BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

MARINE BANK SPRINGFIELD TRUST #53-0051	)	
	)	
Petitioner,	)	
v.	)	PCB No. 2024-81
	)	(UST 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)

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

PLEASE TAKE NOTICE that I have today electronically filed with the Office of the Clerk of the Illinois Pollution Control Board, pursuant to Board Procedural Rule 101.302 (h), PETITIONER'S MOTION FOR SUMMARY JUDGMENT, a copy of which is herewith served upon Respondent.

The undersigned hereby certifies that a true and correct copy of this Notice of Filing, together with a copy of the document described above, were today served upon Respondent by enclosing same in envelopes addressed as above with postage fully prepaid, and by depositing said envelopes in a U.S. Post Office Mailbox in Springfield, Illinois on the 26th day of February, 2025, and the number of pages is 22.

MARINE BANK SPRINGFIELD TRUST #53-0051

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

MARINE BANK SPRINGFIELD TRUST #53-0051)		
Petitioner,	)	
	)	
v.	)	PCB No. 2024-081
	)	(UST Permit Appeal)
ILLINOIS ENVIRONMENTAL	)	
PROTECTION AGENCY,	)	
Respondent.	)	

PETITIONER'S MOTION FOR SUMMARY JUDGMENT

NOW COMES Petitioner, MARINE BANK SPRINGFIELD TRUST #53-0051, 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)), stating as follows:

STATEMENT OF UNDISPUTED FACTS

Petitioner is a land trust that owns a former self-service fueling station in the Village of Cantrall, County of Sangamon, Illinois. (A.R.006) On February 4, 2003, a release was reported from four gasoline underground storage tanks, and the incident was assigned Incident Number 2003-0135. (A.R.001) In March of 2003, the tanks were removed as a part of early action. (A.R.007) Following site investigation activities, a Site Investigation Completion Report was submitted to the Illinois EPA, which was approved on October 17, 2005. (A.R.006)

Thereafter, multiple corrective action plans were submitted for removal of contaminated soil which were rejected, or the plan was approved, but not an associated budget. (A.R.214) The proper method of determining the Tier 2 remediation objectives for soil was debated throughout these submittals. (A.R.425) On January 18, 2021, a corrective action plan and budget were submitted for resampling the site to determine whether contamination had naturally attenuated

over the last twelve years. (A.R.426) This corrective action plan and budget was approved on May 19, 2021. (A.R.006)

The approved corrective action work was performed thereafter and on April 7, 2023, a corrective action plan and budget was submitted for the site, reporting that while contamination had attenuated in some areas, exceedances of applicable site remediation objectives remained. (A.R.009, A.R.013) The corrective action plan proposed additional soil borings to further define the extent of soil exceedances, as well as a boring to collect a site-specific geotechnical soil sample which would permit TACO calculations to be updated in response to past Agency issues with how remediation objectives were identified. (A.R.013-A.R.014; A.R.427)

On August 1, 2023, the Illinois EPA approved the plan in its entirety, but some deductions were made to the associated budget. (A.R.206) Of importance to this appeal was a cuts to consulting personnel costs:

> **$845.40 for 6 hours for Senior Project Manager at $140.90 per hour for review analytical results, bore logs, tabulation of analytical. These costs must be submitted in the next corrective action plan budget.**

(A.R.209)[1]

Thereafter, the approved corrective action was performed and the results were reported in the next Corrective Action Plan dated February 2, 2024. (A.R.210) Based upon the new soil borings, TACO calculations were revised and new remediation objectives were established. (A.R.218 - A.R.219) Based upon the new clean-up objectives, it was determined that multiple soil samples still exceed applicable site remediation objectives, and would need to be addressed

[1] There were no corresponding deductions in the budget for drilling the geotechnical sample or geo-technical lab analysis, just the related consultant's time. (A.R.47-A.R.48 (budget))

through installation of an engineered barrier of replacement concrete. (A.R.221) Further remediation would be performed by implementing a Construction Worker Caution Area, as well as a site restriction requiring future buildings to be built on a concrete base with no sumps. (A.R.222) Groundwater issues would be addressed with an Environmental Land Use Control for adjacent farmland and a groundwater ordinance from Fancy Creek Township for property to the west and southeast of the site. (A.R.222 - A.R.223) The budget for this work estimated corrective action costs to be $22,725.26. (A.R.258) Upon completion of the corrective action activities, a Corrective Action Completion Report would be submitted requesting a No Further Remediation letter. (A.R.224)

On or about May 17, 2024, the Illinois EPA reviewed the plan and budget. (A.R.428 - A.R.430) During review, the Illinois EPA asked for and received a copy of a draft groundwater ordinance and communications with the Fancy Prairie Township. (A.R.429; A.R.431; S.R.001)[2]

On May 22, 2024, the Illinois EPA emailed consultant to indicate the draft ordinance was insufficient:

> **Thank you for providing the draft ordinance. However, I have been told it is not the only thing we need. I apologize for requesting only the ordinance, as this is how I have been doing it for some time. Maybe I just haven't been doing it correctly. Anyway, we need an indication from the Village of Cantrall that they are aware of the use of a groundwater ordinance and are in support of using one and proof that the off-site property owners are willing to accept an ELUC being placed on their properties.**
>
> **I can approve the plan for using these but not the costs for obtaining them in the budget.**

[2] On February 11, 2025, petitioner filed a motion to supplement the administrative record with e-mail exchanges regarding the groundwater ordinance between the parties. The motion was granted by the Hearing Officer on February 13, 2025. Citations to those documents is given in the following form: (S.R._____)

> **Since I am on vacation next week and we need this information, perhaps a waiver of the 120-day deadline for review of 60 days would be useful for this review? Or I can approve the plan and cut the costs for the ELUC and ordinance out of the budget.**

(S.R.002)

The email mistakenly refers to the Village of Cantrall, when it is the Fancy Creek township implementing the groundwater ordinance. In any event, Petitioner's consultant responded with correspondence with the township and a draft of the groundwater ordinance sent to it. (S.R.005; S.R.006-S.R.009) A signed ELUC was provided on May 23, 2024. (S.R.005)

On May 28, 2024, the Illinois EPA approved the corrective action plan in all respects relevant to this appeal. (A.R.432)[3] The Agency modified the budget by cutting $8,884.41. (A.R.435 - A.R. 437) There are four cuts:

1. $887.70 for Senior Project Manager to review analytical results, bore log and analytical tabulation. (A.R.435) Petitioner had been directed to submit these cost in the previous Agency approval. (A.R.209)
2. $1,183.60 for Senior Project Manager for scheduling fieldwork, contractor search, arrangements, and coordination for corrective action activities. (A.R. 435-A.R.436)
3. $3,992.88 for concrete placement costs with the explanation of a lack of supporting documentation. (A.R.436) "Please provide documentation that the

[3] There were four modifications to the plan: (1) a requirement for building control technology on site for any future buildings; (2) proof that the abandoned well was properly abandoned; (3) offsite groundwater contamination must be addressed; and (4) groundwater modeling should be done using semicircle instead of a cone to identify property owners to be notified of the groundwater ordinance. (A.R.432-A.R.433)

costs for installing the concrete will be at or below the Subpart H Rate of $7.86 per square foot." (A.R.436)

4. $2,820.23 for costs for obtaining a groundwater ordinance. "These costs can be submitted for reconsideration once the ordinance has been obtained from Fancy Prairie." (A.R.437)

On June 27, 2024, Petitioner filed a timely petition for review, which was accepted by the Pollution Control Board on July 11, 2024.

LEGAL STANDARDS AND SCOPE OF REVIEW

The Agency's denial or modification of a corrective action plan budget may be appealed to the Board. See 415 ILCS 5/57.7(c)(4). Such Agency action must be 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 the 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.

The 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 the Agency and the explanation given in the Agency decision letter. 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).

ARGUMENT

There are four cuts to the budget that can broadly be seen as presenting the same core issue of whether the Agency can approve a plan for work, but then refuse to approve costs in the budget for the work. For the concrete work at issue in the second and third deductions, the Agency approved the use of an engineered barrier, but refused to approve any of the costs for installing the barrier, including the costs to search for and contract with a concrete subcontractor, without documenting the actual costs of installing concrete. For the fourth deduction, the Agency approved the use of a groundwater ordinance, but refused to approve costs in the budget to implement until and unless "the ordinance has been obtained from Fancy Prairie." (A.R.437) The first deduction is different only in that the Agency previously determined that the consultant's cost of reviewing, analyzing and documenting soil samples belonged in the next budget, only for the Agency to disapprove costs of the work in the next budget as well. If not now, then when?

The Illinois Environmental Protection Act is clear, a budget is "an accounting of all costs associated with the implementation and completion of the corrective action plan." (415 ILCS 5/57.7(b)(3)) Reviewing soil samples, installing a concrete barrier and instituting a groundwater ordinance were all approved corrective action activities, and the budget appropriately presented estimates of the cost of that work, which is all that is required at the budget stage. No provision of the Act or Board regulations is violated in doing what the Act expects.

I. Analytical Review of Soil Samples.

Corrective action activities frequently require additional soil or groundwater samples to be collected beyond the site investigation stage in order to determine the suitability and extent of various forms of remediation or institutional controls. For whatever purposes the samples are taken, the same basic steps are involved: samples are collected and delivered to a laboratory, the laboratory tests reports the raw data to the consultant and then the consultant analyzes the data in light of the cleanup objectives and regulatory requirements for the work. The consultant's review of the data is submitted either in a plan or report, and Agency forms require this work not only to be described, but also tabulated, mapped and in a format that permits the Agency to review the consultant's work. (A.R.228-A.R.229 (Corrective Action Plan form))[4] While the lab reports are submitted with plans and reports, (e.g., A.R.142-A.R.173), raw data does not speak for itself, but must be reviewed and analyzed by the consultant in light of the totality of the information available, such as location of borings, detection limits and previous sampling results.

The appropriateness of these costs is demonstrated by the previous Illinois EPA decision letter stating that such costs were premature for the 2023 Corrective Action Plan:

> **$845.40 for 6 hours for Senior Project Manager at $140.90 per hour for review analytical results, bore logs, tabulation of analytical. These costs must be submitted in the next corrective action plan budget**.

(A.R.209 (emphasis added))

[4] The Illinois EPA's Corrective Action Plan form requires at a minimum the following: "1. Description of investigation activities performed to define the extents of soil and/or groundwater contamination; 2. Analytical results, chain-of-custody forms, and laboratory certifications; 3. Tables comparing analytical results to applicable remediation objectives; 4. Boring logs; 5. Monitoring well logs; and 6. Site maps meeting the requirements of 35 Ill. Adm. Code . . . 734.440 and showing: a. Soil sample locations; b. Monitoring well locations; and c. Plumes of soil and groundwater contamination." (A.R.228-A.R.229)

The Illinois EPA did not object to the work, but wanted the costs to be budgeted in the next corrective action plan. Petitioner did not appeal that deduction, but in the next correction action plan submitted in 2024 budgeted six hours for the same work:

	Senior Project Manager	6.00 hours	$147.95 rate	$887.70
CCAP	Review of analytical results/bore log and and [sic] analytical tabulation			

(A.R.261)

On or about May 17, 2024, the Illinois EPA reviewed the 2024 corrective action plan and conducted its own analysis of the sampling results. (A.R.428-A.R.430) No problems were noted with this budget item, nor any reference made to the 2023 decision concerning this item. (Id.)

The Agency decision letter cites to two legal requirements to justify its decision. First, the costs lack supporting documentation (35 Ill. Adm. Code § 734.630(cc), and second, the costs are not reasonable as submitted. (35 Ill. Adm. Code § 734.630(dd)) However, the Agency decision letter fails to provide "an explanation" why either legal provision might be violated. (415 ILCS 5/57.8(c)(4)(A)&(B)) Nor did the Agency offer any "explanation of the specific type of information" that was not already in its possession. (415 ILCS 5/57.8(c)(4)(C)) Nor did the Agency provide "a statement of specific reasons why the Act and the regulations might not be met if the plan were approved." (415 ILCS 5/57.8(c)(4)(D))

The Agency decision is unsupported by the record and entirely arbitrary. The costs at issue were deemed to be part of the next correction action plan and therefore "these costs must be submitted in the next corrective action plan budget." (A.R.209) The Agency did not previously state that these costs lacked supporting documentation, or were unreasonable, but indicated the costs were premature.

The Agency erred in denying costs for consultants to perform review and analysis of the soil sample results conducted as part of approved corrective action activities. Consultants review all documentation for the project which is budgeted on a time and materials basis. (35 Ill. Adm. Code § 734.845) Soil boring logs and tables summarizing the laboratory results were included in the approved corrective action plans. (A.R.217; A.R.354) Traditionally, soil and groundwater investigation entails evaluation of analytical results, boring logs and "tables comparing analytical results to applicable remediation objectives." (AR.228-229 (Corrective Action Plan form)) The work budgeted describes work expected by approved plans, but without cause no cost estimates were approved.

In summary, the record indicates that there are no statutory or regulatory provisions that would be violated if the budget for consultant's work reviewing soil samples and tabulating the data for soil sample investigations approved by the Agency.

2. Consultant's Field Work

The corrective action plan's primary activity is the replacement of concrete as an engineered barrier for contamination exceeding TACO Industrial/Commercial Inhalation Tier 2 of benzene. (A.R.222) Consulting personnel costs were estimated for planning, overseeing, and travel to and from the site:

	Senior Project Manager	8.00 hours	$147.95 rate	$1,183.60
CCA-Field	Scheduling, Contractor search/Arrangements/Coordination for Corrective Action Activities			

(A.R.262)

Mileage	38.00 miles	$0.59 rate	$21.00
CCA-Field	1 Round Trip. (Set up/Layout/final Inspection/Documentation)		

(A.R.263)

While the Illinois EPA did not deduct the mileage cost, it deducted the entire cost of the Senior Project Manager performing any field work, alleging the costs lack supporting documentation (35 Ill. Adm. Code § 734.630(cc), and the costs are not reasonable as submitted. (35 Ill. Adm. Code § 734.630(dd)) However, the Agency decision letter fails to provide "an explanation" why any legal provision might be violated. (415 ILCS 5/57.8(c)(4)(A)&(B)) Nor did the Agency offer any "explanation of the specific type of information" that was not already in its possession. (415 ILCS 5/57.8(c)(4)(C)) Nor did the Agency provide "a statement of specific reasons why the requirements of the Act or the regulations might not be met if the plan were approved." (415 ILCS 5/57.8(c)(4)(D)) Reading the Agency decision letter as a whole, it is believed that the deduction of cost of the consultant's time planning and overseeing the installation of an engineered barrier was based upon the same erroneous reasoning given for the third deduction to the budget for the contractor's cost of installation of concrete, which is discussed further in the next section.

As to the consultant's work, professional consulting services include costs such as "project planning and oversight; field work; field oversight; [and] travel." (35 Ill. Adm. Code 734.845) The work in this budget is similar categorically to the work approved in the previous budget for planning and oversight of drilling activities (A.R.53; see also A.R.206 (Agency decision approving this work)), but the concrete field work requires a search for a contractor to perform the work, as well as round trip travel to the site. The necessity for this additional work is

not really disputed by the Illinois EPA. Not only did the Illinois EPA approve the cost of mileage for field work, its decision letter states that it wants Petitioner to conduct the Contractor search before it will approve a budget for the Contractor search. (A.R.436 ("Please provide documentation that the costs for installing the concrete will be at or below the Subpart H rate of $7.86 per square foot.”))

As in previous cases, the Illinois EPA improperly wants Petitioner to perform work without a budget for that work. See Dersch Energies v. IEPA, PCB 17-3, slip op. at pp. 16-17 (Aug. 11, 2022) Pursuant to the Board's 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 Agency is without authority to review the actual costs of work before they are submitted as part of an application for payment. City of Benton Fire Department v. IEPA, PCB 17-01, slip op. at p. 6 (Feb. 22, 2018)

In summary, the Agency decision letter falls far short of the content mandated by statute and the record indicates that there are no statutory or regulatory provisions that would be violated if the budget for consultant's field work costs were approved, and indeed the decision letter indicates that the Agency wants the concrete work to be performed by consultant, but arbitrarily refuses to approve a budget for that work until after the work is performed.

3. Concrete Replacement.

The corrective action plan's primary activity is the replacement of concrete as an engineered barrier for contamination exceeding TACO Industrial/Commercial Inhalation Tier 2

of benzene. (A.R.222) This activity was approved without modification for 508 square feet. (A.R.222; A.R.432) The total budget for this work was $3,992.88 at a rate of $7.86 per square foot. (A.R.259) This rate is the maximum payment amount authorized in the Board's Subpart H rate, as indicated in the Agency's denial:

> **Pursuant to 35 Ill. Adm. Code 734.870(d)(1), for costs approved by the Illinois EPA in writing prior to the date the costs are incurred, the applicable maximum amounts must be the amounts in effect on the date the Illinois EPA received the budget in which the costs were proposed. Once the Illinois EPA approves a cost, the applicable maximum payment amount for the cost must not be increased. Please provide documentation that the costs for installing the concrete will be at or below the Subpart H rate of $7.86 per square foot.**

(A.R.436)

The denial statement is clearly rooted in issues with the increased cost of concrete that have necessitated increasing reliance on the bidding alternative to fixed Subpart H rates. E.g., Singh v. IEPA, PCB 23-90, slip op. at 3 (Sept. 21, 2023) (budget approved for a $3.23 per square foot Subpart H rate superceded by $14.00 per square foot established by bidding) Nonetheless, the Illinois EPA has not reported to the Board that any amounts set forth in the Subpart H regulations "are not consistent with the prevailing market rates and suggest changes needed to make the amounts consistent with the prevailing market rates." (35 Ill. Adm. Code 734.875)

The first legal error in the Agency's denial explanation is that Section 734.870(d)(1) of the Board's UST Regulations has no applicability to this corrective action plan. All Section 734.870(d)(1) does is establish the effective date for "adjusted maximum payment amounts" created by annual application of the inflation factor. (35 Ill. Adm. Code § 734.870(d)(1)) As the Board recently ruled, "Section 734.870(d)(1) does not prohibit the amendment of corrective action plan budgets using the bidding process under Section 734.800(a)(2)." ABP Properties v.

IEPA, PCB 2025-001, slip op. at 10 (Feb. 6, 2025) The Illinois EPA's decision letter clearly does not dispute that $7.86 per square foot is the correct adjusted maximum payment amount. (A.R.436) The insinuation that approval of that rate in this budget would foreclose a future increase in a later submittal is contrary to the Board's ruling in ABP Properties.

The second legal error is improperly demanding that costs be established at the budget stage, whereas only the reasonableness of the cost estimates and their necessity to the corrective action plan are established at this stage.

> **A budget review aims to establish that the costs sought are reasonable; such review is subject to Section 57.7 of the Act and Part 734 Subpart E of the Board rules. A review of an application for payment, on the other hand, determines whether the approved costs have actually been expended; it is subject to Section 57.8 of the Act and Part 734 Subpart F of the Board rules.**

City of Benton Fire Department v. IEPA, PCB 17-01, slip op. at p. 6 (Feb. 22, 2018) (emphasis added).

In other words, at the budget stage costs are merely "an estimate" (35 Ill. Adm. Code § 734.335(b)), while costs at the payment stage have already been "expended." (415 ILCS 5/57.8(a)(6)(B)) Costs that have been expended can be documented with invoices or other evidence, but estimates are by their nature opinions as to future events.

The Board's Subpart H regulations create a rebuttable presumption that costs listed in Section 734.810 through Section 734.850 are reasonable costs (as adjusted by an inflation factor). (35 Ill. Adm. Code 734.800(a)(1)) A presumption is a legal device which "requires the fact finder to assume the existence of a presumed or ultimate fact, after certain predicate or basic facts have been established." People v. Watts, 181 Ill. 2d 133, 141-142 (1998) The costs and rates listed in Subpart H were established through an extensive rulemaking in which the Board

expressly found that "the maximum payment rates to be 'reasonable' and not in 'excess' of activities necessary to meet the 'minimum' requirements of the Act." Proposed Amendments To: Regulation of Petroleum Leaking Underground Storage Tanks (35 Ill. Adm. Code 732), R04-22(a), slip op. at 62-63 (Dec. 1, 2005) (Second Notice) Subpart H specifically sets reasonable maximum payment amount for concrete installation based upon square footage and depth of material (35 Ill. Adm. Code 734.840(b)), adjusted by an annual increase for inflation (35 Ill. Adm. Code 734.870). There are two alternative methods to establish maximum payment amounts based upon formal bidding (35 Ill. Adm. Code 734.800(a)(2)) or unusual or extraordinary circumstances (35 Ill. Adm. Code 734.800(a)(3)). These three methods are the exclusive methods used to determine maximum payment amounts. (35 Ill. Adm. Code 734.800(c)) The cost estimates in the budget are based upon the maximum payment amounts established by the Board in the Subpart H regulations. (35 Ill. Adm. Code 734.800(a)(1))

Together these regulatory provisions create a legal presumption that a budgetary item within the adjusted maximum payment amounts is reasonable and not excessive. The Agency is without authority to further require documentation that the regulatory rate can in fact be met since the Board has already resolved that these rates comply with the Act and the Board regulations. That is not to say that the amounts cannot be rebutted by the owner/operator. Those same Board regulations give the applicant two alternatives for determining maximum payment amounts: competitive bidding and unusual or extraordinary circumstances. (35 Ill. Adm. Code 734.800(a)(2)&(3)) The most relevant alternative here, competitive bidding, must "be optional," and thus cannot be required by the Agency. (415 ILCS 5/57.7(c)(3)(C)(1)) Both alternatives are expensive, requiring extensive processes to establish costs.

The Illinois EPA itself has an obligation if it believes that the Subpart H rates fail to reflect market rates. "No less than every three years the Agency must review the amounts set forth in this Subpart H and submit a report to the Board on whether the amounts are consistent with the prevailing market rates. The report must identify amounts that are not consistent with the prevailing market rates and suggest changes needed to make the amounts consistent with the prevailing market rates." (35 Ill. Adm. Code § 734.875) The Illinois EPA has a responsibility to help effectuate rulemaking to make sure the listed rates are reasonable and not excessive. It does not have the authority to simply reject maximum payment amounts established through Board rulemaking as those regulations are conclusive as to costs, barring the applicant's election to bid or submit an alternative proposal for unusual or extraordinary circumstances.

In summary, the Agency decision letter improperly imposes an obligation to demonstrate actual costs at the budget stage, misstates the legal meaning of the inflation adjustment provisions, and fails to apply the legal presumption for the rates established by rulemaking. These errors also relate back to the second deduction of related consultant's costs.

4. Obtaining Groundwater Ordinance.

The corrective action plan proposed addressing groundwater contamination with an ordinance from Fancy Creek Township and an Environmental Land Use Control ("ELUC") from a neighboring property owner. (A.R.221) The groundwater ordinance would prevent use of groundwater as a potable water supply to the west and southeast of the property. (A.R.223; see also A.R.249 (map of area to be covered by groundwater ordinance and ELUC)) There are no potable water supply wells that would be restricted. (A.R.23)

The budget estimated $2,820.26 for preparation and implementation of the groundwater ordinance:

	Senior Project Manager	12.00 hours	$147.95 rate	$1,775.40
ELUC	Preparation and Distribution of groundwater ordinance			

	Senior Project Manager	6.00 hours	$147.95 rate	$887.70
ELUC	Groundwater Ordinance Notifications			

	Senior Admin. Assistant	12.00 hours	$66.58 rate	$133.16
ELUC	Groundwater Ordinance Notifications			

Postage		4.00	$6.00/each	$24.00
ELUC	Groundwater Ordinance Notifications			

(A.R.262-A.R.263)

The Agency reviewer requested a draft copy of the groundwater ordinance, which was provided, along with email communications with the township about the ordinance. (A.R.429; A.R.431; S.R.001) The reviewer sent the draft ordinance to legal. (A.R.429) Despite this, the reviewer noted that there was "no evidence the groundwater ordinance will be approved." (A.R.430) The reviewer must have deemed that there was sufficient likelihood that the ordinance would be approved if "legal" was expected to take the time to examine it.

The emails attached to this motion indicate that the Agency had implemented a new rule requiring the ordinance to be approved before costs of preparation can be budgeted:

> **Thank you for providing the draft ordinance. However, I have been told it is not the only thing we need. I apologize for requesting only the ordinance, as this is how I have been doing it for some time. Maybe I just haven't been doing it correctly. Anyway, we need an indication from the Village of**

> **Cantrall that they are aware of the use of a groundwater ordinance and are in support of using one and proof that the off-site property owners are willing to accept an ELUC being placed on their properties.**
>
> **I can approve the plan for using these but not the costs for obtaining them in the budget.**
>
> **Since I am on vacation next week and we need this information, perhaps a waiver of the 120-day deadline for review of 60 days would be useful for this review? Or I can approve the plan and cut the costs for the ELUC and ordinance out of the budget.**

(S.R.0002 (emphasis added))

The Agency reviewer had been following the Agency's own forms, which only require a corrective action plan to include "draft groundwater ordinance(s) and Environmental Land Use Controls." (A.R.229 (Corrective Action Plan form)) Although an Agency form does not supercede Board regulations, "contents of this form have regulatory weight because the budget must be submitted to the Agency 'on forms prescribed and provided by the Agency.'" Knapp Oil Co. v. IEPA, PCB 16-103, slip op. at 6 (Sept. 22, 2016)(quoting 35 Ill. Adm. Code 734.135(a))[5] It cannot be disputed that a draft groundwater ordinance was submitted to the Agency. (S.R.006)

Nonetheless, the draft ordinance was insufficient because the Agency has begun enforcing a new standard of general applicability which is invalid without promulgation by rulemaking. (5 ILCS 100/1-70 (Administrative Procedure Act)) The Agency decision letter declares a requirement for a corrective action plan supported neither by statute nor regulation:

> **The plan must include assurances that the local governmental authority is amenable to the proposed option to address off-site contamination.**

[5] Since the Pollution Control Board has promulgated a model ordinance and model environmental land use control, there does not appear to be a justification for requiring draft documents. 35 Ill. Adm. Code 742.APPENDIX F Environmental Land Use Control; 35 Ill. Adm. Code 742.APPENDIX G. Nonetheless, consultant provided drafts as requested.

* * *

These costs can be submitted for reconsideration once the ordinance has been obtained from Fancy Prairie.

(A.R.436-A.R.437)

The use of the groundwater ordinance was approved, just not the costs for obtaining one. Not only is the rule invalid for not being promulgated pursuant to the requirements of the Administrative Procedure Act, the rule is inconsistent with the Illinois Environmental Protection Act's provision that a budget include "an accounting of all costs associated with the implementation and completion of the corrective action plan." (415 ILCS 5/57.7(b)(3))

The Agency cannot refuse to approve a budget on the condition that the proposed work be performed first. Dersch Energies v. IEPA, PCB 17-3, slip op. at pp. 16-17 (Aug. 11, 2022) The use of the word "reconsideration," here is revealing as to how poorly this new requirement has been thought out since the Agency lacks authority to reconsider its final determinations. Reichhold Chemicals v. PCB, 204 Ill. App. 3d 674, 677-78 (3rd Dist. 1990) However, the context is clear that the Agency expects new information (actual costs) to be submitted in a future budget after the ordinance has been obtained, so it might not be a reconsideration.

The question presented is whether the Act or Board regulations prevent the Agency from approving a budget for a groundwater ordinance without first obtaining a groundwater ordinance. (Cf. 415 ILCS 5/57.7(c)(4)(C) (denial letter must explain the specific type of information not provided)) Clearly, the answer is "no," as the purpose of the budget is to determine whether the estimates are reasonable, while it is only at the payment stage that actual costs must be proven. City of Benton Fire Department v. IEPA, PCB 17-01, slip op. at p. 6 (Feb. 22, 2018)

The record further identifies a lack of understanding about the nature of local government and ordinances. A groundwater ordinance is adopted by a unit of local government and must "effectively" prohibit the installation of potable water supply wells to be deemed an institutional control. (35 Ill. Adm. Code § 742.1015) The ordinance must meet certain "minimum" requirements, but there are no limitations as to what can be included in the ordinance, so long as they don't limit the effectiveness of the prohibition. (Id.) Ultimately, whether or not a groundwater ordinance will be approved is to be decided by a representative body of the local government following public notice and opportunity to comment. "Township government today is probably the last bastion of pure democracy in an otherwise bureaucratized republic. It is the direct descendant of the idealized state envisioned by the ancient philosophers where every man could speak his piece and be afforded a hearing by his peers." Griffie v. Spanski, 84 Ill.App.3d 118, 122 (4th Dist. 1980) Township government does not act without a majority of votes following a public hearing and open dialogue. Until the ordinance is approved, there is no information as to whether the ordinance will be approved, nor any assurance that the initial ordinance proposed will be the ordinance approved.

In summary, neither the Illinois Environmental Protection Act nor the regulations promulgated thereunder require a groundwater ordinance to be obtained in order to approve a budget for obtaining a groundwater ordinance.

WHEREFORE, Petitioner MARINE BANK SPRINGFIELD TRUST #53-0051 prays that the Board find the Illinois EPA erred in its decision, authorize Petitioner to submit an accounting of legal costs for review and approval, and grant such other and further relief as it deems meet and just.

MARINE BANK SPRINGFIELD TRUST
#53-0051
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