

BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

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

NOTICE OF FILING AND PROOF OF SERVICE

TO: Carol Webb, Hearing Officer	Melanie Jarvis
Illinois Pollution Control Board	Division of Legal Counsel
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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, Petitioner's Motion for Leave to File Reply in Support of Petitioner's Motion for Summary Judgment Instantly, a copy of which is herewith served upon the above parties of record in this cause.

The undersigned hereby certifies that I served the aforementioned document by e-mail to each of the persons listed above at the above e-mail address on the 24th day of December 2020, and the number of pages in the e-mail transmission are 8.

DERSCH ENERGIES, INC.,

BY: LAW OFFICE OF PATRICK D. SHAW

BY: /s/ Patrick D. Shaw

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**PETITIONER'S MOTION FOR LEAVE TO FILE REPLY IN SUPPORT OF
PETITIONER'S MOTION FOR SUMMARY JUDGMENT INSTANTER**

NOW COMES Petitioner, DERSCH ENERGIES, INC., by its undersigned counsel, pursuant to Section 101.500(e) of the Procedural Rules of the Illinois Pollution Control Board (35 Ill. Adm. Code § 101.500(e)), and move for leave to file reply instanter in support of Petitioner's Motion for Summary Judgment, stating as follows:

1. On November 24, 2020, Petitioner filed its motion for summary judgment, accompanied by eight exhibits.
2. On December 7, 2020, Respondent filed Illinois EPA's Motion to Strike these exhibits, to which Petitioner's Response to Motion to Strike was filed December 21, 2020.
3. On December 10, 2020, Respondent filed Illinois EPA's Response to Petitioner's Motion for Summary Judgment.
4. The Response raises new legal issues, which Petitioner would be materially prejudiced if it were unable to reply to these new, novel arguments made in the Response.
5. Illinois Pollution Control Board rules authorize the filing of a motion seeking permission to file a reply within 14 days after service of the response. (35 Ill. Adm. Code 101.500(e))

6. This motion is filed fourteen days from service of the response and seeks leave to file the reply instanter.

WHEREFORE, Petitioner, DERSCH ENERGIES, INC., requests that the Board authorize permission to file the attached reply instanter, and for such other and further relief as the Board deems meet and just.

Respectfully submitted,

DERSCH ENERGIES, INC.

Petitioner,

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PETITIONER’S REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

NOW COMES Petitioner, DERSCH ENERGIES, INC., by its undersigned counsel,
pursuant to Section 101.501(e) of the Board’s Procedural Rules (35 Ill. Adm. Code §
101.501(e)), as follows:

INTRODUCTION

There is currently pending a motion to strike eight exhibits from the motion summary judgment, which Petitioner has addressed in Petitioner’s Response to Motion to Strike, which is hereby incorporated by reference and will therefore not be specifically addressed herein. As explained in Petitioner’s Motion for Summary Judgment, “[f]or the most part these exhibits should clarify evidence in the administrative record and remove any suggestion of any disputed facts.” (Mot. S.J. at p. 10) The primary evidence relied upon was and is in the administrative record.

I. Respondent has Failed to Dispute any Material Facts.

“The purpose of summary judgment is not to try a question of fact but simply to determine if one exists.” Forsythe v. Clark USA, Inc., 224 Ill.2d 274, 280 (2007) The movant,

has the initial burden of production on a summary judgment motion. Mashal v. City of Chicago, 2012 IL 112341, ¶ 49. “[I]f the movant satisfies its initial burden of production . . . the burden shift[s] to the respondent to present some factual basis that would arguably entitle it to a favorable judgement.” Pecora v. County of Cook, 323 Ill. App. 3d 917, 933 (1st Dist. 2001).

Petitioner submits that it has met its initial burden of production. Petitioner’s Motion for Summary Judgment was supported by approximately a hundred pinpoint citations to the administrative record filed by the Agency, addressing each cut the Agency made to the budget. As the Agency states herein, the “Board’s review is generally limited to the record before IEPA at the time of its determination.” (Resp. at p. 4) Summary Judgment may be particularly appropriate “[i]f what is contained in the papers on file would constitute all of the evidence before a court.” Pyne v. Witmer, 129 Ill.2d 351, 358 (1989). Furthermore, the issues herein are framed by the Agency’s denial letter, Abel Investments v. IEPA, PCB 16-108, slip op. at 3 (Dec. 15, 2016), and the purpose of the hearing is to give petitioners an opportunity to challenge the Agency’s decision. EPA v. PCB, 138 Ill. App. 3d 550, 552 (3rd Dist. 1985). All in all, summary judgment is not such a drastic measure when the Agency’s general position is that evidence outside the administrative record is suspect at best, impermissible at worst.

“Once the movant has met its initial burden of production, the burden shifts to the nonmovant. At this point, the nonmovant cannot rest on its pleadings to raise genuine issues of material fact.” Triple R Dev. v. Golfview Apartments I, 2012 IL App (4th) 100956, ¶ 12. “Nor is mere argument enough to raise an issue of material fact.” Id. ¶ 16. “Moreover, the mere allegation that material factual disputes exist does not create a triable issue of fact.” Outboard Marine Corp. v. Liberty Mut. Ins. Co., 154 Ill. 2d 90, 132 (1992) “A genuine issue of material

fact precluding summary judgment exists where the material facts are disputed or, if the material facts are undisputed, reasonable persons might draw different inferences from the undisputed facts.” Mashal v. City of Chi., 2012 IL 112341, ¶ 49.

Illinois EPA’s response failed to provide any “factual basis that would arguably entitle it to a favorable judgement” which would be necessary to preclude summary judgment. Pecora, 323 Ill. App. 3d at 933. The Agency alleges the existence of a “a material issue of fact,” but does not identify any fact disputed. The only citations to the administrative record are references to conclusions reached in the Agency’s decision letter. (Response M.S.J. at p. 4 (citing R.003 - R.008)) That is merely argument in the form of a restatement of the conclusions the Agency reached which are being appealed. Since the Agency’s decision letter frames the issues before the Board, the letter’s relevance is indisputable, but citing only to its conclusions is tantamount to resting on the pleadings.

That there are no genuine issues of material fact should not be surprising given that the facts are essentially that the documents presented to the Board are true and correct copies of what they purport to be. “Inferences may be drawn from undisputed facts.” Pyne v. Witmer, 129 Ill.2d 351, 358 (1989).¹ Where a case is governed by documents, such as contracts or insurance policies, that primarily involve interpreting language, summary judgment is particularly

¹ The further qualifier in Pyne and other cases cited herein is that summary judgment should be “denied where reasonable persons could draw divergent inferences from the undisputed facts.” Pyne, 129 Ill.2d at 358. This appears to be a recitation of the standard for directed verdicts, as the Illinois Supreme Court also states that if the evidence on summary judgment motion would necessitate a court “to direct a verdict” at jury trial, summary judgment should be entered. Id. The Board is at technical body that tries all issues of fact and law within its jurisdiction. There is no jury and as such, its not clear that this restriction would typically apply if ever.

appropriate procedure. E.g., Jones v. Seiwert, 164 Ill.App.3d 954, 957 (1st Dist. 1987)

In summary, there are no material questions of fact that would preclude motion for summary judgment. By not raising any factual basis to dispute any fact, Respondent has conceded as much.

II. There are no Procedural Restrictions Precluding Summary Judgment.

Respondent's claim that there exists a material issue of fact (Resp. At p. 2), is followed by reference to the course of proceedings before the Board. A motion for summary judgment is proper "any time after the opposing party has appeared" and far enough in advance of any hearing date to allow the Board time to rule upon it. (35 Ill. Adm. Code § 101.516 (a)) Moreover, either party can file a motion for summary judgment. (*Id.*) The only deadline not observed in this case has been Respondent's more than six-month delay in filing an appearance and the administrative record. (Board Order of August 25, 2016)

III. The Language Quoted from the Abel Decision Has No Applicability Here.

On page 4 of the IEPA's Response, two paragraphs are quoted from Abel Investments v. IEPA, PCB 16-108 (Dec. 15, 2016). That discussion relates to cuts to the personnel time for the Senior Project Manager that the IEPA believed were the proper responsibility of the Project Manager. *Id.* at p. 6. The Agency denial letter in Abel stated that "IEPA assumes reviewing 'ongoing work on a project to see if it was staying on track' is the duty of a project manager." *Id.*

In the pending case, no such reason was given in the decision letter. Senior Project

Manager time was cut from the budget because it was “only an estimate” and should be resubmitted after the work is performed and “the costs will be known.” (R.004) To the extent the Agency wanted to make cuts for a different reason, the Agency was required by the Illinois Environmental Protection Act to specifically explain its reasons in the denial letter and the Agency is now precluded from raising that issue. Environmental Protection Agency v. Pollution Control Board, 86 Ill.2d 390, 405 (1981).

CONCLUSION

WHEREFORE, Petitioner, DERSCH ENERGIES, INC., prays that the Board find the Agency erred in its decision, direct the Agency to approve the budget as submitted, allow Petitioner to submit proof of legal costs, and for such other and further relief as it deems meet and just.

DERSCH ENERGIES, INC.,
Petitioner

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