STANDARD OF REVIEW

The Agency misstates the shifting burdens described in John Sexton Contractors Company v. Illinois Pollution Control Board, 201 Ill.App.3d 414, 425-426 (1st Dist. 1990). Before the Board, Petitioners have the initial burden of production of a *prima facie case*. Id. This burden is not, however, as described by the Agency, a "high burden." Resp. Brief, at p. 3. A prima facie case merely requires "some evidence on every element essential to the cause of action." Hedrich v. Mack, 2015 IL App (2d) 141126, ¶ 8. This is comparable to the standard for summary judgment motions in which the nonmoving party need not conclusively prove its case to avoid defeat, but "nonetheless present a factual basis, which would arguably entitle it to a judgment." Dersch Energies v. IEPA, PCB 17-3, slip op. at p. 13 (June 17, 2021). The Board denied the Agency's motion for summary judgment, finding that Petitioner established at least

some evidence that would entitle it to judgment.

Here, it became the Agency's to produce evidence refute the *prima facie case* if it could, and in any event ultimate burden of persuasion remains on Petitioner, but that burden is merely to persuade that any proposition is more likely than not. Abel Investments v. IEPA, PCB 16-108, slip op. at 3 (Dec. 15, 2016). For example, one of the questions the Board is asked in this case is whether a given cost was more likely reasonable or unreasonable based upon the evidence before it.

II. CONSULTANT'S PERSONNEL COSTS.

A. Cost of preparing Corrective Action Plan.

While the Agency approved the corrective action plan, it modified the proposed budget by the full amount proposed for plan design and preparation by a professional geologist. The justifications given for this inconsistency have varied.

The need to perform additional analysis stems from site investigation activities performed by a prior consultant and approved by Brad Dilbatis without use of site specific parameters. (Petitioner's Ex. B (IEPA Approval Letter)) Having subsequently reached the end of site investigation with the approval of the site investigation completion report, the only plans remaining under the Board's regulations are corrective action plans. There is no process for going back, and in any event the taking of a sample for purpose of establishing remediation objectives is quite similar to taking samples in a corrective action plan for further deliniating the soil that needs to be excavated for remediation.

The Agency points out that this work could have been performed with or without a plan (Resp. at p. 7), which is not entirely true. A plan and budget for the work must be submitted for

approval regardless, but doing so after the work is performed places the owner or operator at the added risk that "they may not be entitled to full payment from the Fund." (35 Ill. Adm. Code § 734.335 (d)) The plan had already been prepared, so there was no reason to wait. And given the unusual circumstances presented, the need to have a legally binding acceptance of the plan from the Agency.

Carol Rowe testified that the professional geologist took about 29 ½ hours to prepare the corrective action plan, and explained how that was calculated. (Hrg. Trans. at p. 14) She was not challenged on this point on cross-examination and thus there is no contrary evidence before the Board that this was the actual time it took.

What the Agency appears to be arguing is that the work that was performed in the first corrective action plan is not reimbursable when used in the second corrective action whenever the earlier corrective action plan is rejected. The Agency recognizes that it is common to use portions of previous submittals in subsequent ones. (Resp. at p. 8) But then states that such costs are ineligible. (Id.) This is clearly absurd. If, for example, a plan is rejected for failure to include the required signatures, the signatures need to be obtained and the plan resubmitted. There is nothing in the Board's regulations that cost of plan preparation is forfeit by this oversight. Similarly, there is nothing in the Board's regulations that preclude reimbursement for work performed to prepare the subject corrective action plan, whether it originated in an early plan, so long as it was paid for in the earlier plan. Again, Carol Rowe explained how costs were allocated at hearing.

On the other hand, the Agency appears to assert that certain costs of preparing the plan from the previous plan should be submitted in the next (third) corrective action plan and budget.

(Resp. at p. 8) So it simply appears that the principle being applied is that Brad Dilbatis does not want to pay for the preparation of this plan.

The evidence before the Board is that 29.5 hours were used by the professional geologist to prepare the approved corrective action plan, about twelve of which originated from the earlier corrective action plan and 17 ½ hours for this specific corrective action plan. These costs are unique in this appeal as they were incurred, or mostly incurred, by the time the plan was submitted, and thus contains the best evidence that the budget estimate was reasonable.

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

The Agency's position is that only one map is needed, not the twelve maps. Other than the unsworn testimony of the Agency's attorney, the only support for this position is 35 Ill. Adm. Code § 734.320(b)(4)(B), which governs Stage 2 Site Investigation Plans. This is a Corrective Action Plan, as the denial reason recognized: "This Corrective Action Plan requires one map." (R.004 (denial letter)) Moreover, the samples that are essentially being redone were previously performed as part of Stage 1 Site Investigation (Petitioner's Ex. A at pp. 1-2), which requires numerous maps. (35 Ill. Adm. Code § 734.320(b)(3)) The Agency is required to review submittals pursuant to a procedure promulgated by the Board (415 ILCS 5/57.3(c)(3)), not one it invents.

Furthermore, the Agency's argument that the number of maps is unreasonable should be rejected out-of-hand because this claim was not made in the Agency decision letter that frames the issues in this appeal, and thus has been waived. Environmental Protection Agency v. Pollution Control Bd., 86 Ill. 2d 390, 405 (1981). Brad Dilbatis rejected the number of maps

because he believed they exceeded the minimum requirements of the Act and the only legal provision cited in support is clearly inapplicable.

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

"IEPA acknowledges that Dersch's plan requires collecting and analyzing a soil sample to calculate Tier 2 remediation objectives." Dersch v. IEPA, PCB 17-3, slip op. at p. 21 (June 17, 2021). This finding is beyond dispute because the Agency decision letter states that "the soil sample needs to be collected for analysis." (R.004) The corrective action plan specifically provided for the determination of clean-up objectives. (R.036) Brad Dilbatis' issue is that the costs to perform this work is "only an estimate on how long it will take the consultant to perform the modeling," and if those costs are submitted in the next plan, "the costs will be known." (R.004) The costs will be known because they will have determined site-specific physical parameters according to the approved plan.

As a matter of law, Brad Dilbatis is wrong. The purpose of the budget is to produce "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 his e-mails, Dilbatis concedes that appropriate costs are those "anticipated for the execution of this Corrective Action Plan," including "the TACO boring and the modeling calculations." (R.015) Yet his decision letter states that these should be submitted in the next plan.

Furthermore, the Agency attempts to raise an issue not presented in the Agency denial letter by claiming that the number of hours was unreasonable. Environmental Protection Agency v. Pollution Control Bd., 86 Ill. 2d 390, 405 (1981). In fact the explanation given in the denial

letter for delaying consideration of costs of modeling calculations is that the estimates may be too low:

> **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 <u>if the original estimate did not include enough hours to complete the tasks</u>.**

(R.004 (emphasis added))

Brad Dilbatis did not reject the budget for this work as unreasonable, but because he did not want to have to determine whether it was reasonable at this time.

III. <u>CONSULTANT'S MATERIALS COSTS</u>

A. Photoionization Detector (PID).

The Agency falsely claims that "[i]t was evident to the Agency that the rental rates from Envirotech in California were the highest PID rental rates that could be found online so that the reimbursement could be at the highest rate possible." (Resp. at p. 15) At the hearing, Brad Dilbatis was asked whether he had made such analysis:

> **Q. Did you investigate whether the rates on the California rental sheet were comparable to rates outside of California?**
>
> **A. I don't recall.**

(Hrg. Trans. at p. 65)

Otherwise, the only evidence in the record is the consultant's explanation that "the rates were similar to others we were finding." (R.019) The Agent's argument improperly exceeds evidence before the Board. The record is clear that Brad Dilbatis simply did not believe that

rental rates were a valid means of justifying reasonableness of usage rates. (Id. at p. 54) The supporting documentation Dilbatis wanted was "to take the equipment, how much it cost, all of the expected ancillary type of costs for calibration, or, you know, if they needed to send it in occasionally for cleaning or anything like that, and add that together, divide that by the amount of years that they expect to own it and the amount of times they expect to use in a year." (Hrg. Trans. at p. 54) This formula is an illegal rule – a standard of general applicability that was not promulgated through notice and comment rulemaking. Without notice that this requirement existed, there cannot be any reasonable, let alone legal, expectation that such information would need to be created and maintained over the years.

Even assuming *arguendo* that the Agency had issues not with rental rates in general, but in this rental rate sheet in particular, it was necessary for Brad Dilbatis to specifically identify what types of rental information he needed in the decision letter, or waive that contention. Environmental Protection Agency v. Pollution Control Bd., 86 Ill. 2d 390, 405 (1981).

There is no evidence in the record that the PID purchased by the consultants is not commonly used in the environmental field, and there appears to be nothing in the record or the hearing transcript where Brad Dilbatis claims that a PID which can detect parts per billion is an extravagance. To the contrary, rounding analytical results is a common scientific practice. See Weeke Oil Co. v. IEPA, PCB 10-01, slip op. at p. 23 (May 20, 2010) (finding that "generally accepted scientific practice is to round" when the analytical results or more specific than the relevant standard, which presupposes that rounding is common).

Petitioner objects to the Agency's calculations on page 16 of its Response. First, it utilizes a website and other information not in evidence. Second, it is irrelevant because it fails

to utilize all of the required elements of the Dilbatis formula the Agency contends was required here. Furthermore, it is not all clear that the Agency understands tax depreciation or how it would be relevant here.

IV. USE OF UNPROMULGATED RULES BY THE AGENCY

The Agency is seeking to enforce unpromulgated rules in this proceeding in a number of ways. First, the Agency has set reimbursement rates for equipment that have not been promulgated as a rule. Brad Dilbatis did not seek to enforce these rates because they did not exist at the time he was reviewing the subject submittal. However, the Agency has sought to enforce these rates by introducing one of them at hearing:

> **A. . . . I believe the agency has settled on something since then, and that's fine, but at the time we're just trying to establish appropriate rates, and a hundred and fifty dollars for a piece of -- for the use of a PID for one day was just not appropriate. It just wasn't.**
>
> **Q. What has the agency settled on since then?**
>
> **A. Seventy-five dollars.**

(Hrg. Trans. at p. 55)

This testimony did not just "come up." (Response Brief, at p. 6) It was solicited by counsel for the Agency from the Agency witness. Accordingly the legal nature of this testimony is relevant. ""Rule" means each agency statement of general applicability that implements, applies, interprets, or prescribes law or policy . . .." with the exception of entirely internal matters. (5 ILCS 100/1-70) There is no evidence that the policy has been promulgated as an

administrative rule and therefore its an invalid, illegal principle.

Other invalid rules raised in this proceeding are the Dilbatis Formula, by which a principle was imposed as a general standard that precluded consideration of the evidence of reasonableness provided by consultants, as well as the federal mileage rate.

Finally, a number of the Board's findings denying motion for summary judgment in this case implicitly raise issues regarding the overall approach to be taken. For example, while Petitioners introduced precedent that $142 per day was a reasonable charge to use a PID in 1991 (Malkey v. IEPA, PCB 92-104, slip op. at 5 (Mar. 11, 1993)), the Board found that the precedent had "some merit," it was not persuaded at that point in time. Dersch Energies v. IEPA, PCB 17-3, slip op. at p. 25 (June 17, 2021). The Agency has not addressed Malkey and instead sought to bolster the requirement of a formula to determine equipment rates that has not been promulgated into rule. The Agency can certainly create generalized standards to make its job easier, but it must do so through rulemaking. Adopting a formula for payment clearly constitutes an adoption of a rule that must undergo public notice and comment. Kaufman Grain Co., Inc. v. Director, Dept. of Agriculture, 179 Ill.App.3d 1040, 1047 (4th Dist. 1988). At the heart of several, but not all, issues raided in this appeal, the matter can be reduced to the Agency seeking to enforce an unpromulgated rule. This makes the rule of decision simple, as it is more likely than not the evidence relied upon by Petitioners is correct when the Agency's position originates from an unlawful premise.

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 the Board deems meet and just.

DERSCH ENERGIES, INC.,
Petitioner

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