BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

ILLINOIS AYERS OIL COMPANY,	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB No. 03-214
	)	
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
	)	
	)	
Respondent.	)	

NOTICE OF FILING AND PROOF OF SERVICE

TO: Dorothy Gunn, Clerk, Illinois Pollution Control Board, James R. Thompson Center, 100 W. Randolph, Suite 11-500, Chicago, IL 60601-3218

Carol Sudman, Hearing Officer, Illinois Pollution Control Board, 1021 North Grand Avenue East, P.O. Box 19274, Springfield, IL 62794-9274

John Kim, Illinois Environmental Protection Agency, Division of Legal Counsel, 1021 North Grand Avenue East, P.O. Box 19276, Springfield, IL 62794-9276

PLEASE TAKE NOTICE that on February 9, 2004, I sent to the Clerk of the Illinois Pollution Control Board the original and nine (9) copies, via U.S. mail, of Petitioner's Brief for filing in the above-entitled cause, a copy of which is attached hereto.

The undersigned hereby certifies that a true and correct copy of the Notice of Filing together with a copy of Petitioner's Brief, was served upon the Hearing Officer via U.S. mail and the Respondent via U.S. mail and facsimile, on the 9th day of February, 2004.

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THIS FILING SUBMITTED ON RECYCLED PAPER

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

ILLINOIS AYERS OIL COMPANY,	)	
	)	
Petitioner,	)	
	)	
vs.	)	PCB No. 03-214
	)	(UST Appeal)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
	)	
Respondent.	)	

PETITIONER'S BRIEF

NOW COMES Petitioner, Illinois Ayers Oil Company (hereinafter "Petitioner" or "Illinois Ayers"), by its undersigned attorneys, and for its brief states as follows:

I. INTRODUCTION

Petitioner seeks Board review of the Agency's decision to modify the proposed corrective action plan by reducing the number of soil borings and drastically slashing the budget from $52,367.96 to $22,074.77. These $52,367.96 is actually a reduction from an earlier budget proposal which is currently before the Board in Illinois Ayers v. IEPA, PCB No. 03-70. By reducing the scope of work and certain costs to $52,367.96, Petitioner had hoped to avoid litigation of this matter. Unfortunately, those concessions did not sate the Agency's appetite and the Board is now asked to decide whether the $52,367.96 is reasonable and appropriate.

Most of the problems with the Agency's decision stem from three major mistakes. First, the Agency Reviewer cut rates for personnel and equipment solely based upon a secret rate sheet which is illegal and incompetent evidence in this proceeding. Petitioner asks that the rate sheet and all testimony premised on the rate sheet be stricken. Second, the Agency Reviewer

eliminated ten direct-push soil borings on her mistaken assumption that soil conditions at the site were homogenous. The subject corrective action plan and the referenced Berg Circular clearly state the contrary. Finally, the Agency Reviewer concluded that each of the direct-push borings could be accomplished in an hour based upon a number of arbitrary assumptions and little attention to the technology of push-driven technology. Since a number of costs in the budget depend on the number of soil borings and the time requirements for a direct-push investigation, these last two mistakes resulted in corresponding reductions in a number of related costs which should not have been reduced, either. Petitioner asks that the Board approve the entire corrective action plan and budget, as submitted.

II. STATEMENT OF FACTS

Illinois Ayers operates a gasoline service station at 310 State Street, Beardstown, Cass County, Illinois. (Agency Rec., at p. 4) In 2000, a release was reported from three underground storage tanks on the property, each of which is eligible for reimbursement from the LUST Fund. (Agency Rec., at p. 82) The site was subsequently classified as a "high priority" site because one or more groundwater quality standards were exceeded at the property boundary line. (Agency Rec., at pp. 4 & 84)

Illinois Ayers hired CSD Environmental Services, Inc. (hereinafter "CSD Environmental") to perform remediation services related to the incident. CSD Environmental is an experienced civil and environmental consulting firm specializing in land development and environmental restoration projects. (Pet.'s Ex. 18(a)) On behalf of its client, CSD Environmental submitted corrective action plans and budgets to the Agency. The plan that is the subject of this

Board Appeal is entitled "'Revised' Phase 1 – Corrective Action Plan & Budget" and was submitted to the Agency for review and approval on December 4, 2002. (Agency Rec., at p. 1 et seq.) Before discussing the subject application, the events leading up to the revised plan and budget are pertinent.

The initial High Priority Corrective Action Plan was submitted to the Agency on June 20, 2002. (Pet. Ex. 6(A)) On October 11, 2002, the Agency rejected the plan because, *inter alia*, "the plan propose[d] direct push groundwater sampling. The Illinois EPA wishes to clarify that monitoring wells must be installed to obtain groundwater samples." (Pet. Ex. 6(A)) The Agency also rejected as excessive some of the hours and the number of soil samples to be taken. (Id.)

In an attempt to resolve these issues without an appeal, Illinois Ayers and the Agency obtained a ninety-day extension of the appeal deadline. See Illinois Ayers Oil Co. v. IEPA, PCB 03-70 (Nov. 21, 2002). Thereafter, representatives of CSD Environmental and the Agency met twice. (Hrg. Trans. at pp. 26 & 29)

In the first meeting, the parties discussed both the Illinois Ayers site and another CSD Environmental project in Gibson City, Illinois, called the Royal Oil site. (Hrg. Trans. at pp. 68-69) Both projects involved direct-push groundwater sampling and were "essentially identical." (Hrg. Trans. at pp. 69) Joseph Truesdale, a professional engineer with CSD Environmental, brought to the Agency's attention an Agency fact sheet stating that push-driven technology is acceptable for sampling both soil and groundwater. (Hrg. Trans. at pp. 33-34, Pet. Ex. 9) Doug Clay of the Agency conceded this to be true. (Hrg. Trans. at p. 34) The Agency agreed to approve the investigation plan for the Royal Oil site, but requested a second meeting to independently discuss the Illinois Ayers site. (Hrg. Trans. at p. 70)

At the second meeting, Truesdale emphasized that the investigation plan for Illinois Ayers was the same as that approved for Royal Oil. (Hrg. Trans. at p. 69) He noted on his copy of the denial letter: "NEED TO CLARIFY LIKE ROYAL OIL." (Hrg. Trans. at p. 60; Pet.'s Ex. 6) Truesdale justified to Agency representatives the number of hours for the work (Hrg. Trans. at pp. 36-38, 56) and the number of soil samples. (Hrg. Trans. at p. 67) At the request of the Agency, he described how the direct-push ground water samples would be obtained, drew diagrams depicting the equipment and strategy, explained average number of lineal feet of borings that could be accomplished in a day and identified the proposed locations for the borings. (Hrg. Trans. at pp. 37-38) Truesdale testified that he felt that the Agency understood and agreed with his rationale. (Hrg. Trans. at p. 67)

The Agency asked for concessions on the number of hours for certain personnel and the number of soil borings. (Hrg. Trans. at pp. 56 & 67) These concessions were made in the hopes of avoiding litigation before the Board (Hrg. Trans. at p. 119), but as will be discussed later, they merely set the stage for the Agency to demand further reductions.

However, no understandings were reached with respect to the rates charged for personnel and equipment. Members of the Agency are not allowed to disclose an acceptable rate to the public, even at meetings intended to resolve budget disputes. (Pet.'s Ex.2 at pp. 96-98) The Agency's denial letter does not disclose which rates are excessive and what an appropriate rate may be. (Admin. Rec. at p. 91) Thus, the only non-litigation resolution proposed by the Agency was to make arbitrary cuts as to rates.

After the last meeting, Illinois Ayers submitted a new application entitled "'Revised' Phase 1 – Corrective Action Plan & Budget" (Agency Rec. at p. 2) The accompanying correspondence indicated that the enclosed plan and budget contained revisions "[i]n accordance with our October 24, 2002 meeting." (Agency Rec. at p. 1) The Petitioner did not make any reductions in its standard rates, stating that its rates are actual billing rates and that the Agency's analysis of rates is statistically invalid. (Id.)

On March 27, 2003, Carol Hawbaker, the Agency Reviewer, reviewed the plan and budget. (Agency Rec. at p. 84) On March 28, 2003, the Agency issued a letter rejecting the plan and budget as submitted and modifying the plan by (a) reducing the number of direct-push soil borings from 13 to 3, and (b) reducing the budget from $52,367.96 to $22,074.77. (Admin. Rec. at pp. 86-92) Among the items reduced were those which had already been reduced as a concession to the Agency. For example, Petitioner reduced the number of hours for licensed professional engineering oversight from ten to five as a concession, but the Agency cut the hours to two. (Hrg. Trans. at p. 56) In addition, Petitioner eliminated laboratory analysis for ten soil borings as a concession to cost, only to have the Agency eliminate the ten soil borings as irrelevant without the chemical analysis. (Hrg. Trans. at p. 104)\

From the March 28, 2003 letter, Illinois Ayers brought this LUST appeal. The previous appeal concerning the initial corrective action plan is still pending before the Board and is currently stayed until the subject appeal is decided.

III. REGULATORY BACKGROUND

The purpose of a corrective action plan is to formulate a remedy "to mitigate any threat to human health, human safety, or the environment resulting from the underground storage tank release." (415 ILCS 5/57.7(b)(2)) If reimbursement from the LUST Fund will be sought, the plan must also be accompanied by a budget that includes 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 is directed to review and approve corrective action plans pursuant to Section 57.7(c) of the Illinois Environmental Protection Act. (415 ILCS 5/57.7(c)) In making its determination, the Agency must utilize "a procedure promulgated by the Board under Section 57.14." (415 ILCS 5/57.7(c)(3)) These procedural rules begin at Section 732.500 of the Board's rules. (35 Ill. Admin. Code § 732.500) Together, the Act and the Board's procedural rules govern the obligations of the respective parties and define the issues for review by the Board.

All plans submitted to the Agency must be made on forms proscribed by the Agency. (35 Ill. Admin. Code § 732.501) Within 45 days of receiving a plan, the Agency must conduct a completeness review "to determine whether all information and documentation required by the Agency form for the particular plan are present." (35 Ill. Admin. Code § 732.502(a)) If any information or documentation is missing, the Agency must notify the applicant of the specific type of information needed. (35 Ill. Admin. Code § 732.502(b)) If the Agency fails to notify the owner or operator within 45 days that a plan is incomplete, the plan is deemed complete. (35 Ill. Admin. Code § 732.502(d))

Assuming that the plan is complete, the Agency initiates a full technical and financial review of the corrective action plan and associated budget. (35 Ill. Admin. Code § 732.504(a)(1)) Such a review is described in the Board's procedural rules as follows:

> **A full technical review shall consist of a detailed review of the steps proposed or completed to accomplish the goals of the plan and to achieve compliance with the Act and regulations. Items to be reviewed, if applicable, shall include, but not be limited to, number and placement of wells and borings, number and types of samples and analysis, results of sample analysis, and protocols to be followed in making determinations. The overall goal of the technical review for plans shall be to determine if the plan is sufficient to satisfy the requirements of the Act and regulations and has been prepared in accordance with generally accepted engineering practices. . . .**
>
> . . .
>
> **A full financial review shall consist of a detailed review of the costs associated with each element necessary to accomplish the goals of the plan as required pursuant to the Act and regulations. Items to be reviewed shall include, but not be limited to, costs associated with any materials, activities or services that are included in the budget plan. The overall goal of the financial review shall be to assure that costs associated with materials, activities and services shall be reasonable, shall be consistent with the associated technical plan, shall be incurred in the performance of corrective action activities, and shall not be used for corrective action activities in excess of those necessary to meet the minimum requirements of the Act and regulations.**

(35 Ill. Admin. Code § 732.505(a),(c))

If the Agency determines that the plan should be rejected or modified, the Agency must give the owner or operator written notice within 120 days of receipt of the plan, and said notice shall be accompanied by a detailed explanation of the legal provisions which might be violated if the plan is approved, of the "specific" type of information, if any, which the Agency deems the applicant did not provide, and of the "specific" reasons why the law might not be met if the plan is approved. (415 ILCS 5/57.7(c)(4)(A)-(D))

Within 35 days of receipt of the Agency's decision, the owner or operator may appeal the Agency's decision to the Board. (415 ILCS 5/57.7(c)(4)) The Agency's denial letter frames the issues before the Board. Kathe's Auto Service Center v. IEPA, PCB 96-102 (Aug. 1, 1996). The Agency is precluded from raising additional reasons not specified in the denial letter. IEPA v. IPCB, 86 Ill.2d 390 (1981); Clinton County Oil Co. v. IEPA, PCB 91-163 (June 4, 1992). The burden of proof is on the petitioner. (415 ILCS 5/40(a)(1)) Once the petitioner has established a *prima facie* case, it becomes incumbent upon the Agency to refute the *prima facie* case. John Sexton Contractors Co. v. PCB, 201 Ill. App. 3d 415, 425 (1st Dist. 1990).

While the procedures in this appeal are based upon those in permit appeals, the roles of the parties are reversed. In a permit appeal, the Agency's role is to advocate those controls or restrictions which best protect the environment from pollution and its threats, while the permit applicant complains about the cost of those controls or restrictions. In UST appeals, the Agency seeks to protect the LUST Fund, while the petitioner seeks more environmental protection. The Board is the arbiter of those disputes, but in the final analysis it is environmental protection which is the reason for the existence of the Act, the Agency and the Board.

IV. ARGUMENT

A. THE RATE SHEET AND ALL TESTIMONY BASED UPON THE RATE SHEET SHOULD BE STRICKEN.

For a number of the contested issues, the Agency's decision was based solely upon a rate sheet. (Pet. Exhibit 2, at pp. 56, 68, 69, 70, 95) A redacted version of the rate sheet can be found as an attachment to Petitioner's Exhibit 3. (Pet. Ex. 3(Att. 3)) Petitioner sought, and was refused access to, the entire rate sheet and the data which forms its basis. Petitioner was also refused

access to portions of the rate sheet which were relied upon in this case. For example, the Agency Reviewer testified that rates for drilling labor, utility trucks, and job trailers were not reasonable based upon the rate sheet. (Hrg. Trans. at pp.179-80) The same was true for rates for the concrete coring machine and Bentonite chips, (id. at 182), the ph/ORP/temperature meter (id. at 184), the camera (id.), the number of USP sample shipments (id.), and the rate of the peristaltic pump. (Id.) None of these items is included in the redacted rate sheet given to Petitioners. The Agency's continuing assertion that it has provided "relevant" portions of the rate sheet is simply untrue. See Response to Motion for Interlocutory Appeal, ¶ 1.

With the caveat that there has not been anything close to complete disclosure of relevant portions of the rate sheet, Petitioner renews its legal objection to the rate sheet that the Agency stated was prematurely raised by pre-hearing motion. Id. at ¶5. Specifically, the rate sheet is an invalid rule which should be stricken and given no legal effect in this proceeding. Alternatively, the rate sheet is summary evidence which should be stricken and given no legal effect in this proceeding since the Agency refused discovery of the basis of said evidence.

1. The Rate Sheet is an Invalid *De Facto* Rule.

The Agency's rate sheet is an unpromulgated rule that violates the Illinois Administrative Procedure Act (hereinafter "the APA"). 5 ILCS 100/1 et seq. Under the APA, a rule means "each agency statement of general applicability that implements, applies, interprets, or prescribes law or policy . . .." (5 ILCS 100/1-70) The Agency's rate sheet implements an Agency policy proscribing the "maximum allowable cost" for a wide variety of items. (Pet. Ex. 2 (Att. 3)) The Agency Reviewer testified that she and other members of the LUST Section "are required to use

the rate sheets" as a matter of Agency "practice." (Pet. Exhibit 2, at p 70) In reviewing the reasonableness of any rate, the Agency Reviewer did not deviate one iota from the rate sheet or look at any information upon which the rate sheet was based. (Hrg. Trans. at 205) Brian Bauer, the LUST Project Manager most closely involved with the administration of the rate sheet, testified that the rate sheet was intended to promote consistency and speed of review. (Hrg. Trans. at p. 221) While these objectives are laudable, the rate sheet accomplishes the goal of consistency by creating "standards of general applicability" that implement the Act's requirement that only reasonable costs are reimbursed. The Illinois Supreme Court has ruled that there is "no doubt" that an agency policy for calculating reimbursable costs under Medicare is a rule of general applicability subject to strict adherence to the notice and comment provisions of the APA. Senn Park Nursing Center v. Miller, 104 Ill.2d 169, 178 (1984). Guidance or policy statements that determine the amount of money the State will compensate for services affect the rights and procedures available to people and entities outside the agency. Id.

While there are certain statutory exceptions to the notice and comment requirements, these are exceptions of "a limited nature [which] should be appropriately applied." Id. at 179. The exceptions the Agency believes apply are obvious from the cover page of the rate sheet:

> **Effective immediately the attached rate sheet should be used in the review of all budgets and reimbursement claims. The rate sheet is meant to be a guidance document therefore, any requests for reimbursement for costs above the amounts listed on the rate sheet if justifiable, should be discussed with your unit manager. Please note that the rate sheet is for internal use only.**

(Pet. Ex. 2 (Att. 2))

This bit of boilerplate reveals the Agency's legal strategy in defending its use of the rate sheet, but it tells us little about how the rate sheet is actually used. First, while the rate sheet

states that it is "for internal use only," the sole purpose of the rate sheet is to decide how much money people outside of the Agency will be paid. In order for the rate sheet to be exempt from notice and comment requirements, it must relate to the "internal management of an agency and not affect[] private rights or procedures available to persons or entities outside the agency." (5 ILCS 100/1-70(i)) Any question on this point is resolved by the Illinois Supreme Court's comparable ruling that the amount of money the state reimburses nursing homes does not relate "solely" to internal agency management. Senn Park Nursing Center, 104 Ill. 2d at 181.

Nor is it true that the rate sheet is merely guidance. According to the Agency Reviewer of this particular plan the Agency's practice is that "we are required to use the rate sheets." (Pet. Ex. 2, at p. 70) Similar testimony was provided by the Agency employee in charge of the rate sheets:

> **Q. . . . What is your understanding of how the rate sheet is intended to be used by project managers in a case where a rate presented in a high priority Corrective Action Plan budget is above the maximum rate found on the rate sheet?**
>
> **A. It would either be – that particular item would be either denied or modified down to the maximum level.**

(Hrg. Trans. at p. 217 (Bauer Testimony))

Now, Bauer admittedly refined his answer later under leading questions by the Agency's attorney (id.), but Bauer's answer is not only clear and unequivocal, but corresponds precisely with how the Agency Reviewer viewed her duty to the rate sheet. For each cost or expense to which the rate sheet applied, no other evidence was relied upon by the Agency. In other words, the public face on the LUST program minimizes the significance of the rate sheets, while in

reality, the rate sheet is the only thing that matters and project managers have no idea under what circumstances a larger rate would or could be justified.

Nonetheless, whether or not project manager's have the discretion to exceed the maximum costs allowed in the rate sheet, this does not make the rate sheet any less an "agency statement of general applicability that implements, applies, interprets, or prescribes law or policy." (5 ILCS 100/1-70) The rate sheet is not issued on a case-by-case basis; it is not a statement made specifically about Illinois Ayers. It is a statement of Agency policy applicable to "all budget and reimbursement claims." (Pet. Ex. 2 (Att. 2)) Even the Agency's explanation of the program indicates that there is a general statement of policy which discriminates between costs which exceed the "maximum allowable cost" and those which do not.

By testifying that the purpose of the rate sheet is to promote consistency and speed of review, the Agency has admitted that it has moved away from any pretense of adjudicatory decisionmaking in UST reimbursement decisions. In Platolene 500 v. IEPA, PCB No. 92-9 (May 7, 1992), the Agency told the Board that it had elected not to promulgate rules, but instead make case-by-case adjudications. Id. at pp. 13-14. The Board commented on the practical problems with such an approach, namely the utter lack of guidance to applicants and the ultimate necessity of a Board appeal to determine what costs are reimbursable. Id. at 14. To these problems must be added that case-by-case determinations do not lend themselves to consistency or speed, since each budget request must be evaluated on its specific facts without reliance upon general standards. In Platolene 500, the Board held that Agency guidance (if that is what this is) can have no legal or regulatory effect in these proceedings. Id.

Finally, the APA forbids the Agency from engaging in ratemaking unless expressly authorized to do so by statute and without promulgating rules which define the practice and procedure to be followed in setting rates. (5 ILCS 100/5-25; see also 5 ILCS 100/1-65 (definition of "ratemaking") Assuming in *arguendo* that the Agency's statutory authority to reimburse "reasonable" costs gives the Agency authority to set rates, then the Agency was obligated to promulgate rules which would determine how such rates would be set. The Agency is further restricted in its exercise of discretion by section 5-20 of the APA, "which requires that an agency define as clearly and precisely as possible the standards by which it will exercise its discretionary power in order to fully inform those affected." Guzzo v. Snyder, 326 Ill. App. 3d 1058, 1062 (3rd Dist. 2002) (citing 5 ILCS 100/5-20)). Together, these provisions of the APA indicate that the Agency should promulgate rules or propose rules to the Board.

The problems with the Agency's secret rate setting are numerous. The practice spurs litigation. The only way Petitioner learned what rates were acceptable and which were not acceptable to the Agency was by bringing this appeal. Second, errors in calculations cannot be corrected through the scrutiny of others. Testimony in this hearing indicated that the Agency uses a statistical methodology for sampling which introduces bias. (Hrg. Trans. at pp. 237-38) The Agency's "expert" on the rate sheet heard this testimony and then left the room without response. (Hrg. Trans. at p. 239)[1] The Agency does not at all feel compelled to respond to criticism about its closely-guarded secrets. The final problem with secret rules is that it violates the spirit of open government, encouraging cynicism and loss of confidence in the government.

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[1] Brian Bauer took a single class in basic statistics fifteen years ago. (Pet.'s Ex. pp. 27-28)

In summary, the rate sheet is a *de facto* rule which should be given no legal effect in this proceeding. Since the Agency relied exclusively on the rate sheet in rejecting rates as unreasonable, the corresponding costs should be restored to the budget.

2. In the Alternative, the Agency's Refusal to Disclose the Basis of the Rate Sheet Prohibits its Use as Evidence.

Assuming that the rate sheet is found not to be an illegal rule, the question remains as to whether the rate sheet has any legitimate evidentiary value in an adjudicatory proceeding. Where an Agency is reluctant to disclose information it wants protected from the public, its choices are not without consequences:

> **Although one cannot force a government agency to disclose information is deems confidential, the government has the option of holding back such information and taking the risk of not being able to prove its case, or of producing the material and allowing it to be subject to cross examination.**

(2 Am. Jur. 2d, Administrative Law § 330 (citing Wirtz v. Baldor Electric Co., 337 F.2d 518 (D.C. Cir. 1964).

In Wirtz, the government was calculating the prevailing minimum wage in the electrical industry based upon employer surveys obtained under a pledge of confidence. Wirtz, 337 F.2d at 522. Employers that did not pay the prevailing minimum wage were to be denied certain government contracts. Id. at 520 n.1. In an administrative hearing to set aside the wage determination, the government refused to disclose the underlying data on which the wage conclusions had been reached, but instead offered into evidence tables summarizing the data. While the Court of Appeals refused to compel the government to disclose the underlying data under those circumstances, it held that the government could not support its decision based upon

summaries of evidence that it refused to disclose the opposing party. Id. at 526-27. In support of this conclusion, the Court of Appeals stated that the rules of evidence permit the introduction of summary evidence only if "the documents supporting the tables and on which they are based [are] introduced or at least made available to the opposing party." Id. at 526. Furthermore, the federal Administrative Procedure Act give parties the right to rebut evidence and conduct such cross-examination as may be required for a full and true disclosure of the facts. Id. at 525. A right to rebut and challenge the government's case was impossible without an opportunity to review the underlying data:

> **It is difficult to see how the accuracy, authenticity and relevancy of these tabulations could be tested in any way without the disclosure of the . . . data upon which the tabulations are based. The tabulations were complied from data which was kept secret, but which was in the possession of the [government]. Errors in the computation could not be checked . . . and the real meaning of the figures could not be developed unless the character of the individual sales could be inquired into.**

Id. at 526-27.

Similarly, if the rate sheet is seen as a compendium of data summarized by the Agency and not as a rule, then Petitioner should have been given access to the underlying data and not merely summaries of the data or more specifically selectively-redacted summaries. The rules of evidence and administrative law that were applicable in Wirtz are also applicable in this proceeding. Illinois' APA also gives parties to administrative hearings a right to respond to evidence and argument (5 ILCS 100/10-25(b)), and to conduct cross-examination (5 ILCS 100/10-40(b)). Under the Act, parties to proceedings before the Board have a right to cross-examination. (415 ILCS 5/32) Since the Agency's decision on several matters is based solely upon the rate sheet, the only means a party has to challenge the Agency's decision is to examine

the facts surrounding the rate sheet. The only opportunity to dispute evidence relied upon by the Agency is in the Board's hearing. EPA v. PCB, 138 Ill. App. 3d 550, 551 (3rd Dist. 1985).

Similarly, Illinois law follows federal evidence law with respect to summaries. See People v. Wiesneske, 234 Ill. App. 3d 29, 41 (1st Dist. 1992) (applying Federal Rule of Evidence 1006).[2] It has also long been a rule of evidence in Illinois that summaries may only be considered if the documents summarized are made available in court or otherwise made available to the opponent. Heller Financial, Inc. v. Johns-Byrne Co., 264 Ill. App. 3d 681, 692 (1st Dist. 1994); see also In re Marriage of DeLarco, 313 Ill. App. 3d 107, 116 (2nd Dist. 2000) (summaries of billing records inadmissible). A summary of evidence can only be admissible if the underlying materials upon which the summary is based are admissible. Wiesneske, 234 Ill. App. 3d at 44 (holding that most of the underlying data would have been admissible, but the summaries were also based in part upon discussions that were inadmissible hearsay). In other words, the admission of summary evidence is premised upon the notion that it is the underlying data (the best evidence) which is actually being admitted, albeit in a more convenient form. Illinois law and the fundamental mechanics of the adversarial process require the underlying data to be subject to examination and possible challenge.

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[2] **The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at reasonable time and place. The court may order that they be produced in court.**

(Fed. R. Evid. 1006 (emphasis added))

Substantial questions were raised about the rate sheet in this hearing. First, a number of the rates rejected were previously approved in earlier applications, raising the highly suspect notion that the Agency's statistical analysis reveals falling prices. (Hrg. Trans. at pp. 135, 137) Second, since the Agency not only keeps its rates secret, but also the categories for which it keeps rates, neither the private consultants nor the Agency project reviewers know for certain what any of the titles mean (such as project engineer). (Hrg. Trans. at p. 138; Pet.'s Ex. 2, at p. 88) The only way to know whether categorical rate correctly applies to any job description would be to examine the underlying data. Finally, the Agency's description of how it obtains a representative sample (subjectively eliminating budgets from the same consultant) for establishing a "reasonable" statistical range indicates that it is introducing bias into its equations. (Hrg. Trans. at pp. 237-38)[3] Without access to the underlying data, however, these problems cannot be fully examined. Petitioner was not even allowed to challenge the rate sheet with Petitioner's own list of Agency decisions in which the rates were accepted. (Hrg. Trans. at p. 156; Pet.'s Ex. 19)

The purpose of this proceeding is to allow Petitioner the opportunity to challenge the basis for the Agency's decision. EPA v. PCB, 138 Ill. App. 3d 550, 551 (3rd Dist. 1985); Kathe's Auto Service Center v. IEPA, PCB 96-102 (Aug. 1, 1996). To allow the Agency to base its decisions concerning rates on a document that cannot be subjected to traditional avenues of

[3] Another potential source of bias in the sampling is its limitation to budgets submitted to a single consumer, the Agency. This can have a downward bias if, for example, a consultant submits lower rates in order to avoid litigation before the Board. The more frequently a consultant lowers rates to appease the Agency, the less the information on rates in the Agency's records reflect prevailing market rates. This bias can only be eliminated by expanding sampling beyond a single consumer.

adversarial examination would involve nothing less than elevating the rate sheet to the status of a rule. The Agency cannot have it both ways – it cannot both base its decisions on the rate sheet, while keeping its details secret.

B. TECHNICAL REVIEW OF THE CORRECTIVE ACTION PLAN

1. The Requirements of the Act and the Regulations Will Be Met If the Remedial Investigation Includes Thirteen Direct Push Borings and Not Merely Three.

The Agency modified by the corrective action plan with the following condition:

> **The plan includes 13 additional "direct push" soil borings to better define and evaluate the extent and relative distribution of petroleum contaminants in the subsurface. The plan proposes that only 3 of these direct push soil borings will be sampled for BTEX concentrations. Therefore, it appears as though the remaining 10 direct push soil borings would be to classify and log the subsurface soils in connection with the 13 direct push groundwater sampling probes to define groundwater extent. For the purposes of reimbursement, as the soils were previously classified at the site during site classification activities, the additional 10 direct push soil borings are in excess of those necessary to meet the minimum requirements of Title XVI of the Act for corrective action investigation; costs for such activities are not reimbursable (Section 57.5(a) of the Act and 35 IAC 732.606(o)).**

(Joint Ex. at pp. 86-87 (emphasis added)

The Board's rules recognize that corrective action may include additional soil and groundwater examination. (35 Ill. Admin. Code § 732.404(e) (additional investigation activities, "include, but are not limited to, additional soil borings") Additional investigation was deemed necessary by the project's professional engineer because of information learned during soil classification activities. As part of soil classification activities, a licensed professional engineer

must verify whether the physical soil classifications are consistent with the "Berg Circular."[4] (415 ILCS 5/57.7(a)(3)) Here, the Berg Circular indicated that the geologic materials beneath the site are designated A2 and/or AX, which consists of "thick permeable sand and gravel within 20 feet of land surface and/or modern river alluvium consisting of a mixture of gravel, sand, silt, and clay along streams, variable in composition and thickness." (Agency Rec., at p. 8 (emphasis added)) Such soil conditions pose a high potential for both surface and groundwater contamination. (Agency Rec., at p. 8)

Petitioner verified the classifications in the Berg Circular were correct:

> **The actual geology encountered at the site was representative of "AX" type stratigraphy, containing assemblages of sand, silt, and clay in varying proportions, to a depth of approximately twelve (12) to fifteen (15) feet below the ground surface at which point clean sands and gravel representative of "A2" type stratigraphy were encountered.**

(Admin. Rec. at p. 9 (emphasis added))

A diagram of a stratigraphic cross section was included in the corrective action plan (Admin. Rec. at p. 19), along with these discussions of the actual soil conditions and the information drawn from the Berg Circular. Having verified that site conditions conform to those described in the Berg Circular, there was still inadequate information to determine the "the full extent of soil or groundwater contamination and of threats to human health and the environment." (35 Ill. Admin. Code 732.404(e)) The Act also requires an investigation and remediation of natural migration pathways, which the Board defines as "natural routes for the transport of mobile petroleum free-liquid or petroleum-based vapors including, but not limited to

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[4] The Illinois Geological Survey Circular (1984) titled "Potential for Contamination of Shallow Aquifers in Illinois," by Berg, Richard C. et al.

soil, groundwater, sand seams and lenses and gravel seams and lenses." (35 Ill. Admin. Code § 732.103)

Because soil conditions at the site were determined to be variable, Petitioner did not have enough information to determine the extent of BTEX contamination. Joseph Truesdale, a professional engineer with CSD Environmental, explained:

> **The Act requires evaluation of potential natural migration pathways. Since the soils at the site were specified as variable in composition and thickness without quantifying that variability across the potential limits of the plume, there would be no way to fully evaluate those identified natural migration pathways or, as a matter of fact, would not be able to identify those potential natural migration pathways on off site locations, whatsoever.**

(Hrg. Trans. at p. 72)

In order "to better define and evaluate the extent and relative distribution of petroleum contaminants in the subsurface," Petitioner proposed to advance six on-site "direct-push" soil borings and seven off-site "direct-push" soil borings. (Agency Rec., at p. 6) The location of these thirteen soil borings would also be used for taking groundwater samples from each of these thirteen locations. (Id.) Since the groundwater samples are to be taken within two feet of the soil borings, there are a total of 26 borings proposed at 13 locations. (Id. at 68) Modeling from the initial site classification work was used to determine the number and location of the direct-push borings. (Pet.'s Ex. 1, at p. 6) The proposed direct-push boring were identified on a map submitted with the plan and labeled B-5 through B-17. (Agency Rec., at p. 16) At the hearing, Truesdale testified on the location and number of borings:

> **We proposed a total of 13 direct-push soil and ground water sampling locations, the majority of which were down gradient from the source, some of which were in the source area. A single location was up gradient, in order to characterize potential input of contamina[n]t mass from an off site location.**

And the final boring location was placed side gradient to evaluate additional potential contaminant flux from a second potential off site location.

. . .

As we discussed in the meeting with the Agency personnel, boring B5 was located to evaluate potential source contaminant mass flux from an off site location located to the east of State Street. Boring B6 was also located in order to evaluate flux from a potential – a second potential off site source located to the south of Fourth Street. The remaining borings, B17 was located at that approximate distance based on preliminary ground water contaminant transport modeling conducted using TACO equation R26, as outlined in the application. The remaining three off site borings were located so as to evaluate the lateral spread of the plume across the approximate center line as estimated, using equation R26.

(Hrg. Trans.. at pp. 41-43)

Truesdale testified that thirteen borings at the described locations is the minimum that would be necessary to achieve the Act's goals, and in fact, more borings may ultimately be required. (Hrg. Trans. at p. 72) He also testified that this plan was prepared in accordance with generally accepted engineering practices. (Hrg. Trans. at p. 97) The investigation approach taken was consistent with USEPA guidance entitled "Expedited Site Assessment Tools for Underground Storage Tank Sites," a copy of which was brought to the Agency's attention prior to filing the subject plan and budget with the Agency. (Hrg. Trans. at pp. 65-66; Pet.'s Ex. 10)

At the locations identified in the map accompanying the plan, Truesdale proposed taking both soil and groundwater samples using direct-push technology. (Agency Rec., at p. 6; Hrg. Trans. at p. 35) As the Agency Reviewer previously rejected the use of such technology for taking water samples (Joint Ex. 6(A) at ¶5), the nature of this emerging technology may need some explanation. In April of 2001, the Agency published guidance entitled "Use of Push-Driven Technology." (Pet.'s Ex. 9) This document describes push-driven technology as a "useful

and cost-effective technology, which yields accurate and representative soil and groundwater samples." (Id.) This technology may be used to "investigate contaminant migration along natural and man-made pathways." (Id.)

While the corrective action plan states that 13 direct-push soil borings will be advanced, soil samples will only be taken from three locations for laboratory analysis. (Agency Rec., at p. 6) Originally, Petitioner proposed that soil samples be taken and tested from all thirteen locations, but as a concession, Petitioner would only "log and screen" the soil borings at ten of the locations without laboratory backup. (Hrg. Trans. at p. 104) This would be done in accordance with the Board's rules at Section 732.308. (Agency Rec., at p. 68) Even without quantitative chemical analysis, these soil borings should provide useful qualitative information concerning soil conditions and characteristics of potential migration pathways, including soil constituents, consistency, moisture content, nature and extent of sand or gravel seems and/or lenses, visual and olfactory evidence of contamination and volatile organic vapor concentrations based on field screening with instruments capable of detecting such vapors. See 35 Ill. Admin. Code § 732.308(a). While the Section 732.308(a) rules are in the subpart dealing with site evaluation and classification, the purpose of these soil borings is not to re-classify the soil, but "to better define and evaluate the extent and relative distribution of petroleum contaminants in the subsurface." (Admin. Rec. at p. 6)

In summary, initial investigation identified variable soil conditions, which make it particularly difficult to know the extent and nature of the contamination at the site. This investigation also revealed the need for further investigation of natural migration pathways to be investigated, remediated and restored. This information was in the corrective action plan

submitted to the Agency. Its veracity and sufficiency was supported from a licensed professional engineer, Joseph Truesdale, the only person with such qualifications testifying in these proceedings. His resume is in the record (Pet.'s Ex. 8) and he testified to his qualifications and his previous experience in direct-push operations. (Hrg. Trans. at pp. 22-24, 40) There was no other comparable testimony at the Board's hearing.

The Agency's denial is premised on a number of errors, but particularly, the false belief that the soil conditions at the site were homogeneous. The Agency Reviewer's testimony is clear:

> **Q. So tell me, do you know whether the soils at offsite locations at this Beardstown gas station are known to be uniform homogeneous soils?**
>
> **A. According to their site classification report, yes, that is what they found.**
>
> **Q. Okay. And if that were not in the site classification completion report and that finding were not made, would you change your view that perhaps they need to do some soil investigation as part of this Phase 1 Plan?**
>
> **A. <u>If we had found some layers that seemed to be heterogeneous in the site, yes.</u>**
>
> **However, that was not the case.**
>
> **Q. So the fact that the soils at off-site locations were known to be uniform homogenous soils –**
>
> **A. Regional soil geology has been proven to be uniform at the site.**
>
> **It can be assumed that it is uniform off-site as well.**

(Pet.'s Ex. 2, at pp. 21-22 (emphasis added))

> **Q. And in this particular case you believe that during site classification they confirmed that the Berg Circular properly described regional geology?**
>
> **A. If I remember correctly it did. I know it was an AX classification.**

Essentially what it was determined it was, it was homogenous throughout the site.

Q. That's what you recall?

A. Yes.

Q. And that's why some of the cuts were recommended by you in your review letter to the Agency – to the client in this case, because they had already confirmed, and it was homogenous?

A. It was not going to give us any additional information that would be helpful.

Q. Okay.

A. I have very sites in Beardstown.

Beardstown is old hat. I would be very, very surprised to find something that is not sand there.

I think what are you four blocks from the river? It's all sand.

(Pet.'s Ex. 2, at pp. 100-101)

Had the Agency Reviewer read the corrective action plan instead of relying upon her recollection of nearly two years at the Agency, she would have known that the Berg Circular did not describe soil conditions as homogenous, but as a mixture of gravel, sand, silt, and clay which was "variable in composition and thickness." (Agency Rec., at p. 8) She would have also read that the actual geology encountered at the site was, in fact, a mixture of sand, silt, and clay in varying proportions. (Agency Rec., at pp. 9 & 19) Attached hereto as Exhibit A is a stratigraphic cross section which was included with the corrective action plan. (Agency Rec. at p. 19)

The primary reason for reprinting large chunks of the Agency Reviewer's testimony is in case there is any doubt as the veracity of her testimony when she later testified that whether soils conditions were homogenous or heterogenous was "irrelevant" to her decision. (Hrg. Trans. at p.

202) Her previous testimony, taken under oath and with multiple opportunities for her to explain herself, is quite to the contrary. In fact, Hawbaker's testimony that her decision to reject the ten soil borings based upon her perception of soil conditions at the site is a judicial admission which cannot be withdrawn or rebutted by the Agency. In re Estate of Rennick, 181 Ill. 2d 395, 406-07 (1998). Judicial admissions are defined as deliberate, clear, unequivocal statements by a party about a concrete fact within that party's knowledge. Id. The Agency Reviewer clearly had personal knowledge of the reason for reducing the number of soil borings and the lengthy quotes from her testimony clearly show that her decision was based upon an erroneous assumption about soil conditions at the site. Her testimony cannot be changed as a matter of law.

Even if the Agency Reviewer's testimony can be adjusted, the explanation given at hearing requests this Board to make a highly dubious ruling. It is the Agency Reviewer's contention that regardless of local site or soil conditions, a high priority investigation plan can never include soil borings without chemical analysis. (Hrg. Trans. at p. 201) The Board has never before expressed rigid, inflexible limits on the scope of investigation during corrective action. See 35 Ill. Admin. Code § 732.404(e)("additional investigation activities beyond those required for the site evaluation and classification may be necessary"). Petitioner has proposed additional soil borings at new locations to obtain information additional to that which was obtained at the site classification stage. As the Agency Reviewer explained in her testimony, the initial site investigation work is merely "an initial assessment based on the Berg Circular." (Pet.'s Ex. 3, at p. 100)

There are two fallacies in the Agency Reviewer's position. First, it is not true that soil borings without chemical analysis can never provide useful information about the extent of

contamination. The Agency Reviewer's opinion overlooks the fact that even though chemical analysis is not proposed to be done on the ten soil borings (the Agency's own cost-saving strategy), there will be information on field observations (such as color and odors) and OVA/PID readings for petroleum vapors. See 35 Ill. Admin. Code § 732.308. The second fallacy is that information specific to soil conditions can never provide useful information as to the extent of contamination. The reason local soil conditions are investigated in the first place is to obtain information on the potential for contamination to migrate. The Act and the Board's rules require investigation and remediation of natural migration pathways, which requires an understanding of local soil conditions. In this case, it requires knowledge of local soil conditions beyond knowing simply that soil conditions vary.

The purpose of a technical review of the plan is "to determine if the plan is sufficient to satisfy the requirements of the Act and regulations and has been prepared in accordance with generally accepted engineering practices." (35 Ill. Admin. Code § 732.505(a)) The thirteen soil borings were proposed based upon site-specific conditions which were analyzed in depth by Petitioner's professional engineer. This is the minimum number of borings that would be necessary to achieve the goals of the Act and may not ultimately be enough. The Agency's contrary position is based purely on a mistake.

C. FINANCIAL REVIEW OF THE BUDGET

1. The Investigation Costs are Reasonable Given the Actual Length of Time to Perform the Direct Push Investigation.

The Agency eliminated $8,910.72 for Investigation Costs:

As 10 direct push borings are in excess of the minimum requirements of Title XVI, the Direct Push investigation should take 2 days to complete (8 direct push borings per day). Therefore, the costs for the direct push investigation, drilling labor, utility truck, job trailer, decontamination activities, and disposable sampling tubes have been modified accordingly. Please note that drilling labor and utility truck must be included in the Geoprobe per day cost. Job trailer is part of mobilization costs and are included in the mobilization rate. Sampling tubes have been modified from 70 to 6. In addition, costs for Direct Push investigation, drilling labor, utility truck and job trailer are not reasonable as submitted (35 IAC 732.606(hh))

(Agency Rec., at p. 90)

The Agency also eliminated $108.00 for the following investigation costs:

Costs for the concrete coring machine and bentonite chips are unreasonable and have been modified accordingly.

(Agency Rec., at p. 91)

Together the investigation costs eliminated from the budget total $9,018.72.

a. The Reduction to 10 direct-push borings is erroneous.

The Agency eliminated 10 direct-push borings in its technical review of the corrective action plan. Petitioner restates and reincorporates its arguments pertaining to that decision here.

b. The Time the Agency Claims that it Takes to Conduct the Direct-push Investigation is Erroneous.

Petitioner proposed 26 borings at 13 locations. (Agency Rec., at p. 68) The first boring would be for direct-push subsurface investigation and the second boring for direct-push

groundwater sampling. (Id.) The budget estimated 50 hours to conduct these 26 borings. (Id.) As per the Agency's forms, this estimate was based upon the number of feet to be bored; since each boring was to reach 20 feet, then there was a total of 520 feet to be bored. (Id.)

Before further explaining the basis of the 50 hour estimate, Petitioner would like to point out that it offered into evidence as a demonstrative exhibit, Truesdale's calculations that accompanied his testimony. (Pet.'s Ex. 13) This document was not admitted into evidence because it was redundant, but allowed under an offer of proof. (Hrg. Trans. at pp. 79-81) The primary issue in admitting demonstrative evidence is whether it will help the trier of fact understand the issues in the case. Burke v. Toledo, Peoria & Western R.R. Co., 148 Ill. App. 3d 208, 213 (1st Dist. 1986). This exhibit is available if it would help the Board.

Truesdale testified that in a meeting with the Agency he explained his figures and drew diagrams on the dry erase board to help. (Hrg. Trans. at p. 37) CSD Environmental conducted field tests in order to develop numbers for estimating the time it would take to conduct the direct-push investigation. (Hrg. Trans. at p. 40) There were three components to the analysis: (1) how long would it take to drill non-stop on a per-foot basis, (2) how long would it take to draw groundwater samples, and (3) how long would it take to mobilize on off-site properties. (Hrg. Trans. at p. 37)

Truesdale testified that in his experience, a team could drill between 140 to 170 feet in a ten hour day, and in this case he estimated 160 feet per-day. (Hrg. Trans. at p. 37) Given that there were 520 total feet to be drilled, this meant it would take 32.5 hours or 3.25 days simply to do the drilling.

The recovery of groundwater samples from direct-push technology is not instantaneous. Enough time must pass in order for groundwater to accumulate in the screen in order to be collected. (Hrg. Trans. at p. 37) Truesdale testified that it may take anywhere from 20 minutes to an hour-and-a-half for the groundwater to accumulate. (Hrg. Trans. at p. 46) Given local site conditions, Truesdale estimated it would take an average of a half-hour per groundwater sample. (Hrg. Trans. at p. 46) Since two groundwater samples were to be taken from each of the 13 sites (for a total of 26 groundwater samples), there would be 13 hours in which probing would stop in order to allow groundwater to accumulate.

Furthermore, the direct-push investigation on off-site locations will require an additional hour to move equipment and setup off site. (Hrg. Trans. at p. 37) Since there are five off-site locations to be investigated, Truesdale added five hours to his estimate.

This brings the direct-push investigation to a total of 50.5 hours (which was rounded down to 50 hours on the budget). The Agency's belief that the work could be done in 16 hours is without basis. Even if ten soil probes were eliminated from the corrective action plan, there would still be 13 hours in which groundwater was being collected. Since the Agency had previously denied that direct-push technology can be used to sample groundwater, the unmistakable impression is that the Agency is not fully familiar with the benefits and limits of this technology.

The Agency Reviewer admitted that she did not know how long it would take to conduct the direct-push investigation, so she asked Harry Chappel, her unit manager. (Pet.'s Ex. 2, at p. 32) Chappel testified that he was asked his opinion on the number of direct-push borings that could be done in a day and he responded eight. (Pet.'s Ex. 3, at p. 27) Chappel was never told

any information about the site, was not told that groundwater samples would be taken, was not told how many feet were to be drilled and was not told about any site or soil conditions. (Pet.'s Ex. 2, at pp. 32-33; Pet.'s Ex. 3, at pp. 34-36; Hrg. Trans. at pp. 209-10)

The Agency Reviewer's conclusion that eight probes per day is reasonable is based upon the erroneous assumption that all probes are the same. The Agency Reviewer had no information that the total number of hours was unreasonable other than an off-hand question to her supervisor that lacked any of the details necessary to make an informed decision. In contrast, Truesdale testified in depth about his experience and the numerous practical considerations which were relied upon in reaching the appropriate 50 hour estimate.

c. Other Investigation Costs Are Reasonable Given These Time Considerations and the Unrebutted Evidence of the Reasonableness of the Rates.

The remaining investigation costs were reduced by the Agency based upon the assumptions that the direct-push investigation would take only two days. Since the direct-push investigation will take fifty hours (5 days), the Agency's reductions are erroneous. These costs are located in the chart on the bottom half of page 68 of the Agency Record.

Truesdale testified that the decontamination equipment will be needed for five days in order to decontaminate equipment between borings, (Hrg. Trans. at p. 53 & 89), labor will be needed to run the decontamination equipment (id. at 89), a concrete coring machine is needed for five days in order to provide an opening in impervious materials (id. at 53), the disposable sampling tubes are needed in order to extract the soils to be logged (whether or not a chemical sample will be taken) (id.), drilling labor is needed to conduct the work (id.), utility locate is required before digging on-site (id.), the utility truck and job trailer are required (id. at 53-54 &

91) and the Bentonite Chips are required to seal the bore holes in order to prevent additional flux of contamination to the subsurface (id. at 54).

It is unclear how cuts were made to these investigation costs. The Agency Reviewer merely testified that she cut other investigation costs from five days to two days. (Hrg. Trans. at p. 179) In addition, the Agency Reviewer testified that costs associated with the direct-push investigation, drilling labor, utility truck, job trailer, concrete coring machine and Bentonite chips were unreasonable based upon her comparison with the rate sheet. (Hrg. Trans. at pp. 180-81) For the record, Petitioner was never provided those portions of the rate sheet relating to these items. (Pet.'s Ex. 3, Att. 3) Cindy Davis offered unrebutted testimony as to the reasonableness of all of these rates. (Hrg. Trans. at pp. 144-46)

Since most of the reductions for other investigation equipment derive from the Agency Reviewer's reduction of the investigation plan from five days to two days, a change that should be rejected, Petitioner asks that these costs be restored given the evidence that it will take five days. Furthermore, to the extent that the Agency cut rates based upon a secret rate sheet, those cuts should be restored because the rate sheet should be given no legal effect in this proceeding.

In summary, Petitioner asks that $9,018.72 in investigation costs be restored.

2. The Analysis Cost Necessary to Calculate TACO Objectives Should Be Restored.

The Agency eliminated $490.00 for analysis costs:

> **The following analyses have cut from the budget: moisture content analysis, Foc analysis, bulk density, particle density. In addition, there is no mention in the plan that soil cuttings will be transported to a landfill. Therefore, pH, paint filter, flash point and TCLP lead have been cut from the budget.**

(Agency Rec., at p. 91)

The budget contains $3,010.00 in analysis costs. (Agency Rec., at pp. 70-71) Joseph Truesdale explained the importance of the analyses the Agency proposes to cut:

> **In order to develop risk based objectives for subsequent determination of appropriate clean up levels, these parameters must be obtained during investigation in order to calculate the appropriate risk based objectives under TACO.**

(Hrg. Trans. at p. 65)

The Agency Reviewer also stated that she relied upon the rate sheet in eliminating and/or reducing the ph/ORP/temperature meter. (Hrg. Trans. at p. 184) Therefore the $490.00 for analysis costs should be restored as both reasonable and necessary.

3. The Personnel Costs are Based Upon Reasonable Rates and Work Necessary to Complete the Corrective Action Plan.

The Agency eliminated $18,450.00 in personnel costs:

> **The following job titles have been modified to a more reasonable rate and time to complete tasks: Professional Engineer, Project Engineer, and Staff Geologist. In addition the Job title Field Manager has been cut from the budget for excessive personnel at the site. In addition, as the plan has been modified, the hours attributed to the above titles exceed the minimums to comply with Title XVI (35 IAC 732.505(c))).**

(Agency Rec., at p. 91)

The Agency provided a breakdown of its rate and time reductions. (Pet.'s Ex. 11, at ¶3(d)) The rate reductions are based entirely upon the illegal rate sheet and should be rejected outright. Without waiving said objection, Petitioner states that the rates and time are not excessive for the following reasons:

a. Professional Engineer.

The Agency appears to have cut the number of hours for the professional engineer from 5 hours to 2 hours. (Pet.'s Ex. 11, at ¶3(d)) Truesdale testified that by law the professional engineer is required to oversee all phases of the work, which he is signing and certifying. (Hrg. Trans. at p. 56; see 225 ILCS 325/14 (Professional Engineering Practice Act); 68 Ill. Admin. Code 1380.300(a)(2) (implementing regulations). "[T]wo hours is obviously not enough time to oversee the . . . upward of 400 hours that are specified in the plan elsewhere under the other items." (Hrg. Trans. at p. 56) In fact, five hours is not enough in Truesdale's opinion, but he reduced the time as a concession to the Agency. (Id.) According to the Agency, all the professional engineer needs to do is thumb threw some documents and sign-off on them. (Pet.'s Ex. 3, at p. 67)

Cindy Davis, owner of CSD Environmental, testified at the hearing as to the basis of the $150 hourly rate for professional engineer. (Hrg. Trans. at pp. 134-42) The rate is arrived at by considering the employee's salary, the employer's tax contributions, and a standard engineering profit multiplier which takes into consideration employee health insurance, overhead costs and company profit. (Id. at 134) This is the standard way it is done in the engineering business. (Id. at 142) She testified that employee salaries are comparable to Agency salaries. (Id. at 135) The resulting rate of $150-per-hour is the company's usual and customary rate for all services, including those paid by CSD Environmental's customers. (Id. at 135-36) The Agency has also approved this rate before. (Id.) In fact, the Petitioner attempted to submit into evidence the identity of numerous projects in which the Agency had previously approved rates which it now

challenges. (Pet.'s Ex. 19)[5] In setting the rate of $150-per-hour, Cindy Davis was familiar with rates charges by other companies in the industry. (Hrg. Trans. at pp. 136-37)[6] Cindy Davis also purchased a survey that provided standard billing rates for professional engineers in small Midwest firms at between $132 to $155 per-hour. (Hrg. Trans. at p. 140)

b. Project Engineer.

The project engineer's hours were reduced from 156 hours to 40 hours. (Pet.'s Ex. 11, at ¶3(d)) The project engineer's hours are for the design and development of the corrective action plan and the corrective action plan budget, correspondence with the Agency and with the client, coordinating the investigation project, meeting with the Agency and preparing the reimbursement request. (Hrg. Trans. at p. 59) Truesdale testified that 156 hours is necessary to do the work in the plan in a way that complies with the Act. (Hrg. Trans. at pp. 59-60) When asked by the Agency's attorney to explain how she reached 40 hours, the Agency Reviewer testified that she "felt" that 40 hours should be ample time. (Hrg. Trans. at p. 189)

The project engineer's hourly rate is $114-per-hour. (Agency Rec., at p. 72) These rates were also based upon the same standard formula discussed supra with respect to professional engineers. (Hrg. Trans. at p. 141) Moreover, the Agency has previously and repeatedly approved a rate of $114-per-hour for project engineers. (Hrg. Trans. at p. 137) Furthermore, the survey

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[5] Petitioner submitted a list of projects in which the Agency had previously approved rates which are now deemed unreasonable. This information is directly relevant to the issue of whether or not these rates are reasonable and should have been admitted.

[6] Cindy Davis testified to her knowledge of comparable rates in the industry based upon experience in taking over projects from other companies, Freedom of Information Act queries, participation in the Consulting Engineers Council, and annual seminars in which pricing issues are discussed. (Hrg. Trans. at pp. 136-37)

purchased by Cindy Davis stated that project engineers in small Midwestern firms were charging approximately $120 to $130 per-hour. (Hrg. Trans. at p. 140)

c. Staff Geologist.

The Staff Geologist's hours were reduced from 88 hours to 40 hours. (Pet.'s Ex. 11, at ¶3(d)) The Staff Geologist's job is to perform the R26 modeling and CAP design. (Hrg. Trans. at p. 56) Truesdale testified that the number of hours were necessary for the described tasks and were not excessive. (Hrg. Trans. at pp. 57-58)

Petitioner submitted a budget in which the Staff Geologist would be paid $72.00 per hour. (Agency Rec., at p. 72) Since the rate sheet has a maximum rate of $86 per hour (Pet. Ex. 2 (Att. 2)), the Agency did not cut this rate. (Pet.'s Ex. 11, at ¶3(d))

d. Field Manager.

All of the Field Manager's eight hours were cut as excessive. (Pet.'s Ex. 11, at ¶3(d)) The Field Manger's job was to collect groundwater samples. (Agency Rec., at p. 73) A field technician was also tasked to help collect groundwater samples for the same eight hours. (Id.) If either of these positions was eliminated, it would take twice as many hours (16) to perform the task. (Hrg. Trans. at p. 56) Furthermore, the position that would need to be eliminated would not be the more-experienced Field Manager ($90 per hour), but the less-experienced Field Technician ($66 per hour). (Hrg. Trans. at p. 56) However, Truesdale testified that OSHA regulations do not allow one person to perform this function unassisted. (Id. at 56) OSHA

regulations require the use of a "buddy system" when handling potentially hazardous materials in order to provide rapid assistance in the event of an emergency. (29 CFR Part 1910)

The Agency did not object to the Field Manger's hourly rate, and it is a rate that has been approved in the past. (Hrg. Trans. at p. 137) Therefore, there is no question that the rate is reasonable.

For the foregoing reasons, all personnel costs must be restored.

4. The Equipment Costs Are Necessary for the Number of Days of Work Required and Are Based Upon Reasonable Equipment Rates.

The Agency rejected $849.30 in the following equipment costs:

> **The following items have been reduced to 2 day's use: PID, ph/ORP/temperature meter, and utility truck for geologist for logging soil borings. In addition, EnCore samplers have been reduced to 6 from 12. The following item's rates was also modified as unreasonable: pH/ORP/temperature meter (35 IAC 732.606(hh))**

(Agency Rec., at p. 91)

In addition, $36.00 for camera costs were also rejected, (id.), for a total of $885.30 in equipment costs.

Truesdale explained the necessity for these costs:

> **As specified on the sheet, the PID and the pH meter were estimated to be used for five days, which corresponds to the investigation hour estimate provided on page 68 previously. The EnCore samplers were estimated based on the number of sample – the soil samples approved by the Agency in accordance with 5035, analysis for BTEX, two EnCore samplers must be submitted to the laboratory for each BTEX sample. Since we had six samples that were approved by the Agency, 12 EnCore samplers were required.**

A camera was also reduced. We had two days of camera use instead of five.

(Hrg. Trans. at p. 61)

The reduction of use of this equipment to two days is not appropriate given that the work will take five days. The Agency Reviewer also indicated that the camera use had been reduced in light of the rate sheet. All of these equipment costs should therefore be restored.

5. <u>The Field Purchases Are Necessary for the Number of Days of Work Required and Are Based Upon Reasonable Equipment Rates.</u>

The Agency eliminated $150.00 as "an adjustment in USP sample shipping," $50.00 for "Misc. Retail Purchases," and $270.00 as a reduction for the number of rental days for a peristaltic pump. (Agency Rec., at p. 92) These costs total $470.00.

Truesdale explained the necessity of these items:

Miscellaneous retail purchases includes ice, film, and miscellaneous parts in the field. Ice is required for preservation of samples in the field. . . . We have film. Obviously, that is required for documenting photographic evidence of what is being conducted. It is a relatively small cost on a per day basis so we don't charge for disposable gloves and shovels and spades and miscellaneous equipment. We lump it into a miscellaneous purchase cost which is covered on item one.

UPS, shipment of samples to the laboratory. Soil and ground water samples are very heavy and are shipped in coolers. And $50.00 per sample per day is probably actually now slightly low. Our recent costs are actually a little bit higher than that.

The ground water sampling pump is obviously required in order to obtain the ground water samples. The screen point sampler and the disposable ground water sampling tube is also required to obtain direct-push screen point sampler ground water samples.

. . .

We are required to submit reports to the Agency in duplicate, and as a result, photocopying is required.

(Hrg. Trans. at pp. 61-62)

These are expenses needed to complete the plan, and which are slightly lower than actual costs. The Agency reviewer testified that she relied on the rate sheet in determine a reasonable number of sample shipments and a reasonable rate for the peristaltic pump. (Hrg. Trans. at p. 184) Therefore, these $470 in items should be restored to the budget.

6. The Handling Charges Were Reduced Solely Due to Other Cuts in the Budget and Therefore Should Be Restored to the Extent the Budget is Restored.

The budget included $1,714.76 in handling charges. (Agency Rec., at p. 78) There was no objection to the handling charges themselves, but once cuts were made elsewhere in the budget, the $1,714.76 in handling charges exceeded the costs eligible under the statutory formula. (Agency Rec., at p. 92) In the event that the Board restores any or all cuts made elsewhere in the budget, Petitioner asks that the corresponding cuts in handling charges be restored as well.

V. CONCLUSION.

Petitioner gave the Agency a technically sound Phase I High Priority Corrective Action Plan (Investigation), complying in all respects with the Act and the Board regulations, and a corresponding barebones budget to implement that plan. Petitioner's first attempt was rejected, primarily because the Agency Reviewer mistakenly believed that direct-push soil borings cannot be used to gather groundwater samples. Rather than clog the Board's docket with an appeal,

Petitioner sought a 90-day extension for appealing the Agency's decision, timely met with Agency personnel to explain the direct-push technology (using the Agency's own fact sheet) , and agreed to make certain concessions in an amended plan and budget. Without advance warning, the Agency rejected 10 out of 26 direct-push borings and 58% of the reduced budget. Recognizing a moving target, Petitioner appealed to the Board and hereby respectfully requests the Board reverse the Agency's changes in the corrective action plan, reverse the Agency's cuts to the associated budget, and provide for such other relief as the Board deems meet and just.

Respectfully submitted by

ILLINOIS AYERS OIL COMPANY,
Petitioner,

By its attorneys,
MOHAN, ALEWELT, PRILLAMAN & ADAMI

By _____
Fred C. Prillaman

By _____
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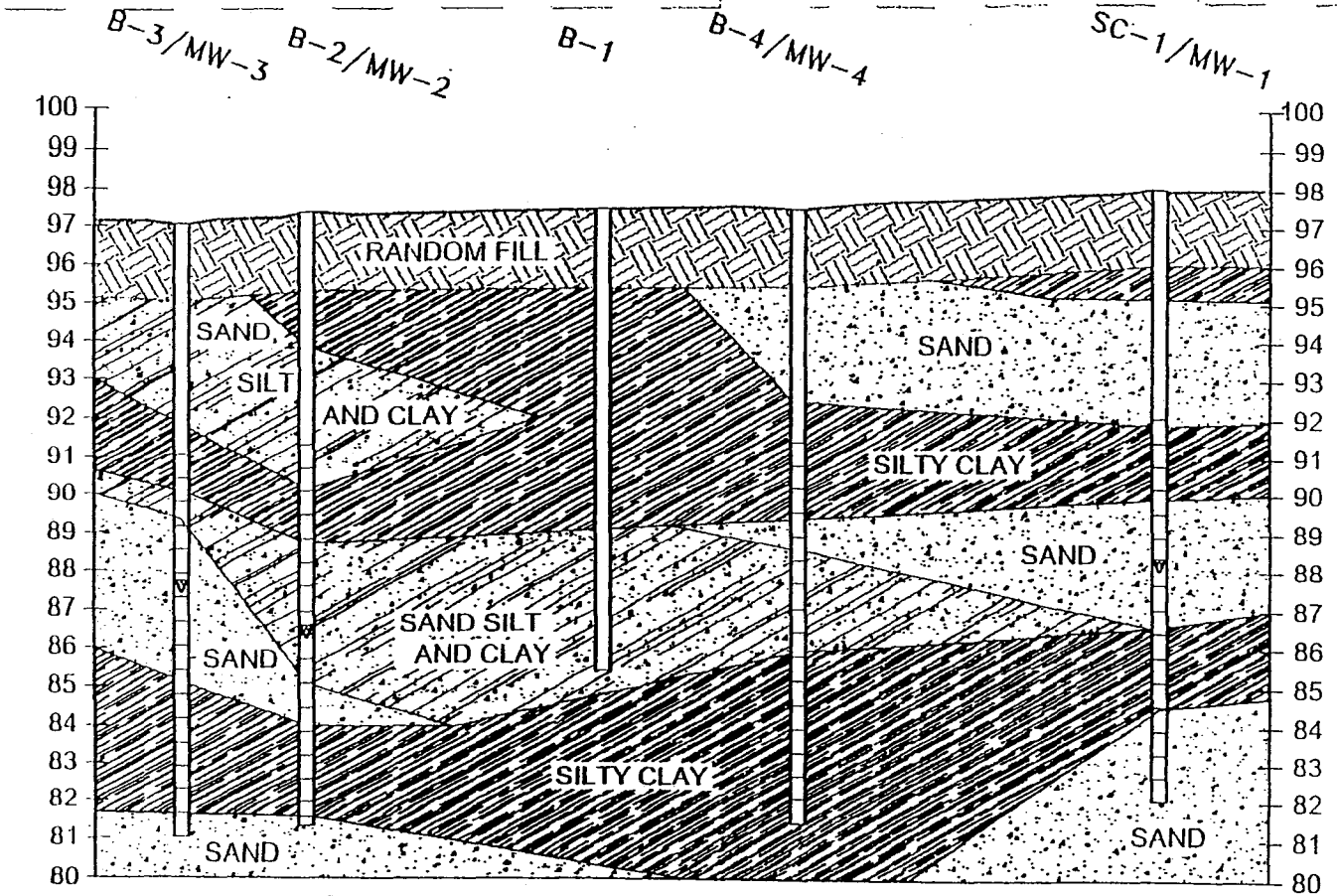

PENGAD 800-631-6989

EXHIBIT A

FIGURE 3: CROSS-SECTION	
SCALE: SEE LEGEND	DATE 5-14-01
Illinois Ayers Oil Co. - Ayerco #7	
4th & STATE ST.	BEARDSTOWN, IL

CSD ENVIRONMENTAL SERVICES, INC.
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