

ILLINOIS POLLUTION CONTROL BOARD

June 17, 2021

DERSCH ENERGIES, INC.,)	
)	
Petitioner,)	
)	
v.)	PCB 17-3
)	(UST Appeal)
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Respondent.)	

OPINION AND ORDER OF THE BOARD (by C.M. Santos):

Dersch Energies, Inc. (Dersch) owns an automotive repair facility in Lawrenceville (facility or site) at which underground storage tanks (USTs) leaked petroleum. Before Dersch removed the USTs in 2005, a service station known as Croslow's Shell operated at the facility. As part of remediating its site, Dersch submitted a corrective action plan and budget to the Illinois Environmental Protection Agency (IEPA or Illinois EPA or Agency). IEPA approved the plan but modified the budget by: 1) deeming \$6,650.99 in consulting personnel costs excessive; 2) deeming \$21.00 in consultant's materials costs for a measuring wheel an indirect cost; and 3) deeming a total of \$577.10 in consultant's materials costs lacked supporting documentation. Dersch requests that the Board reverse these modifications and approve the budget as submitted.

Both parties filed a motion for summary judgement. The parties agree that summary judgment is appropriate, although they do not agree on the facts the Board considers to decide the motions.

For the reasons below, the Board grants Dersch's motion for summary judgment on the single issue of a measuring wheel but otherwise denies its motion. The Board denies IEPA's motion for summary judgment. The Board directs its assigned hearing officer to proceed expeditiously to hearing on the disputed budget modifications.

This opinion first summarizes the procedural history of the case and then decides three preliminary matters. The Board then provides the factual background. After addressing summary judgment and the applicable standard of review and burden of proof, the Board discusses and decides the issues on appeal before issuing its order.

PROCEDURAL HISTORY

On August 18, 2016, Dersch filed a petition for review (Pet.). On August 25, 2016, the Board accepted the petition for hearing. Beginning on September 7, 2016, and continuing for

more than four years, the Board's hearing officer conducted regular status conferences with the parties.

On March 31, 2017, IEPA submitted the administrative record of its determination (R.).

On November 30, 2020, Dersch filed a motion for summary judgment (Pet. Mot. SJ). On December 10, 2020, IEPA filed its response (IEPA Resp.). On December 24, 2020, Dersch filed a motion for leave to reply (Pet. Mot. Leave) accompanied by its reply (Pet. Reply).

Dersch's motion for summary judgment included a request that the Board take official notice of eight exhibits (Exh. A-H). Pet. Mot. SJ at 8-10. On December 7, 2020, IEPA filed a motion to strike the exhibits other than those that are part of its administrative record (Mot. Strike). On December 21, 2020, Dersch responded to IEPA's motion to strike (Resp. Strike).

On January 29, 2021, IEPA filed a motion for summary judgment (IEPA Mot. SJ). On February 16, 2021, Dersch filed its response (Pet. Resp.). On February 18, 2021, IEPA filed a motion for leave to reply (IEPA Mot. Leave), accompanied by its reply (IEPA Reply). IEPA's reply "requests that the Board strike the Petitioner's Response. . . ." IEPA Reply at 1. On March 4, 2021, Dersch responded to IEPA's motion for leave (Pet. Resp. Leave).

PRELIMINARY MATTERS

In the following subsections of this opinion the Board addresses three pending preliminary matters. First, the Board grants Dersch's request that the Board take official notice of eight exhibits submitted with its motion for summary judgment and denies IEPA's motion to strike those documents. Second, the Board grants Dersch's motion for leave to reply. Third, the Board grants IEPA's motion for leave to reply.

Dersch's Request that the Board Take Official Notice of Exhibits

Dersch states that the Board can take official notice of "[m]atters of which the circuit courts of this State may take judicial notice; and [g]enerally recognized technical or scientific facts within the Board's specialized knowledge." Pet. Mot. SJ at 7, citing 35 Ill. Adm. Code 101.630(a).

Dersch's motion for summary judgment requests that the Board take official notice of the following eight exhibits:

Exh. A	Leaking UST Technical Review Notes (4/11/07)
Exh. B	Stage 2 and Stage 3 Site Investigation Plan (4/17/07)
Exh. C	Stage 3 Site Investigation Plan (6/11/13)
Exh. D	IEPA Decision Letter on Stage 3 Site Investigation Plan (7/30/13)
Exh. E	Site Investigation Completion Report (5/18/15)
Exh. F	IEPA Decision Letter on Site Investigation Completion Report (6/5/15)
Exh. G	IEPA Instructions for Budget & Billing Forms (4/09); and

Exh. H U.S. Bureau of Labor Statistics CPI Inflation Calculator

Dersch argues that these are “consistent with documents of which the Board has previously taken official notice.” Pet. Mot. SJ at 9, citing 35 Ill. Adm. Code 101.630(b). Dersch argues that these exhibits “should clarify evidence in the administrative record and remove any suggestions of any disputed facts.” Pet. Mot. SJ at 9; Pet. Reply at 1.

Exhibits A-F. Dersch states that it downloaded Exhibits A through F from IEPA’s website. Pet. Mot. SJ at 7 (citation omitted). Dersch argues that the Board previously has taken notice of documents created by IEPA and available from its website. *Id.* at 7-8, n.2, citing McAfee v. IEPA, PCB 15-84, slip op. at 2 (Mar. 5, 2015); City of Benton Fire Dept. v. IEPA, PCB 17-1, slip op. at 2 (Feb. 22, 2018).

Exhibits A through F from IEPA’s file “were created after the Site Investigation Plan and Budget dated February 23, 2007.” Dersch argues that “the next oldest document” in the record is the November 9, 2015 Corrective Action Plan, so Exhibits A through F “fill gaps in the Administrative Record.” Pet. Mot. SJ at 8, citing R. at 98-225, 226-420. Dersch adds that “Exhibits B through F were expressly incorporated by reference in the Corrective Action Plan under review here.” *Id.*, citing R. at 40.

Exhibit G. Dersch states that Exhibit G, IEPA’s instructions for its budget and billing forms, was also downloaded from IEPA’s website. Pet. Mot. SJ at 8, n.3. Dersch argues that these instructions have “been admitted into evidence in at least three previous Board decisions.” *Id.*, citing City of Benton Fire Dep’t. v. IEPA, PCB 17-1, slip op. at 2 (Feb. 22, 2018); Abel Inv. v. IEPA, PCB 16-108, slip op. at 11 (Dec. 15, 2016); Knapp v. IEPA, PCB 16-103, slip op. at 2 (Sept. 22, 2016). Although Dersch acknowledges that the Board admitted these without taking official notice of them, “the Board has taken official notice of budget and billing forms.” Pet. Mot. SJ at 8, citing Knapp v. IEPA, PCB 16-103, slip op. at 8, n.2 (Sept. 22, 2016). Dersch adds that these forms “have regulatory weight” because Board regulations require using them. Pet. Mot. SJ at 8, citing Knapp v. IEPA, PCB 16-103, slip op. at 6 (Sept. 22, 2016), citing 35 Ill. Adm. Code 734.135(a).

Exhibit H. Dersch describes Exhibit H as “a Consumer Price Index calculator maintained by the U.S. Bureau of Labor Statistics.” Pet. Mot. SJ at 9, n.4 (citation omitted). Dersch argues that the Board has previously taken official notice of documents from other public agencies. *Id.* at 9, citing PAK-AGS v. IEPA, PCB 15-14, slip op. at 2-3 (Dec. 4, 2014) (denying IEPA motion to strike).

Dersch argues that Exhibit H calculates inflation’s effect on costs. Pet. Mot. SJ at 9. Dersch further argues that this effect is within the Board’s technical expertise, as its regulations address inflation factors. *Id.*, citing 35 Ill. Adm. Code 734.870 (Increase in Maximum Payment Amounts); *see* 35 Ill. Adm. Code 101.630(c). Dersch adds that Exhibit H is typical of information of which circuit courts take official notice. Pet. Mot. SJ at 9, citing 35 Ill. Adm. Code 101.630(a)(1).

Discussion of IEPA’s Motion to Strike

IEPA argues that the Board must determine whether Dersch's submitted application demonstrates compliance with the Act and Board regulations. Mot. Strike at 1, citing Rantoul Township High Sch. Dist. v. IEPA, PCB 03-42, slip op. at 3 (Apr. 17, 2003). It further argues that the Board must make this determination by reviewing documents in the administrative record. Mot. Strike at 1, 2.

IEPA asserts that, when deciding a motion for summary judgment, "the only undisputed facts are those contained in the Administrative Record. . . ." Mot. Strike at 1. IEPA suggests that documents on its website are not necessarily undisputed facts when deciding a motion for summary judgment and that those documents are not necessarily part of the record.

Dersch argues that IEPA has not disputed that Exhibits B-H "are proper subjects for official notice." Resp. Strike at 1, citing Mot. Strike at 2.

While IEPA objects to having the Board take official notice of these documents at summary judgment, IEPA acknowledges that the documents are typical of those that could be admitted at a Board hearing. See Mot. Strike at 1-2. IEPA cites no authority in support of its position that the Board cannot take official notice of documents when considering a motion for summary judgement.

A summary judgement motion "[m]ay be directed toward all or part of a claim or defense and it may be made on the basis of the pleadings or other portions of the record in the case or it may be supported by affidavit and a variety of outside material." *Black's Law Dictionary*, 5th Ed. 1979. Including documents with a motion for summary judgment is not uncommon, and these documents can be used to support the motion. See, e.g., Slightom v. IEPA, PCB 11-25 (Apr. 19, 2012); People v. Illinois Fuel, PCB 10-86 (July 25, 2019). IEPA does not persuade the Board that it cannot take official notice of documents attached to a motion for summary judgment. IEPA's response appears to confuse what is undisputedly a part of IEPA's record and what is an undisputed fact.

IEPA also asserts that it has had no opportunity to contest the material in these exhibits as they would have to cross examine them at hearing. Mot. Strike at 2; see 35 Ill. Adm. Code 101.630(b). IEPA argues that "[a] Motion for Summary Judgment is simply not the place to amend the record or to admit documents. . . ." Mot. Strike at 2. IEPA suggests that Dersch's exhibits introduce a genuine issue of material fact, while the material in its record does not contain one. See *id.*

Dersch acknowledges that IEPA must be provided notice of and an opportunity to contest the material proposed for taking official notice. Resp. Strike at 2, citing 35 Ill. Adm. Code 101.630(b). Dersch argues that, although IEPA's response provided this opportunity, IEPA failed to identify any reason that its exhibits are not suitable for taking official notice. Resp. Strike at 2. Dersch suggests that the response "confuses the motion for summary judgment with a motion to supplement the record." *Id.*

Dersch also stresses that the Board has taken official notice of documents that were not introduced at hearing. Resp. Strike at 1-2, citing PAK-AGS v. IEPA, PCB 15-14, slip op. at 2-3 (Dec. 4, 2014).

Dersch concludes that IEPA had had the “opportunity to dispute whether the exhibits are what they purport to be [and] whether they are complete and accurate.” Resp. Strike at 3. It adds that IEPA has raised no “dispute that would prevent their consideration in a motion for summary judgement.” *Id.*

The Board’s procedural rules provide that “[p]arties will be notified of the material noticed . . . and they will be given an opportunity to contest that material.” 35 Ill. Adm. Code 101.630(b). Dersch’s motion notified IEPA of materials for which Dersch requested that the Board take official notice.

Finally, IEPA argues that Dersch’s Exhibits B-H were not part of the record and that IEPA’s Project Manager did not review them when making its determination. Mot. Strike at 2.

Dersch responds that IEPA’s Project Manager “created Exhibits A, B, D, and F, and he was the addressee in Exhibits C and E. Exhibit G was created by Respondent.” Resp. Strike at 2. IEPA “is free to ask itself if these documents are what they purport to be.” *Id.*

The Board notes IEPA’s argument that it did not consider the documents for which Dersch requests official notice and that the Board therefore cannot review them. *See generally* Mot. Strike at 1, citing Rantoul Township High Sch. Dist. v. IEPA, PCB 03-42, slip op. at 3 (Apr. 17, 2003). The standard for review is whether Dersch’s submission 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).

However, the Board notes that the documents for which Dersch requests that the Board take official notice either relate to the site, are available on IEPA’s website, or generally apply to UST reimbursements. IEPA states that its reviewer did not consider the documents on its website in making IEPA’s determination. However, the Board recognizes Dersch’s arguments that IEPA’s reviewer either prepared or received most of the documents and that a number of the documents are specifically cross-referenced in the Corrective Action Plan for the site. Even if those documents were not included in the record filed by IEPA, IEPA knew the history of the site and forms submitted to it when made its determination on Dersch’s budget. The Board finds that taking official notice of the documents is consistent with the standard of review in this appeal.

Finally, taking official notice of documents in the public domain and specifically on the IEPA’s website is allowed by the Board’s rules and Board precedent. When considering whether to take official notice of materials on IEPA’s website, the Board stated that it

will take administrative notice of the documents attached to the petitioner's brief. *See generally* Stop The Mega-Dump v. County Board of DeKalb County, Illinois and Waste Management, of Illinois Inc., PCB 10-103 (Mar. 17, 2011); *see also* People v. Young, 355 Ill. App. 3d 317, 321 (2nd Dist. 2005). The documents are all documents created by the [IEPA] and available from the [IEPA]'s website. The Board finds that the [IEPA] is not prejudiced by the Board taking official notice of those documents. McAfee v. IEPA, PCB 15-84, slip op. at 2 (Mar. 5, 2015).

Similarly, in Knapp Oil Co. v. IEPA, PCB 16-103, slip op. at 8 (Sept. 22, 2016), the Board took official notice of forms from IEPA's website. As Dersch points out, the Board also did so in PAK-AGS v. IEPA, PCB 15-14, slip op. at 2-3 (Dec. 4, 2014). Based on these precedents, the Board is convinced that taking official notice of the documents attached to Dersch's motion is appropriate and will not prejudice the IEPA.

IEPA has not persuaded the Board to overlook precedent and its own procedural rules concerning official notice. IEPA's motion does not persuade the Board to strike Dersch's exhibits from its motion for summary judgment, and the Board denies the motion.

Motions for Leave to File Reply

The Board's procedural rules address replies by providing that "[t]he moving person will not have the right to reply, except as the Board or the hearing officer permits to prevent material prejudice. A motion for permission to file a reply must be filed with the Board within 14 days after service of a response." 35 Ill. Adm. Code 101.500(e).

Dersch's Motion for Leave to File a Reply. Dersch states that it filed its motion for leave to file a reply in support of its motion for summary judgment on December 24, 2020, fourteen days after service of IEPA's response on December 10, 2020. Pet. Mot. Leave at 2. The Board accepts the motion as timely filed. *See id.* (seeking leave to file *instantly*).

Dersch argues that IEPA's response to its motion for summary judgment "raises new legal issues." Pet. Mot. Leave at 1. Dersch asserts that it "would be materially prejudiced if were unable to reply to these new, novel arguments made in the Response." *Id.*

The Board grants Dersch's unopposed motion for leave to file and accepts its reply in support of its motion for summary judgment.

IEPA's Motion for Leave to File a Reply. IEPA states that Dersch served its response on IEPA on February 12, 2021, a State holiday falling on the 14th day after IEPA filed its motion for summary judgment. IEPA Mot. Leave at 1. Dersch filed the response with the Board on February 16, 2021, which the Board accepts as timely. *See* 35 Ill. Adm. Code 101.300(a) (extending deadlines for State holidays).

IEPA's motion for leave to file a reply argues that Dersch's "arguments or lack thereof" necessitate a reply. IEPA Mot. Leave at 1. IEPA further argues that "[t]he issue in this case is important and material prejudice may result if the Illinois EPA is not allowed to reply." *Id.*

Dersch notes IEPA's characterization of the "arguments or lack thereof" in its response. Pet. Resp. Leave at 1. Dersch argues that, if IEPA believes that the response lacks arguments, "then no reply is justified." *Id.* at 2. Dersch adds that, as the movant, IEPA's motion should meet its burden of proof "without relying on replies and surreplies for support." *Id.*

Dersch argues that the issues on appeal are framed not by the parties' briefs but by IEPA's decision letter. Pet. Resp. Leave at 2. Dersch states that its motion for summary judgment addressed each of twelve disputed budget reductions listed in IEPA's decision. *Id.*, citing R at 3-8. Dersch asserts that IEPA's motion for summary judgment included "little if anything that could not be found in the Agency decision letter." Pet. Resp. Leave at 2. To respond to this motion, Dersch argues that "it was entirely appropriate for Petitioner to incorporate its prior briefing and avoid redundant and multitudinous filings." *Id.*

IEPA's Reply argues that Dersch's response is insufficient "for the Agency to be able to reply due to its vagueness and therefore, the Agency requests that the Board strike the Petitioner's Response as it denies the Agency any due process." IEPA Reply at 1. Dersch responds that IEPA "has no due process rights at issue here." Pet. Resp. Leave at 1.

Dersch concludes by requesting that the Board deny IEPA's motion for leave to file a reply. If the Board grants leave, Dersch requests that the Board deny IEPA's motion to strike its response to IEPA's motion for summary judgment. If the Board grants the motion to strike, Dersch requests that the Board grant leave to file an amended response. Mot. Leave Reply at 2.

The Board denies IEPA's motion to strike Dersch's response to IEPA's motion for summary judgment. The Board also grants IEPA's motion for leave to file and accepts its reply in support of its motion for summary judgment.

FACTUAL BACKGROUND

In the following subsections, the Board first summarizes the record on the release from the USTs at the site. The Board then reviews the 2015 corrective action plan and budget IEPA rejected. It then addresses the 2016 plan approved by IEPA and the budget Dersch proposed.

Release and Eligibility Determination

Following an environmental assessment, Dersch reported a release at its facility known as Croslow's Shell located at 1421 Lexington Avenue, Lawrenceville, Lawrence County. R. at 32, 33; *see* Pet. Mot. SJ at 1. On March 17, 2005, the Illinois Emergency Management Agency assigned the release Incident No. 2005-0374. R. at 32; *see* Pet. Mot. SJ at 1. On May 5, 2005, four USTs were removed from the site: three 6,000-gallon gasoline tanks (Tanks 1-3) and one 1,000-gallon diesel tank (Tank 4). R. at 33; *see* Pet. Mot. SJ at 1. Tank removal also included

excavation and disposal of approximately 443 tons of hydrocarbon-impacted backfill. R. at 33; *see* Pet. Mot. SJ at 1.

Also on May 5, 2005, the Office of the Illinois State Fire Marshal determined that Dersch is eligible to seek payment of costs exceeding \$10,000 from the UST Fund in response to Incident No. 05-0374 and associated with Tanks 1-4. R. at 74.

2007 Site Investigation Plan

On February 23, 2007, Applied Environmental Technologies (AET) submitted a Stage 2 and 3 Site Investigation Plan for the site to IEPA. R. at 226; *see* R. at 32; Pet. Mot. SJ at 1. The proposed plan addressed establishing site-specific parameters based in part on a sample collected from Boring No. 2 on the north side of the property. R. at 242-44; *see id.* at 248 (General Site Map); 393-97 (Exhibit F: analytical results). When drilling Boring No. 2, “no petroleum odors were encountered, no discoloration was encountered, and when the samples were screened with the calibrated PID meter. No indication of petroleum impaction was detected. However, the laboratory report indicated the presence of petroleum impaction below remediation objectives.” *Id.* at 243-44. The proposed plan requested that, “[s]hould the agency believe that the results of this analysis are not satisfactory for use in modeling, please advise in the agency response and during the next phase of the investigation an effort will be made to collect this sample from another on site area if possible.” *Id.* at 244.

IEPA’s technical review of the plan noted the proposed site-specific parameters, including four collected from Boring No. 2. Pet. Mot. SJ, Exh. A at 2. On April 17, 2007, IEPA approved the plan with the modification of an additional boring “to further delineate onsite contamination on the northeastern quarter of the property.” Pet. Mot. SJ, Exh. B at 1; *see* R. at 32; Pet. Mot. SJ at 2; Pet. Mot. SJ, Exh. A at 2. IEPA’s modification did not address re-sampling to obtain revised site-specific parameters. *See* Pet. Mot. SJ, Exh. B.

On June 11, 2013, Dersch’s new consultant CW³M submitted a budget to IEPA. R. at 32, 40; *see* Pet. Mot. SJ at 2, Exh. C. The proposed budget itemized costs in four categories: \$4,013.50 in drilling and monitoring well costs; \$2,163.33 in analytical costs; \$30,733.02 in consulting personnel costs; and \$1,334.60 in consultant’s materials with a total of \$38,244.45. Pet. Mot. SJ, Exh. C at 6. IEPA approved the budget on July 30, 2013. Pet. Mot. SJ, Exh. D; *see* R. at 32; Pet. Mot. at 2.

On March 27, 2014, CW³M began off-site drilling activities to define off-site impacts following AET’s plan for Stages 2 and 3. R. at 34; *see* Pet. Mot. SJ at 2. On May 22, 2015, CW³M submitted a Site Investigation Completion report to IEPA. Pet. Mot. SJ, Exh. E; *see* R. at 32, 40; Pet. Mot. SJ at 2-3. It reported Stage 3 actual costs itemized in four categories: \$3,089.10 in drilling and monitoring well costs; \$2,163.33 in analytical costs; \$36,377.59 in consulting personnel costs; and \$2,436.60 in consultant’s materials with a total cost of \$44,236.62. Pet. Mot. SJ, Exh. E (Appendix F).

IEPA approved the report on June 5, 2015. Pet. Mot. SJ, Exh. F; *see* R. at 32, 103; Pet. Mot. SJ at 3. IEPA also approved the requested costs for Stage 2 and 3, as well as \$1,170.00 in remediation and disposal costs. Pet. Mot. SJ, Exh. F.

2015 Corrective Action Plan and Budget

Based on analysis of soil and groundwater samples, Dersch concluded that soil contamination was present at soil borings B-1, B-3, B-4, B-5, and B-6 and extended from the site west across 15th Street and south across Lexington Avenue. R. at 109; *see id.* at 132 (Soil Contamination Plume Map). Dersch also concluded that groundwater contamination was present at monitoring wells MW-1, MW-3, MW-4, and MW-5 and also extended across 15th Street and Lexington Avenue. *Id.* at 109; *see id.* at 133 (Groundwater Contamination Plume Map).

To address soil contamination, Dersch proposed to excavate soil near borings B-4, B-5, and B-6. Dersch proposed four additional borings to establish boundaries for the excavation. R. at 109; *see id.* at 131 (Proposed Soil Boring Location Map). After defining the area in which contamination exceeds Tier 2 Industrial-Commercial clean up objectives, Dersch intended to propose an amended corrective action plan for the removal of soil exceeding those limits. *Id.* at 109; *see* Pet. Mot. SJ at 3. Remaining soil contamination would be addressed by restrictions on use of land and groundwater. R. at 109; *see* Pet. Mot. SJ at 3.

To address on-site groundwater contamination, Dersch intended to implement a “TACO Tier 2 Industrial-Commercial land use restriction with groundwater use restriction.” R. at 110. “The site has public water available and is not within the setback of a known potable well.” *Id.*; *see id.* at 111 (Table 3-1: Water Supply Well Information). While the City of Lawrenceville has adopted a groundwater ordinance, the site does not fall within its boundaries. Dersch indicated that it would propose an ordinance revision. *Id.* at 110.

To address off-site groundwater contamination, Dersch proposed to enter into Highway Authority Agreements (HAAs) with the City of Lawrenceville for Lexington Avenue and the Illinois Department of Transportation (IDOT) for 15th Street. R. at 110; *see id.* at 134 (Proposed Highway Authority Agreement Map).

Dersch’s proposed plan established remediation objectives based on physical parameters under Part 742, Tiered Approach to Corrective Action Objectives. R. at 107, 159 (summary of inputs), 173-76 (SSL parameters); *see* 35 Ill. Adm. Code 742.APPENDIX C, TABLES B, D (parameters).

The proposed Corrective Action Plan included a total budget of \$52,569.72. R. at 142; *see* Pet. Mot. SJ at 3.

E-mail Communication

In a January 15, 2016 e-mail, IEPA’s project manager noted that Dersch calculated Tier 2 objectives “using defaults for soil bulk density, soil particle density and fraction of organic carbon; these parameters have to be site-specific.” R. at 97. In 2006, samples from soil boring

B-2 were not analyzed to establish these parameters. *Id.*; *see id.* at 256, 265-68, 301, 305 (2007 Site Investigation Plan). The project manager stated that “[i]t looks like we’re going to need to do another geotechnical boring and analyze for the [Section] 734.410 parameters. The boring should probably be placed northeast of MW-9 and the sample should be taken at 7.5’ bgs [below ground surface].” *Id.* at 97.

On January 18, 2016, CW³M responded that it was “trying to salvage the results of another consultant even though the data was possibly going to be insufficient for our needs. We understand that the plan will need to be rejected. . . .” R. at 96. She stated that “we will prepare a plan to collect a TACO sample for physical analysis. Once the TACO results are returned to our office, we will recalculate the TACO Tier 2 cleanup objectives and resubmit this plan with any appropriate modifications.” *Id.*

IEPA Determination

In a letter dated January 21, 2016, IEPA rejected Dersch’s proposed corrective action plan. R. at 90; *see* Pet. Mot. SJ at 3. IEPA stated that owners and operators must propose remediation objectives according to TACO requirements. R. at 90, citing 35 Ill. Adm. Code 734.410, 742. Payment from the UST Fund for corrective action according to Tier 2 remediation objectives requires calculating those objectives with site-specific parameters. R. at 90; *see* 35 Ill. Adm. Code 734.410. IEPA determined that Dersch had performed Tier 2 TACO calculations “using default parameters for soil bulk density, soil particle density and organic carbon content. These parameters must be determined on a site-specific basis before payment can be made for on-site corrective action.” R. at 90; *see id.* at 94-95 (IEPA technical review notes); Pet. Mot. SJ at 3.

IEPA also rejected Dersch’s proposed budget. R. at 90, citing 35 Ill. Adm. Code 734.510(b). “Without an approvable plan, the proposed budget cannot be fully reviewed.” R. at 91; *see id.* at 95 (IEPA technical review notes).

2016 Corrective Action Plan

On March 23, 2016, Dersch submitted a new corrective action plan. R. at 28. The plan proposed to advance a single soil boring north of existing monitoring well MW-9. *Id.* at 37; *see id.* at 53 (Proposed Soil Boring Location Map); *see* Pet. Mot. SJ at 3. Dersch explained that this location is just beyond the limit of the soil and groundwater contamination plumes. R. at 37. Dersch stated that the soil sample would be taken directly above the groundwater table, which had been encountered at the site at a depth of between nine and 11 feet below ground surface. *Id.* Dersch intended to analyze the samples to obtain site-specific parameters. *Id.* at 35; *see* Pet. Mot. SJ at 3.

Dersch’s plan also included a slug test to determine current hydraulic conductivity. R. at 36. Dersch also proposed to measure groundwater depth in all on-site and off-site monitoring wells. *Id.* at 37. Dersch intended to use the measurements to determine groundwater flow direction and to calculate velocity and hydraulic gradient. *Id.*

After Dersch analyzed the soil sample and established site-specific parameters, it intended to submit an amended corrective action plan and budget to IEPA. R. at 39; *see* Pet. Mot. SJ at 3-4. To address contaminated soil, Dersch expected to determine the extent of on-site soil exceeding Tier 2 clean-up objectives and then remove it. R. at 38. To address soil exceeding Tier 1 standards in the rights-of-way, Dersch expected its plan to include HAAs. *Id.* at 38, 39. To address groundwater contamination, Dersch expected to propose an ordinance effectively prohibiting potable water supply wells in the area affected by the release. *Id.* at 39. Dersch's well survey determined that "there are no community water supply wells located within 2,500 feet of the site." *Id.* at 39. Although seven wells were within 2,500 feet of the site, no well fell within the 200-foot setback zone. *Id.*

2016 Corrective Action Budget

Dersch submitted a corrective action budget of \$23,187.55, including \$20,444.43 in consulting personnel costs (R. at 79, 83-87) and \$825.30 in consultant's materials costs (R. at 79, 88-89). *See* Pet. Mot. SJ at 4.

IEPA Determination

On July 12, 2016, IEPA approved Dersch's corrective action plan. R. at 1. IEPA modified Dersch's proposed corrective action budget. *Id.* 1, 3-8. Of Dersch's proposed \$20,444.43 in consulting personnel costs, IEPA approved \$13,793.43 with modifications of \$6,650.99. *Id.* at 3, 12. Of Dersch's proposed \$825.30 in consultant's materials costs, IEPA approved \$227.40 with modifications of \$598.10. *Id.*

Below under the heading of "Disputed Budget Modifications," the Board addresses each of the modifications in its discussion of the parties' motions for summary judgment.

BOARD DISCUSSION

The Board first provides the legal background to the motions for summary judgment before summarizing the issues raised in the parties' motions. The Board then separately discusses each of the disputed modifications to Dersch's budget.

Legal Background

Summary Judgment

Summary judgment is appropriate when the pleadings, depositions, admissions, affidavits, and other items in the record show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Adames v. Sheahan*, 233 Ill. 2d 276, 295, 909 N.E.2d 742, 753 (2009); *Dowd & Dowd, Ltd. v. Gleason*, 181 Ill. 2d 460, 483, 693 N.E.2d 358, 370 (1998); 35 Ill. Adm. Code 101.516(b). A genuine issue of material fact precluding summary judgment exists when "the material facts are disputed, or, if the material facts are undisputed, reasonable persons might draw different inferences from the undisputed

facts.” Adames, 233 Ill. 2d at 296, 909 N.E.2d at 753; Adams v. Northern Illinois Gas Co., 211 Ill. 2d 32, 43, 809 N.E.2d 1248, 1256 (2004).

When determining whether a genuine issue of material fact exists, the record “must be construed strictly against the movant and liberally in favor of the opponent.” Adames, 233 Ill. 2d at 295-96, 909 N.E.2d at 754; Purtill v. Hess, 111 Ill. 2d 229, 240, 489 N.E.2d 867, 871 (1986). Summary judgment “is a drastic means of disposing of litigation, and therefore, should be granted only when the right of the moving party is clear and free from doubt.” Adames, 233 Ill. 2d at 296, 909 N.E.2d at 754; Purtill, 111 Ill. 2d at 240, 489 N.E.2d at 871. “Even so, while the nonmoving party in a summary judgment motion is not required to prove [its] case, [it] must nonetheless present a factual basis, which would arguably entitle [it] to a judgment.” Gauthier v. Westfall, 266 Ill. App. 3d 213, 219, 639 N.E.2d 994, 999 (2d Dist. 1994).

“The mere filing of cross-motions for summary judgment does not establish that there is no issue of material fact, nor does it obligate the Board to render summary judgment.” Prairie Rivers Network v. PCB, 2016 Ill. App. (1st) 150971 (Feb. 26, 2016).

Standard of Review

The Board must decide whether Dersch’s submission 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). “[T]he Board does not review the Agency’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 [submission] as presented to the Agency demonstrates compliance with the Act”. Illinois Ayers, PCB 03-214, slip op. at 15 IEPA’s denial letter frames the issues on appeal. Pulitzer Cmty. Newspapers, Inc. v. IEPA, PCB 90-142 (Dec. 20, 1990).

Burden of Proof

In appeals of final Agency determinations, “[t]he burden of proof shall be on the petitioner. . . .” 35 Ill. Adm. Code 105.112(a), citing 415 ILCS 5/40(a)(1), 40(b), 40(e)(3), 40.2(a) (2016); Ted Harrison Oil v. IEPA, PCB 99-127, slip op. at 5-6 (July 24, 2003). 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 (consol.), 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.”).

Summary of Motions for Summary Judgement

Timing

IEPA criticizes the timing of Dersch's motion for summary judgment. It argues that, more than three years after it certified the record and filed it with the Board, Dersch filed its motion and requested that the Board take official notice of eight exhibits. IEPA Resp. at 2. Dersch stresses that the Board's procedural rules allow filing a motion for summary judgment "[a]ny time after the opposing party has appeared . . . but no fewer than 30 days prior to the regularly scheduled Board meeting before the noticed hearing date. 35 Ill. Adm. Code 101.516(a); *see* Pet. Reply at 4. Dersch argues that timing is no barrier to filing its motion for summary judgment. Pet. Reply at 4.

Parties' Burdens

Dersch states that it has met its initial burden of production. It asserts that it supported its motion with "approximately a hundred pinpoint citations to the administrative record filed by the Agency, addressing each cut the Agency made to the budget." Pet. Reply at 2. Dersch argues that IEPA's motion "contains almost no discussion of the facts in the record" and does not "address all of the legal provisions cited in the Agency decision letter under review." Pet. Resp. at 1. Dersch further argues that IEPA does not identify any disputed fact and that its "only citations to the administrative record are references to conclusions reached in the Agency's decision letter." Pet. Reply at 3; *see* IEPA Resp. at 4, citing R. at 3-8. Dersch suggests that IEPA does not raise a genuine issue of material fact simply by citing the conclusions that are being appealed. *See* Pet. Reply at 3. As its response to IEPA's motion, Dersch incorporated its reply. Pet. Resp. at 1.

IEPA characterizes Dersch's response as an assertion "that the Agency did not make an argument incorporating the facts and law." IEPA Reply at 1. IEPA responds that "the Agency did, and oh, look at my other pleadings." *Id.* at 1. IEPA asserts that,

[f]or the Petitioner to then tell the Agency and the Board that he is not going to bother writing a response, just look back at my other pleadings and figure it out yourselves, is either the height of arrogance or a complete recognition on the Petitioner's part that no matter what he responded that it was fruitless as the Illinois EPA was correct in its decision. Either way, it is not the Illinois EPA's job and certainly not the Board's job to figure out and write the Petitioner's argument on his case for him. *Id.* at 2.

IEPA argues that Dersch's response is insufficient for IEPA "to be able to reply due to its vagueness and therefore, the Agency requests that the Board strike the Petitioner's response as it denies the Agency any due process." IEPA Reply at 1. Above, the Board denied this request to strike and noted Dersch's argument that IEPA "has no due process rights at issue here." *See supra* at 7.

Dersch's Proposed Budget

Addressing its proposed corrective action budget, Dersch argues that it must include "an estimate of all costs associated with the development, implementation, and completion of the corrective action plan, excluding handling charges." Pet. Mot. SJ at 10, citing 35 Ill. Adm. Code

734.335(b). Dersch further argues that the term “estimate” is considered to be synonymous with “opinion.” Pet. Mot. SJ at 10, citing Sampen v. Dombrowski, 222 Ill. App3d 918, 925 (1st Dist. 1991).

Dersch asserts that IEPA’s budget modifications raise two general issues. First, Dersch argues that IEPA rejected consulting personnel costs as an estimate and recommended resubmitting those costs in a subsequent budget when they are known. Pet. Mot. SJ at 10, citing R. at 4, 15. Dersch argues that delaying this review until the owner incurs these costs is not consistent with the Act and Board regulations. Pet. Mot. SJ at 11; *see id.* at 37.

Regarding consulting personnel costs, IEPA argues that it could not ensure that these budgeted costs did not exceed the minimum requirements of the Act. IEPA Mot. SJ at 5; IEPA Resp. at 3. IEPA further argues that it requested supporting documentation, but it was never submitted. IEPA Mot. SJ at 5; IEPA Resp. at 3, citing R. at 3-4.

On consultants’ fees, IEPA cited the Board’s decision in Abel: “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.” IEPA Mot. SJ at 5; IEPA Resp. at 3, citing Abel Inv. v. IEPA, PCB 16-108, slip op. at 7 (Dec. 15, 2016). IEPA argues that the Board should follow its holding in Abel, which “is very relevant here.” IEPA Mot. SJ at 5; IEPA Resp. at 3.

Dersch discounts IEPA’s reference to Abel. It asserts that the cited language addresses the allocation of time and responsibility between personnel titles. Dersch argues that IEPA did not provide that reason for its modification of the Senior Project Manager’s time. Pet. Reply at 4-5, citing R. at 4. If IEPA had wanted to modify that time for that different reason, the Act requires that it do so in its denial letter. Pet. Reply at 5.

Second, Dersch argues that IEPA rejected the cost of materials because it had decided “to set rates for equipment for each consultant and disallow entirely categories of equipment by a separate internal rule.” Pet. Mot. SJ at 11, citing R. at 16, 22. It argues that IEPA lacks authority to adopt these rules or rates. Pet. Mot. SJ at 11. It further argues that it provided proof that it submitted reasonable equipment rental rates. Pet. Mot. SJ at 11; *see id.* at 37.

On consultant’s material costs, IEPA again argues that it could not determine whether budgeted costs exceeded the minimum requirements of the Act. IEPA Mot. SJ at 5; IEPA Resp. at 3. IEPA reports that it requested documentation that it did not receive. *Id.* IEPA argued that it could not make this determination, so its modification should be affirmed with one exception. *Id.*, citing R. at 5-8. The deduction for the cost of a measuring wheel was addressed by the Board in Abel. IEPA “did not prevail” and “no longer contests this issue.” IEPA Mot. SJ at 6; IEPA Resp. at 4.

Existence of Genuine Issue of Material Fact

In its response to Dersch’s motion, IEPA stated that “[t]here exists a material issue of fact.” IEPA Resp. at 1. IEPA suggests that Dersch’s corrective action budget lacked support if

its motion for summary judgment requires taking notice of eight exhibits. *Id.* at 2. According to IEPA, “[i]f this does not shout material issue of fact, I am not sure what else would.” *Id.* IEPA requested that the Board find “a genuine issue of material fact” and deny Dersch’s motion for summary judgment. *Id.*

In its own motion, IEPA argues that “[t]here exists no material issue of fact.” IEPA Mot. SJ at 4. It further argues that “[t]he facts contained within the Administrative Record are not in dispute.” *Id.* IEPA requests that the Board grant its motion for summary judgment. *Id.* at 6.

Dersch correctly observes that “the parties agree that there are no genuine issues of material fact, although they disagree as to what facts may be considered by the Board.” Pet. Resp. at 2.

Above, the Board granted Dersch’s request to take official notice of eight exhibits. In the following subsections of the opinion, the Board reviews the entire record on the contested elements of Dersch’s proposed budget to determine whether either party is entitled to summary judgment on any of those elements.

Disputed Budget Modifications

Plan Preparation: Professional Geologist

Dersch’s 2016 Budget. For “Corrective Action Plan Design and Preparation,” Dersch proposed 30.00 hours by a Professional Geologist at \$111.76 per hour for a total cost of \$3,352.80. R. at 83. Dersch’s budget also proposed 4.00 hours of “Corrective Action Plan Development” by an Engineer III and 6.00 hours of “Corrective Action Plan Development and Technical Compliance” by a Senior Project Manager. *Id.*

IEPA’s project manager rejected Dersch’s 2015 plan because Tier 2 calculations used default values. R. at 22. When it rejected the plan, IEPA indicated that site-specific parameters could be obtained from a single additional geotechnical sample. *Id.*; *see id.* at 97. The project manager asked why there are “so many hours for the plan development?” *Id.* at 22.

Dersch’s consultant responded that the additional boring could in all likelihood “have been simply added to an approval with modifications letter. A short letter itemizing the sampling and soil boring costs could have been submitted as a small budget amendment.” R. at 18. IEPA’s project manager discounted this suggestion. He stated that IEPA needs site specific remediation objectives and modeling before it can approve a Corrective Action Plan. R. at 15. He added that he had notified Dersch “that a TACO boring had to be done, where it needed to be advanced, and at what depth it needed to be sampled.” *Id.*; *see id.* at 97. He added that Dersch “didn’t need to submit this Corrective Action Plan” because Dersch could have included costs such as boring and analysis in its next proposed plan and budget. *Id.* at 15. He indicated that those costs are required by the Board’s regulations and are “always approved . . . so you know it’ll be paid.” *Id.*, citing 35 Ill. Adm. Code 734.410.

Dersch's consultant then explained that "[i]nformation gathered and prepared for the November 2015 CAP was used to prepare the current CAP adding the TACO boring; thus, a portion of the time from that original submittal was prorated and utilized for the current CAP (*i.e.*, the base and information of the design document)." R. at 18. She elaborated that "time to prepare and design the further soil sampling portion from the previous submittal was removed from the current budget. Conversely, the time for the preparation and design of the additional TACO boring was then added to the current CAP and budget." *Id.* The consultant added that, "[o]nce the activities of the current CAP are approved and completed, an amended CAP will be submitted with the results and calculations. . . ." *Id.*

IEPA's project manager responded that Dersch's proposed budget includes "some costs from the preparation of the first Corrective Action Plan that was denied. You can't do this." R. at 15. If Dersch intends to submit a plan based on site-specific parameters determined through the proposed plan, then Dersch should submit only costs associated with the current plan. *Id.* The project manager elaborated that the current plan "is simply to advance a soil boring in a clean area on site to collect a geotechnical sample. Your plan to address the information gathered from this plan is forthcoming. That's where you would apply the applicable hours you originally spent on the original Corrective Action Plan that was denied." *Id.*

IEPA's Determination. The approved corrective action plan consists of a single soil boring. R. at 37; *see* R. at 3, citing 35 Ill. Adm. Code 734.410 (requiring site-specific parameters). IEPA's project manager provided Dersch with a location for the boring and the depth at which to collect a soil sample. R. at 3; *see id.* at 97 (e-mail). IEPA stated that "[t]he time spent on Corrective Action Plan development by the consultant should be minimal, if any." *Id.* at 3. In addition to six hours by a Senior Project Manager and four hours by an Engineer III, Dersch's budget for plan development included 30 hours by a Professional Geologist. *Id.*, at 3; *see id.* at 83. IEPA's project manager concluded that developing this Corrective Action Plan should not require 30 hours of a Professional Geologist's time. *Id.* at 13 (technical review notes).

IEPA modified the budget by \$3,352.80, the full amount proposed by Dersch for plan design and preparation by a Professional Geologist. R. at 3; *see id.* at 13, 83. IEPA determined that costs lacked supporting documentation and were ineligible for payment from the UST Fund. R. at 3, citing 35 Ill. Adm. Code 734.630(cc). Without documentation, IEPA stated that it could not determine whether the proposed costs exceed those necessary to meet the minimum requirements of the Act. R. at 3. Since the costs may be used for activities exceeding those requirements, IEPA did not approve them. *Id.*, citing 415 ILCS 5/57.7(c)(3). Finally, IEPA determined that the requested costs are ineligible for payment from the UST Fund because they are "not reasonable as submitted." R. at 3, citing 415 ILCS 5/57.7(c)(3), 35 Ill. Adm. Code 734.630(dd).

Dersch's Motion for Summary Judgment. Dersch argues that each corrective action plan must include all required information. Pet. Mot. SJ at 12, citing 415 ILCS 5/57.7(b)(2) (2018); 35 Ill. Adm. Code 734.335(a); R. at 43-46 (IEPA form). While Dersch believes that its original plan did so, IEPA did not approve it. Dersch then used the original information to prepare the new plan. Pet. Mot. SJ at 13. Dersch argues that its consultant reasonably prorated

time used to prepare specific elements of the original plan and applied it to preparing the new plan. *Id.*, citing R. at 18.

IEPA's project manager responded that Dersch didn't need to submit this Corrective Action Plan because it could have added these costs into its next corrective action plan. Pet. Mot. SJ at 12, citing R. at 15. Dersch discounts this position because owners and operators proceeding without an approved budget risk being denied reimbursement from the UST Fund. Pet. Mot. SJ at 12, citing Illico Ind. Oil Co. v. IEPA, PCB 17-84, slip op. at 8 (Dec. 20, 2018).

Dersch argues that its consultant offered IEPA the option of approving the original plan with a modification requiring the additional TACO boring and a budget amendment for its costs. Pet. Mot. SJ at 14, citing R. at 18. Dersch reports that IEPA declined that option, as the project manager wished to have site-specific information. Pet. Mot. SJ at 14, citing R. at 15. Dersch argues that requiring multiple corrective action plans will result in additional costs to review, update, and submit them. *See* Pet. Mot. SJ at 14.

Dersch asserts that IEPA erroneously cut 30 hours budgeted for a professional geologist to design and prepare the corrective action plan because its project manager considered the plan he had approved was unnecessary. Pet. Mot. SJ at 14. Dersch argues that this approach does not satisfy the Act and Board regulations and should be rejected. *Id.* Dersch concludes that it was reasonable to apportion costs between past and current plans and that "apportioning no costs to prepare the plan and budget is entirely unreasonable." *Id.*

IEPA's Motion for Summary Judgment. IEPA cited the Board's decision in Abel: "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." IEPA Mot. SJ at 5, citing Abel Inv. v. IEPA, PCB 16-108, slip op. at 7 (Dec. 15, 2016); *see* IEPA Resp. at 3. IEPA argues that the Board should follow its holding in Abel, which "is very relevant here." IEPA Mot. SJ at 5; *see* IEPA Resp. at 3.

IEPA argues that it could not ensure that these budgeted costs did not exceed the minimum requirements of the Act. IEPA Mot. SJ at 5; *see* IEPA Resp. at 3. IEPA further argues that it requested supporting documentation, but it was never submitted, and IEPA denied the costs. *Id.*, citing R. at 3-4.

Board Finding. IEPA acknowledges that Dersch's plan and budget are likely to require at least minimal time for plan development, but it modified the proposed budget by the full amount proposed for plan design and preparation by a Professional Geologist. While Dersch prorated time from preparing a previous plan to this plan, the record now before the Board does not include a method or calculation supporting this proration.

In addition, the Board is not persuaded that its decision in Abel Inv. v. IEPA, PCB 16-108 (Dec. 15, 2016), requires it to grant IEPA's motion for summary judgment. Dersch's budget and IEPA's modification do not plainly raise an issue of allocating tasks and costs among titles.

Based on the record on this modification now before it, the Board finds that neither party has placed material facts beyond dispute. Neither party has established that it is entitled to judgment as a matter of law, and the Board denies both motions for summary judgment on this modification.

Plan Preparation: Draftsperson/CAD IV

Dersch's 2016 Budget. For "Drafting for Corrective Action Plan," Dersch proposed 6.00 hours by a Draftsperson/CAD IV at \$66.81 per hour for a total cost of \$400.86. R. at 83.

IEPA's project manager asked Dersch how much time "was devoted to placing the PSB-TACO boring on the Proposed Soil Boring Location Map?" *Id.* at 16; *see id.* at 52 (Drawing 4). In technical review notes, he indicated that Board regulations do not require submission of maps with corrective action plans. *Id.* at 13, citing 35 Ill. Adm. Code 734.335. He suggested that Dersch's proposed plan required only one revision of an existing map to show the location of a single proposed soil boring. R. at 13; *see id.* at 53 (Drawing 4A).

IEPA's Determination. IEPA states that the Board's UST regulations do not require the submission of a map with the corrective action plan. R. at 4, citing 35 Ill. Adm. Code 734.335. Dersch's corrective action plan included 12 maps, one of which updates a previously submitted map to show the location of the soil boring in the approved corrective action plan. R. at 53 (Drawing 4a). IEPA stated that the other 11 maps are not needed or useful. *Id.* at 4.

IEPA modified the budget by \$334.05 by reducing five hours at \$66.81 per hour by a Draftsperson/CAD IV. IEPA approved one hour to update a map. R. at 4; *see* R. at 53 (Drawing 4a). IEPA determined that the other 11 maps exceeded the minimum requirements necessary to comply with the Act and that their cost is not eligible for payment from the UST Fund. R. at 4, citing 415 ILCS 5/57(c)(3), 35 Ill. Adm. Code 734.630(o). IEPA also determined that that cost of the 11 maps lacked supporting documentation and was ineligible for payment from the UST Fund. R. at 4, citing 35 Ill. Adm. Code 734.630(cc). Without documentation, IEPA stated that it could not determine whether the proposed costs will exceed those necessary to meet the minimum requirements of the Act. R. at 4. Since the costs may be used for activities exceeding those requirements, IEPA did not approve them. *Id.*, citing 415 ILCS 5/57.7(c)(3).

Dersch's Motion for Summary Judgment. Dersch states that the approved corrective action plan included 12 maps. Pet. Mot. SJ at 15, citing R. at 49-60. However, IEPA approved a single map for a proposed boring location and concluded that "[t]he additional 11 maps that were submitted are not needed and exceed the minimum requirements necessary to comply with the Act." R. at 4; *see* Pet. Mot. SJ at 15. Dersch argues that is not consistent with statutory and regulatory requirements. Pet. Mot. SJ at 15.

Dersch argues that IEPA's decision letter claims that the number of hours exceeded minimum legal requirements but does not claim that the number of hours is unreasonable. Pet. Mot. SJ at 15. Dersch argues that its plan needs to address the elements of corrective action. *Id.*, citing 35 Ill. Adm. Code 734.440; R. at 45. It further argues that IEPA's decision letter does not identify a "specific type of information" that Dersch did not provide. Pet. Mot. SJ at 15-16,

citing 415 ILCS 5/57.7(c)(4) (2018). Dersch discounts this argument as lacking merit. Pet. Mot. SJ at 16.

Dersch acknowledges that its index of maps lists a groundwater elevation map. Pet. Mot. SJ at 15, n.5. citing R. at 48. However, the plan instead included a second map of groundwater analytical results. Pet. Mot. SJ at 15, n.5, citing R. at 55, 60. Based on IEPA's justification for cutting these costs, Dersch suggests that the mistake is not material. Pet. Mot. SJ at 15, n.5.

IEPA's Motion for Summary Judgment. IEPA cited the Board's decision in Abel: "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." IEPA Mot. SJ at 5, citing Abel Inv. v. IEPA, PCB 16-108, slip op. at 7 (Dec. 15, 2016); *see* IEPA Resp. at 3. IEPA argues that the Board should follow its holding in Abel, which "is very relevant here." IEPA Mot. SJ at 5; *see* IEPA Resp. at 3.

IEPA argues that it could not ensure that these budgeted costs did not exceed the minimum requirements of the Act. IEPA Mot. SJ at 5; *see* IEPA Resp. at 3. IEPA further argues that it requested supporting documentation, but it was never submitted, and IEPA denied the costs. *Id.*, citing R. at 3-4.

Board Finding. IEPA acknowledges that Dersch's plan and budget are likely to require at last minimal time for plan development, but it modified the proposed budget by the full amount proposed for plan design and preparation by a Professional Geologist. While Dersch prorated time from preparing a previous plan to this plan, the record now before the Board does not include a method or calculation supporting this proration.

The pleadings reveal a dispute about the number of maps required by Dersch's proposed budget and the time necessary to prepare them. IEPA has not persuasively explained how 11 of the 12 maps are "not useful" to the plan, and Dersch has not persuasively argued that all of the updated maps are required for its plan.

In addition, the Board is not persuaded that its decision in Abel Inv. v. IEPA, PCB 16-108 (Dec. 15, 2016), requires it to grant IEPA's motion for summary judgment. Dersch's budget and IEPA's modification do not plainly raise an issue of allocating these tasks and costs among titles.

Based on the record on this modification now before it, the Board finds that neither party has placed material facts beyond dispute. Neither party has established that it is entitled to judgment as a matter of law, and the Board denies both motions for summary judgment on this modification.

Contaminant Transport Modeling: Senior Project Manager

Dersch's 2016 Budget. For "Contaminant Transport Modeling/Oversight/Technical Compliance," Dersch proposed 6.00 hours by a Senior Project Manager at \$121.40 per hour for a total cost of \$728.94. R. at 86.

In technical review notes, IEPA's project manager stated that this request merely estimates the time required to perform modeling. R. at 13. He indicated that "costs associated with the modeling should be submitted in the amended Corrective Action Plan that will be submitted to apply the modeling calculations." *Id.* When Dersch submits its amended plan, "the costs will be known and it will not be necessary to approve costs in excess of what is needed for the task." *Id.*

IEPA's Determination. IEPA states that personnel costs associated with contaminant transport modeling and calculating Tier 2 remediation objectives "are usually approved in a Corrective Action Budget after the calculations have been performed. . . ." R. at 4. IEPA adds that these costs should be submitted in an amended corrective plan that applies the calculations. *Id.* In an amended plan, "the costs will be known and it will not be necessary to approve costs in excess of what is needed or to approve additional costs if the original estimate did not include enough hours to complete the tasks." *Id.* IEPA acknowledges that this site requires an additional preliminary plan for a soil sample, but argues that should not change the point at which Dersch submits costs associated with calculating the Tier 2 objectives. *Id.* IEPA characterizes Dersch's proposed budget as "only an estimate on how long it will take the consultant to perform the modeling." *Id.*

IEPA modified the budget by \$2,964.14, the full amount proposed to perform contaminant transport modeling and Tier 2 calculations. This included six hours for the Senior Project Manager at a rate of \$121.49 per hour for a total of \$728.94 R. at 4; *see id.* at 86. IEPA determined that the proposed costs lacked supporting documentation and were ineligible for payment from the UST Fund. R. at 4, citing 35 Ill. Adm. Code 734.630(cc). Without documentation, IEPA stated that it could not determine whether the proposed costs will exceed those necessary to meet the minimum requirements of the Act. R. at 4. Since the costs may be used for activities exceeding those requirements, IEPA did not approve them. *Id.*, citing 415 ILCS 5/57.7(c)(3).

Dersch's Motion for Summary Judgment. Dersch argues that IEPA approved a plan that includes analyzing a soil sample. It further argues that IEPA must review and approve the estimated costs to complete this task. Pet. Mot. SJ at 18. However, IEPA cut from its proposed budget "all costs associated with analyzing the data acquired from the soil boring in order to develop site-specific physical parameters." Pet. Mot. SJ at 16. Dersch states that IEPA acknowledges that "the soil sample needs to be collected for analysis." *Id.*, citing R. at 3.

Dersch argues that IEPA insists on submitting these costs in an amended corrective action plan applying the calculations. Pet. Mot. SJ at 17, citing R. at 4. Dersch argues that "[a] budget is an estimate" and suggests that its proposed budget appropriately estimates costs for this analysis. Pet. Mot. SJ at 17, citing 35 Ill. Adm. Code 734.335(b); R. at 37. Dersch argues that IEPA effectively requires it to submit an "actual costs budget," which IEPA "erroneously used to require until the Board ruled that the Agency was not authorized to review actual costs until the reimbursement stage." Pet. Mot. SJ at 17, citing City of Benton Fire Dep't. v. IEPA, PCB 17-1, slip op. at 6 (Feb. 22, 2018).

Dersch argues that the Act and Board regulations do not support IEPA's decision that these costs "can be shifted to a subsequent corrective action plan after they have been incurred." Pet. Mot. SJ at 18. It further argues that IEPA's decision letter does not identify a "specific type of information" that Dersch did not provide. Pet. Mot. SJ at 15-16, citing 415 ILCS 5/57.7(c)(4) (2018). Dersch discounts this argument as lacking merit. Pet. Mot. SJ at 16.

IEPA's Motion for Summary Judgment. On consultants' fees, IEPA cited the Board's decision in Abel: "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." IEPA Mot. SJ at 5, citing Abel Inv. v. IEPA, PCB 16-108, slip op. at 7 (Dec. 15, 2016); *see* IEPA Resp. at 3. IEPA argues that the Board should follow its holding in Abel, which "is very relevant here." IEPA Mot. SJ at 5; *see* IEPA Resp. at 3.

IEPA argues that it could not ensure that these budgeted costs did not exceed the minimum requirements of the Act. IEPA Mot. SJ at 5; *see* IEPA Resp. at 3. IEPA further argues that it requested supporting documentation, but it was never submitted, and IEPA denied the costs. *Id.*, citing R. at 3-4.

Board Finding. IEPA acknowledges that Dersch's plan requires collecting and analyzing a soil sample to calculate Tier 2 remediation objectives, but it modified the proposed budget by the full amount proposed for this task by a Senior Project Manager.

The pleadings reveal a dispute about the timing for Dersch to submit costs for this task. While IEPA states its preference to review costs after they have been incurred as part of an amended plan, IEPA does not persuasively support this preference. The Board is puzzled by IEPA's reference to a budget as "only an estimate" and finds some merit in Dersch's position that IEPA effectively requires an "actual costs budget."

The pleadings also reveal a dispute about the amount proposed by Dersch. While IEPA appears to acknowledge that the plan requires time to perform modeling, it modified the budget by the full amount proposed. However, the record now before the Board does not persuade it that Dersch is entitled to summary judgment on the entire amount it requested.

In addition, the Board is not persuaded that its decision in Abel Inv. v. IEPA, PCB 16-108 (Dec. 15, 2016), requires it to grant IEPA's motion for summary judgment. Dersch's budget and IEPA's modification do not plainly raise an issue of allocating tasks and costs among titles.

Based on the record on this modification now before it, the Board finds that neither party has placed material facts beyond dispute. Neither party has established that it is entitled to judgment as a matter of law, and the Board denies both motions for summary judgment on this modification.

Contaminant Transport Modeling: Professional Geologist

Dersch's 2016 Budget. For “Preliminary Contaminant Transport Modeling & TACO Calculations,” Dersch proposed 20.00 hours by a Professional Geologist at \$111.76 per hour for a total cost of \$2,235.20. R. at 86.

IEPA’s project manager stated that “‘preliminary’ implies that there will be more TACO charges in the future.” R. at 22. If the requested hours are not all that are expected, he asked “why do they need to be re-calculated later?” *Id.* Dersch’s consultant responded that it referred to calculations based on the previous data for submission in the next corrective action plan. R. at 18. She added that additional modeling based on samples obtained during corrective action may be necessary to determine boundaries for a groundwater ordinance. *Id.*

In technical review notes, IEPA’s project manager stated that this request merely estimates the time required to perform modeling. R. at 13. When Dersch submits its amended plan, “the costs will be known and it will not be necessary to approve costs in excess of what is needed for the task.” *Id.*

IEPA’s Determination. IEPA states that personnel costs associated with contaminant transport modeling and calculating Tier 2 remediation objectives “are usually approved in a Corrective Action Budget after the calculations have been performed. . . .” R. at 4. IEPA adds that these costs should be submitted in an amended corrective plan that applies the calculations. *Id.* In an amended plan, “the costs will be known and it will not be necessary to approve costs in excess of what is needed or to approve additional costs if the original estimate did not include enough hours to complete the tasks.” *Id.* IEPA acknowledges that this site requires an additional preliminary plan for a soil sample, but it argues that should not change the point at which Dersch submits costs associated with calculating the Tier 2 objectives. *Id.* IEPA characterizes Dersch’s proposed budget as “only an estimate on how long it will take the consultant to perform the modeling.” *Id.*

IEPA modified the budget by \$2,964.14, the full amount proposed to perform contaminant transport modeling and Tier 2 calculations. This included 20 hours for a Professional Geologist at a rate of \$111.76 per hours for a total of \$2,235.20. R. at 4; *see id.* at 86. IEPA determined that the proposed costs lacked supporting documentation and were ineligible for payment from the UST Fund. R. at 4, citing 35 Ill. Adm. Code 734.630(cc). Without documentation, IEPA stated that it could not determine whether the proposed costs will exceed those necessary to meet the minimum requirements of the Act. R. at 4. Since the costs may be used for activities exceeding those requirements, IEPA did not approve them. *Id.*, citing 415 ILCS 5/57.7(c)(3).

Dersch’s Motion for Summary Judgment. Dersch argues that IEPA approved a plan that includes analyzing a soil sample. It further argues that IEPA must review and approve the estimated costs to complete this task. Pet. Mot. SJ at 18. However, IEPA cut from its proposed budget “all costs associated with analyzing the data acquired from the soil boring in order to develop site-specific physical parameters.” Pet. Mot. SJ at 16. Dersch states that IEPA acknowledges that “the soil sample needs to be collected for analysis.” *Id.*, citing R. at 3.

Dersch argues that IEPA insists on submitting these costs in an amended corrective action plan applying the calculations. Pet. Mot. SJ at 17, citing R. at 4. Dersch argues that “[a] budget is an estimate” and suggests that its proposed budget appropriately estimates costs for this analysis. Pet. Mot. SJ at 17, citing 35 Ill. Adm. Code 734.335(b); R. at 37. Dersch argues that IEPA effectively requires it to submit an “actual costs budget,” which IEPA “erroneously used to require until the Board ruled that the Agency was not authorized to review actual costs until the reimbursement stage.” Pet. Mot. SJ at 17, citing City of Benton Fire Dep’t. v. IEPA, PCB 17-1, slip op. at 6 (Feb. 22, 2018).

Dersch argues that the Act and Board regulations do not support IEPA’s decision that these costs “can be shifted to a subsequent corrective action plan after they have been incurred.” Pet. Mot. SJ at 18. It further argues that IEPA’s decision letter does not identify a “specific type of information” that Dersch did not provide. Pet. Mot. SJ at 15-16, citing 415 ILCS 5/57.7(c)(4) (2018). Dersch discounts this argument as lacking merit. Pet. Mot. SJ at 16.

IEPA’s Motion for Summary Judgment. On consultants’ fees, IEPA cited the Board’s decision in Abel: “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.” IEPA Mot. SJ at 5, citing Abel Inv. v. IEPA, PCB 16-108, slip op. at 7 (Dec. 15, 2016); *see* IEPA Resp. at 3. IEPA argues that the Board should follow its holding in Abel, which “is very relevant here.” IEPA Mot. SJ at 5; *see* IEPA Resp. at 3.

IEPA argues that it could not ensure that these budgeted costs did not exceed the minimum requirements of the Act. IEPA Mot. SJ at 5; *see* IEPA Resp. at 3. IEPA further argues that it requested supporting documentation, but it was never submitted, and IEPA denied the costs. *Id.*, citing R. at 3-4.

Board Finding. IEPA acknowledges that Dersch’s plan requires contaminant transport modeling, but it modified the proposed budget by the full amount proposed for this task by a Professional Geologist.

Again, the pleadings reveal a dispute about the timing for Dersch to submit these costs. While IEPA prefers to review costs after they have been incurred as part of an amended plan, IEPA does not persuasively support this preference. The Board is puzzled by IEPA’s reference to a budget as “only an estimate” and finds some merit in Dersch’s position that IEPA effectively requires an “actual costs budget.”

The pleadings also reveal a dispute about the amount proposed by Dersch. While IEPA appears to acknowledge that the plan requires time for contaminant transport modeling, it modified the budget by the full amount proposed. However, the record now before the Board does not persuade it that Dersch is entitled to summary judgment on the entire amount it requested.

In addition, the Board is not persuaded that its decision in Abel Inv. v. IEPA, PCB 16-108 (Dec. 15, 2016), requires it to grant IEPA’s motion for summary judgment. Dersch’s budget and IEPA’s modification do not plainly raise an issue of allocating tasks and costs among titles.

Based on the record on this modification now before it, the Board finds that neither party has placed material facts beyond dispute. Neither party has established that it is entitled to judgment as a matter of law, and the Board denies both motions for summary judgment on this modification.

Consultant's Materials: Photoionization Detector (PID) Rental

Dersch's 2016 Budget. With the Description/Justification that it is “[t]o detect VOC [volatile organic compound] levels in soil samples,” Dersch proposed PID rental for one day at \$148.00 per day. R. at 88.

IEPA's project manager asked Dersch how it determined its daily rental rate. R. at 22. IEPA needed documentation to determine whether the proposed rate is appropriate. *Id.*

Dersch's consultant responded that IEPA had never asked for a breakdown of equipment costs. The consultant had not kept the original invoice for its PID and had not tracked maintenance costs. R. at 18, 20. She based the rate on what others had charged and then “adjusted for inflation a few times.” *Id.* at 19. The response included a list of equipment rental prices. *Id.* at 22-23. The consultant argued that its proposed rate was less than the rental rate, particularly after considering “taxes, shipping, and the time required to locate, order, and return the item.” *Id.* at 20.

IEPA's project manager discounted the equipment rental rate sheet. He questioned whether it is “appropriate to compare the rate you've requested to a rental rate? I personally don't think so.” R. at 16. He suggested that the rate should be the total costs for the equipment divided by the expected number of days of use. *Id.* at 17.

IEPA's Determination. IEPA modified the budget by \$148.00, the entire amount to rent a PID. R. at 5; *see id.* at 88. IEPA determined that the proposed costs lacked supporting documentation and were ineligible for payment from the UST Fund. *Id.* at 5; citing 35 Ill. Adm. Code 734.630(cc). Without documentation, IEPA stated that it could not determine whether proposed costs will exceed those necessary to meet the minimum requirements of the Act. R. at 5, citing 415 ICLS 5/57.7(c)(3). For costs that do not have a maximum payment amount in Subpart H of the UST rules, IEPA states that Dersch must prove its costs are reasonable. R. at 5, citing 35 Ill. Adm. Code 734.850(b). IEPA argues that, although it requested documentation supporting Dersch's budgeted amount, it was either not provided or did not provide sufficient information to determine whether the request is reasonable. R. at 5; *see* 35 Ill. Adm. Code 734.505(a), R. at 23-24. IEPA determined that, without supporting documentation, the PID costs were not reasonable as submitted and were not eligible for payment from the UST Fund. *Id.*, citing 35 Ill. Adm. Code 734.630(dd); *see id.* at 13 (technical review notes).

Dersch's Motion for Summary Judgment. The Board's regulations provide that, although the “[p]urchase costs of non-expendable materials, supplies, equipment, or tools” are ineligible for payment from the UST Fund, “a reasonable rate may be charged for the usage of such materials, supplies, equipment, or tools.” 35 Ill. Adm. Code 734.630(h); *see* Pet. Mot. SJ at

19. Dersch argues that its consultant provided documentation and explanation sufficient to show that a charge of \$148 per day is a reasonable rate for a PID. Pet. Mot. SJ at 19-20, citing R. at 19, 20, 23-24. Dersch adds that the Board affirmed a 1991 IEPA determination that \$142 per day is a reasonable charge to use a PID. Pet. Mot. SJ at 20, citing Malkey v. IEPA, PCB 92-104, slip op. at 5 (Mar. 11, 1993). Dersch argues that this amount is the equivalent in 2016 of approximately \$250. Pet. Mot. SJ at 20, Exh. H.

IEPA's project manager suggested that the best way to establish a reasonable rate for use of equipment such as a PID is to divide the initial purchase price by the number of days of expected use. Pet. Mot. SJ at 20, citing R. at 16-17. Dersch argued that setting the rate in this manner presented "practical absurdities" when applied to different consultants. Pet. Mot. SJ at 21. Dersch asserts that IEPA lacks authority to create consultant-specific rates. *Id.*, citing 415 ILCS 5/57.14(a) (2018).

Dersch argues that IEPA's review is limited to whether costs associated with the corrective action plan are reasonable. Pet. Mot. SJ at 21, citing 415 ILCS 5/57.7(c)(3) (2018). It argues that it supplied information demonstrating that its budgeted rate of \$148 per day is reasonable and supported it with Board precedent. Pet. Mot. SJ at 21-22.

IEPA's Motion for Summary Judgment. IEPA argues that it could not determine whether these budgeted costs exceeded the minimum requirements of the Act. IEPA Mot. SJ at 5; see IEPA Resp. at 4. IEPA reports that it requested documentation that it did not receive. *Id.* IEPA argued that it could not make this determination, so its modification should be affirmed.

Board Finding. IEPA has not disputed the use of a PID in Dersch's plan, but it modified the budget by the full amount proposed.

The pleadings reveal a dispute about the cost of this item. The Board finds some merit in Dersch's position that the rules allow it to charge a reasonable rate for the use of a PID and that its proposed amount is not inconsistent with precedent. However, the Board is not persuaded that Dersch is entitled to summary judgment. The record does not show a detailed calculation of its proposed rate, and it raises questions about the weight that should be given to rental rates of the same or similar equipment.

Based on the record on this modification now before it, the Board finds that neither party has placed material facts beyond dispute. Neither party has established that it is entitled to judgment as a matter of law, and the Board denies both motions for summary judgment on this modification.

Consultant's Materials: Measuring Wheel

Dersch's 2016 Budget. With the Description/Justification that it is for "[m]apping sampling locations," Dersch proposed use of a measuring wheel for one day at \$21.00 per day. R. at 88.

IEPA's project manager stated that "measuring wheels are now considered indirect costs and are not being approved as Consultant's Materials Costs." R. at 22; *see id.* at 13 (technical review notes). He explained that, because they have a low purchase price, "a daily rate for their use is no longer appropriate." *Id.*

IEPA's Determination. IEPA modified the budget by \$21.00, the entire amount to rent a measuring wheel. R. at 5; *see id.* at 88. IEPA determined that it was an indirect corrective action costs charged as a direct cost and ineligible for payment from the UST Fund. *Id.* at 5, citing 35 Ill. Adm. Code 734.630(v). IEPA also determined that the costs were not reimbursable because they are unreasonable. R. at 5, citing 415 ILCS 5/57/7(c)(3), 35 Ill. Adm. Code 734.630(dd).

Dersch's Motion for Summary Judgment. Since IEPA made its determination in this case, the Board decided Abel Investments. Dersch argues that the Board concluded that a measuring wheel is not an indirect cost and reversed IEPA's determination to eliminate budgeted costs for one. Pet. Mot. SJ at 22-23, citing Abel Inv. v. IEPA, PCB 16-108, slip op. at 10-11 (Dec. 15, 2016). Dersch adds that IEPA's instructions for its budget and billing forms list a "measure wheel" as an item charged separately as consultant's materials. Pet. Mot. SJ at 22-23, Exh. G at 15.

Dersch argues that IEPA did not request that it support its budgeted cost for a measuring wheel. Pet. Mot. SJ at 23. Instead, Dersch argues that IEPA "has determined as a standard of general applicability that measuring wheel can never be approved." *Id.* Dersch suggests that, if IEPA believed the budgeted cost was unreasonable for any other reason, it was required to specify that reason. *Id.* Without another specified reason, Dersch indicates that it has been "prejudiced by the inability to submit proof of rental costs." *Id.*

IEPA's Motion for Summary Judgment. IEPA acknowledges that this deduction for the cost of a measuring wheel was addressed by the Board in Abel. IEPA "did not prevail" and "no longer contests this issue." IEPA Mot. SJ at 6; *see* IEPA Resp. at 3-4.

Board Finding. The Board agrees with the parties that its decision in Abel resolves the issue of this modification for the cost of a measuring wheel. IEPA no longer disputes the issue, and its motion for summary did not challenge the budget for this equipment. Based on these factors, the Board grants Dersch's motion for summary judgement on this modification and denies IEPA's cross-motion.

Consultant's Materials: Gloves

Dersch's 2016 Budget. With the Description/Justification that they are for soil sampling, Dersch proposed the use of one box of disposable gloves at \$16.00 per box. R. at 88.

IEPA's project manager stated that "an entire box of gloves should not be used for the collection of a geotechnical sample. I would actually expect only 1 pair of gloves to be used." R. at 22. He requested the brand of gloves to be used and the size of the box. "We'd prefer to see the invoice/receipt for the gloves you actually use to help determine the appropriate rate." *Id.*

Dersch's consultant responded that it buys bulk quantities of various types and sizes of gloves. R. at 19. She argued that it is not practical to project the brand and size of gloves that will be used on a project. *Id.* She further argued that it would be much more expensive and difficult to purchase gloves individually. *Id.* The consultant supplied vendor information showing that a box of 100 commonly used gloves costs \$15.93. *Id.* at 25-26. She stressed that this cost "doesn't include the sales tax or shipping, or any of our time to order the gloves." *Id.* at 20. She argued that "to count and document the number and type of gloves actually used on the project will cost more than \$16.00." *Id.* She acknowledged that the plan would require no more "than a couple of pairs of gloves" and requested that IEPA "just cut the entire cost, or pay the full retail price as a field purchase." *Id.*

IEPA's project manager responded that "[y]ou're asking for \$16.00 for the use of possibly one pair of gloves. This is obviously unreasonable." R. at 16; *see id.* at 13 (technical review notes). He suggested that actual glove costs can be easily determined based on previous purchases so that both the consultant and IEPA benefit from bulk purchases. *Id.* at 16. He also discounted the vendor information submitted by Dersch. He argued that the information "does not indicate that these are the gloves that you use nor does it indicate that there is any cost benefit to ordering in bulk." *Id.*; *see id.* at 13.

IEPA's Determination. IEPA modified the budget by \$16.00, the entire proposed amount for disposable gloves. R. at 5; *see id.* at 88. IEPA determined that the proposed cost lacked supporting documentation and was ineligible for payment from the UST Fund. R. at 5, citing 35 Ill. Adm. Code 734.630(cc). Without documentation, IEPA stated that it could not determine whether the proposed cost will exceed that necessary to meet the minimum requirements of the Act. R. at 5. Since the cost may be used for activities exceeding those requirements, IEPA did not approve it. *Id.*, citing 415 ILCS 5/57.7(c)(3).

For costs that do not have a maximum payment amount in Subpart H of the UST rules, IEPA states that Dersch must prove its cost is reasonable. R. at 5, citing 35 Ill. Adm. Code 734.850(b). IEPA argues that, although it requested documentation supporting Dersch's requested amount, it was either not provided or did not provide sufficient information to determine whether the request is reasonable. R. at 5, citing 35 Ill. Adm. Code 734.505(a); *see R.* at 25-26. IEPA determined that, without supporting documentation, the cost for gloves was not reasonable as submitted and was not eligible for payment from the UST Fund. *Id.*, citing 35 Ill. Adm. Code 734.630(dd).

Dersch's Motion for Summary Judgment. Dersch states that a consultant typically purchases gloves, which are then consumed when performing corrective action. Pet. Mot. SJ at 24. Dersch adds that IEPA's instructions for its budget and billing forms list supplies such as "gloves" as an item charged separately as consultant's materials. Pet. Mot. SJ at 22-23, Exh. G at 15. It adds that "the Agency has paid for items such as disposable gloves as stock items, which are treated differently from field purchases in part because they are not eligible for handling charges." *Id.* at 25. Dersch elaborates that IEPA "reimbursed the cost of stocking the items, not individual purchases." *Id.*

IEPA's project manager indicated that it would "prefer to see the invoice/receipt for the gloves you usually use to help determine the appropriate rate." Pet. Mot. SJ at 24, citing R. at 22. Dersch first stressed that it submitted a budget for future costs and that it would submit an invoice or receipt "only after work is completed and reimbursement is sought." Pet. Mot. SJ at 25, citing 35 Ill. Adm. Code 734.605(b)(9). Dersch submitted to IEPA information on the cost of commonly used gloves. Pet. Mot. SJ at 25, citing R. at 20, 25. However, it argues that "[i]t is simply erroneous as a matter of law to require an invoice of glove purchases in a budget." Pet. Mot. SJ at 26.

Based on the IEPA project manager's position, Dersch argues that it is not possible to provide disposable gloves as a stock item and also "provide the real cost of a box of gloves." Pet. Mot. SJ at 25, citing R. at 19. Dersch argues that gloves will need to be treated as a field purchase with an invoice included in the request for reimbursement. *Id.* Dersch argues that this approach loses the financial benefit of bulk purchasing. Pet. Mot. SJ at 25-26, citing R. at 19.

IEPA's Motion for Summary Judgment. IEPA argues that it could not determine whether these budgeted costs exceeded the minimum requirements of the Act. IEPA Mot. SJ at 5; *see* IEPA Resp. at 4. IEPA reports that it requested documentation that it did not receive. *Id.* IEPA argued that it could not make this determination, so its modification should be affirmed.

Board Finding. IEPA acknowledges that Dersch's plan requires using gloves, but it modified the budget by the full amount proposed.

The pleadings reveal a significant dispute about the cost and reimbursement of this item. The Board recognizes IEPA's position that Dersch's plan is not likely to require using a full box of gloves reflected in its budget. The Board also recognizes Dersch's argument estimating costs and not a request for reimbursement. However, the Board is not persuaded that Dersch has placed its proposed \$16.00 budget amount – or any other specific amount – beyond dispute.

Based on the record on this modification now before it, the Board finds that neither party has placed material facts beyond dispute. Neither party has established that it is entitled to judgment as a matter of law, and the Board denies both motions for summary judgment on this modification.

Consultant's Materials: Water Level Indicator

Dersch's 2016 Budget. With the Description/Justification that it is for measuring groundwater depth, Dersch proposed the use of a water level indicator for one day at \$28.00 per day. R. at 88.

IEPA's project manager asked Dersch's consultant how it determined this daily rate. R. at 22. He asked specifically whether the requested rate is based on the initial cost of the indicator and what the rate included. *Id.*; *see id.* at 13 (technical review notes). Dersch's consultant responded that its proposed daily rate is "based on what others were charging years ago, adjusted for inflation a few times." R. at 20. She stated that it could not project which of its indicators it would use and acknowledged that it did not have a receipt for the purchase of any of

them. *Id.* She argued that the proposed rate is “cheaper than the rental rates we could find, not even factoring in shipping, taxes, and our time to rent and return one.” *Id.*

IEPA’s Determination. IEPA modified the budget by \$28.00, the entire amount for a water level indicator. R. at 5; *see id.* at 88. IEPA determined that the proposed cost lacked supporting documentation and was ineligible for payment from the UST Fund. R. at 5, citing 35 Ill. Adm. Code 734.630(cc). Without documentation, IEPA stated that it could not determine whether the proposed cost will exceed those necessary to meet the minimum requirements of the Act. R. at 5-6. Since the cost may be used for activities exceeding those requirements, IEPA did not approve them. *Id.*, citing 415 ILCS 5/57.7(c)(3). For costs that do not have a maximum payment amount in Subpart H of the UST rules, IEPA states that Dersch must prove its costs are reasonable. R. at 6, citing 35 Ill. Adm. Code 734.850(b). IEPA argues that, although it requested documentation supporting Dersch’s requested amount, it was either not provided or was not sufficient to determine whether the request is reasonable. R. at 6, citing 35 Ill. Adm. Code 734.505(a); *see* R. at 25-26. IEPA determined that, without supporting documentation, the cost for a water level indicator was not reasonable as submitted and was not eligible for payment from the UST Fund. *Id.*, citing 35 Ill. Adm. Code 734.630(dd).

Dersch’s Motion for Summary Judgment. As with the amount budgeted for a PID, Dersch argues that “the rate for a water level indicator has been approved by the Agency for decades.” Pet. Mot. SJ at 26, citing R. at 19. Dersch stated that its consultant “has several water level indicators, none of which have receipts, and is not certain which one they will end up using.” Pet. Mot. SJ at 27, citing R. at 19, 20. Dersch supplied IEPA with equipment rental information with rates for a water level indicator of \$30-75 per day. Pet. Mot. SJ at 26-27, citing R. at 23. Since its budgeted amount is lower than those rates, Dersch argues that its cost is reasonable. Pet. Mot. SJ at 27.

IEPA’s Motion for Summary Judgment. IEPA argues that it could not determine whether these budgeted costs exceeded the minimum requirements of the Act. IEPA Mot. SJ at 5; *see* IEPA Resp. at 4. IEPA reports that it requested documentation that it did not receive. *Id.* IEPA argued that it could not make this determination, so its modification should be affirmed.

Board Finding. IEPA has not disputed the use of a water level indicator in Dersch’s plan, but it modified the budget by the full amount proposed.

The pleadings reveal a dispute about the cost of this item. The Board finds some merit in Dersch’s position that its proposed amount is not inconsistent with previous cases. However, the Board is not persuaded that Dersch is entitled to summary judgment. The record does not show a detailed calculation of its proposed rate, and it raises questions about the weight that should be given to rental rates of similar equipment.

Based on the record on this modification now before it, the Board finds that neither party has placed material facts beyond dispute. Neither party has established that it is entitled to judgment as a matter of law, and the Board denies both motions for summary judgment on this modification.

Consultant's Materials: Slug

Dersch's 2016 Budget. With the Description/Justification that it is to for conducting a slug test, Dersch proposed the use of a slug for one day at \$36.00 per day. R. at 88.

IEPA's project manager asked Dersch how much the slug costs and how it determined this requested rate. R. at 22; *see id.* at 13 (tech review notes). Dersch's consultant responded that its proposed daily rate is "based on what others were charging years ago, adjusted for inflation a few times." R. at 20. She could not project which slug she would use and acknowledged that she did not have a receipt for the purchase of any of them. *Id.* She argued that the proposed rate is "cheaper than the rental rates we could find, not even factoring in shipping, taxes, and our time to rent and return one." *Id.*

IEPA's Determination. IEPA modified the budget by \$36.00, the entire amount for a slug. R. at 6; *see id.* at 88. IEPA determined that the proposed cost lacked supporting documentation and was ineligible for payment from the UST Fund. *Id.* at 6, citing 35 Ill. Adm. Code 734.630(cc). Without documentation, IEPA stated that it could not determine whether the proposed cost will exceed that necessary to meet the minimum requirements of the Act. R. at 6. Since the cost may be used for activities exceeding those requirements, IEPA did not approve it. *Id.*, citing 415 ILCS 5/57.7(c)(3). For costs that do not have a maximum payment amount in Subpart H of the UST rules, IEPA states that Dersch must prove its costs are reasonable. R. at 6, citing 35 Ill. Adm. Code 734.850(b). IEPA argues that, although it requested documentation supporting Dersch's requested amount, it was either not provided or did not provide sufficient information to determine whether the request is reasonable. R. at 6, citing 35 Ill. Adm. Code 734.505(a). IEPA determined that, without supporting documentation, the cost for a slug was not reasonable as submitted and was not eligible for payment from the UST Fund. R. at 6., citing 35 Ill. Adm. Code 734.630(dd).

Dersch's Motion for Summary Judgment. As with the amount budgeted for a PID, Dersch argues that "the rate for a slug to conduct a slug test has been approved by the Agency for decades." Pet. Mot. SJ at 27, citing R. at 19. Dersch stated that its consultant "has several slugs, none of which have receipts, and is not certain which one they will end up using." Pet. Mot. SJ at 27, citing R. at 19, 20. Dersch supplied IEPA with equipment rental information showing a \$60 per day cost to rent a slug. Pet. Mot. SJ at 27, citing R. at 23. Since its budgeted amount is lower than that rate, Dersch argues that its cost is reasonable. Pet. Mot. SJ at 28.

IEPA's Motion for Summary Judgment. IEPA argues that it could not determine whether these budgeted costs exceeded the minimum requirements of the Act. IEPA Mot. SJ at 5; *see* IEPA Resp. at 4. IEPA reports that it requested documentation that it did not receive. *Id.* IEPA argued that it could not make this determination, so its modification should be affirmed.

Board Finding. IEPA has not disputed the use of a slug in Dersch's plan, but it modified the budget by the full amount proposed.

The pleadings reveal a dispute about the cost of this item. The Board finds some merit in Dersch's position that its proposed amount is not inconsistent with previous cases. However, the

Board is not persuaded that Dersch is entitled to summary judgment. The record does not show a detailed calculation of its proposed rate, and it raises questions about the weight that should be given to rental rates of similar equipment.

Based on the record on this modification now before it, the Board finds that neither party has placed material facts beyond dispute. Neither party has established that it is entitled to judgment as a matter of law, and the Board denies both motions for summary judgment on this modification.

Consultant's Materials: Mileage

Dersch's 2016 Budget. With the Description/Justification that it is for "[o]ne round trip from Springfield Office for Drilling," Dersch proposed 310 miles of travel at \$0.65 per mile for a total cost of \$201.50. R. at 88. IEPA's project manager stated that "mileage has to be approved at the Federal mileage rate of \$0.54 per mile." R. at 17; *see also id.* at 13-14.

IEPA's Determination. IEPA modified the budget for reimbursement of mileage by \$34.10. R. at 6. To drill a soil boring, Dersch had proposed a round trip of 310 miles from Springfield to Lawrenceville at \$0.65 per mile for a total of \$201.50. *Id.* at 6, 88. IEPA determined that the proposed cost lacked supporting documentation and was ineligible for payment from the UST Fund. *Id.* at 6, citing 35 Ill. Adm. Code 734.630(cc). Without documentation, IEPA stated that it could not determine whether the proposed cost will exceed those necessary to meet the minimum requirements of the Act. R. at 6. Since the cost may be used for activities exceeding those requirements, IEPA did not approve them. *Id.*, citing 415 ILCS 5/57.7(c)(3). IEPA determined that the cost was not reasonable as submitted and was not eligible for payment from the UST Fund. *Id.*, citing 415 ILCS 5/57.7(c)(3), 35 Ill. Adm. Code 734.630(dd). IEPA approved mileage at a federal rate of \$0.54 per mile for a total of \$167.40. R. at 6-7.

Dersch's Motion for Summary Judgment. Dersch argues that IEPA reduced its budgeted mileage reimbursement rate by applying "an unpromulgated rule requiring the Federal mileage rate." Pet. Mot. SJ at 28, citing R. at 17. Although Dersch acknowledges that this rate is commonly adopted by other agencies through rulemaking, it does not apply to heavy trucks used to transport drilling and excavating equipment. Pet. Mot. SJ at 29.

Dersch argues that IEPA's determination did not give it an opportunity to justify its budgeted mileage rate and did not specify the information that it had not provided. Pet. Mot. SJ at 30-31, citing 415 ILCS 5/57.7(c)(4)(C) (2018). Dersch stresses that IEPA reduced its budget by \$0.11 per mile, an amount "insufficient to establish" that the budgeted rate was unreasonable for heavy commercial vehicles. Pet. Mot. SJ at 31.

IEPA's Motion for Summary Judgment. IEPA argues that it could not determine whether these budgeted costs exceeded the minimum requirements of the Act. IEPA Mot. SJ at 5; *see* IEPA Resp. at 4. IEPA reports that it requested documentation that it did not receive. *Id.* IEPA argued that it could not make this determination, so its modification should be affirmed.

Board Finding. The pleadings reveal a dispute about mileage. The Board recognizes Dersch's argument that IEPA applies a rate that may not apply to vehicles it would use in its plan. However, the Board is not persuaded that Dersch is entitled to summary judgment. The record does not calculate or support its proposed reimbursement rate.

Based on the record on this modification now before it, the Board finds that neither party has placed material facts beyond dispute. Neither party has established that it is entitled to judgment as a matter of law, and the Board denies both motions for summary judgment on this modification.

Consultant's Materials: Copies of Plan, Maps, Budget, and Reimbursement

Dersch's 2016 Budget. Dersch's budget proposed 2,100 copies in four sets. For "Field/Plan/Maps/Borelogs," Dersch proposed 100 copies at \$0.15 each for a total cost of \$15.00. R. at 88. For "Copies of Corrective Action Plan/Draft/Forms," Dersch proposed 800 copies for a total of \$120.00. *Id.* For "Copies of Corrective Action Budget," Dersch proposed 200 copies for a total cost of \$30.00. *Id.* at 89. For "Copies of Corrective Action Reimbursement," Dersch proposed 1,000 copies for a total cost of \$150.00. *Id.*

IEPA's project manager asked Dersch's consultant how she determined the rate of \$0.15 per copy. R. at 22. The consultant submitted "a page from IEPA's website that shows we are charging the same price per copy as IEPA itself." R. at 20; *see id.* at 27 (Freedom of Information Act fees). The project manager responded that, for Freedom of Information Act requests, IEPA charges \$0.15 per copy in excess of 400 copies. *Id.* at 20; *see id.* at 27; *see also id.* at 14 (technical review notes). He noted that the plan and budget combined total 62 pages. *Id.* at 14, 16. He calculated that, with 124 pages for the original and a copy, Dersch's request for \$165 represents \$1.33 per page. *Id.* at 16.

IEPA's Determination. IEPA first modified the budget for copies by \$127.80. R. at 7. IEPA noted that Dersch's budget requested reimbursement at \$0.15 per copy for 800 copies of the plan, 100 copies of the maps and borelogs, and 200 copies of the budget for a total cost of \$165.00. *Id.* at 7, 88-89. IEPA received a 48-page plan and 14-page budget, so Dersch's request represented nearly 18 copies of those documents. *Id.* at 7. IEPA determined that the proposed costs lacked supporting documentation and were ineligible for payment from the UST Fund. *Id.*, citing 35 Ill. Adm. Code 734.630(cc). Without documentation, IEPA stated that it could not determine whether the proposed costs will exceed those necessary to meet the minimum requirements of the Act. R. at 7. Since the costs may be used for activities exceeding those requirements, IEPA did not approve them. *Id.*, citing 415 ILCS 5/57.7(c)(3). IEPA determined that the cost was not reasonable as submitted and was not eligible for payment from the UST Fund. R. at 7, citing 415 ILCS 5/57.7(c)(3), 35 Ill. Adm. Code 734.630(dd). Because IEPA had received 2 copies of the 62-page plan and budget, it approved 124 copies and deducted 976 copies or \$127.80.¹ R. at 7.

¹ At the requested rate of \$0.15 per copy, a deduction of 976 copies would be a modification of \$146.40. IEPA's technical review notes proposed to approve four 62-page copies of the plan and budget: two provided to IEPA, one to the owner or operator, and one to the consultant. R. at 14.

IEPA modified the entire remaining \$37.20 of Dersch's request. R. at 7. IEPA determined that the proposed costs lacked supporting documentation and were ineligible for payment from the UST Fund. *Id.*, citing 35 Ill. Adm. Code 734.630(cc). Without documentation, IEPA stated that it could not determine whether the proposed costs will exceed those necessary to meet the minimum requirements of the Act. R. at 7. Since the costs may be used for activities exceeding those requirements, IEPA did not approve them. *Id.*, citing 415 ILCS 5/57.7(c)(3). For costs that do not have a maximum payment amount in Subpart H of the UST rules, IEPA states that Dersch must prove its costs are reasonable. R. at 7, citing 35 Ill. Adm. Code 734.850(b). IEPA argues that, although it requested documentation supporting Dersch's requested amount, it was either not provided or did not provide sufficient information to determine whether the request is reasonable. R. at 6, citing 35 Ill. Adm. Code 734.505(a); *see* R. at 25-26. IEPA determined that, without supporting documentation, the cost for copies was not reasonable as submitted and was not eligible for payment from the UST Fund. *Id.*, citing 35 Ill. Adm. Code 734.630(dd).

Finally, IEPA addressed Dersch's request for 1,000 copies of its reimbursement at \$0.15 per page for a total cost of \$150.00. R. at 7, 89. IEPA determined that the proposed cost lacked supporting documentation and was ineligible for payment from the UST Fund. *Id.* at 7, citing 35 Ill. Adm. Code 734.630(cc). Without documentation, IEPA stated that it could not determine whether the proposed cost will exceed those necessary to meet the minimum requirements of the Act. R. at 7. Since the cost may be used for activities exceeding those requirements, IEPA did not approve them. *Id.*, citing 415 ILCS 5/57.7(c)(3). For costs that do not have a maximum payment amount in Subpart H of the UST rules, IEPA states that Dersch must prove its costs are reasonable. R. at 8, citing 35 Ill. Adm. Code 734.850(b). IEPA argues that, although it requested documentation supporting Dersch's requested amount, it was either not provided or did not provide sufficient information to determine whether the request is reasonable. R. at 6, citing 35 Ill. Adm. Code 734.505(a). IEPA determined that, without supporting documentation, the rate for copies was not reasonable as submitted and was not eligible for payment from the UST Fund. R. at 6., citing 415 ILCS 5/57.7(c)(3), 35 Ill. Adm. Code 734.630(dd).

Dersch's Motion for Summary Judgment. First, IEPA "cut the number of pages for the corrective action plan, budget and associated maps down to 248 pages, resulting in a total of \$127.80 in cuts." Pet. Mot. SJ at 32-33; *see* R. at 7.

Second, IEPA "cut the rate charged per page of copying these documents from \$0.15 per page to \$0.00 per page, resulting in an additional \$37.20 in cuts." Pet. Mot. SJ at 33; *see* R. at 7.

Third, IEPA "also cut the rate charged per page for copies of the reimbursement request from \$0.15 per page to \$0.00 per page, resulting in an additional \$150.00 in cuts." Pet. Mot. SJ at 33; *see* R. at 7-8.

This approval results in a deduction of 852 copies at \$0.15 per page for a total modification of \$127.80, the amount in IEPA's determination. *See id.* at 7. However, IEPA ultimately modified the entire remaining request for copies on separate grounds. *Id.* (¶11).

Dersch's motion begins by addressing the third modification because it applies to all documents. Pet. Mot. SJ at 33. Also, Dersch argues that IEPA asked it only to support the copy rate of \$0.15 per page. *Id.*, citing R. at 22. Dersch responded that proposed the same rate as IEPA charges for copies under the Freedom of Information Act (FOIA). Pet. Mot. SJ at 33, citing 5 ILCS 140/6(b) (2018); R. at 20, 27. Dersch argues that FOIA establishes discounted copy rates and that other statutes authorize higher rates for functions such as professional services. Pet. Mot. SJ at 34-35, citing 735 ILCS 5/8-2001(d) (2018) (Inspection of Records Act). Dersch argues that these statutes support its position that \$0.15 per page is a reasonable copy rate. Pet. Mot. SJ at 35.

Regarding the numbers of copies, Dersch states that IEPA's project manager did not request justification. Pet. Mot. SJ at 35. When it submitted its 2015 corrective action plan, Dersch's consultant stressed that "the number of copies budgeted for reports and claims are not just the number of pages submitted to the Agency." R. at 99. That budget also included "drafts, client copies, and our own copies of reports, budgets, and claims." *Id.* Dersch argued that Board regulations require it to maintain a copy of submissions and other evidence. Pet. Mot. SJ at 36, citing 35 Ill. Adm. Code 734.655.

Regarding the copies of plans, maps, and borelogs, Dersch argues that IEPA "erroneously treated these as part of the plan and budget submitted. Pet. Mot. SJ at 36. Dersch describes these instead as "documents taken to the site to guide and document the performance of corrective action." *Id.*

Dersch concluded that it estimated the number appropriately for the budget stage. Pet. Mot. SJ at 36. "[T]he actual number of copies will be identified once all the work is performed and reimbursement is sought." *Id.*

IEPA's Motion for Summary Judgment. IEPA argues that it could not determine whether these budgeted costs exceeded the minimum requirements of the Act. IEPA Mot. SJ at 5; *see* IEPA Resp. at 4. IEPA reports that it requested documentation that it did not receive. *Id.* IEPA argued that it could not make this determination, so its modification should be affirmed.

Board Finding. The pleadings reveal a dispute about a budget for copies. The Board finds some merit in Dersch's view that a reasonable budget for copies exceeds \$0. However, the Board is not persuaded that Dersch is entitled to summary judgment. The record does not place beyond doubt the number of copies required or the rate structure or amounts for copying charges.

Based on the record on this modification now before it, the Board finds that neither party has placed material facts beyond dispute. Neither party has established that it is entitled to judgment as a matter of law, and the Board denies both motions for summary judgment on this modification.

CONCLUSION

For the reasons above, the Board grants Dersch's motion for summary judgment on the issue of a measuring wheel. The Board otherwise denies Dersch's motion for summary judgment, and the Board denies IEPA's motion for summary judgment.

The Board directs its assigned hearing officer to proceed expeditiously to hearing on the disputed budget modifications.

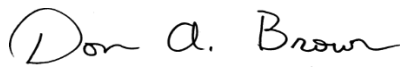
This opinion and order constitutes the Board's findings of fact and conclusions of law.

ORDER

1. The Board grants Dersch's request that the Board take official notice of eight exhibits submitted with its motion for summary judgment.
2. The Board grants Dersch's December 24, 2020 motion for leave to reply.
3. The Board grants IEPA's February 18, 2021 motion for leave to reply.
4. The Board grants Dersch's motion for summary judgment on the issue of a measuring wheel but otherwise denies Dersch's motion for summary judgment.
5. The Board denies IEPA's motion for summary judgment.
6. The Board directs its assigned hearing officer to proceed expeditiously to hearing on the disputed budget modifications.

IT IS SO ORDERED.

I, Don A. Brown, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion and order on June 17, 2021, by a vote of 4-0.



Don A. Brown, Clerk
Illinois Pollution Control Board