BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

KNAPP OIL COMPANY, Petitioner,	)	
v.	)	PCB 2016-103
	)	(LUST Permit Appeal)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, Respondent.	)	

NOTICE OF FILING AND PROOF OF SERVICE

TO: Carol Webb, Hearing Officer
Illinois Pollution Control Board
1021 N. Grand Avenue East
P.O. Box 19274
Springfield, IL 62794-9274
(Carol.Webb@illinois.gov)

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

PLEASE TAKE NOTICE that I have today electronically filed with the Office of the Clerk of the Illinois Pollution Control Board, **Petitioner's Post-Hearing Reply Brief**, copies of which are herewith served upon the above persons.

The undersigned hereby certifies that I have served this document by e-mail upon the above persons at the specified e-mail address befoe 5:00 p.m. on the 18th of August, 2016. The number of pages in the e-mail transmission is 8.

KNAPP OIL COMPANY

BY: LAW OFFICE OF PATRICK D. SHAW

BY: /s/ Patrick D. Shaw

Patrick D. Shaw
Law Office of Patrick D. Shaw
80 Bellerive Road
Springfield, IL 62704
217-299-8484
pdshaw1law@gmail.com

THIS FILING SUBMITTED ON RECYCLED PAPER

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PETITIONER'S POST-HEARING REPLY BRIEF

NOW COMES Petitioner, KNAPP OIL COMPANY, by its undersigned counsel, for its post-hearing reply brief, states as follows:

INTRODUCTION

In Petitioner's initial brief, it attempted to restrict its arguments to the issues raised in the Agency's decision letter. Herein, Petitioner replies to the issues raised through hearing.

I. PROCEDURAL IRREGULARITIES

Without citing to any specific examples, the Agency blames the Board for effectively shifting the burden against it. (Resp. Brief, at p. 5) The issues in this proceeding are framed by the Agency's denial letter. Environmental Protection Agency v. Pollution Control Bd., 86 Ill. 2d 390, 405 (1981). It is the Agency's improper attempt to modify (or what it labels explain) the denial letter, which led it to present testimony at hearing. The Board does not rule on grounds not raised in the denial letter. Prime Location Properties v. IEPA, PCB 09-67 (Aug. 20, 2009).[1]

[1] In Prime Location Properties, the project reviewer's notes indicated that the reason the Agency was requiring a new plan and budget was in order to charge a second deductible. However, since the word "deductible" appeared nowhere in the letter, the parties' arguments about whether one or two deductibles applied warranted no discussion. Id.

Petitioner's burden in this proceeding is "to prove that the Agency's denial reason was insufficient to warrant affirmation." Rosman v. IEPA, PCB No. 91-80 (Dec. 19, 1991). The scope of review is generally confined to the application, as submitted to the Agency. Metropolitan Pier and Exposition Authority v. IEPA, PCB 10-73, at p. 51 (July 7, 2011). Where additional information beyond the application is submitted at hearing, it is almost always to provide the applicant with the safeguards of due process and the opportunity "to test the validity of the information the Agency relie[d] upon in denying its application." EPA v. Pollution Control Board , 115 Ill. 2d 65, 70 (1986).

II. THE DIGITAL CAMERA

The denial letter states that "[t]he cost associated with the camera will not be reimbursable as this is an indirect costs billed as a direct cost." (R.53) There was no testimony in support of this point; instead there was testimony that the Agency's Lust Section held a meeting in April where it was decided that camera costs would no longer be reimbursed (Hrg. Trans. at p. 17), and the Agency project reviewer testified that film processing is "rarely used" these days. (Hrg. Trans. at p. 10) Even if true, this testimony does not support the conclusion that camera costs became "indirect costs" in April since the nature of the activity in relation to the project did not change.

Instead, the testimony evidences that the Agency is engaging in illegal rulemaking, circumventing Board regulations by making a policy change of general applicability. Illinois Ayers v. IEPA, PCB 03-214, at pp. 15-16 (April 1, 2004). The Agency did not make any particular findings as to Petitioner, the site or the work plan. "When an administrative agency

interprets statutory [or regulatory] language as it applies to a particular set of facts, adjudicated cases are a proper alternative method of announcing agency policies" to rulemaking. Kaufman Grain Co. v. Director of Department of Agriculture, 179 Ill. App.3d 1040, 1047 (4th Dist. 1988). The denial letter did not purport to apply the particular facts in this budget to the regulations, but merely enforced an unwritten, blanket policy regarding all camera costs without any rulemaking in violation of the Administrative Procedure Act.

Moreover, the Agency reviewer is simply incorrect that the camera costs were previously reimbursed only for film-processing. (Hrg. Trans. at p. 10) "Cameras/photo development" are treated in the Agency's budget form instructions as "other equipment and supplies." (Pet's Ex. A, at p. 15)[2] Cameras and cellphones are equipment which must be purchased, and the regulations allow that "a reasonable rate may be charged for the usage of such materials, supplies, equipment, or tools." (35 Ill. Adm. Code § 734.630(h)) Having equipment at the site to take pictures is chargable at a reasonable rate, just like a measuring wheel or a PID.

The purpose of the camera was to "[d]ocument Stage 1 Site Investigation field activities," which is an activity specific to the work approved. This activity is attributed to the specific site, not office overhead. If the real purpose behind denying camera costs is as part of a larger design to eliminate the "materials" component from consultant's billing on a "time and materials" basis, the Agency should be precluded from even attempting this until it has conducted the required triennial review of whether Subpart H rates are consistent with prevailing market rates. 35 Ill. Adm. Code 734.875. Otherwise, shifting costs of materials to the time-component is a change in

[2] It may also be worth mentioning that while digital cameras and cellphones are not terribly recent developments, the Agency's instructions were last updated April of 2009. (Petitioner's Ex. A)

consultant's billing that is unsupported by any evidence of current market rates.

III. MOTION TO STRIKE "OTHER MODIFICATIONS" ARGUMENT.

At the hearing the Agency offered into evidence an exhibit that was clearly improper, and was properly rejected by the Hearing Officer. (Hrg. Trans. at pp. 15-16)

The exhibits are clearly improper evidence because it is a document that did not even exist when the Agency made its decision. See Weeke Oil Co. v. IEPA, PCB 10-01, at p. 3 (May 20, 2010) (post-decision communication properly excluded). To the extent it was offered to explain what information was needed, the Agency had a duty under Section 57.7(c)(4) of the Act to explain in its denial letter "the specific type of information, if any, which the Agency deems the applicant did not provide the Agency." (415 ILCS 5/57.7(c)(4)) The denial letter was either sufficient to raise the issue, or it was not and any explanation after the close of Petitioner's case cannot fix the letter if it is not.

To the extent it was offered to suggest that the Agency's argument is reasonable by ratification of an unknown third-party, it is an improper argument. Whether the information is relevant and can be required is a question of law, and there is no precedent established when a consultant, given the opportunity, elects a compromise. Notably, such an option was not given to the consultant here, which should draw questions about the normalcy of the Agency's practices herein. Also notably, the Agency engaged in its change in practices only after the LUST Fund stopped making payments due to the state's budget standoff, and consequently knew or should have known that there would be few resources available to challenge improper IEPA actions.

Beyond the issue with the exhibit, the Agency also improperly argues that the amounts

requested for these three items "was higher than normally submitted to the Agency." (Resp. Brief, at p. 7) There is no evidence in the record or in the testimony that the budget was higher than normal, there is just evidence that the reviewer feels free to ask for justification any time he wishes.

Once the improper evidence is stricken, there is really no argument left about the "Other Modifications" other than the argument that the modifications to the budget were not actually modifications, a point made in other places. Therefore, Petitioner requests this section of the argument be stricken in its entirety.

IV. UNMODIFYING MODIFICATIONS.

The Agency's denial letter contains four modifications, three of which the Agency claims did not actually modify the budget, but reflect the Agency's "authority to put applicants on notice that requests in their budget may not be reimbursable during the Budget review period." (Resp. Brief, at p. 5 (emphasis added))[3] Later this is described giving "notice that these items most likely would need supporting documentation at the reimbursement stage." (Id. at p. 7) Meanwhile, the project manager testified that he had the choice of either e-mailing a consultant to require information before making a decision, or suggesting information be provided at a later stage through modification of the budget . (Hrg. Trans. at p. 18)

There is a complete failure in these explanations to differentiate the Agency's responsibilities at the budget and payment stage. The Illinois Environmental Protection Act

[3] Petitioner does not dispute the Agency's power to e-mail concerns that it eventually will seek to address, but that's not what was done here.

precludes the Agency from re-reviewing plans and budgets at the payment stage. (415 ILCS 5/57.8(a)(1); cf. Evergreen v. IEPA, PCB 11-51, at pp. 20-21 (June 21, 2012) (explaining that the only issue is whether the billing package is consistent with the approved plan and budget). The purpose of the budget is to obtain certainty that the work and the budgeted costs are acceptable to the Agency before costs are incurred. If the types of bailers, survey equipment or sampling kits used turn out to be unacceptable to the Agency, what good is it to learn that after they have been used? If the Agency wants consultants to lease equipment, then the budget needs to re-estimate the number of days the equipment will be needed, given that in many places in Illinois it would not be possible to pick-up and return rental equipment during business hours. After adding shipping and transportation costs, as well as handling charges, what good would it be to learn at the payment stage that the Agency now thinks leasing is unreasonably expensive?

The law is clear. The Agency has the authority pursuant to 57.7(c)(4) of the Act to modify the budget, as it did here, and the Petitioner has the stark choice of accepting the modification to the budget, or appealing. (415 ILCS 5/57.7(c)(4)) Petitioner has exercised its statutory right to appeal, and the Board should reject the argument that these modifications are merely suggestions, or that this is any sort of argument that in the first place. If the Agency is arguing that the budget was not actually modified by these three items, they should be stricken as improper budget modifications.

CONCLUSION

WHEREFORE, Petitioner, KNAPP OIL COMPANY, prays that: (a) the Board find the Agency erred in its decision, (b) the Board direct the Agency to approve the budget as submitted, (c) the Board award payment of attorney's fees; and (d) the Board grant Petitioner such other and further relief as it deems meet and just.

KNAPP OIL COMPANY,
Petitioner

By its attorneys,
LAW OFFICE OF PATRICK D. SHAW

By: /s/ Patrick D. Shaw

Patrick D. Shaw
LAW OFFICE OF PATRICK D. SHAW
80 Bellerive Road
Springfield, IL 62704
217-299-8484
pdshaw1law@gmail.com