

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

FRIENDS OF THE ENVIRONMENT, NFP,)	
Petitioner,)	
)	
v.)	
)	PCB No. 16 – 102
ILLINOIS ENVIRONMENTAL)	(UST Appeal)
PROTECTION AGENCY,)	
Respondent.)	

NOTICE OF FILING

PLEASE TAKE NOTICE that today I have filed with the Office of the Clerk of the Pollution Control Board Petitioner's Response to IEPA's Motion for Summary Judgment. Copies of these documents are hereby served upon you.

To: Pollution Control Board, Attn: Clerk	Scott B. Sievers
100 West Randolph Street	Division of Legal Counsel
James R. Thompson Center, Suite 11-500	Illinois Environmental Protection Agency
Chicago, Illinois 60601-3218	1021 North Grand Avenue, East
(via electronic filing)	Springfield, Illinois 62794-9276
	(via email to scott.sievers@illinois.gov)
 Bradley P. Halloran	
Hearing Officer	
James R. Thompson Center, Suite 11-500	
Illinois Pollution Control Board	
100 West Randolph Street	
Chicago, Illinois 60601	
(via email to brad.halloran@illinois.gov)	

Respectfully submitted,
FRIENDS OF THE ENVIRONMENT, NFP

Dated: June 29, 2016

By: /s/William D. Ingersoll
 Its Attorney

BROWN, HAY & STEPHENS, LLP
William D. Ingersoll
Registration No. 6186363
wingersoll@bhslaw.com
205 S. Fifth Street, Suite 700
P.O. Box 2459
Springfield, IL 62705-2459
(217) 544-8491

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

FRIENDS OF THE ENVIRONMENT, NFP,)	
)	
Petitioner,)	
)	
v.)	PCB No. 16 – 102
)	(UST Appeal)
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
Respondent.)	

RESPONSE TO IEPA’S MOTION FOR SUMMARY JUDGMENT

Petitioner, FRIENDS OF THE ENVIRONMENT, NFP, by and through its attorneys, BROWN HAY & STEPHENS, LLP, pursuant to 35 Ill. Adm. Code 100.516¹ and the Hearing Officer Order of June 1, 2016, hereby responds to the Illinois EPA’s Motion for Summary Judgment filed herein on June 17, 2016. In support of said response, Petitioner says the following:

I. BACKGROUND

1. Pursuant to agreement and the June 1, 2016 scheduling order by the Hearing Officer, each party filed its motion for summary judgment on June 17, 2016.
2. The Petitioner contends that it fairly described the facts in this matter as are relevant and material. The Petitioner does not dispute the accuracy of the factual assertions made in the IEPA’s motion, however, it does not appear that the IEPA’s implications of some improper motivation of the Fryceks as relates to the corporate Petitioner is either relevant or material to any of the arguments made in IEPA’s motion.

¹ Hereinafter citations to the Board regulations will be made by section number only – *e.g.*, Section 100.516.

II. ARGUMENT

3. Briefly stated, IEPA seems to have two main points in its argument: just because Subpart H rates were paid to a contractor does not mean they must be reimbursed (citing *Brimfield Auto & Truck v. IEPA*, PCB 12-134 (September 4, 2014) and, that the IEPA may demand, from the prime contractor, invoices from any and all subcontractors, even second or third level subcontractors, and deny reimbursement if not provided (citing *T-Town Drive Thru v. IEPA*, PCB 07-85 (April 3, 2008)).

4. One secondary IEPA argument was made regarding there being no dispute that the Petitioner did not provide IEPA the documents *it requested*. This argument does not take the analysis of this case very far. The Petitioner agrees that not all requested documents were provided. This argument does not even lead to the legal conclusion the IEPA seeks. The IEPA is free to request anything, but that does not mean the failure to produce a document beyond those required by law for reimbursement can support a denial of costs.

5. Another secondary IEPA argument was made that the Petitioner “has asserted no authority precluding a UST owner or operator from requiring a contractor and any subcontractors from providing any requisite documentation for reimbursement of costs.” There are problems with this logic. If the IEPA wishes to mandate such limitless document support for reimbursement, it should have sought to include them in the regulations. Also, the issue in this matter is really the reverse of what the IEPA appears to contend – *i.e.*, it is not a matter of a person having the authority to not provide documents, but rather whether the IEPA may demand documents beyond what the rules require under pain of a denial of reimbursement.

6. Contrary to the IEPA’s argument, *T-Town* does not control here. The facts in this case are different. This was adequately described in Petitioner’s Motion for Summary Judgment

¶14:

the T-Town prime contractor was United Science Industries (“USI”) and USI had subcontracted the laboratory work to Teklab. USI submitted Teklab analytical results, but for costs USI just provided information on the IEPA’s “Analytical Costs Form” and showed the total as invoiced to T-Town. The costs reflected Subpart H rates. The IEPA requested the backup invoices from Teklab, but they were not provided. Teklab was a direct subcontractor to USI, the prime contractor.

Here, the invoices and documentation from any subcontractor directly hired by Inland-Frycek have been provided. *See e.g.*, invoice and payment documentation for analytical work by Stat Analysis Corporation billing to Inland-Frycek. Administrative Record pages 90-93. This is the same type of backup documentation that was missing in the *T-Town* case. The lack of those documents in the submittal by USI led to the IEPA’s denial of the costs and the Board’s affirmation of the IEPA decision. Clearly that was a different case.

WHEREFORE, for the reasons stated above, FRIENDS OF THE ENVIRONMENT, NFP requests that the Board grant summary judgment in its favor as described in the Petitioner’s Motion for Summary Judgment and deny the Illinois EPA’s Motion for Summary Judgment.

Respectfully submitted,
FRIENDS OF THE ENVIRONMENT, NFP

Dated: June 29, 2016

By: /s/William D. Ingersoll
Its Attorney

BROWN, HAY & STEPHENS, LLP
William D. Ingersoll
Registration No. 6186363
wingersoll@bhslaw.com
205 S. Fifth Street, Suite 700
P.O. Box 2459
Springfield, IL 62705-2459
(217) 544-8491

CERTIFICATE OF E-MAIL SERVICE

I, William D. Ingersoll, certify that I have this date served the attached Notice of Filing and Response to IEPA's Motion for Summary Judgment by e-mail as described below and from my e-mail address as indicated below, upon the following persons:

To: Bradley P. Halloran
Hearing Officer
Illinois Pollution Control Board
brad.halloran@illinois.gov

Scott B. Sievers
Division of Legal Counsel
Illinois Environmental Protection Agency
scott.sievers@illinois.gov

The number of pages in this e-mail transmission is five (5).

Dated: June 29, 2016

BROWN, HAY & STEPHENS, LLP

William D. Ingersoll
Registration No. 6186363
wingersoll@bhslaw.com
205 S. Fifth Street, Suite 700
P.O. Box 2459
Springfield, IL 62705-2459
(217) 544-8491

By: /s/William D. Ingersoll
William D. Ingersoll