BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

EVERGREEN FS, INC.,	)	
Petitioner,	)	
v.	)	PCB Nos. 11-51 & 12-61
	)	(LUST Permit Appeal)
ILLINOIS ENVIRONMENTAL	)	
PROTECTION AGENCY,	)	
Respondent.	)	

NOTICE OF FILING AND PROOF OF SERVICE

To: John T. Therriault, Acting Clerk
Illinois Pollution Control Board
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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, pursuant to Board Procedural Rule 101.406, PETITIONER'S REPLY BRIEF, a copy of which is herewith served upon the attorneys of record in this cause.

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 counsel of record of all parties to this cause by enclosing same in envelopes addressed to such attorneys with postage fully prepaid, and by depositing said envelopes in a U.S. Post Office Mailbox in Springfield, Illinois on the 1st day of May, 2012.

Respectfully submitted,
EVERGREEN FS, INC., Petitioner

BY: MOHAN, ALEWELT, PRILLAMAN & ADAMI

BY: /s/ Patrick D. Shaw

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EVERGREEN FS, INC., Petitioner,	)	
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ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, Respondent.	)	

PETITIONER'S BRIEF

NOW COMES Petitioner, Evergreen FS, Inc. ("Evergreen"), and for its post-hearing reply brief states as follows:

INTRODUCTION

The issue in this appeal, as defined by the Agency's own denial letters, is whether a 50% apportionment is required by Section 57.8(m) of the Act (415 ILCS 5/57.8(m)), because an earlier 1991 release was deemed ineligible. The Agency is mischarachterizing Petitioner's position as a request for reconsideration of an earlier eligibility determination. While the first two arguments presented in Petitioner's Brief certainly cast doubt on the earlier determination (though not the remaining three arguments), but Petitioner has done so because the Board has indicated that the application of Section 57.8(m) is highly dependent upon the facts of the particular case. Freedom Oil v. IEPA, PCB 03-54, at p. 65 (Feb. 2, 2006). If new information becomes available, the applicability of Section 57.8(m) may change. Id. (Johnson, concurring). Understanding what we know and how we know it about the site since the early 19990s is material to determine if any apportionment is appropriate.

Petitioner is not required to submit evidence at hearing with respect to every issue to be raised in its brief. Three of the issues are primarily legal and thus need no particular evidentiary exposition. However, with respect to any evidence established at the hearing, the burden shifted

to the Agency to refute it. See John Sexton Contractors Co. v. Pollution Control Bd., 201 Ill. App. 3d 415, 425 (1st Dist. 1990) ("Once Sexton had established a prima facie case that the conditions were unnecessary, it became incumbent upon the Agency to refute the prima facie case.") Once Petitioner had established a prima facie case that any release into the monitoring well in 1992 was *de minimis*, it became incumbent upon the Agency to refute it.

OBJECTIONS TO STATEMENT OF FACTS

The statement of facts repeatedly misidentifies "Petitioner" as Livingston Service Company. (Resp. Brief, at pp. 7-13) Livingston Service Company was a prior owner or operator of the underground storage tanks at the site. The Agency's Response accurately identifies this fact in paragraph 7 of its Statement of Facts by referring to "Petitioner's predecessor," but that identification should also have been used in paragraphs 5 through 11.

Furthermore, the Midwest Engineering Service environmental assessment report referred to in paragraph 13 of the Agency's Statement of Facts was not prepared "on behalf of the Petitioner," (Resp. Brief, at p. 10) but was prepared on behalf of Camp Farm Management, Inc, the owner of the property. (Rec. 18) Nor is true that "[p]ursuant to this report . . . the Petitioner stated . . ." anything. (Resp. Brief, at p. 10) The report states that it "summarizes previous on-site and off-site assessment work performed by MES in 1993." (Rec. 18, at p. 7) In other words, the report is Midwest Engineering Services repeating the content of previous reports performed on behalf of Livingston Service Company.

I. PETITIONER IS NOT SEEKING RECONSIDERATION, NOR WOULD THE

RESTRICTIONS ON AGENCY RECONSIDERATION APPLY TO A NEW SUBMITTAL.

Petitioner is not seeking reconsideration of the eligibility determination. Petitioner has been cleaning-up major releases from all four tanks on the property, which had been in operation for over fifteen years since the 1991 incident was reported. The Agency has interjected, improperly, the circumstances surrounding the 1991 incident in an effort to arbitrarily cut reimbursement for these activities in half. Petitioner is asking for full reimbursement as was approved in the budget.

While not seeking reconsideration, the Agency's argument is premised on an erroneous assumption that a final decision can never be revised on the basis of new or additional information. The Appellate Court actually rejected this argument in Reichhold Chemicals v. Pollution Control Board, 204 Ill. App. 3d 674 (3rd Dist. 1990). There, the Appellate Court ruled that the Agency was without authority to reconsider its own decision, but this in turn did not preclude subsequent reapplications, at least so long as the issues were not identical. Id. at 680. Petitioner has submitted an application for payment for amounts previously approved in the budget; it has not requested that the 1991 incident be re-reviewed. A true reconsideration request under these facts would be brought by the prior owner/operator, Livingston, in order to get reimbursed for the over $150,000 that the LUST Fund probably should have paid but for Livingston's own mistakes and the Agency's own contrivances. That issue is not presented. Evergreen simply wants paid what the Agency promised.

II. THE ARGUMENTS PRESENTED HEREIN ARE FRAMED BY THE AGENCY'S DENIAL LETTER.

The Agency generally refuses to respond to most of the arguments in the brief, purporting to claim without citation to any legal authority that the apportionment of costs issue was not raised by the Petitioner in its Petition for Review." (Resp. Brief, at p. 12) It is within the discretion of the courts whether to consider such claims unsupported by any legal citation. In re Estate of Kline, 245 Ill. App. 3d 413, 434 (3d Dist. 1993) ("We note that petitioners have failed to support their argument with any citation of legal authority. A reviewing court is not a depository in which a litigant may leave the burden of argument and research. As such, we consider this aspect of the issue waived.") This is particularly applicable here where the contentions run contrary to the Agency's own prefatory statement that "[i]t is clear that the Illinois EPA's final decision must frame the issues on appeal, (Resp. Brief, at p. 11), not the Petition for Review.

The Illinois Environmental Protection Act requires the Agency to present an "explanation" and "statement of specific reasons why the Act and the regulations might not be met if the plan were approved." (415 ILCS 5/57.7(d)(4); see also 35 Ill. Adm. Code § 734.610(d)) This "detailed statement,"along with the record, is necessary and sufficient to frame the issues to be decided before the Board. Environmental Protection Agency v. Pollution Control Bd., 86 Ill. 2d 390, 405 (1981). Unfortunately, the Agency does not traditionally file the record within the timeframe of the Board's procedural rules. See Prime Location Properties LLC v. IEPA, PCB 09-67, at p. 9 (Aug. 20, 2009) (failure to comply with Board procedural rules will not result in sanction absent proof of material prejudice). Furthermore, in cases such as this, where

the Agency admits it has changed its position from past approvals of budgets in this cleanup (Resp. Brief, at pp. 19-20), it was not clear what legal and factual basis had moved the Agency to begin apportioning approved payments. There was no Wells letter sent to apprise the owner/operator of the archaeological discovery of a generations-old issue with an opportunity to review the file and formulate a detailed response.

In any event, the Petition for Review was sufficient. It specifically complained of "an improper apportionment after completion of the approved work," (PCB No. 12-61, at ¶ 8), which is the grounds of this appeal. Petitioner's Brief does not argue any affirmative defense that might arguably surprise the opposing party. Nor does the Agency claim any material prejudice and none could because these issues were not a surprise to the Agency prior to the hearing. Furthermore, the Agency's plan to sue Evergreen as a result of this appeal indicates that these are issues likely to recur, making the argument for avoidance particularly weak.

Alternatively, in the event the Board decides, what would appear to be for the first time, that the Petition for Review has any preclusive effect here on the scope of the Board's review, Petitioner moves to amended the Petitions for Review to conform with the proof by including the five specific items listed in the brief. (735 ILCS 5/2-616(c))

III. THE AGENCY IS NOT PERMITTED TO RELY ON POST-DECISION EVIDENCE TO SUPPORT ITS DECISION.

As stated in the Response Brief, "[t]he Board will not consider new information not before the Illinois EPA prior to its determination on appeal." (Resp. Brief at p. 6) Yet, cynically the Agency relies on a set of 2012 documents to support its 2011 decisions. One of these

documents was admitted at the hearing for a limited purpose, but not as evidence that the Agency's decision was correct. (Trans. at p. 30) The Response Brief also relies on a document that did not even exist at the time of the hearing, so was not even admitted for any purpose. No legal authority is offered for this astounding change in the Agency's traditional position, as well as change in the law.

Petitioner has no problem with advising the Board of other development that may assist the Board in crafting a decision on the case before it, so as not to unnecessarily impinge on other related activities. Environmental projects often involve several issues, and knowledge of these other issues can prevent the Board from inadvertently ruling on issues not before it. But taking notice of other matters for purposes of shaping an opinion does not authorize the Agency to ignore the limitations on evidence stated in its own brief, nor attach documents to the brief without admitting them at evidence at hearing. Exhibit 4 to the Response Brief should be stricken and the arguments on pages 13 to 14 should be stricken as well.

CONCLUSION

Petitioner has performed environmental work approved by the Agency within the budgets approved by the Agency. When an apportionment was surprisingly raised after the last two budgets, Petitioner exercised its right to review that decision to the Board. Petitioner asks that the decisions appealed to the Board be reviewed and the Board find that no apportionment was appropriate under these circumstances.

EVERGREEN FS, INC.,
Petitioner

By its attorneys,
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