

BEFORE THE POLLUTION CONTROL BOARD  
OF THE STATE OF ILLINOIS

|                        |   |                     |
|------------------------|---|---------------------|
| JESSE FOODMART, INC.,  | ) |                     |
| Petitioner,            | ) |                     |
| v.                     | ) | PCB 2024-073        |
|                        | ) | (UST Permit Appeal) |
| ILLINOIS ENVIRONMENTAL | ) |                     |
| PROTECTION AGENCY,     | ) |                     |
| Respondent.            | ) |                     |

NOTICE OF FILING AND PROOF OF SERVICE

|                                  |                            |
|----------------------------------|----------------------------|
| TO: Carol Webb                   | Richard Kim                |
| Hearing Officer                  | Assistant Counsel          |
| Illinois Pollution Control Board | Division of Legal Counsel  |
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PLEASE TAKE NOTICE that I have today electronically filed with the Office of the Clerk of the Illinois Pollution Control Board, Petitioner's Motion for Reconsideration of Summary Judgment for the Fourth Deduction, a copy of which is herewith served upon respondent.

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 27<sup>th</sup> day of August, 2026. The number of pages in this e-mail transmission excluding exhibit is 8.

JESSE FOODMART, INC.

BY: /s/ Patrick D. Shaw

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**PETITIONER'S MOTION FOR RECONSIDERATION OF SUMMARY  
JUDGMENT FOR THE FOURTH DEDUCTION**

NOW COMES Petitioner, JESSE FOODMART, INC., by its undersigned counsel, moves for reconsideration of the Pollution Control Board's grant of IEPA's motion for summary judgment as to the Fourth Deduction, pursuant to Section 101.520 of the Board's Procedural Rules (35 Ill. Adm. Code 101.520), states as follows:

**INTRODUCTION**

On July 23, 2026, the Pollution Control Board entered an interim opinion and order on the parties' motions for summary judgment, granting some, denying others, and leaving some yet to be resolved. This Motion for Reconsideration is brought seeking reversal of summary judgment with respect to the Fourth Deduction.

**STANDARD**

"The purpose of summary judgment is to determine whether triable issues of fact exist and is proper where the pleadings, depositions, and admissions on file,

together with any affidavits and exhibits, when viewed in the light most favorable to the nonmoving party, establish no genuine issue of material fact exist and the moving party deserves judgment as a matter of law.” DeMarzo v. Harris (In re Estate of DeMarzo), 2015 IL App (1st) 141766, P29 (2015)

An order of partial summary judgment is an interlocutory order that may be modified or vacated at any time before final judgment. Berry v. Chade Fashions, 383 Ill. App. 3d 1005, 1009 (1<sup>st</sup> Dist. 2008) A judgment that fails to dispose of all claims is not final and is subject to revision before entry of a final judgment, even after trial. Id. at 1010.

Section 101.520 of the Board’s Procedural Rules states that any motion for reconsideration or modification of a Board order must be filed within 35 days after receipt of the motion. (35 Ill. Adm. Code 101.520) Such a motion exists “in order to correct any errors, omissions, or oversights that [the Board] finds in previous Opinions and Orders.” Land and Lakes Co. v. Village of Romeoville, PCB 91-7, slip op. at 3 (Dec. 6, 1991)

**I. The Board Affirmed the Illinois EPA’s Fourth Deduction on Grounds Never Raised by the Illinois EPA.**

The Board found that all of the labor costs for tank abandonment were not adequately documented. (Interim Opinion, at p. 14) The Board explained:

**For the requested reimbursement of costs associated with purchases of rock, flowable cement, lodging, and landfill deposits, Jesse Foodmart provided detailed receipts for each. The record does not include rental receipts for the excavator,**

**skid loader, or dump truck on June 5 and 6, 2023. Similarly, the record does not include detailed receipts for time billed by the employees.**

(Interim Order, at p. 14)

As an initial matter, the Agency cut reimbursement of Bandy's lodging costs (Interim Opinion, at p. 13 (\$19.58)), so it's unclear why the Board simultaneously affirmed the deduction of Bandy's lodging cost while employing the hotel receipt as a benchmark.<sup>1</sup>

Bandy was hired to perform the tank abandonment, supplying and mobilizing all necessary labor and materials. There is no dispute that the materials were documented, but those materials help describe the associated labor. There is no evidence in the record that Bandy rented any equipment; the Board assumed that rental receipts exist and concluded that the failure to provide them justified the Agency's deduction. Similarly, "time billed by employees" does not make sense given it is Bandy that billed the consultant for tank abandonment, not its employees. In any event, the invoice in the record contained the same level of detail as in any of the other receipts mentioned – it identifies the task performed, the amount charged and the date the work was performed. (A.R.144) It is similar in detail to consulting personnel's invoice which are also paid on a time and materials basis. (A.R.188 (Engineer III, 16.50 hours UST oversight, charged \$2,324.52))

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<sup>1</sup> The Illinois EPA did not mention or defend this lodging deduction to the Board. (Cross Mot., at pp. 13-14) With respect to the Seventeenth Deduction for handling charges, the Illinois EPA argued that "[l]odging is a direct cost for completing professional consulting services and helping enable field work and field oversight." (Cross Mot. At p. 20) The Board found that the record "does not reconcile IEPA's treatment of the Bandy invoice in Deduction 17 with its treatment of the same invoice in Deduction 4." (Interim Opinion, at p. 22)

Moreover, the Agency did not make the argument expressed in the Interim Opinion, and as such the Board was not well advised in the premises as to the basis of its ruling. There is no reference to rental receipts or time billed by employees in the Agency decision (A.R.209), nor such reference in the emails exchanged prior to the Agency decision (A.R.195-A.R.200), nor in the Agency's Cross Motion for Summary Judgment (Cross. M.S.J. at pp. 13-14) "The law is clear that the Agency's letter frames the issues on appeal." Mineral Solutions v. IEPA, PCB 2003-039, slip op. at p. 2 (April 3, 2003); see also Environmental Protection Agency v. Pollution Control Bd., 86 Ill. 2d 390, 405 (1981) ("The Agency had a duty . . . to specify reasons for the denial . . . or be precluded from raising that issue.") By going beyond the issues presented in this appeal, the Board exceeded its scope of review and lacked the necessary background to approve the Agency's Cross Motion. Summary judgment "is a drastic means of disposing of litigation, and therefore, should be granted only when the right of the moving party is clear and free from doubt." Dersch Energies v. IEPA, PCB 2017-003, slip op. at 12 (June 17, 2021)

With all due respect to the Board, and understanding the complex number of issues presented, Petitioner contends that the Board erred in granting the Illinois EPA's Cross Motion for Summary Judgment as to the Fourth Deduction.

**II. By Accepting the Waiver of the Decision Deadline, the Illinois EPA Deemed the Application Complete.**

In Petitioner's Response to the Cross Motion for Summary Judgment,

Petitioner argued that the Illinois EPA, by accepting the waiver of the decision deadline, necessarily deemed the application complete. (Petitioner's Response, at p. 5 (relying on Metropolitan Pier and Exposition Authority v. IEPA, PCB 20-73, slip op. at 23 (July 7, 2011)) Petitioner will not repeat the argument, but will clarify that Petitioner is not arguing that the application was somehow deemed approved by acceptance of the waiver, but that the application was deemed to be "complete," in "contain[ing] all of the elements and supporting documentation required . . ." by current Section 734.605(b) of the Board's UST Rules. (35 Ill. Adm. Code 734.605(b))

At a minimum, the Board's finding that the Petitioner failed to submit rental receipts or receipts of employee time billed are matters that were to be decided in the completeness review, and should be reversed.

### **III. Testimony Explaining Documentation in the Record Should be Considered by the Board.**

The purpose of the Board proceedings is to give the applicant the "opportunity to challenge" the reasons given by the Illinois EPA for denial "under the full panoply of safeguards normally associated with a due process hearing," which include consideration of the record before the Illinois EPA and the receipt of testimony and other proofs. Illinois EPA v. Illinois Pollution Control Board, 138 Ill. Ad3d 550, 551-552 (3<sup>rd</sup> Dist. 1985) Here, the reason given for denial is allusive at best:

**Additional information provided to the Illinois EPA indicated that the 16 hours for a laborer from Bandy Concrete & Excavation on**

**June 5, 2023 was invoiced in error and should be reduced to eight hours. Furthermore, there is insufficient documentation to support the time and materials invoiced by Bandy Concrete & Excavation based [sic] the work performed, per documentation submitted to the Illinois EPA.**

(A.R.209 (emphasis added))

Petitioner does not contest the first sentence but disputes the allegation in the second sentence that there was insufficient documentation submitted to the Illinois EPA. The Board hearing is a proper proceeding to hear testimony explaining documents in the record and is necessary to satisfy requirements of due process. Illinois Ayers Oil. Co. v. Illinois EPA, PCB 2003-214, slip op. at p. 17 (April 1, 2004); see also Dersch Energies v. Illinois EPA, PCB 2017-003, slip op. at 4 n.1 (Aug. 11, 2022) (following denial of cross motions for summary judgment, consultant testified by explaining 12 tasks deducted).

An explanation of matters in the Agency record can also be found in the record in the form of an April 3, 2024 email from the consultant. (A.R.200) The Board apparently did not consider this document for the reason that it was not “available to IEPA at the time of its determination.” (Interim Opinion, at p. 14) The Illinois EPA never explained why this document was in the Agency record which was certified pursuant to Section 105.410 of the Board’s Procedural Rules. (35 Ill. Adm. Code 105.410) Nor did the Agency move to amend the Agency record at any time.

Attached hereto is the Affidavit of Carol Rowe, stating that if called upon to testify she could testify to the explanations given in the April 3, 2024, email. This

explanation is the type provided by consultants in many underground storage tank hearings, including Illinois Ayers and Dersch Energies. Consideration of this explanation is necessary to provide Petitioner with the opportunity to challenge the Agency's denial reason, particularly given the vagueness of the denial reason and the Board's subsequent finding that rental receipts and employee charges were what the Illinois EPA must have meant.

WHEREFORE, Petitioner respectfully prays for an order reconsidering or modifying the Board Order of July 23, 2026, or for such other relief as the Board deems meet and just.

JESSE FOODMART, INC.,  
Petitioner,

BY: */s/ Patrick D. Shaw*

Patrick D. Shaw  
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**AFFIDAVIT OF CAROL ROWE**

Affiant, Carol Rowe, being first duly sworn, states as follows:

1. The statements made herein are based upon my personal knowledge, and I am competent to testify hereto.
2. I am President and senior geologist at CWM Company, an environmental consulting company which has been hired to provide environmental consulting services for JESSE FOODMART, INC. in relation to Incident No. 2023-0338 in Galesburg, Illinois.
3. I have worked with the Leaking Underground Storage Tank Program for over thirty-five years.
4. On April 3, 2024, I responded to four questions from Becky Fiedler of the Illinois EPA, and a true and correct copy of my response is on page 200 of the administrative record.
5. If given the opportunity to testify in this matter, I would testify consistent with the April 3, 2024 e-mail.

FURTHER AFFIANT SAYETH NOT.

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct, except as to matters therein stated to be on information and belief and as to such matters the undersigned certifies as aforesaid that he verily believes the same to be true.



\_\_\_\_\_  
Carol Rowe

Item 1.

There is no manifest for the liquid. It was taken to a fuel recycler for fuel recovery/blending.

Items 2 and 3.

Greg bandy's personnel on 6/5 and 6/6 included operators of excavator, skid loader, dump truck and general labor.

Below are activities included in the tank abandonment:

At the beginning the equipment is used to remove the dispensers from the bases and placed off to the side for future recycling. Both the excavator and skid loader were used for removal and movement of the dispenser, along with need of a labor to manage the dispenser.

After the dispensers were removed, the skid loader and excavator were used to break the concrete and remove the concrete over the piping, submersible pumps, other accesses to the tanks that need to be remove, buckets below the dispensers and areas excavated to allow access to clean out and fill the tanks with flowable fill. Various material was loaded on the truck such as concrete taken off site for recycling and metal piping and other such material for recycling.

After concrete was removed, the excavator and skid loader were used to remove the buckets from under the dispenser, expose and remove the piping that ran from the manway to the dispenses and access the area for the piping samples. Then the area from the submersible pumps to the manway was excavated down to expose the top about 25% of the tanks and one end to allow removal of submersible pumps and cutting a larger access to allow for internal cleaning and inspection of the tanks by the fire marshal. It was also used to remove tings like the pumps and piping, the metal plated cut for access and other heavy items from the excavation. When all these items, including backfill was removed from the excavation by the excavator, the skid loader was used to stockpile the backfill, load, or set aside the other items from the excavation. The laborer was engaged the whole time assisting the equipment operators.

The next step, after the tanks were cleared by the fire marshal, they were filled with flowable fill.

Once the flowable fill was in place, the process of backfilling the excavation was performed using both the excavator and skid loader. Stock piled backfill was first used to fill the excavation, then new material was placed to bring the area to grade. Laborer was also used to spread the backfill, remove the vent pipes, and pick up debris generated during the whole process.

This whole process to two days and was under the observation of the fire marshal.

Through out all above the dump truck was being used to remove waste material from the site or to bring in tools or to being used to bring in backfill material.

Item 4.

The product piping was removed as required.