

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

FRIENDS OF THE ENVIRONMENT, NFP,))
)
 Petitioner,)
)
 v.) PCB 2016-102
) (UST Appeal)
 ILLINOIS ENVIRONMENTAL)
 PROTECTION AGENCY,)
)
 Respondent.)

NOTICE OF FILING

To: John T. Therriault
Clerk of the Board
Illinois Pollution Control Board
100 West Randolph Street, Suite 11-500
Chicago, IL 60601-3218

William D. Ingersoll
Brown, Hay & Stephens, LLP
205 S. Fifth Street, Suite 700
P.O. Box 2459
Springfield, IL 62705
wingersoll@bhslaw.com

Hearing Officer Bradley P. Halloran
Illinois Pollution Control Board
James R. Thompson Center, Suite 11-500
100 West Randolph Street
Chicago, IL 60601
Brad.Halloran@Illinois.gov

PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Pollution Control Board ILLINOIS EPA'S MOTION FOR SUMMARY JUDGMENT, a copy of which is served upon you.

Respectfully submitted,

Dated: June 17, 2016

Scott B. Sievers
Attorney Registration No. 6275924
1021 North Grand Avenue East
P.O. Box 19276
Springfield, IL 62794-9276
(217) 782-5544
Scott.Sievers@Illinois.gov

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY,

Respondent,

BY: /s/ Scott B. Sievers
Scott B. Sievers
Special Assistant Attorney General

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Petitioner,)	
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v.)	PCB 2016-102
)	(UST Appeal)
ILLINOIS ENVIRONMENTAL)	
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ILLINOIS EPA’S MOTION FOR SUMMARY JUDGMENT

NOW COMES the Respondent, ILLINOIS ENVIRONMENTAL PROTECTION AGENCY (“Illinois EPA”), by and through its attorney, Special Assistant Attorney General Scott B. Sievers, and moves this honorable Board for summary judgment. In support, the Respondent states the following:

I. FACTS

On September 1, 2015, James Frycek of Inland-Frycek, Inc. reported a hazardous material leak or spill involving diesel and gasoline at a site at 3609-23 West Harrison Street in Chicago, Illinois. (R. 001.) The Petitioner, Friends of the Environment, NFP, was identified as the responsible party and subsequently elected to proceed as owner of the site, with Mark Frycek signing the applicable paperwork as the Petitioner’s Trustee. (R. 002, 005.)

On September 16, 2015, Illinois EPA received a Leaking Underground Storage Tank Program 20-Day Certification report from James Frycek of Inland-Frycek. (R. 006-008.) That report identified the UST owner or operator as Friends of the Environment, NFP, with Mark Frycek as its trustee, and Inland-Frycek, Inc. as its consultant, with James Frycek as its contact. (R. 008.) Both Mark Frycek and his father, James Frycek signed the report, and the report

disclosed that Friends of the Environment, NFP and Inland-Frycek, Inc. shared the same street address: 6130 W. Lawrence Ave., Chicago, IL 60630. (R. 008.)

On October 14, 2015, Illinois EPA received a 45 Day Report for Friends of the Environment, NFP from Inland-Frycek, Inc. (R. 010.) The Executive Summary disclosed that Mark Frycek, the Friends of the Environment, NFP trustee, also wore a hat as an Inland-Frycek, Inc. consultant: "On September 1, 2015 James G. Frycek, P.E. and Mark Frycek, Environmental Specialist, of Inland-Frycek, Inc. (IFI) investigated the site to determine if a release had occurred from the 8,000 gal. gasoline and 8,000 gal. diesel fuel tank." (R. 014.) Nonetheless, Mark Frycek signed the report on behalf of the owner or operator and James Frycek signed it on behalf of the consultant. (R. 021.)

On October 23, 2015, Illinois EPA received the deductibility determination from the Office of the State Fire Marshal. (R. 039.) Attached to the OSFM's letter was the Eligibility and Deductible Application for Friends of the Environment, NFP. (R. 041.) That application identified James Frycek, not Mark Frycek, as the contact person for Friends of the Environment, NFP, and James Frycek swore under oath that he was its "Owner, Operator." (R. 042.)

On November 9, 2015, Illinois EPA received an Early Action Bill Package from Inland-Frycek, Inc. that is the subject of this appeal. (R. 057.) Unlike in the 45 Day Report, which characterized him as an "Environmental Specialist," the Executive Summary of the Early Action Bill Package characterized Mark Frycek as a Senior Technician: "On September 1, 2015 James G. Frycek, P.E. and Mark Frycek, Sr. Technician of Inland-Frycek, Inc. (IFI) assessed the site to confirm if a release of petroleum from the underground storage tank system had occurred." (R. 060.) However, Mark Frycek signed the document again as trustee of the owner or operator, Friends of the Environment, NFP. (R. 063.) Inland-Frycek, Inc. even invoiced Friends of the

Environment, NFP at each other's mutual address of 6130 West Lawrence Avenue, Chicago, Illinois 60630. (R. 070.) In the package, both James Frycek and Mark Frycek reported working hours on behalf of Friends of the Environment. (R. 071-076.) James Frycek even reported spending time "[m]eeting with client at Inland's office" (R. 074) as well as to "meet with client to sign OSFM E&D report," which the submittal notes was signed by James Frycek himself. (R. 072.)

On February 1, 2016, Brad Dilbaitis, Illinois EPA's project manager for the site, e-mailed James Frycek with concerns about early action claim submitted by Friends/Frycek.¹ (R. 205-206.) James Frycek responded within Dilbaitis' e-mail and also attached various documents. (R. 205-206.) Those documents included a letter from sub-contractor Orivne, Inc. to James Frycek that stated, in pertinent part:

As I know you are aware, for Orivne to complete all of the necessary tasks associated with the tank removal work, a number of suppliers and subcontractors are utilized based on each projects scope. Orivne has agreements with a multitude of suppliers to complete these services and per contract these agreements are private. Orivne has provided you with all the load tickets, manifests and tank removal forms/permits documenting the work and quantities it took to complete the project.

(R. 208.)

On February 23, 2016, Illinois EPA received an Amended Early Action Bill Package from Reimbursement Claim from Inland-Frycek, Inc. which is not the subject of this appeal. (Pet. for Review; R. 180-200.)

In a letter dated February 26, 2016, Illinois EPA agreed to pay \$19,146.98 of the \$43,964.55 in costs requested by Friends/Frycek in its November 9, 2015 payment application.

¹ Due to the overlapping relationship between Friends of the Environment, NFP and Inland-Frycek, Inc. as set forth above, the Petitioner is referenced hereafter as "Friends/Frycek."

(R. 220.) Illinois EPA deducted the remaining costs because the application lacked supporting documentation and because some costs were ineligible. (R. 220-223.)

In deducting backfill costs due to the lack of supporting documentation, Illinois EPA explained as follows:

The Remediation and Disposal Costs request 80 cubic yards of backfill at a rate of \$24.78 per cubic yard for a total of \$1,982.40. A letter from Orvine, Inc. [sic] indicates that the subcontractor used 32 cubic yards of existing onsite fill and 48 cubic yards of sand backfill. The application for payment does not include any purchase tickets for the sand to document how much sand was purchased but does include an invoice from Lindahl Bros. Inc. for the transportation of four loads of sand at a rate of \$200.00 per load for a total of \$800.00. Without purchase tickets for the sand it is impossible to determine the amount of sand each load contained to ensure that the transportation rate for the four loads of sand doesn't exceed the applicable/current Subpart H rate of \$24.78 per cubic yard. Please submit all backfill purchase tickets and purchase invoices for Backfill Costs to be paid.

(R. 222.)

In deducting groundwater removal costs due to the lack of supporting documentation, Illinois EPA explained as follows:

The Remediation and Disposal Costs requests the disposal of 15,455 gallons of contaminated water at a rate of \$0.84 per gallon for a total of \$12,982.20. The groundwater disposal manifest indicates that North Branch Environmental transported the contaminated water to Ortek, Inc. for disposal. The application for payment does not include an invoice from North Branch Environmental for the transportation or from Ortek, Inc. for the disposal of the contaminated water. These invoices from North Branch Environmental and Ortek, Inc. are required to document the transportation and disposal costs before Groundwater Disposal Costs can be paid.

(R. 222.)

In deducting drum disposal costs due to the lack of supporting documentation, Illinois EPA explained as follows:

The Remediation and Disposal Costs requests \$619.57 for disposal of one 55-gallon drum of solid waste. The drum disposal manifest indicates that North Branch Environmental transported the drum to American Waste Industries for

disposal. A disposal invoice for the drum from American Waste Industries and a transportation invoice from North Branch Environmental are required to be submitted to document the transportation and disposal costs for the 55-gallon drum of solid waste before Drum Disposal Costs can be paid. Also note that the purchase cost of the 55-gallon drum was not indicated on any invoice or form.

(R. 222.) Illinois EPA also adjusted the handling charges in light of the deductions made due to the lack of supporting documentation. *Id.*

On March 2, 2016, Friends/Frycek received Illinois EPA's February 26, 2016 decision letter. (Pet. for Review ¶ 5.)

On April 5, 2016, Friends/Frycek filed its Petition for Review in this action. (Pet. for Review.)

II. APPLICABLE LAW

A. THE LEAKING UNDERGROUND STORAGE TANK PROGRAM

Section 57.3 of the Environmental Protection Act, 415 ILCS 5/1 et seq., provides for the establishment of the Illinois Leaking Underground Storage Tank Program, which is to be administered by the Office of the State Fire Marshal and the Respondent, the Illinois Environmental Protection Agency. 415 ILCS 5/57.3. Illinois EPA has “the authority to review any application for payment or reimbursement” for corrective action activities conducted pursuant to the Act and Part 734 of the regulations. 35 Ill. Adm. Code 734.600. Illinois EPA is charged by Board regulation with conducting a financial review of submitted plans and budgets, and that review includes assuring that costs associated with materials, activities, and services “must not be used for corrective action activities in excess of those necessary to meet the minimum requirements of the Act and regulations.” 35 Ill. Adm. Code 734.510(b). Section 57.7(c)(4) of the Act provides, in pertinent part, that “[a]ny action by the Agency to disapprove

or modify a plan or report ... shall be subject to appeal to the [Pollution Control] Board in accordance with the procedures of Section 40.” 415 ILCS 5/57.7(c)(4).

B. STANDARD OF REVIEW

The standard of review under Section 40 of the Act is whether Friends/Frycek’s submittal to Illinois EPA would not violate the Act and Board regulations. *Chatham BP, LLC v. Illinois EPA*, PCB No. 14-1, slip op. at 6 (Sept. 4, 2014). The Pollution Control Board’s review generally is limited to the record before the Agency at the time of its determination. *Evergreen FS, Inc. v. Illinois EPA*, PCB No. 11-51, op. at 14 (June 21, 2012). The Board reviews the entirety of the record to determine that the petitioner’s submittal demonstrates compliance with the Act. *Illinois Ayers Oil Co. v. Illinois EPA*, PCB 03-214, slip op. at 14 (April 1, 2004). The Board will not consider new information that was not before Illinois EPA prior to its final determination concerning the issues on appeal. *Chatham BP, LLC v. Illinois EPA*, PCB No. 14-1, slip op. at 6 (Sept. 4, 2014). Illinois EPA’s denial letter frames the issues on appeal. *Chatham BP, LLC v. Illinois EPA*, PCB No. 14-1, slip op. at 6 (Sept. 4, 2014).

Finally, the Board’s procedural rules provide that, in appeals of final Agency determinations, the burden of proof rests upon the petitioner. *Id.* at 7.

C. SUMMARY JUDGMENT

Section 26 of the Environmental Protection Act combined with Sections 101.202 and 101.516 of this Board’s rules provide for summary judgment to dispose of an adjudicatory proceeding without hearing when the record shows that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. 415 ILCS 5/26; 35 Ill. Adm. Code 101.202, 101.516.

Illinois EPA expects the Petitioner in this action to also file a summary judgment motion. Where they file cross-motions for summary judgment, the parties agree that no issues of material fact exist and invite the Board to decide the issues presented as questions of law. *Chatham BP, LLC v. Illinois EPA*, PCB No. 14-1, slip op. at 21 (Jan. 9, 2014). However, merely filing cross-motions for summary judgment does not prohibit the Board from determining that triable issues of fact remain. *Id.*

D. DOCUMENTATION OF COSTS

Illinois EPA has “the authority to review any application for payment or reimbursement” for corrective action activities conducted pursuant to the Act and Part 734 of the regulations. 35 Ill. Adm. Code 734.600. Owners or operators who seek payment from the Underground Storage Tank Fund (“UST Fund”) must submit an application to Illinois EPA for payment. 35 Ill. Adm. Code 734.605(a). Illinois EPA, in turn, is required to review payment applications to determine whether they contain all of the elements and documentation required by Subsection 734.605(b) of the regulations. 35 Ill. Adm. Code 734.610(a). One such required element is “[a]n **accounting of all costs**, including, but not limited to, **invoices, receipts, and supporting documentation** showing the dates and descriptions of the work performed.” 35 Ill. Adm. Code 734.605(b)(9) (emphasis added).

Illinois EPA is further required to determine for costs incurred in early action “whether there is sufficient documentation” to demonstrate the work was completed in accordance with the applicable regulations. 35 Ill. Adm. Code 734.610(a)(2). When it reviews any payment application, Illinois EPA “may require the owner or operator to submit a full accounting supporting all claims as provided in subsection (c) of this Section.” 35 Ill. Adm. Code 734.610(b). Illinois EPA’s review may include

a review of any or all elements and supporting documentation relied upon by the owner or operator in developing the application for payment, **including but not limited to a review of invoices or receipts supporting all claims**. The review also may include the review of any plans, budgets, or reports previously submitted for the site to ensure that the application for payment is consistent with work proposed and actually performed in conjunction with the site.

35 Ill. Adm. Code 734.610(c) (emphasis added).

Finally, Section 734.630 of the UST regulations identifies costs that are ineligible for payment from the UST Fund, including “[c]osts that lack supporting documentation.” 35 Ill.

Adm. Code 734.630(cc).

III. ARGUMENT

A. FRIENDS/FRYCEK CANNOT MEET ITS BURDEN BY MERELY CONTENDING THAT THE COSTS SOUGHT WERE PAID AND COMPLIED WITH SUBPART H RATES.

In its Petition for Review, Friends/Frycek disputes Illinois EPA’s deduction of various costs. (Pet. for Rev. ¶ 6.) These include deductions due to the lack of supporting documentation for \$1,982.40 in backfill costs, \$12,982.20 in groundwater removal costs, and \$619.57 in drum disposal costs as well as a deduction of \$1,329.54 in handling charges. (Pet. for Rev. ¶ 6.) In challenging these decisions, Friends/Frycek argues that “[n]one of the requested amounts at issue exceed [sic] the applicable rates from Part 734, Subpart H for the applicable year.” (Pet. for Rev. ¶ 7.) This is the same argument Friends/Frycek raised in response to an e-mail from Illinois EPA alerting James Frycek to concerns about the early action payment claim. (R. 205.) James Frycek responded in pertinent part, “*Inland-Frycek Inc. paid the invoice at Sub Part H rates thus should be paid by the fund.*” (R. 205.) (emphasis in original.)

Whether Friends/Frycek paid certain amounts and whether those amounts comport with the Subpart H rates is beside the point. This Board repeatedly has rejected the argument that

expenses should be reimbursed merely because they may have been incurred. *Brimfield Auto & Truck v. Illinois EPA*, PCB 12-134, slip op. at 15 (Sept. 4, 2014) at 15 (citing *Beverly Powers, f/d/b/a Dick's Super Service v. Illinois EPA*, PCB 11-63, slip op. at 19 (Aug. 8, 2013).)

Further, this Board has made it clear that Subpart H rates are maximum payment amounts. *T-Town Drive Thru, Inc. v. Illinois EPA*, PCB 07-85, slip op. at 2 (April 3, 2008). “These amounts are not guaranteed irrespective of **supporting documentation**, and do not replace the requirement that a UST owner or operator provide **an accounting of all costs** to receive UST Fund reimbursement.” *Id.* (emphasis added).

B. NO GENUINE ISSUE OF MATERIAL FACT EXISTS THAT FRIENDS/FRYCEK FAILED TO PROVIDE ILLINOIS EPA WITH THE COST DOCUMENTATION IT REQUESTED.

In its Petition for Review, Friends/Frycek disputes Illinois EPA’s deduction of costs for lack of supporting documentation. (Pet. for Rev. ¶¶ 12-15.) Friends/Frycek makes no argument that it has provided the documentation Illinois EPA requested but Illinois EPA now misreads, ignores, overlooks, or otherwise fails to recognize it. (Pet. for Rev.) Thus, no genuine issue of material fact exists that Friends/Frycek did not provide the documentation requested by Illinois EPA in support of Friends/Frycek’s cost reimbursement claim.

C. FRIENDS/FRYCEK HAS NOT CITED AUTHORITY ALLOWING IT TO CIRCUMVENT THE REQUIREMENT FOR DOCUMENTATION OF THE COSTS FOR WHICH IT SEEKS REIMBURSEMENT.

In its Petition for Review, Friends/Frycek argues, in pertinent part:

12. The general contractor for the Petitioner is Inland-Frycek, Inc. Inland-Frycek retained Orivne, Inc. as its subcontractor. Orivne then retained and controlled certain sub-subcontractors to handle some of the tasks required by Inland-Frycek. The sub-subcontractors did not invoice and were not paid by Inland-Frycek. Rather, the subcontractors billed Orivne for their parts of the work on the project and Orivne billed Inland-Frycek for the Orivne work and that of the sub-subcontractors that Orivne had retained.

...

15. The IEPA's insistence on a complete breakdown of the backfill activities and materials beyond what was actually billed to the general contractor by the subcontractor (*i.e.*, \$24.78 per cubic yard) is not required by Part 734 for a complete application. The IEPA's insistence that all invoices be produced from even downstream subcontractors is beyond what is required by Part 734 and in many cases, beyond what the general contractor even has the contractual ability to demand from the subcontractor of the general, and definitely not those sub-subcontractors responsible directly only to the first subcontractor (Orivne) that retained them.

(Pet. for Rev. ¶¶ 12-15.)

The Board should disregard Friends/Frycek's assertion that that "[t]he IEPA's insistence that all invoices be produced from even downstream subcontractors is ... in many cases, beyond what the general contractor even has the contractual ability to demand from the subcontractor of the general, and definitely not those sub-subcontractors responsible directly only to the first subcontractor (Orivne) that retained them." (Pet. for Review ¶ 15.) The contracts between the general contractor and the subcontractors and the subcontractors and the sub-subcontractors are not part of the record, and thus any contractual inability to provide the requested invoices was not before Illinois EPA at the time of its decision and cannot have any bearing upon this action.

While Friends/Frycek may try waiving the February 9, 2016 letter from Orivne (R. 208) in support of its argument, that letter only says that the agreements Orivne has with "a multitude of suppliers" are private; it does not even specify that this includes the particular subcontractors at issue in this case, let alone that Orivne or any other subcontractor is prohibited by the terms of their agreements from providing Friends/Frycek with the documentation specifically requested by Illinois EPA. Further, Friends/Frycek 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.

If Friends/Frycek entered into contracts with subcontractors who in turn entered into contracts with sub-subcontractors that preclude them from providing Friends/Frycek with the documentation necessary to support their request for reimbursement of costs from the UST Fund, then Friends/Frycek did so at its own peril, and the risk they ran was that their claims would be denied. The requirement that requests for the reimbursement of costs be supported by documentation is not new to the UST world, and Friends/Frycek's Petition for Review cited no authority, legal or otherwise, allowing it to circumvent this requirement.

D. THIS BOARD HAS ALREADY REJECTED THE IDEA THAT SUBCONTRACTOR RECORDS CANNOT BE REQUIRED FOR COST DOCUMENTATION IN *T-TOWN DRIVE THRU*.

Friends/Frycek argues that the documentation Illinois EPA requested is not required by Party 734 of the UST regulations. (Pet. for Review ¶ 14-15.) As previously noted, Friends/Frycek contends it need not produce documentation of the costs for which it seeks reimbursement because they were incurred by a subcontractor or sub-subcontractor and not by the contractor but were instead rolled into the contractor's bill to Friends/Frycek. ((Pet. for Review ¶ 12-15.)

The argument that a petitioner may avoid the obligation to provide documents supporting its payment application based upon its consultant's use of subcontractors already has been rejected by this Board in *T-Town Drive Thru, Inc. v. Illinois EPA*, PCB 07-85, slip op. (April 3, 2008).

In that case, Illinois EPA had received a reimbursement application on behalf of the petitioner, T-Town, from its consultant, USI, for \$8,109 in analytical costs. *Id.* at 3. While the application contained invoices from USI for the analytical costs, Illinois EPA requested "backup invoices" for the costs, writing, "If I don't have backup invoices for the analysis costs by the close of business today I will have to cut the costs." *Id.* at 7. Illinois EPA subsequently cut

\$8,109 in analytical costs for the same reason it cut them in the case at bar: the lack of supporting documentation. *Id.* “Analysis costs do not have any backup invoices listing the costs for lab costs.” *Id.* T-Town appealed Illinois EPA’s decision.

On appeal, T-Town made one of the same arguments that Friends/Frycek has made in the instant action: that the amounts charged and sought to be reimbursed comported with the Subpart H rates. *T-Town* at 16. As previously noted, though, this Board held in *T-Town* that Subpart H rates are maximum payment amounts and “are not guaranteed irrespective of supporting documentation.” *Id.* at 2.

More significantly, T-Town also argued that Illinois EPA’s demand for documentation of a sub-contractor lab’s charges was improper because those charges were rolled into, and only a portion of, a bundle of services provided by USI within a lump sum that was compliant with Subpart H. *Id.* at 16-17, 19. This Board rejected that argument:

The Board finds that the Agency, in requesting the laboratory invoices, acted within the scope of its authority for reviewing reimbursement applications, as provided for in both the Act and the Board’s regulations. . . . **When T-Town did not provide the requested [laboratory] invoices, it failed to provide adequate documentation to support the claim.**

T-Town at 29 (emphasis added).

Just as it did in *T-Town*, this Board should find that Friends/Frycek cannot avoid the obligation to provide documentation of the costs for which it seeks reimbursement by blaming the lack of the requisite paperwork on subcontractors whose charges are rolled or bundled into the less detailed invoices of another contractor.

IV. CONCLUSION

No genuine issue of material fact exists that the costs for which Friends/Frycek seeks reimbursement lacked the documentation requested by Illinois EPA. While Friends/Frycek claims those costs were incurred by subcontractors and sub-subcontractors whose records may be beyond Friends/Frycek's control, this Board's precedent in *T-Town Drive Thru* rejects that excuse for failing to provide supporting documentation. Consequently, the Board should affirm Illinois EPA's February 26, 2016 decision, as Illinois EPA is entitled to summary judgment as a matter of law.

WHEREFORE, the Respondent, ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, prays that this honorable Board enter summary judgment in its favor and against the Petitioner.

Dated: June 17, 2016

Scott B. Sievers
Attorney Registration No. 6275924
1021 North Grand Avenue East
P.O. Box 19276
Springfield, IL 62794-9276
(217) 782-5544
Scott.Sievers@Illinois.gov

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY,

Respondent,

BY: /s/ Scott B. Sievers
Scott B. Sievers
Special Assistant Attorney General

Friends of the Environment, NFP v. Illinois EPA
PCB No. 2016-102

CERTIFICATE OF SERVICE

I, the undersigned, on affirmation state the following:

1. That I have served the attached ILLINOIS EPA'S MOTION FOR SUMMARY JUDGMENT upon William D. Ingersoll at the e-mail address of wingersoll@bhslaw.com and upon Hearing Officer Bradley P. Halloran at the e-mail address of Brad.Halloran@Illinois.gov.
2. That my e-mail address is Scott.Sievers@Illinois.gov.
3. That the number of pages in the e-mail transmission is 14.
4. That the e-mail transmission took place before 5:00 p.m. on the date of June 17, 2016.

Dated: June 17, 2016

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY,

Scott B. Sievers
Attorney Registration No. 6275924
1021 North Grand Avenue East
P.O. Box 19276
Springfield, IL 62794-9276
(217) 782-5544
Scott.Sievers@Illinois.gov

Respondent,

BY: /s/ Scott B. Sievers
Scott B. Sievers
Special Assistant Attorney General