

**BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS**

DERSCH ENERGIES, INC.	,)	
)	
	Petitioner,)	
	v.)	PCB 2017-003
)	(UST Appeal)
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
	Respondent.)	

NOTICE

Don Brown, Clerk
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph Street
Suite 11-500
Chicago, IL 60601

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

Patrick D. Shaw
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80 Bellerive Road
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PLEASE TAKE NOTICE that I have today filed with the office of the Clerk of the Pollution Control Board **ILLINOIS EPA'S RESPONSE TO PETITIONER'S MOTION FOR SUMMARY JUDGMENT**, copies of which are herewith served upon you.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,
Respondent



Melanie A. Jarvis
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217/782-5544
217/782-9143 (TDD)
Dated: December 10, 2020

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ILLINOIS EPA'S RESPONSE TO PETITIONER'S MOTION FOR SUMMARY JUDGMENT

NOW COMES the Respondent, the Illinois Environmental Protection Agency ("Illinois EPA" or "Agency"), by one of its attorneys, Melanie A. Jarvis, Assistant Counsel and Special Assistant Attorney General, and hereby submits its **ILLINOIS EPA'S RESPONSE TO PETITIONER'S MOTION FOR SUMMARY JUDGMENT** to the Illinois Pollution Control Board ("Board").

I. STANDARD FOR ISSUANCE AND REVIEW

A motion for summary judgment should be granted where the pleadings, depositions, admissions on file, and affidavits disclose no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Dowd & Dowd, Ltd. v. Gleason, 181 Ill.2d 460, 483, 693 N.E.2d 358, 370 (1998); McDonald's Corporation v. Illinois Environmental Protection Agency, PCB 04-14 (January 22, 2004), p. 2.

There exists a material issue of fact. The Administrative Record in this case was filed on March 31, 2017 per the request of the Petitioner in anticipation of the Petitioner filing a motion for summary judgement in this case. At each status hearing, Petitioner represented that the filing of the motion for summary judgement was imminent. Petitioner had over three years to object to the Administrative Record yet did not do so. Petitioner had over three years to move to amend the

Administrative Record yet did not do so. A Certificate of Record on Appeal was filed with the Administrative Record wherein, the project manager, certified that “on information and belief that the entire record of the Respondent’s decision, as defined in 35 Ill. Adm. Code 105.410(b)” was enclosed. Now, over three years later, during the filing of a motion for summary judgement, the Petitioner files multiple exhibits along with his motion for summary judgement and only one is enclosed within the Administrative Record. If this does not shout material issue of fact, I am not sure what else would.

It is the Agency’s belief however, that a motion for summary judgement could be sustained solely upon the Administrative Record in the Agency’s favor, as it is clear that the Petitioner’s submitted document lacked supporting documentation if all of these exhibits need to be included in the Petitioner’s motion at this time in order to make their claim before the Board.

Further, the decision in Abel Investments v. IEPA, PCB 2016-108, set forth what the Board must decide in a case such as this one which encompasses similar issues.

“The Board must decide whether Abel’s submittal to IEPA demonstrated compliance with the Act and the Board’s rules. Illinois Ayers Oil Co. v. IEPA, PCB 03-214, slip op. at 8 (April 1, 2004); Kathe’s Auto Service Center v. IEPA, PCB 96-102, slip op. at 13 (Aug. 1, 1996). The Board’s review is generally limited to the record before IEPA at the time of its determination. Freedom Oil Co. v. IEPA, PCB 03-54, 03-56, 03-105, 03-179, 04-04 (cons.), slip op. at 11 (Feb. 2, 2006); *see also* Illinois Ayers, PCB 03-214, slip op. at 15 (“the Board does not review [IEPA’s] decision using a deferential manifest-weight of the evidence standard,” but “[r]ather the Board reviews the entirety of the record to determine that the [submittal] as presented to [IEPA] demonstrates compliance with the Act”).

Further, on appeal before the Board, IEPA’s denial letter frames the issue (Karlock v. IEPA, PCB 05-127, slip op. at 7 (July 21, 2005)), and the UST owner or operator has the burden of proof (Ted Harrison Oil v. IEPA, PCB 99-127, slip op. at 5-6 (July 24, 2003); *see also* 35 Ill. Adm. Code 105.112). The standard of proof in UST appeals is the “preponderance of the evidence.” Freedom Oil Co., slip op. at 59 (Feb. 2, 2006), citing McHenry County Landfill, Inc. v. County Bd. of McHenry County, PCB 85-56, 85-61, 85-62, 85-63, 85-64, 85-65, 85-66 (cons.), slip op. at 3 (Sept. 20, 1985) (“A proposition is proved by a preponderance of the evidence when it is more probably true than not.”) *Abel at 3*.

The “Board’s review is generally limited to the record before IEPA at the time of its determination.” Yet here, during a Motion for Summary Judgement no less, the Petitioner includes exhibits, outside of the Administrative Record. However, we can look to that record and to the Abel case for more guidance as its holding is very relevant here. The Board discussed this consultant’s fees on pages 5 through 8 of that case and held as follows:

The Board notes CW₃M’s team-work approach to UST remediation may not lend itself to clearly delineating actual costs and budget items by including an “employee name” on the Consulting Personnel Costs Form. CW₃M could, instead, distinguish line items with more specific language in the “task” field of the Consulting Personnel Costs Form or otherwise outside of the Consulting Personnel Costs Form as part of its submittal to IEPA. CW₃M’s team-work approach with vague, and in some cases redundant task descriptions, makes it difficult for IEPA to determine what budget requests exceed the minimum requirements of the Act. Abel’s argument that it completely filled out the IEPA budget forms falls short if the completed forms fail to demonstrate that the budget costs do not exceed the minimum requirements of the Act.

IEPA is charged with the role of ensuring that remediation work exceeding the minimum requirements of the Act is not reimbursed from the UST Fund in violation of the Act. The Board affirms IEPA’s determination that it “cannot determine that costs will not be used for activities in excess of those necessary to meet the minimum requirements” of the Act. R. at 122-124. IEPA acknowledges that Abel is “afforded the opportunity to resubmit the [consultant budgeting] information with documentation that would explain what is being performed.”

Contrary to the Petitioner’s assertions, The Agency cannot ensure that the consultant’s personnel costs in the submitted budget that the Agency denied in line items 1 through 3, (A.R. 003-004), do not exceed the minimum requirements of the Act and requested supporting documentation to explain the costs. That supporting documentation was never submitted and the Illinois EPA denied the costs.

Further, in respect to the consultant’s material costs, Illinois EPA likewise, could not determine if the uses for the items at the site were necessary or if they exceeded the minimum requirements of the Act. Therefore, the Agency requested supporting documentation which once again was not submitted. The Agency’s deductions 4, and 6 through 12, (A.R. 005-008), should be upheld as the budget as submitted to the Illinois EPA was not sufficient to make such a determination. Regarding deduction 5, (A.R. 005), the Illinois

admits that this issue was already ruled upon by the Board in the Abel decision and the Agency did not prevail. The Agency no longer contests this issue.

CONCLUSION

The facts and the law are clear and in favor of the Illinois EPA. The Petitioner's budget lacks supporting documentation and exceeds the minimum requirements of the Act and regulations.

WHEREFORE: for the above noted reasons, the Illinois EPA respectfully requests the Board either, (1) DENY Petitioner's Motion for Summary Judgment, or (2) find a genuine issue of material fact.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,

Respondent



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217/782-5544, 217/782-9143 (TDD)
Dated: December 10, 2020

This filing submitted on recycled paper.

CERTIFICATE OF SERVICE

I, the undersigned attorney at law, hereby certify that on **December 10, 2020**, I served true and correct copies of **ILLINOIS EPA'S RESPONSE TO PETITIONER'S MOTION OF SUMMARY JUDGMENT** via the Board's COOL system and email, upon the following named persons:

John Therriault, Acting Clerk
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Carol Webb, Hearing Officer
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