BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

BENTON FIRE DEPARTMENT Petitioner,	))	
v.	)	PCB 2017-001
	)	(UST Appeal - Land)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, Respondent.	))	

NOTICE

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PLEASE TAKE NOTICE that I have today filed with the office of the Clerk of the Pollution Control Board **RESPONDENT'S POST-HEARING BRIEF,** copies of which are herewith served upon you.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,
Respondent

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Dated: November 28, 2017

BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

BENTON FIRE DEPARTMENT Petitioner, v. ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, Respondent.	))))))))	PCB 2017-001 (UST Appeal - Land)

RESPONDENT'S POST-HEARING BRIEF

NOW COMES the Respondent, the Illinois Environmental Protection Agency ("Illinois EPA" or "Agency"), by one of its attorneys, Melanie A. Jarvis, Assistant Counsel and Special Assistant Attorney General, and hereby submits a Post-Hearing Brief in the above captioned matter.

BURDEN OF PROOF

Section 105.112(a) of the Illinois Pollution Control Board's ("Board") procedural rules (35 Ill. Adm. Code 105.112(a)) provides that the **burden of proof shall be on a Petitioner**. In reimbursement appeals, of which this matter is, the applicant for reimbursement has the burden to demonstrate that alleged costs are related to corrective action, properly accounted for, and reasonable. See: Rezmar Corporation v. Illinois EPA, PCB 02-91 (April 17, 2003), p. 9.

As the Board, itself has noted, the primary focus of a reimbursement appeal must remain on the adequacy of the permit application and the information submitted by the applicant (Petitioner) to the Illinois EPA for review. See: John Sexton Contractors Company v. Illinois EPA, PCB 88-139 (February 23, 1989), p. 5. Simply, the ultimate burden of proof will remain on the party initiating an appeal (Petitioner) and what Petition

presented for the Illinois EPA to review and render an opinion upon. See: John Sexton Contractors Company v. Illinois Pollution Control Board, 201 Ill. App. 3d 415, 425-426, 558 N.E.2d 1222, 1229 (1st Dist. 1990).

Petitioner must demonstrate to the Board that it satisfied this high burden before the Board may even entertain a review of the Illinois EPA's decision. The facts below and the arguments presented will lead the Board to one conclusion, that Petitioner has **failed** to meet its burden of proof.

STANDARD OF REVIEW

Section 57.8(i) of the Environmental Protection Act ("Act") allows an individual to challenge a determination of the Illinois EPA to the Board pursuant to Section 40 of the Act (415 ILCS 5/57.8(i)). Section 40 of the Act (415 ILCS 5/40 (2016)) is the general appeal section for permits and has been used by the legislature as the basis for this type of review to the Board. When considering an Illinois EPA determination on a submitted corrective action plan and/or budget, the Board must determine whether the proposal(s), as submitted to the Illinois EPA, demonstrate compliance with the Act and Board regulations. See: Broderick Teaming Company v. Illinois EPA, PCB 00-187 (December 7, 2000).

The Board will not, and should not, consider new information not presented to the Illinois EPA. Simply put, if the information was not before the Illinois EPA it could not have been relied upon by either the Petitioner nor Illinois EPA in review and rendering a determination on the sufficiency of the application. As such, the Illinois EPA's final decision, and the application, frame the appeal. See: Todd's Service Station v. Illinois EPA, PCB 03-2 (January 22, 2004), p.4; See also: Pulitzer Community Newspapers, Inc. v. EPA, PCB 90-142 (Dec. 20, 1990). The Board must, therefore, look to the documents within the

Administrative Record ("Record")[1] as the sole source of rendering an opinion on whether the Illinois EPA framed its determination consistently with the application and law.

ISSUE

The Illinois EPA final determinations on the application frame the issues on appeal. The issue presented in this matter is:

> **Issue:** Where Petitioner's application fails to provide supporting documentation for costs that were not reviewed nor approved within the Petitioner's Site Investigation Actual Costs Report, should such costs be reimbursed?
>
> **Answer:** No. Based upon the express language of the Act, the Board's Regulations, controlling caselaw and sound reason

FACTS

On February 9, 2016, Petitioner submitted a Site Investigation Completion Report and Stage 1 Site Investigation Actual Costs. These documents were prepared by Chase Environmental Group and received by the Illinois EPA on February 11, 2016. The Site Investigation Completion Report was, following review, approved by the Illinois EPA on June 10, 2016. The Stage 1 Site Investigation Actual Costs were, following review, modified in the decision letter issued to Petitioners on June 10, 2017. No appeal was taken of either action of the Illinois EPA. Full facts as set forth in Petitioner's Report are set forth on Pages 003 and 004 of the Record and are incorporated herein.

The Actual Costs approved, subject to modification (See: AR005 and AR006), based upon the rationale as follows:

> "The total amount of costs from Consulting Materials Cost Form ($960.01) (See AR075 and AR076) is reduced to $0.00.

[1] Citations to the Administrative Record will hereinafter be made as, "AR___."
Citations to the Hearing Transcript will hereinafter be made as, "Trans___."

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

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

c) These costs may include indirect corrective action costs for personnel, materials, services, or equipment charged as direct costs. Such costs are ineligible for payment from the Fund pursuant to 35 Illinois Administrative Code 734.603(v).

In accordance with 35 Illinois Administrative Code 734.505(a), the Illinois EPA may review any or all technical or financial information, or both, relied upon by the owner or operator or the Licensed Professional Engineer or Licensed Professional Geologist in developing any plan, budget, or report selected for review. The Illinois EPA may also review any other plans, budgets, or reports submitted in conjunction with the site.

The Illinois EPA has requested the following information directly from chase Environmental Group. (See AR010 and AR011). However, the information was not provided. The Illinois EPA may be willing to reconsider these costs if this information can be provided.

For each of the items which are listed on the Consulting Materials Costs Form, please provide the following information:

1. Please provide a mathematical financial derivation for how the unit rate for the item was determined. Include such variables (as applicable) as purchase costs (including receipts), operation & maintenance costs, estimated product usage, and estimated product life.

2. Please discuss if it is appropriate for the item to be charged as a direct project cost (versus as an indirect cost of doing business)."

A Stage 1 Site Investigation Actual Costs Summary can be found at AR007. This table shows that the amount of 'Actual Costs' requested was $20,119.05 and the Actual Costs granted was $19,159.04. The Petitioner filed this appeal on July 18, 2016. A hearing before the Board was held on October 18, 2017.

APPLICABLE LAW

Title 35 of the Illinois Administrative Code, Section 734.505(a) states as follows:

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

Section 734.505(b) specifically grants to the Illinois EPA authority to review any plan, budget, or report, and allows discretion to either approve, reject or modify any such submittals.

> b) The Agency has the authority to approve, reject, or require modification of any plan, budget, or report it reviews. The Agency must notify the owner or operator in writing of its final action on any such plan, budget, or report, except in the case of 20 day, 45 day, or free product removal reports, in which case no notification is necessary. Except as provided in subsections (c) and (d) of this Section, if the Agency fails to notify the owner or operator of its final action on a plan, budget, or report within 120 days after the receipt of a plan, budget, or report, the owner or operator may deem the plan, budget, or report rejected by operation of law. If the Agency rejects a plan, budget, or report or requires modifications, the written notification must contain the following information, as applicable:
>
> 1) An explanation of the specific type of information, if any, that the Agency needs to complete its review;
>
> 2) An explanation of the Sections of the Act or regulations that may be violated if the plan, budget, or report is approved; and
>
> 3) A statement of specific reasons why the cited Sections of the Act or regulations may be violated if the plan, budget, or report is approved.

ARGUMENT

In this case, Illinois EPA acted within the duty and authority vested to it in reviewing and rendering a determination on the application submitted by Petitioner.

Illinois EPA reviewed the Petitioner's Site Investigation Completion Report and Actual Costs. As stated in the above, the Board's regulations expressly provide that:

> "[t]he Agency may review any or all technical or financial information, or both, **relied upon** by the owner or operator or the Licensed Professional Engineer or Licensed Professional Geologist in developing any plan, budget, or report selected for review." (Emphasis added).

Illinois EPA's project manager and Leaking Underground Storage Tank program formally informed the Petitioner, via email, that additional supporting documentation were needed to render a complete review of costs alleged by Petitioner which were not included within the application nor prior reviewed plans. Chase Environmental flatly refused to submit supporting documentation, and failed to cooperate in any manner with the Illinois EPA project manager to allow for a review beyond the submitted request alone. (See AR010 to AR011). As such, the 'Actual Costs' were modified, pursuant to Section 734.505(b), since no supporting documentation was provided to allow for approval of the claim.

To be clear, the application submitted made only a numeric claim of cost and Petitioner itself refused to provide anything further for the Illinois EPA to consider or review. As such, the modification to zero was reasonable and appropriate and consistent with a lack of supporting information to review.

Regarding practical consideration of the Illinois EPA's review and determination, it cannot be lost on the Board that the request made by the Illinois EPA project manager was

appropriate based upon the lack of information presented by Petitioner, was within the authority of existing law, and further was reasonable.

Again, presented with nothing more than a claim of cost, how could the Illinois EPA determine if the cost listed are reasonable? Simply, the Illinois EPA could not and neither can the Board on appeal.

Further, as noted above, it is Petitioner's burden to support its claims of cost, not the Illinois EPA's. While the Agency did request additional information, it is not the responsibility of the Agency to submit an application for reimbursement of costs, nor was it the Agency's duty to review more than the application presented by Petitioner. If Petitioner wished to stand on the cost figure alone, it was perfectly capable of doing that. However, based upon a cost figure alone, the Agency could do nothing to approve reimbursement. It is important to note, that this case is not about what a consultant bills for or what a tank owner pays for, but rather what is reimbursable from the fund.

To do the job given to it by the Illinois Legislature and the Board's regulations, the Illinois EPA must be able to ask for supporting documentation and owners/operators and their consultants must be cooperative in giving such information to the Illinois EPA if they want reimbursement from the Fund.

Illinois EPA followed the law and regulations, the consultant for Petitioner was not cooperative in responding to the request and providing the requested documentation. The email exchange clearly shows that the response from the Petitioner's consultant had a sarcastic and rude tone, while the questions asked from the Illinois EPA project manager were professional in nature[2].

[2] The email exchange clearly shows that the response from the Petitioner's consultant had a sarcastic and rude tone, while the questions asked from the Illinois EPA project manager were professional in nature

The law is clear; the Illinois EPA has the right to seek supporting documentation. (See35 Illinois Administrative Code 734.505(a)). And, the facts are clear; the Petitioner did not submit supporting documentation.

RESPONSE TO PETITIONER'S POST HEARING BRIEF

Petitioner placed a great deal of emphasis on an attempt to focus attention on the impact of direct as contrasted with indirect cost. This is a red-herring. No information was provided within the application on this new distinction presented for consideration, nor is there even a discussion of this within either the Statute nor Board regulations. In addition, Petitioner ventures further off the beaten path by throwing stones at the applicant reviewer's comment regarding the request for a mathematical derivation to determine if the unit cost of an item was reasonable. (Pet.Brief p.5). Let us be clear once more, no information is given to support the costs for which reimbursement is sought. How the reviewer rationalized the need for additional information provides absolutely zero support for Petitioner not providing any information.

Moreover, as the Petitioner itself finally acknowledges on page 6 of its brief, the real issue is the lack of supporting documentation necessary to decide if the costs are direct or indirect and to determine if the unit cost of the item is reasonable. This ends the debate.

One conclusion is possible from the application, the Petitioner never submitted any supporting documentation to the Illinois EPA to help it make that determination. On page 7 of the Petitioner's Post-Hearing Brief it is argued that the rates are reasonable and that Marvin Johnson testified that they were reasonable based on his review of Agency files. Therefore, it can be assumed that the Petitioner bases its rates on what other consultants charge, rather than what is reasonable based on the cost of the equipment and the

projected use. Is this a reasonable approach to determining reasonableness to the Fund? No, it is not. If Petitioner's consultant reviewed the Agency files, why didn't they provide that analysis of what they discovered when asked for supporting documentation? They didn't. They failed to provide supporting documentation to the Agency. The Agency suggested one possible way to provide documentation. Other methods of providing documentation were not precluded. Unfortunately, the Petitioner only made a broad pronouncement that they reviewed Agency records without giving specifics as to what was reviewed. The Agency's review of market based rates does not support the Petitioner's conclusion. This leads the Agency to question if Petitioner is even talking about market rates at all. It appears that the Petitioner is talking about rates that they can get the government to pay, not rates being paid by the public in a competitive open marketplace. The Illinois EPA asked the Petitioner's consultant for what something actually cost, and the consultant was unwilling to provide that information to the Agency.

Petitioner goes on to ponder that since they themselves did not provide documentation requested by the Illinois EPA, and since the Illinois EPA could not determine reasonableness or whether there were direct/indirect costs (again, not the only potential conclusion but a convenient one to Petitioner to speculate nevertheless), that somehow the confusion this creates provides some support for Petitioner not providing documentation, information or the like for review. (Pet.Brief p.6-p.7). This logic is not only clearly flawed; it doesn't pass for rational argument at all.

The Petitioner highlights the fact that the decision letter says "may not be reasonable" and "may include indirect corrective action costs". (Pet.Brief p.7). What Petitioner fails to acknowledge is that when Petitioner itself refuses to give the Illinois EPA

supporting documentation or information or analysis or the like, the Petitioner leaves the Illinois EPA with no lawful manner to review and approve its request for costs under the Board's regulations. In other words, Petitioner prevents the Illinois EPA from determining if the costs are reasonable, direct, indirect or potentially even another subset of reimbursable or non-reimbursable cost. In other words, the Illinois EPA has clearly determined that it is unable to determine reasonableness or whether a cost is indirect without additional supporting documentation. These costs may turn out to be reasonable and direct costs.

Also on pages 7 and 8 of the Petitioner's Brief, the petitioner references Malkey v. IEPA, PCB 92-104, (March 11, 1993). This is a case where the Agency reduced the rate of a PID to $142.00 per day to be consistent with observed market based rates. It is important to keep in mind that this case was in 1992 and the technology has improved vastly and thus the costs to purchase a PID has gone down (think flat screen TVs). The Agency has been comparing rates of such things as PIDs to the market based rates of rental companies and has observed that the rental companies are charging quite a lot less than some consultants in the LUST program.

Also flawed is the argument that the Illinois EPA is ignoring prior Board decision in issuing this determination letter. (Pet.Brief p10). Nothing could be farther from the truth. The Illinois EPA asked for supporting documentation that it is given the authority to ask for under the Board's regulations. The Petitioner's consultant refused to give the Illinois EPA that information. The Illinois EPA could not determine whether those items could be reimbursed based upon the application in front of the Illinois EPA at the time of the

decision letter. There is nothing in this final Agency decision that ignores prior Board decisions.

In fact, the Board stated that in the Abel Investment, LLC order that "Abel's argument that it completely filled out the IEPA budget forms falls short if the completed forms fail to demonstrate that the budget costs do not exceed the minimum requirements of the Act." In this case, the Stage 1 certification form failed to demonstrate that the material costs listed did not exceed the minimum requirements of the Act. The May 8, 2015 Stage 1 Budget was just a certification form there was no "real budget" for which the Agency could act upon.[3] Clearly, Abel gives the Agency direction to look beyond the mere form in order to determine reasonableness and whether a cost is direct or indirect. For the Petitioner to state that the Illinois EPA is ignoring that opinion is simply not true.

In regards to the mathematical derivation requested by the Illinois EPA, Mr. Piggush, the Agency's project manager, who has an engineering degree from the University of Illinois and 25 years of experience as a project manager (Trans p.31 and p.37), explained the concept that framed the request, at hearing, as follows:

> "Q. Okay. Going to what's under appeal in this case, which is the costs involved, what questions did you have concerning the costs?
>
> A. I had questions about how did they...first, if the items were owned or rented and the materials cost, and if they were owned, then I wanted to know how they came up with those costs, and if they were rented, I wanted to know how they came up with those costs, and I had questions about whether the costs were appropriate to be charged as direct costs.
>
> * * * *

[3] On Page 16 of its brief, Petitioner argues that since the Agency approved the budget the Agency cannot second guess costs. This is not true. The 5/8/2015 Stage 1 Budget was just a certification form. There was no "real budget" for which the Agency could act upon.

A. For example, if an item costs a thousand dollars and it has a useful life of a hundred days, then, for example, it would make sense that it costs ten dollars a day to use it; or if it's a rented item, then I would like to see an estimate from the rental company as to how much do they actually charge for it.

Q. So you were looking for some sort of invoice from the rental company?

A. Right.

Q. Okay.
A. Can I explain further?

Q. Go ahead.

A. The purpose of that is to determine reasonableness which is a matter of judgment, but that's why I asked for that.

Q. And you used the phrase about a derivation.

A. Right.

Q. What exactly were you looking for using that phrase and what was actually the reason you put that in there?

A. What I was looking for is the same as the example I just gave. If an item cost a certain amount and has a certain usage, then it makes sense that it costs a certain unit rate for that item.

Q. So that's the mathematical derivation you were talking about?

A. Right. (Trans p.34-p.36).

Further, Mr. Piggush explained direct versus indirect cost during the hearing:

Q. Okay. And then I think the last thing that you put, and correct me if I'm wrong if there was something in between, was a question about direct and indirect costs.

A. Right.

Q. Can you describe why you asked that question?

A. A lot of the costs for equipment for example for a PID meter or a measuring wheel or a digital camera, in my judgment, those would be

considered to be indirect costs or what you would call a tool of the trade. If I can again illustrate by example. If a plumber comes to your house and he fixes your sink, he charges you for time and materials typically. He doesn't charge you a rate for using the pipe wrench, and in my judgment, I don't see how the use of a tool such as a PID meter is any different than the use of a pipe wrench.

Q. Okay.

A. And in that case then, I wouldn't feel that the use of the tool would be reimbursable as a direct cost.

* * * *

Q. Okay. So it's your professional judgment after spending 25 years that which types of items would be indirect costs?

A. For example, the PID meter or a measuring wheel or a digital camera, those are costs that we typically see in budgets. I would question if they should be charged as direct costs.

Q. Okay. And can you just kind of explain the difference again between an indirect and a direct cost?

A. A direct cost would be, for example, if you have to buy something that's expendable, for example, a disposable bailer, you buy it, you use it, and you throw it away. That's a cost that they incurred directly, whereas the cost of, for example, a PID meter, it's a tool of the trade that you have to have to operate a business. (Trans p.37-p.38).

Mr. Piggush, clearly explained (1) the lack of any information relative to the costs sought to be reimbursed and (2) framed a rationale for why supporting documentation or any other retinal, analysis or documentation would be necessary for the Agency to determine if the cost of the items requested was reimbursable. Based upon Petitioner's application before the Agency, the Agency could not perform a review. Information that the Petitioner refused to provide and gave no valid reasoning as to why it failed to do so. Of note, in response to the request for supporting documentation, Chase Environmental responded as follows:

> "Chase has included all information required and in accordance with the Illinois EPA forms and instructions existing at the time of submittal. The rates proposed within the Consulting Materials Form are rates that have consistently been approved in our clients (sic) Budgets and Reimbursement requests."

Basically, Petitioner's consultant stands on a number. In short, Petitioner's entire application is based upon a "you didn't catch me before when I submitted this and you paid me, so why won't you just ignore the Act and regulations now and pay me".

Further, the Petitioner wants the Board to rubber stamp a mere line item without anything more to review than arguments that the Agency asked for additional information and Petitioner did not like what was requested or how it was requested. If the Board accepts this line thinking it will create not only a slippery slope, but a Grand Canyon beyond which the Agency will not be able to perform reviews of almost any cost claimed for reimbursement. In this point of the process, the Illinois EPA has not reviewed nor approved a budget and is reviewing actual costs. It is at this point where the Illinois EPA must request additional information, if necessary, to determine eligibility for payment from the Fund. Section 734.505 provides the Illinois EPA expressly with such authority. Petitioner's application of the law is not consistent with the law as written (allowing for review) nor the intent of the process on-going before the Illinois EPA.

Chase Environmental's argument seeks to explain away any review based upon a contention that the Illinois EPA's forms did not require anything other than a submission of information. This reading is too simplistic and fails to consider the fact that the Fund is not created as a self-policing source of payments of any costs penned by a party seeking reimbursement. No duty to protect the Fund is placed upon the applicant (Petitioner), to the contrary, such function and responsibility is vested in the Illinois EPA and ultimately

this Board. The Act and Regulations do not allow an applicant (Petitioner) to avoid review of its costs by submitting only a cost figure.

Illinois EPA under its legal authority reduced the unsupported amounts to zero, but did not foreclose the ultimate payment, if appropriate, by allowing Petitioner to submit additional documents/information. The Petitioner can always submit the requested information and seek reimbursement from the Fund

The Petitioner, at hearing, insisted that due to the Illinois EPA not approving payment of the costs for materials in this case that it had not been paid for its work on the site. The Petitioner was attempting to paint the Illinois EPA in a bad light. The insinuation was that the Agency was as fault for the consultant not being paid. The testimony on page 24 of the transcript went as follows:

Q. And how much has the City of Benton been paid for the site investigation work to date?

A. Nothing.

Q. Just the site investigation.

A. Nothing.

Upon cross-examination, however, the testimony was that the consultant had not been paid because it had not submitted any request for payment. The fault for not being paid most of the costs lied solely with the Petitioner's consultant and not the Illinois EPA. That exchange on pages 25 to 26 of the transcript, went as follows:

Q. In the Benton case, were your personnel costs denied?

A. No.

Q. So only the material costs were denied?

A. Correct.

Q. So if you were not paid for the personnel cost, that's probably due to the State of Illinois' budget concerns because those were not denied?

A. **We have not submitted a package** because we were hoping that this appeal would have been resolved already but it has not.

Q. So even though your personnel costs have been approved, you haven't submitted a package for them, and that is why you have not been paid for them.

A. That is correct. (Emphasis added)

Further, the Petitioner would like to limit the Agency's review to solely Subpart H rates. When a budget is reviewed the Illinois EPA is able to look at the reasonableness of the item for the type of remediation and whether the cost is appropriate. It is no different during the Stage 1 actual cost review. Is the Petitioner really stating that as long as an item has a Subpart H rate that the Illinois EPA cannot see if it was actually used, or if the personnel costs are duplicative? The abuse that could occur under this scenario is staggering. **NOTE**, if the Agency did not review the items listed in this case, it would not have noticed that the Petitioner is requesting reimbursement approval for a camera, yet no pictures accompany the Stage 1 Report that was filed. Clearly this is something that should not be approved for reimbursement, yet, by Petitioner's argument, the Agency would merely look at the rates and not question if the items were reasonable or if they were even used at all. Surely this cannot be the outcome the Legislature and Board were envisioning when they enacted the Act and regulations.

Paired down to its essence, Petitioner arguments seek the Board to rubber stamp its contention that what an owner/operator submits is definitive as to what is sufficient documentation for purposes of review of its costs and because of the above, any request by the Agency for additional or supporting documentation or information is against the law

and facts and should be found unreasonable and subject the fund to reimbursement of the costs and payment of fees. This is very plainly contrary to existing regulations (upon which the Agency relies) and could not possibly be consistent with the Illinois EPA's function to review and likewise is inapposite to the Board's purpose within the regulations, i.e., to ensure that claims against the fund are justifiable for reimbursement.

OBJECTION TO PETITIONER'S POST HEARING BRIEF EXHIBITS

The Illinois EPA objects to the admission of Petitioner's exhibits attached to its brief. In this case, Petitioner filed a Motion for Summary Judgement, a Reply to the Agency's Motion for Summary Judgement and had a hearing in the matter. At no time were these documents before either the Agency or the Board. For that matter, at any time during the pendency of the appeal, Petitioner could have proffered these exhibits. And, the Agency would have had the opportunity to review, object, provide contrary opinion, etc. which are all deprived when presented belatedly at this stage. Procedural due process is gutted when a Petitioner is allowed to present new argument or documents without the safeguards of objection or notice and ability to respond in kind. The material should be struck from the pleading and argument based thereon should be struck. Indeed, the Petitioner did proffer different exhibits at the hearing in this matter. There has been no showing that the documents were not available to Petitioner at the hearing and no claim of prejudice should they not be considered at this point. The documents do not credible lend themselves to a determination that they are something upon which judicial notice should be considered. Had Petitioner presented them at hearing, Illinois EPA would have been given the chance to cross-examine witnesses on the exhibits. Waiting until after a hearing to offer exhibits in its brief, denies the Agency the ability to cross-examine the witnesses about the documents.

No matter how relevant or benign the exhibits may seem, by admitting them into evidence at this late date, the Board would deny the Agency a fundamental right of procedural due process of law. The Agency objects to the admittance of these documents. The Board should deny admitting the Petitioner's exhibits into evidence as doing so denies the Agency due process of law.

CONCLUSION

The facts and the law are clear and in favor of the Illinois EPA. Did the Petitioner submit supporting documentation when it was lawfully requested? No, thereby resulting in the denial of the costs for reimbursement of only those costs claimed for which supporting documentation was requested.

WHEREFORE: for the above noted reasons, the Illinois EPA respectfully requests the Board affirm the Agency's final decision in this matter.

Respectfully submitted,
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,
Respondent

_____

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Dated: November 28, 2017

CERTIFICATE OF SERVICE

I, the undersigned attorney at law, hereby certify that on **November 28, 2017**, I served true and correct copies of **RESPONDENT'S POST-HEARING BRIEF** via the Board's COOL system and email, upon the following named persons:

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