

**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  
Law Office of Patrick D. Shaw  
80 Bellerive Road  
Springfield, IL 62704

**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**, copies of which are herewith served upon you.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,  
Respondent



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Melanie A. Jarvis  
Assistant Counsel  
Division of Legal Counsel  
1021 North Grand Avenue, East  
P.O. Box 19276  
Springfield, Illinois 62794-9276  
217/782-5544  
217/782-9143 (TDD)  
Dated: January 29, 2021

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| Respondent.            |             | ) |              |

**ILLINOIS EPA'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 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.

Section 57.8(i) of the Illinois Environmental Protection Act ("Act") (415 ILCS 5/57.8(i)) grants an individual the right to appeal a determination of the Illinois EPA to the Board pursuant to Section 40 of the Act (415 ILCS 5/40). Section 40 of the Act, the general appeal section for permits, has been used by the legislature as the basis for this type of appeal to the Board. Thus, when reviewing an Illinois EPA determination of ineligibility for

reimbursement from the Underground Storage Tank Fund, the Board must decide whether the application, as submitted, demonstrates compliance with the Act and Board regulations. Rantoul Township High School District No. 193 v. Illinois EPA, PCB 03-42 (April 17, 2003), p. 3.

In deciding whether the Illinois EPA's decision under appeal here was appropriate, the Board must look to the documents within the Administrative Record ("Record" or "AR"). The Illinois EPA asserts that the Record as filed by the Agency and the arguments presented in this motion are sufficient for the Board to enter a dispositive order in favor of the Illinois EPA on all relevant issues. Accordingly, the Illinois EPA respectfully requests that the Board enter an order granting the Illinois EPA summary judgement.

## **II. BURDEN OF PROOF**

Pursuant to Section 105.112(a) of the Board's procedural rules (35 Ill. Adm. Code 105.112(a)), the burden of proof shall be on the petitioner. In reimbursement appeals, the burden is on the applicant for reimbursement to demonstrate that incurred costs are related to corrective action, properly accounted for, and reasonable. Rezmar Corporation v. Illinois EPA, PCB 02-91 (April 17, 2003), p. 9.

## **III. ISSUES**

The issue presented is whether the Petitioner can be reimbursed for actions that lack supporting documentation, are unreasonable and exceed the minimum requirements of the Act.

Based upon the express language of the Act and regulations thereunder, and the facts presented, the answer is NO.

#### **IV. LAW**

Sec. 57.7. Leaking underground storage tanks; site investigation and corrective action.

- (3) In approving any plan submitted pursuant to subsection (a) or (b) of this Section, the Agency shall determine, by a procedure promulgated by the Board under Section 57.14, that the costs associated with the plan are reasonable, will be incurred in the performance of site investigation or corrective action, and will not be used for site investigation or corrective action activities in excess of those required to meet the minimum requirements of this Title.

#### **Section 734.630 Ineligible Corrective Action Costs**

Costs ineligible for payment from the Fund include, but are not limited to:

\* \* \*

- cc) Costs that lack supporting documentation;
- dd) Costs proposed as part of a budget that are unreasonable;

#### **V. FACTS**

There exists no issue of material fact. The facts set forth in the Administrative Record are clear as follows:

1. On March 23, 2016, Dersch Energies submitted a Corrective Action Plan and Budget. (A.R. 28)
2. On June 14, 2016, an Illinois EPA project manager emailed Dersch Energies' consultant to request supporting documentation on various items in the budget. (A.R. 22)
3. On June 28, 2016, the Dersch Energies consultant responded to the request. (A.R. 17)
4. On July 1, 2016, the Illinois EPA project manager responded to the consultant. (A.R. 15)

5. The Illinois EPA project Manager finished the review of the Corrective Action Plan and Budget on July 8, 2016.
6. On July 12, 2016, the Illinois EPA issued a final decision.
7. On August 18, 2016, Petitioner filed his Appeal.

## **VI. ARGUMENT**

There exists no material issue of fact. This case is a matter of the application of the law. The Administrative Record in this case was filed on March 31, 2017. 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. The facts contained within the Administrative Record are not in dispute.

A motion for summary judgement can be granted in favor of the Illinois EPA based upon the Administrative Record and the Board’s decision in Abel Investments v. IEPA, PCB 2016-108. The Board’s decision in Abel Investments, set forth what the Board must decide in a case such as this one, which encompasses similar issues with personnel costs.

“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 (Karloek 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.” As such, 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 CW<sub>3</sub>M’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. CW<sub>3</sub>M 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. CW<sub>3</sub>M’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.”

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. (A.R. 22) 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.

## **VII. CONCLUSION**

The facts and the law are clear and in favor of the Illinois EPA. The Petitioner's submittal lacks supporting documentation, are unreasonable, and exceed the minimum requirements of the Act and regulations.

**WHEREFORE:** for the above noted reasons, the Illinois EPA respectfully requests the Board GRANT the Illinois EPA's motion for summary judgment.

Respectfully submitted,

**ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,**

Respondent



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Melanie A. Jarvis  
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Division of Legal Counsel  
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217/782-5544, 217/782-9143 (TDD)  
Dated: January 29, 2021

This filing submitted on recycled paper.

## CERTIFICATE OF SERVICE

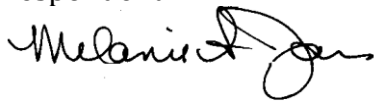
I, the undersigned attorney at law, hereby certify that on **January 29, 2021**, I served true and correct copies of **ILLINOIS EPA'S RESPONSE TO PETITIONER'S MOTION OF SUMMARY JUDGMENT** via the Board's COOL system and email, upon the following named persons:

John Therriault, Acting Clerk  
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  
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