BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

CITY OF BENTON FIRE DEPARTMENT, Petitioner,	)	
v.	)	PCB 2017-001
	)	(LUST Permit Appeal)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, Respondent.	)	

NOTICE OF FILING AND PROOF OF SERVICE

TO: Carol Webb, Hearing Officer
Illinois Pollution Control Board
1021 N. Grand Avenue East
P.O. Box 19274
Springfield, IL 62794-9274
(Carol.Webb@illinois.gov)

Melanie Jarvis
Division of Legal Counsel
1021 North Grand Avenue East
P.O. Box 19276
Springfield, IL 62794-9276
(Melanie.Jarvis@illinois.gov)

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 Brief, copies of which are herewith served upon the above persons.

The undersigned hereby certifies that I have served this document by e-mail upon the above persons at the specified e-mail address before 5:00 p.m. on the 5th day of December, 2017. The number of pages in the e-mail transmission is 9 pages.

Respectfully submitted,

CITY OF BENTON FIRE DEPARTMENT,
Petitioner

BY: LAW OFFICE OF PATRICK D. SHAW

BY: /s/ Patrick D. Shaw

Patrick D. Shaw
LAW OFFICE OF PATRICK D. SHAW
80 Bellerive Road
Springfield, IL 62704
217-299-8484
pdshaw1law@gmail.com

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

CITY OF BENTON FIRE DEPARTMENT, Petitioner,	)	
v.	)	PCB 2017-001 (LUST Permit Appeal)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, Respondent.	)	

PETITIONER'S POST-HEARING REPLY BRIEF

NOW COMES Petitioner, CITY OF BENTON FIRE DEPARTMENT, pursuant to the Hearing Officer's Scheduling Order, for its Post-Hearing Reply Brief, states as follows:

I. THE APPLICATION WAS COMPLETE.

The Agency argues that the primary focus in this proceeding is "on the adequacy of the permit application and the information submitted by the applicant (Petitioner) to the Illinois EPA for review." (Resp., at p. 2) Indeed, the Board has indicated that the focus in these types of proceedings is "whether the application, as submitted to the Agency, would not violate the Act and Board regulations." Metropolitan Pier and Exposition Authority v. IEPA, PCB 10-73, at p. 51 (July 7, 2011).

There is no issue that the application submitted here was complete and provided all information required by the Agency's form. This is illustrated by the fact that previous Agency permit applications required the applicant to identify whether consultant's equipment was owned or rented. (Brief, Ex. 3) That information was deemed superfluous to the administration of the current LUST Program. Indeed, the Agency testified to the Board as part of the Part 734 rulemaking that all of the information required of an application would be requested in the

application form, thus there is no longer the need for the Agency to perform a completeness review, nor is a Wells letter required:

> **The purpose of a Wells letter in the permit program is to notify the applicant of a potential denial of a permit because of information beyond the contents of a permit application. This situation docs not occur in the UST program.**

In re Proposed Amendments To: Regulation of Petroleum Leaking Underground Storage Tanks (35 111. Adm. Code 732 & 734), R04-22 & R04-23 (Feb. 17, 2005), First Notice at p. 28.

As a result, the Board eliminated the requirement that the Agency conduct its completeness review within the first 45 days of receiving an application in order to "determine whether all information and documentation required by the Agency form for the particular plan are present." Id. at pp. 166-167. Since the program was being "streamlined" there was simply no purpose served for such a process. Id. at pp. 17-18 ("Mr. Clay [of the Agency] testified that such a process would extend review times and is counterproductive to streamlining the UST program."); p. 26 ("The Agency indicated that the proposal reflects statutory changes and streamlines the UST program in a way that allows for quicker and easier submittals . . .."; p. 58 ("the Agency's stated purpose of streamlining the review of budgets and claims"; p. 67 ("the Agency's goals to streamline the UST remediation process").

While most other divisions of the Agency are seeking to streamline their programs in light of the various budget pressures the State is under, the Leaking Underground Storage Tank Section appears to be the only one committed to unstreamlining. It is doing so by requiring applicants to provide information removed from application forms over ten years ago, and to explain why equipment is being charged separately when Agency's own instructions direct it.

II. IT IS NOT IMPOSSIBLE FOR THE AGENCY TO PERFORM ITS JOB.

The Agency repeats its assertion from its motion for summary judgment that it cannot perform its job without the requested information, a claim that the Board found resolved at that stage. (Opinion, at p. 2 (Aug. 17, 2017) There was no evidence supporting this assertion at hearing.

Michael Piggush, the Agency's reviewer, testified that the information requested was due to change in management, not because it was something necessary to review the application. (Hrg. Trans. at p. 41) Piggush has worked in the Underground Storage Tank Section for 25 years and has reviewed budgets ever since budgets became part of the program in the mid 1990s without need to request consultant's equipment invoices. (Id.) "While an agency is not required to adhere to a certain policy or practice forever, sudden and unexplained changes have often been considered arbitrary." Greer v. Illinois Housing Development Authority, 122 Ill.2d 462, 506 (1988)(Agency action set aside if it exercises discretion in an "arbitrary or capricious manner.") The Section manager did not testify to offer any explanation. Compare with Abel Investments v. IEPA, PCB 16-108 (Dec. 15, 2016); Estate of Slightom v. IEPA, PCB 11-25 (June 19, 2014). Agency action must be set aside if the agency exercises its discretion in an "arbitrary or capricious manner."

There is ample evidence that the Agency's positions herein is arbitrary beyond simply the change in management. First of all, it cannot be impossible to determine whether costs are reasonable without information about the cost to purchase or lease an item that was removed from the Agency's application form. (Brief, Ex. 3) Second, it cannot be a coherent policy that is built around Agency testimony that PID meters, digital cameras and measuring wheels are

indirect costs when the Board has already ruled to the contrary. Compare Hrg. Trans, at p. 36 with Knapp Oil Co. v. IEPA, PCB 16-103, at p. 6 (Sept. 22, 2016) (camera and PID are direct costs); Abel Investments v. IEPA, PCB 16-108, at p. (Dec. 15, 2016) (measuring wheel is direct cost). Third, it is not rational policy to bar equipment being charged separately, despite the fact that the Board's regulations authorize consultant's equipment to be charged at a reasonable rate (35 Ill. Adm. Code 734.630(h)), as does the Agency's own "Instructions for the Budget and Billing Forms." (Petitioner's Ex. 1, at p. 15) Fourth, the Agency's apparent position that a cinokete application is merely the opening for years of dialogue is not consistent with the legislative requirement that review must take no more than 120 days, and the Agency seeks to create requirements for information that would require more than 120 days for the Agency to review. (415 ILCS 5/57.7(c)(2))

The Agency has traditionally looked to its own records of consultant's materials costs to make sure that costs are not excessive. E.g., City of Roodhouse v. IEPA, PCB 92-31, at p. 8 (Sept. 17, 1992). While policies sometimes need to change, long-standing agency practices and interpretations of the regulations will often require systematic and regulatory modifications, particularly if those policies run counter to existing regulations or precedential rulings. As explained in Petitioner's Brief and unaddressed in the Agency's Response Brief, neither the Act, nor the Board regulations, authorize the Agency to set different equipment rates for different consultants, there is no lawful justification for allowing one consultant to be subject to a different reimbursement rate than another consultant.

The Agency demands that the Board rubberstamp whatever document request it makes, with its imagination as the only limit. It does not conform its analysis to the Board's previous

limited rulings in this area. Cf. T-Town Drive Thru v. IEPA, PCB 07-85 (April 3, 2008); Friends of the Environment v. IEPA, PCB 16-102 (July 21, 2016). While deference is often given to long-standing administrative constructions, no such deference is appropriate where the Agency has taken a new construction of its mandate and authority for the first time. M.I.G. Investments v. IEPA, 151 Ill.App.3d 488, 495 (2nd Dist. 1986); rev'd on other grounds 122 Ill.2d at 396 (giving no deference to any agency construction when legislative intent could be determined from plain language of statute). The Agency's denial of all consultant material costs was arbitrary and not supported by the Act, the Board's regulations or the Agency's own forms and instructions.

III. THERE IS NO EVIDENCE THAT THE PETITIONER'S CONSULTANT "RELIED UPON" THE INFORMATION REQUESTED.

While the Agency's brief emphasizes that it has authority to review "any or all technical or financial information **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," (Resp. Brief, at p. 7 (quoting 35 Ill. Adm. Code 505(a) (Emphasis in Brief)), there is no evidence or argument in the Response Brief showing that any of the information requested was "relied upon." The information did not exist, and the Agency seeks to compel its creation.

IV. THERE ARE FACTUAL CLAIMS IN THE AGENCY'S BRIEF THAT ARE NOT SUPPORTED BY THE RECORD.

Petitioner's consultant did not refuse to respond to the e-mail (Resp. Brief, at p. 7), the

Agency disputes the sufficiency of that response: “The rates proposed within the Consulting Materials Form are rates that have consistently been approved in our clients Budgets and Reimbursement requests.” (R.010) This explanation was rejected because the Agency decision letter stated that the application lacked "a mathematical financial derivation for how the unit rate for [each] item was determined" and a discussion of whether each item is appropriately a direct project cost, and that this information was not provided. (R.006) The denial letter frames the issues in this appeal, and the Agency is trying to backtrack from its decision letter when it argues that it only “suggested” a mathematical financial derivation as a possibility. (Resp. Brief, at p. 10)

The Agency attorney improperly testifies that “[i]t is important to keep in mind that this case was in 1992 and the technology has improved vastly and thus the cost to purchase a PID has gone down (think flat screen TVs).” (Resp. Brief. at p. 11) There is no evidence in the record to support this, and in any event, there is no reason to believe that legacy equipment like PID meters would follow pricing patterns attributable to new consumer technology.

Finally, the Agency insinuates that no photographs were taken and thus for reasons not raised in the denial letter, the digital camera daily rate should be rejected. (Resp. Brief, at p. 17) A digital camera was used to document monitoring well installation during Stage One Site Investigation. (R.075) The information is stored and available if needed, and would be something that a consultant would customarily rely upon from time to time in all future submittals.

V. THE 2015 STAGE 1 BUDGET CANNOT BE A FAKE BUDGET.

With respect to Petitioner's alternative argument that the Agency cannot second-guess costs in the subject budget, the Agency explains that the previous budget approved by certification is not a "real budget." (Resp. Brief, at p. 12) The Board's regulations state that the certification is "a budget," and it is intended to meet the requirements of a pre-performance submittal. (35 Ill. Adm. Code 734.310(b)) The Agency's interpretation of the regulations is contrary to the language of the Act, making post-performance budgets a voluntary election with potentially grave consequences on the owner/operator. (415 ILCS 5/57.7(e)(1)) The regulation cannot be interpreted to be contrary to the statute authorizing it.

VI. REPLY TO OBJECTION TO OFFICIAL NOTICE.

The Agency has objected to the request that the Board take official notice of Agency forms on the Agency's website without mentioning or even addressing the concept of official notice. Pursuant to the Board's regulation found at 35 Ill. Adm. Code 101.630, the Board has repeatedly taken official notice of similar documents. Knapp Oil v. IEPA, PCB 16-103, at p. 8 (Sept. 22, 2016) (Analytical Cost Form from Agency website); McAfee v. IEPA, PCB 15-84, at p. 2 (March 5, 2015) (Project Labor Agreement information from Agency website); Pak-Ags v. IEPA, PCB 15-14, at p. 3 (Dec. 4, 2014) (Code for Motor Fuel Dispensing Facilities and Repair Garages 2003 Edition, Office of State Fire Marshal internet webpage prinout, and Madison County, Illinois Assessment Office internet webpage printout).

In McAfee, the Board rejected the Agency's same complaint that the information should have been presented at hearing. McAfee, PCB 15-84, at p. 2. Official notice can be taken at any

stage of a proceeding so long, including in post-hearing briefs. ESG Watts v. Illinois Pollution Control Bd., 282 Ill.App.3d 43, 54 (4th Dist. 1996). The Post-Hearing Response Brief provided the Agency with ample opportunity to contend that this is not the Agency's own document from the Agency's own website, but the Agency has only challenged the process, not challenged that the document is what it purports to be. Even assuming *in arguendo* that the Agency has any due process rights in this proceeding, due process is not violated in such circumstances. ESG Watts, 282 Ill. App. 3d at 54.

WHEREFORE, Petitioner, CITY OF BENTON FIRE DEPARTMENT, prays for judgment restoring all of the consultant materials' costs to the budget, an order directing Petitioner to submit proof of its legal costs, and such other and further relief as the Board deems meet and just.

CITY OF BENTON FIRE DEPARTMENT,
Petitioner

By its attorneys,
LAW OFFICE OF PATRICK D. SHAW

By: /s/ Patrick D. Shaw

Patrick D. Shaw
LAW OFFICE OF PATRICK D. SHAW
80 Bellerive Road
Springfield, IL 62704
217-299-8484
pdshaw1law@gmail.com