BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

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

NOTICE

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PLEASE TAKE NOTICE that I have today filed with the office of the Clerk of the Pollution Control Board **RESPONDENT'S POST-HEARING BRIEF,** copies of which are herewith served upon you.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,
Respondent

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Dated: **October 22, 2021**

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RESPONDENT'S POST-HEARING BRIEF

NOW COMES the Respondent, the Illinois Environmental Protection Agency ("Illinois EPA" or "Agency"), by one of its attorneys, Melanie A. Jarvis, Assistant Counsel and Special Assistant Attorney General, and hereby submits a Post-Hearing Brief in the above captioned matter.

BURDEN OF PROOF

Section 105.112(a) of the Illinois Pollution Control Board's ("Board") procedural rules (35 Ill. Adm. Code 105.112(a)) provides that the **burden of proof shall be on a Petitioner**. As the Board, itself has noted, the primary focus of a reimbursement appeal must remain on the adequacy of the permit application and the information submitted by the applicant (Petitioner) to the Illinois EPA for review. See: John Sexton Contractors Company v. Illinois EPA, PCB 88-139 (February 23, 1989), p. 5. Simply, the ultimate burden of proof will remain on the party initiating an appeal (Petitioner) and what Petition presented for the Illinois EPA to review and render an opinion upon. See: John Sexton Contractors Company v. Illinois Pollution Control Board, 201 Ill. App. 3d 415, 425-426, 558 N.E.2d 1222, 1229 (1st Dist. 1990).

Petitioner must demonstrate to the Board that it satisfied this high burden before the Board may even entertain a review of the Illinois EPA's decision. The facts below and the arguments presented will lead the Board to one conclusion, that Petitioner has **failed** to meet its burden of proof and a ruling affirming the Illinois EPA's decision is appropriate and warranted.

STANDARD OF REVIEW

Section 57.8(i) of the Environmental Protection Act ("Act") (415 ILCS 5/57.8) allows an individual to challenge a determination of the Illinois EPA to the Board pursuant to Section 40 of the Act (415 ILCS 5/40). Section 40 of the Act is the general appeal section for permits and has been used by the legislature as the basis for this type of review to the Board. When considering an Illinois EPA determination on a submitted corrective action plan and/or budget, the Board must determine whether the proposal(s), as submitted to the Illinois EPA, demonstrate compliance with the Act and Board regulations. See: Broderick Teaming Company v. Illinois EPA, PCB 00-187 (December 7, 2000).

The Board will not, and should not, consider new information not presented to the Illinois EPA. Simply put, if the information was not before the Illinois EPA that information could not have been relied upon by either the Petitioner nor Illinois EPA in review and rendering a determination on the sufficiency of the application. As such, the Illinois EPA's final decision, and the application, as submitted for review, frame the appeal. See: Todd's Service Station v. Illinois EPA, PCB 03-2 (January 22, 2004), p.4; See also: Pulitzer Community Newspapers, Inc. v. EPA, PCB 90-142 (Dec. 20, 1990). The Board must, therefore, look to the documents within the Administrative Record ("Record")[1] as the sole source of

[1] Citations to the Administrative Record will hereinafter be made as, "A.R.___."
Citations to the Hearing Transcript will hereinafter be made as, "Trans___."

rendering an opinion on whether the Illinois EPA framed its determination consistently with the application and law. Petitioner has not challenged the sufficiency of the Record in this matter.

ISSUES

The Illinois EPA final determinations on the application frame the issues on appeal. The issues presented in this matter are many and are presented in the argument as they are set forth in the Agency's decision letter. In short, the issues can be summed up as whether the Petitioner's costs can be approved in a budget when said costs lack supporting documentation, are unreasonable and exceed the minimum requirements of the Act. Based upon the express language of the Act and regulations thereunder, and the facts presented, the answer is **NO**.

FACTS

The facts set forth in the Administrative Record are clear as follows:

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

5. The Illinois EPA project Manager finished the review of the Corrective Action Plan and Budget on July 8, 2016.

6. On July 12, 2016, the Illinois EPA issued a final decision.

7. On August 18, 2016, Petitioner filed his Appeal.

LAW

Sec. 57.7(c)(3). Leaking underground storage tanks; site investigation and corrective action.

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

Section 734.630 Ineligible Corrective Action Costs

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

* * *

cc) Costs that lack supporting documentation;

dd) Costs proposed as part of a budget that are unreasonable;

ARGUMENT

In this case, the Agency will follow its decision letter in forming its argument on the merits of its decision. Despite the Petitioner's attorney's assertion, no illegal rate sheet was used in this case. Petitioner can point to nowhere in the record where an illegal rate sheet was used. It is very clear from the correspondence between parties that the Agency's project manager was attempting to determine reasonableness of the various rates used by the Petitioner in this case. At no point did the Agency's project manager state a rate in this correspondence nor were the amounts in the budget adjusted to a specific rate. Only during

hearing testimony did the subject of what a reasonable rate might be in relation to the PID come up. The project manager gave his opinion and then the testimony at hearing meandered off topic to an area where the project manager admitted that he was not intimately involved and was unsure of the topic. In any case, such a rate was not used in this case in any way and is therefore irrelevant to the issues therein. Again, no illegal rate was used in this case. The PID in question which was the only item where a "rate" was discussed was cut in full and no rate was imposed. The issues here are lack of supporting documentation, unreasonableness, and exceeding the requirements of the Act. All of which the Petitioner in this case has done in regard to the budget cuts made in the Agency's decision letter.

Budget Cut Number 1:

1 $3,352.80 for Consulting Personnel Costs associated with Corrective Action Plan design and preparation by a Professional Geologist which lack supporting documentation. Such costs are ineligible for payment from the Fund pursuant to 35 Ill. Adm. Code 734.630(cc). Since there is no supporting documentation of costs, the Illinois EPA cannot determine that costs will not be used for activities in excess of those necessary to meet the minimum requirements of Title XVI of the Act. Therefore, such costs are not approved pursuant to Section 57 .7(c)(3) of the Act because they may be used for site investigation or corrective action activities in excess of those required to meet the minimum requirements of Title XVI of the Act. In addition, this request is not reasonable as submitted. Such costs are ineligible for payment from the Fund pursuant to Section 57 .7(c)(3) of the Act and 35 Ill. Adm. Code 734.630(dd).

The Consulting Personnel Costs requests 30 hours for a Professional Geologist at a rate of $111.76 per hour for a total of $3,352.80 for Corrective Action Plan Design and Preparation. In addition, the budget also requests 6 hours for a Senior Project Manager and 4 hours for an Engineer III for Corrective Action Plan development and technical compliance. The plan is for the advancement of one soil boring to determine the parameters required for proposing on-site corrective action in accordance with Tier 2 remediation objectives as required in 734.410 and calculating the Tier 2 remediation objectives and groundwater modeling. The soil boring was requested by the IEPA Project Manager and the location of the soil boring and at what depth the soil sample needs to be collected for analysis was also communicated to the consultant in an email by

> the IEPA Project Manager. The time spent on Corrective Action Plan development by the consultant should be minimal, if any. (A.R. 003)

The Agency agreed with the submission of the Corrective Action Plan and Budget prior to its submittal. The only reason the Agency's project manager said that they did not need to submit the plan and budget was in response to Petitioner's Consultant, Carol Rowe stating "(I)n all likelihood, the additional soil borings with monitoring wells will still be needed and the TACO boring could have been simply added to an approval with modifications letter. This was discussed and agreed upon with Rob Stanley and Vince Smith prior to the denial of the previous Corrective Action Plan and Budget

The Petitioner's Consultant is aware that the use of site-specific Tier 2 soil remediation objectives is required per 57.7(c)(3)(A)(i) of the Act and 35 Ill. Adm. Code 734.360(a). They are also aware that 35 Ill. Adm. Code 734.410 requires the site-specific Tier 2 soil remediation objectives be calculated using site specific parameters. The plan and budget that were previously submitted should not have been submitted. Rob Stanley stated as much in the January 18, 2016 email, as follows:

> "(W)e were trying to salvage the results of another consultant even though the data was possibly going to be insufficient for our needs." (A.R. 096)

The Agency told Vince Smith in a January, 15, 2016 email that they were going to need to do another geotechnical boring and analyze for the 734.410 parameters. (A.R. 097). The Agency then instructed them where to drill the soil boring and at what depth to collect the soil sample. There were only two options to proceed at this point: (1) collect the soil sample without a plan and budget at the location and depth determined by the Agency per 734.335(d), or (2) submit a plan and budget for the collection of the soil sample per 734.335(a). Rob Stanley replied to the email and stated that they were going to prepare a plan to collect a geotechnical soil sample. The Agency did not have a problem with this. It

would have taken the opportunity to inform them then if there were an issue with them submitting a plan and budget for the boring/analysis.

The Agency did not have an issue with the preparation and submittal of the plan and budget to collect the geotechnical soil sample. If the Agency believed that the plan should not have been submitted, the plan would have been denied, not approved. The issue was with the requested thirty (actually forty total) hours. The determination of reasonableness of the thirty hours for preparation of the plan was made on the documentation submitted in the plan. Portions of the previous plan/budget may have been included in the current plan (as is common), but the decision on the reasonableness of the preparation time for the plan is determined by the documentation included in the plan, not the plan and the last plan that was denied. The Agency will approve reasonable preparation costs for the plan that was submitted and approved. We are not allowed under law to approve costs associated with the preparation of a plan that was denied. The costs associated with the preparation of the previous plan and budget were ineligible. If that information/documentation is included in the (current) plan, then it is eligible for payment under the preparation costs for this plan.

The Agency had also tried to convey that the costs associated with determining where to propose the soil borings to delineate the soil contamination requiring excavating (proposed in the previous plan) should be submitted in the next plan and budget. The Agency's project manager stated in his July 1, 2016 email "(Y)our 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." (A.R. 015). If the Petitioner believes that the preparation costs for this plan should be included with a subsequent budget that is not true and was never the Agency's intention.

The Petitioner's argument that a complete plan must contain all of the information required in 734.335, not just a proposal to collect a geotechnical sample, but that's what they did. The plan that they submitted proposed a geotechnical sample. The plan that they submitted satisfied 734.335 in that they filled out the form. The plan did not propose any applicable remediation objectives and only vaguely addressed any exposure routes.

They stated that:

> "multiple, sequential corrective action plans will result in additional fixed costs being incurred for each plan that could have been avoided with a single plan. The consultant offered the alternative of approving the original plan with a modification requiring the additional TACO boring. The consultant then submitted a small budget amendment for the additional work." (Pet. Brief 10)

This is a bad faith argument. To be clear, the consultant offered their alternative approach of approving the original plan with a modification requiring the additional TACO boring in an email dated June 28, 2016, over five months after the previous plan and budget were denied and three-plus months after they submitted their new plan for the TACO boring. (A.R. 017). By the time Petitioner's consultant offered this approach on June 28, 2016, the plan to which they were referring had been denied on January 1, 2016. In fact, it was the Agency who offered the alternative approach to avoid multiple, sequential plans at the appropriate time (January 15, 2016 email from the Agency's project manager to Vince Smith). (A.R. 097)

Section 57.7(c)(3) of the Act states that the Agency shall determine, by a regulation promulgated by the Board under Section 57.14, that the costs associated with the plan are reasonable, will be incurred in the performance of site investigation or corrective action, and will not be used for site investigation or corrective action activities in excess of those required to meet the minimum requirements of this Title. They requested a total of forty

hours for the preparation of the plan and budget and this was not reasonable or supported by the information/documentation contained in the plan.

Budget Cut Number 2:

2. $334.05 for Consulting Personnel Costs associated with drafting for the Corrective Action Plan which lack supporting documentation. Such costs are ineligible for payment from the Fund pursuant to 35 Ill. Adm. Code 734.630(cc). Since there is no supporting documentation of costs, the Illinois EPA cannot determine that costs will not be used for activities in excess of those necessary to meet the minimum requirements of Title XVI of the Act. Therefore, such costs are not approved pursuant to Section 57.7(c)(3) of the Act because they may be used for site investigation or corrective action activities in excess of those required to meet the minimum requirements of Title XVI of the Act. In addition, these costs exceed the minimum requirements necessary to comply with the Act. Costs associated with site investigation and corrective action activities and associated materials or services exceeding the minimum requirements necessary to comply with the Act are not eligible for payment from the Fund pursuant to Section 57.7(c)(3) of the Act and 35 Ill. Adm. Code 734.630(o).

   The Consulting Personnel Costs requests 6 hours for a Draftsperson/CAD IV at a rate of $66.81 per hour for a total of $400.86 for the drafting of the Corrective Action Plan. This Corrective Action Plan requires one map, the proposed soil boring location map. The additional ll maps that were submitted are not needed and exceed the minimum requirements necessary to comply with the Act. 35 Ill. Adm. Code 734.335 does not require that a map be submitted with the Corrective Action Plan. In this instance, a site map noting the location of the proposed soil boring is approved, but the other 11 maps are not useful. One hour is approved at a rate of $66.81 for updating the Soil Boring Location Map (Drawing 0004) to the Proposed Soil Boring Location Map (Drawing 0004A). (A.R. 004).

The Agency supported the plan's preparation and submittal. While perhaps not technically required under the regulations, the Agency did see the necessity for the submittal as discussed above.

The Consulting Personnel Costs requested six hours for a Draftsperson/CAD IV for drafting for the plan, which proposed the advancement of one soil boring. Only one map is needed, the proposed soil boring location map, drawing 0004A. (A.R. 053). The map indicates that it was created on April 28, 2014 and was revised for the submission of the

Corrective Action Plan. The map was originally created for inclusion in the Site Investigation Completion Report. The Draftsperson/CAD IV needed only to plot one soil boring on an existing map. We approved one hour for the time to plot this one boring. No other maps were required for this Corrective Action Plan. The plan included a total of twelve maps.

A Corrective Action Plan typically proposes remediation. This plan did not. It proposed additional site investigation to collect a geotechnical soil sample, which makes it akin to a Site Investigation Plan being submitted during corrective action. A site investigation plan to collect an on-site boring (or borings) requires one map per 734.320(b)(4)(B). None of the other eleven maps were useful in the review of the plan.

The Agency actually approved five hours for the Senior Draftsperson/CAD for mapping for this plan, not one. The field costs included a request for four hours for a Senior Draftsperson/CAD for "drafting locations/drilling prep" that was approved. In hindsight, the Agency believes it should have denied these hours as there was no additional mapping needed to implement the plan or complete the drilling, but they were approved and the Petitioner was afforded plenty of hours for a Draftsperson/CAD to plot and draft a map for one drilling point. The additional hours, the ones cut by the Agency were unreasonable and were not justified by the Petitioner with any supporting documentation.

Budget Cut Number 3:

3. $2,964.14 for Consulting Personnel Costs associated with preliminary contaminant transport modeling and TAC calculations which lack supporting documentation. Such costs are ineligible for payment from the Fund pursuant to 35 Ill. Adm. Code 734.630(cc). Since there is no supporting documentation of costs, the Illinois EPA cannot determine that costs will not be used for activities in excess of those necessary to meet the minimum requirements of Title XVI of the Act. Therefore, such costs are not approved pursuant to Section 57.7(c)(3) of the Act because they may be used for site investigation or corrective action activities in excess of those required to meet the minimum requirements of Title XVI of the Act.

> The Consulting Personnel Costs requests 6 hours for a Senior Project Manager at a rate of $121.49 per hour for a total of $728.94 for contaminant transport modeling/oversight/technical compliance and 20 hours for a Professional Geologist for preliminary contaminant transport modeling and TACO calculations at a rate of $111.76 per hour for a total of $2,235.20. This is only an estimate on how long it will take the consultant to perform the modeling. The costs associated with the modeling and the determination of the site-specific Tier 2 soil remediation objectives should be submitted in the amended Corrective Action Plan that will be submitted to apply the modeling calculations. If the Consulting Personnel Costs associated with the Tier 2 calculations are submitted in the amended plan to address the results of this plan, the costs will be known and it will not be necessary to approve costs in excess of what is needed for the task or to approve additional costs if the original estimate did not include enough hours to complete the tasks. It should be noted that the Consulting Personnel Costs associated with the calculation of the site-specific Tier 2 soil remediation objectives are usually approved in a Corrective Action Budget after the calculations have been performed and the hours required to perform the tasks are known. An additional preliminary Corrective Action Plan is required in this case to collect the geotechnical soil sample used to determine the site-specific parameters for the TACO Tier 2 calculations but that should not change when the Consulting Personnel Costs associated with the TACO Tier 2 calculations are submitted and approved. (A.R. 004).

The budget requested twenty-six hours to calculate the site-specific Tier 2 soil remediation objectives and the contaminant transport modeling. These calculations were not included in the plan. The costs associated with the preparation of the Tier 2 SROs/modeling calculations should be included in the budget for the plan in which they are submitted/proposed for use per Section 57.7(b)(3) of the Act and 35 Ill. Adm. Code 734.335(b). Quite frankly, the Agency lacked the documentation to determine whether the request exceeded the minimum requirements.

It should be noted that the applicable site-specific Tier 2 soil remediation objectives can be calculated/determined by spreadsheet within approximately one hour usually, and almost always within two hours based upon the experience of the Agency and the submittals by other consultants. Modeling can generally be completed in a couple of hours as well. Six site-specific Tier 2 soil remediation objectives will be required in the forthcoming plan. At

most, fourteen exceedances will need to be modeled. This will not require 26 hours to calculate since computers do most of the work. The number of hours requested is so extravagantly in excess of what is normally seen by the Agency that all of the Agency's warning bells were ringing. The Petitioner did not explain why this number of hours does not exceed the minimum requirements of the Act and regulations thereunder. Regardless of the unreasonableness of the amount of the hours, the Petitioner's consultant did not submit supporting documentation as to why this is included in this plan and budget.

In fact, Rob Stanley from Petitioner's consultant emailed the Agency's project manager on January 18, 2016 and said as follows:

> "Vince and I have had a chance to discuss the Dersch Croslow's CAP. We were 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 but truly appreciate your contacting us for possible options. As a result, 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." (A.R. 096)

The 2015 budget included twenty-eight hours for the preparation of the TACO Tier 2 modeling calculations. The Agency inferred from this email that they intended to resubmit their TACO budget costs in that budget as well. These costs are preparation costs for the next plan, as evidenced by the previous budget.

The preparation/calculation of the site-specific Tier 2 soil remediation objectives and modeling calculations were not part of the preparation of this plan and were not proposed in this plan. The plan proposed the following (Section 3.1 of the plan submitted March 25 2016 (A.R. 037)):

- One geotechnical soil boring
- Collecting the depth to water from all monitoring wells

- Perform a slug test

The costs associated with the preparation of a plan including the presentation of applicable site-specific Tier 2 soil remediation objectives and modeled groundwater contamination should be contained within in the budget included with that specific plan. The TACO calculations were not presented this plan or even proposed as part of this plan. **These costs are part of the development of the next plan and must be submitted in the budget with the corresponding plan per 35 Ill. Adm. Code 734.335(b). Therefore, they were cut from this plan, but that does not imply that if they were submitted with the correct plan that they would not be approved <u>if they could be supported</u>.**

Note that the documentation in the 2015 CAP indicated that all of the TACO calculations (both Tier 2 Site Remediation Objectives and modeling calculations) were completed on one day, April 25, 2014. (A.R. 159). Unless the Agency is mistaken, there are only 24 hours in a day, not 26. So even by their own submittal, it is blatantly obvious that the number of hours requested to perform this work was unreasonable and exceeded the minimum requirements of the Act. In summary, these hours are misplaced in the wrong budget because the work is not detailed in this plan and even if the work was detailed in the plan, the hours requested exceed the minimum requirements of the Act and are therefore unreasonable.

Budget Cut Number 4:

4. $148.00 for Consultant's Materials Costs associated with the use of a PID, which lack supporting documentation. Such costs are ineligible for payment from the Fund pursuant to 35 Ill. Adm. Code 734.630(cc). Since there is no supporting documentation of costs, the Illinois EPA cannot determine that costs will not be used for activities in excess of those necessary to meet the minimum requirements of Title XVI of the Act. Therefore, such costs are not approved pursuant to Section 57 .7(c)(3) of the Act because they may be used for site investigation or corrective action activities in excess of those required to meet the minimum requirements of Title XVI of the Act.

> Pursuant to 35 Ill. Adm. Code 734.850(b) for costs associated with activities that do not have a maximum payment amount set forth in pursuant to 35 Ill. Adm. Code 734 Subpart H must be determined on a site specific basis and the owner/operator must demonstrate to the Agency the amounts sought for reimbursement are reasonable. The Agency has requested additional documentation to support the rate requested for a PID pursuant 35 Ill. Adm. Code 734.505(a). The documentation was either not provided or fails to provide sufficient information for the Agency to make a site-specific reasonableness determination.
>
> In addition, without supporting documentation for the rate requested the PID costs are not reasonable as submitted. Such costs are ineligible for payment from the Fund pursuant to Section 57.7(c)(3) of the Act and 35 Ill. Adm. Code 734.630(dd). (A.R. 005).

Petitioner's consultant owns and does not rent its PID equipment. Petitioner's consultant charged the Agency $148/day for use of a piece of equipment it owns. In order to justify the rate it was charging, Petitioner's consultant provided a list of rental rates from Envirotech of California that included three PIDs, with daily rates ranging from $95.00 per day to $150.00 per day. They indicated that their discontinued MSA Orion PID measured in parts per billion, so it was comparable to the high-end $150.00 per day model which measured in parts per billion. The Agency's project manager pointed out that our soil boring logs requested parts per million, not parts per billion and that they submitted their results in parts per million, not parts per billion. Therefore, a high-end PID that measures in parts per billion exceeded the minimum requirements of the Act. It was evident to the Agency that the rental rates from Envirotech in California were the highest PID rental rates that could be found online so that the reimbursement could be at the highest rate possible.

The Agency project manager requested Petitioner's consultant to justify their requested daily rate for the PID ($148.00) by factoring in the item's purchase cost and how many times they expected to use it before having to purchase another PID. In emails between the parties, Carol Rowe, a representative from the Petitioner's consultant, stated that:

> "we have not tracked what a PID, an individual box of gloves, or a water meter costs to purchase and maintain. The rates we use were originally developed from what others were charging in this field in the distant past (approximately 1991), adjusted for inflation a few times." (A.R. 020).

It is a little incredulous to believe that a company does not know what they paid for their equipment and stock items. And that they do not depreciate such assets on their financial statements. Ms. Rowe went on to state that:

> "we also found out that our PID, an Orion model from MSA, is no longer available, which means that it will need to be replaced in the near future, as parts for repair and maintenance will be difficult to find and expensive. For comparison purposes, it is similar to the 3000 model from RAE, both of which read in ppb, not ppm as the cheaper models do." (A.R. 020).

There are two points that the Agency would like to make in regards to this statement. The first being that the MSA website indicates that the Orion multigas detector was discontinued in December 2010. Considering that the PID had to have been purchased prior to it being discontinued, they have been using the PID, which Ms. Rowe testified cost $4,500 per unit, (Trans. 34) for many years and charging the State a daily rate of $148.00. The average life of such a unit was 5 to 6 years according to her testimony, but she couldn't be exact. That would allow for a recouping of the costs of the PID within 30 days of use.

Further, as stated above, soil boring logs that are submitted by the Petitioner's company have PID readings in parts per million, not parts per billion which means they are just rounded to the nearest part per million for inclusion on the soil boring log.

It is obvious that the rate the Petitioner is charging for its PID is unreasonable and exceeds the minimum requirements of the Act. The Petitioner provided no supporting documentation for why this rate should be reimbursed and it was therefore cut in full.

Budget Cut Number 5:

5. $21.00 for indirect corrective action costs for a measuring wheel charged as direct costs. Such costs are ineligible for payment from the Fund pursuant to

> 35 Ill. Adm. Code 734.630(v). In addition, such costs are not approved pursuant to 35 Ill. Adm. Code 734.630(dd) and Section 57.7(c)(3) of the Act because they are not reasonable. (A.R. 005).

This issue was decided in the Board's Abel Investments v. IEPA, PCB 2016-108, December 15, 2016 decision and the Agency will concede this $21.00 budget request.

Budget Cut Number 6:

6. $16.00 for Consultant's Materials Costs associated with gloves which lack supporting documentation. Such costs are ineligible for payment from the Fund pursuant to 35 Ill. Adm. Code 734.630(cc). Since there is no supporting documentation of costs, the Illinois EPA cannot determine that costs will not be used for activities in excess of those necessary to meet the minimum requirements of Title XVI of the Act. Therefore, such costs are not approved pursuant to Section 57.7(c)(3) of the Act because they may be used for site investigation or corrective action activities in excess of those required to meet the minimum requirements of Title XVI of the Act.

   Pursuant to 35 Ill. Adm. Code 734.850(b) for costs associated with activities that do not have a maximum payment amount set forth in pursuant to 35 Ill. Adm. Code 734 Subpart H must be determined on a site specific basis and the owner/operator must demonstrate to the Agency the amounts sought for reimbursement are reasonable. The Agency has requested additional documentation to support the rate requested for gloves pursuant 35 Ill. Adm. Code 734.505(a). The documentation was either not provided or fails to provide sufficient information for the Agency to make a site-specific reasonableness determination.

   In addition, without supporting documentation for the rate requested the gloves are not reasonable as submitted. Such costs are ineligible for payment from the Fund pursuant to Section 57.7(c)(3) of the Act and 35 Ill. Adm. Code 734.630(dd). (A.R. 005).

The Petitioner is requesting approval in a budget for reimbursement for an entire box of gloves when only one or two gloves would be used. It is not reasonable for the Agency to approve the cost of an entire box of gloves to collect one soil sample. The Consultant's Materials Costs requests one box of gloves at $16.00 for the collection of one soil sample. The Agency emailed Carol Rowe on June 14, 2016 and stated:

> The Consultant's Materials Costs request the use of 1 box of gloves at $16.00 per box. We need to know what brand of gloves you're using and how big the

> box of gloves is. We'd prefer to see the invoice/receipt for the gloves you usually use to help determine the appropriate rate. Also, 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. (A.R. 022).

To which Ms. Rowe replied on June 28, 2016:

> Are we really supposed to count gloves, and who pays if one rips?... We stock items like gloves, bailers, string, etc. We do not purchase these items specifically for a particular project. For instance, we stock multiple sizes and types of gloves, as some of our employees are allergic to latex, and a specific type of glove may not be able to withstand certain chemicals or concentrations of chemicals. We buy them by the case, and frequently find that when we go to reorder, a particular model is no longer available. To try to predict which brand and size of gloves that will be used on a particular project (or what were used and which order or orders they came from) is not practical. To purchase them individually, rather than provide them as stock items, would drive up the costs, and be a logistical nightmare (who has the partial box of gloves left for Croslow Shell and will they even fit me?). To do a fair assessment and to provide the real cost of a box of gloves, they cannot be provided as a stock item. They will be treated as a field purchase, and will be ordered, invoiced, shipped and tracked with documentation., along with all the appropriate time to do so. The invoice will be included in the reimbursement claim. There is no other way to provide you with the information you requested. Please note that the benefits of bulk purchasing are lost….we cannot argue that we would use more than a couple of pairs of gloves, so just cut the entire cost, or pay the full retail price as a field purchase. Although not necessarily the brand and type we will use, but our most common glove used is Ansell model 69-210 in size large, which were purchased from Grainger. On the Grainger website, a box of those particular gloves are listed for $15.93, which doesn't include the sales tax and shipping, or any of our time to order the gloves. We requested $16.00. To count and document the number and type of gloves actually used on the project will cost more than $16.00. (A.R. 017).

The Illinois EPA finds it hard to believe that an amount could not be found for each individual glove per the box. If a box costs say $20.00 with shipping and sales tax and there are 100 gloves in the box, the cost per glove would be 2 cents. If you anticipate using 2 gloves for one sample, which would be a pair of gloves and you want to make sure you have a spare in case of tearing, you request enough for 4 gloves. You can still bulk purchase. You can still have multiple types of glove on hand, but you would know and be able to budget a number of gloves to be used per activity per site. Remember, in this case, we are talking about a

budget for one sample; not a budget for an entire remediation which may take an entire box of gloves.

At hearing, the testimony was as follows:

> Ms. Jarvis: So if - - you just used one glove out of the box to take one sample, but you charged for the whole box?
>
> Ms. Rowe Yes. (Trans. 36-37).

It is obvious that the rate the Petitioner is charging for a pair of gloves is unreasonable and exceeds the minimum requirements of the Act. The Petitioner provided no supporting documentation for why this rate should be reimbursed and it was therefore cut in full.

Budget Cut Number 7:

7. $28.00 for Consultant's Materials Costs associated with a water level indicator which lack supporting documentation. Such costs are ineligible for payment from the Fund pursuant to 35 Ill. Adm. Code 734.630(cc). Since there is no supporting documentation of costs, the Illinois EPA cannot determine that costs will not be used for activities in excess of those necessary to meet the minimum requirements of Title XVI of the Act. Therefore, such costs are not approved pursuant to Section 57.7(c)(3) of the Act because they may be used for site investigation or corrective action activities in excess of those required to meet the minimum requirements of Title XVI of the Act.

   Pursuant to 35 Ill. Adm. Code 734.850(b) for costs associated with activities that do not have a maximum payment amount set forth in pursuant to 35 Ill. Adm. Code 734 Subpart H must be determined on a site specific basis and the owner/operator must demonstrate to the Agency the amounts sought for reimbursement are reasonable. The Agency has requested additional documentation to support the rate requested for the water level indicator pursuant 35 Ill. Adm. Code 734.505(a). The documentation was either not provided or fails to provide sufficient information for the Agency to make a site-specific reasonableness determination.

   In addition, without supporting documentation for the rate requested the water level indicator is not reasonable as submitted. Such costs are ineligible for payment from the Fund pursuant to Section 57.7(c)(3) of the Act and 35 Ill. Adm. Code 734.630(dd). (A.R. 005).

The Consultant's Materials Costs requested the use of a water level indicator for one day at $28.00. In order to determine if this rate was reasonable, the Agency's project manager emailed the Petitioner's consultant, Carol Rowe on June 14, 2016 and asked:

> "How did you determine your $28.00 daily rate for a water level indicator? Is it based on a daily rate based on the initial cost? What does the rate include?" (A.R. 022).

To which she replied on June 28, 2016:

> "Moving on to the equipment and material questions, the short answer to the provide cost breakdown on equipment is, we never have been asked to. We have not tracked what a PID, an individual box of gloves, or a water meter costs to purchase and maintain. The rates we use were originally developed from what others were charging in this field in the distant past (approximately 1991), adjusted for inflation a few times…* * * For instance, we have several water level meters, and no two are alike. Which one do we "propose" to use, and what happens if we actually use a different one on this project?…Our water level rate and slug test equipment are cheaper than the rental rates we could find, not even factoring in shipping, taxes, and our time to rent and return one. We do not have receipts for any of our water meters or slugs, and we cannot guess which ones will be used on the project." (A.R. 017).

After that email exchange, the discussion about the equipment was mainly concerning the PID cost but generalized to include all equipment costs. The Petitioner's consultant never provided information as to which water level indicator(s) they own, when they were purchased, or what they paid for them. The request for additional information/documentation was ignored.

The Agency is unable to determine if the rate the Petitioner is charging for its water level indicator is unreasonable and exceeds the minimum requirements of the Act. The Petitioner provided no supporting documentation for why this rate should be reimbursed and it was therefore cut in full.

Budget Cut Number 8:

8. $36.00 for Consultant's Materials Costs associated with a slug used in hydraulic conductivity determination which lack supporting documentation. Such costs are ineligible for payment from the Fund pursuant to 35 Ill. Adm. Code 734.630(cc). Since there is no supporting documentation of costs, the Illinois EPA cannot determine that costs will not be used for activities in excess of those necessary to meet the minimum requirements of Title XVI of the Act. Therefore, such costs are not approved pursuant to Section 57.7(c)(3) of the Act because they may be used for site investigation or corrective action activities in excess of those required to meet the minimum requirements of Title XVI of the Act.

   Pursuant to 35 Ill. Adm. Code 734.850(b) for costs associated with activities that do not have a maximum payment amount set forth in pursuant to 35 Ill. Adm. Code 734 Subpart H must be determined on a site specific basis and the owner/operator must demonstrate to the Agency the amounts sought for reimbursement are reasonable. The Agency has requested additional documentation to support the rate requested for the slug pursuant 35 Ill. Adm. Code 734.505(a). The documentation was either not provided or fails to provide sufficient information for the Agency to make a site-specific reasonableness determination.

   In addition, without supporting documentation for the rate requested the slug are not reasonable as submitted. Such costs are ineligible for payment from the Fund pursuant to Section 57.7(c)(3) of the Act and 35 Ill. Adm. Code 734.630(dd). (A.R. 006).

The Petitioner's budget requested $36.00 for a slug to be used in the proposed slug test to determine the hydraulic conductivity at the site. The request was denied for lacking supporting documentation and exceeding minimum requirements of the Act. The Agency approved allowing Petitioner to complete another slug test but that the most conservative hydraulic conductivity would need to be used in the modeling calculations. The Agency's project manager asked Petitioner's consultant in a June 14, 2016 email how much the purchase cost of the slug was and how they determined the daily rate of $36.00. (A.R. 022).

Petitioner's consultant replied in a June 28, 2016 email that their slug test equipment was cheaper than the rental rates that they could find and that they do not have any receipts for any of their slugs. (A.R. 017). During hearing, Carol Rowe testified that they were using

a Solinst levelogger as a slug. (Trans. 25). This was not explained to the Agency prior to making the final determination.

In the budget, they requested the slug and the use of a water level indicator. On page 5 of the CAP that was being reviewed at the time (received March 25, 2016) it was indicated that the slug test would be performed "by lowering a "slug" constructed of polyvinyl chloride (PVC) into a monitoring well. (A.R. 036). When the slug is lowered into the well, the groundwater is displaced by the volume of the slug. As the water within the well equilibrates, water depth measurements will be obtained, and a slug test will be conducted…" (A.R. 036). A slug constructed of PVC is not a level logger, as was indicated in hearing testimony. Even now, it is unclear as to what exact equipment is intended to be used at the site as a "slug". The Agency cannot read minds and it is even harder when the consultant does not know themselves. Had the initial question been addressed and the use of the equipment clarified, the proposed rate could have been properly evaluated.

The Agency is unable to determine if the rate the Petitioner is charging for its slug is unreasonable and exceeds the minimum requirements of the Act. It is unable to determine what the slug even is in this case. The Petitioner provided no supporting documentation for why this rate should be reimbursed and it was therefore cut in full.

Budget Cut Number 9:

9. $34.10 for Consultant's Materials Costs associated with mileage costs which lack supporting documentation. Such costs are ineligible for payment from the Fund pursuant to 35 Ill. Adm. Code 734.630(cc). Since there is no supporting documentation of costs, the Illinois EPA cannot determine that costs will not be used for activities in excess of those necessary to meet the minimum requirements of Title XVI of the Act. Therefore, such costs are not approved pursuant to Section 57.7(c)(3) of the Act because they may be used for site investigation or corrective action activities in excess of those required to meet the minimum requirements of Title XVI of the Act. In addition, this request is not reasonable as submitted. Such costs are ineligible for payment from the

Fund pursuant to Section 57.7(c)(3) of the Act and 35 Ill. Adm. Code 734.630(dd).

The Consultant's Materials Costs requests 310 miles at $0.65 per mile for a total of $201.50 for a round trip from Springfield to the site in Lawrenceville to drill the TACO boring. The federal mileage rate of $0.54 per mile for a total of $167.40 is what is approved by the Agency for mileage costs. (A.R. 006).

The Petitioner offered no supporting documentation as to why they charged the specific milage rate they charged. There was testimony at hearing to that effect, but there was none in the record at the time that the Agency made its decision. The Illinois EPA will assess the federal mileage rate which is ultimately reasonable if no supporting documentation is received to justify the reasonableness of the increase in the rate. The Petitioner's request exceeded the minimum requirements of the Act.

Budget cuts 10, 11, and 12 all relate to costs associated with copies. The Agency will discuss this issue together at the end of the detailing of the language of the Agency's decision letter.

Budget Cut Number 10:

10. $127.80 for Consultant's Materials Costs associated with copies which lack supporting documentation. Such costs are ineligible for payment from the Fund pursuant to 35 Ill. Adm. Code 734.630(cc). Since there is no supporting documentation of costs, the Illinois EPA cannot determine that costs will not be used for activities in excess of those necessary to meet the minimum requirements of Title XVI of the Act. Therefore, such costs are not approved pursuant to Section 57 .7(c)(3) of the Act because they may be used for site investigation or corrective action activities in excess of those required to meet the minimum requirements of Title XVI of the Act. In addition, this request is not reasonable as submitted. Such costs are ineligible for payment from the Fund pursuant to Section 57.7(c)(3) of the Act and 35 Ill. Adm. Code 734.630(dd).

    The Consultant's Materials Costs requests a total of 1,100 copies, including 800 for the plan, 200 for the budget, and 100 for field/plan/maps/bore logs at a rate of $0.15 per copy. The Corrective Action Plan and Budget that was submitted is 62 pages long (48 for the plan and 14 for the budget). The 1,100 copies represent almost 18 copies of the plan and budget. The IEPA received

2 copies, or 124 pages. The deduction is for 976 copies at $0.15 per copy. (A.R. 007).

Budget Cut Number 11:

11. $37.20 for Consultant's Materials Costs associated with copies for the Corrective Action Plan and Budget which lack supporting documentation. Such costs are ineligible for payment from the Fund pursuant to 35 Ill. Adm. Code 734.630(cc). Since there is no supporting documentation of costs, the Illinois EPA cannot determine that costs will not be used for activities in excess of those necessary to meet the minimum requirements of Title XVI of the Act. Therefore, such costs are not approved pursuant to Section 57.7(c)(3) of the Act because they may be used for site investigation or corrective action activities in excess of those required to meet the minimum requirements of Title XVI of the Act.

    Pursuant to 35 Ill. Adm. Code 734.850(b) for costs associated with activities that do not have a maximum payment amount set forth in pursuant to 35 Ill. Adm. Code 734 Subpart H must be determined on a site-specific basis and the owner/operator must demonstrate to the Agency the amounts sought for reimbursement are reasonable. The Agency has requested additional documentation to support the rate requested for copies pursuant 35 Ill. Adm. Code 734.505(a). The documentation was either not provided or fails to provide sufficient information for the Agency to make a site-specific reasonableness determination.

    In addition, without supporting documentation for the rate requested the copies are not reasonable as submitted. Such costs are ineligible for payment from the Fund pursuant to Section 57.7(c)(3) of the Act and 35 Ill. Adm. Code 734.630(dd). (A.R. 007).

Budget Cut Number 12:

12. $150.00 for Consultant's Materials Costs associated with copies for the reimbursement claim which lack supporting documentation. Such costs are ineligible for payment from the Fund pursuant to 35 Ill. Adm. Code 734.630(cc). Since there is no supporting documentation of costs, the Illinois EPA cannot determine that costs will not be used for activities in excess of those necessary to meet the minimum requirements of Title XVI of the Act. Therefore, such costs are not approved pursuant to Section 57.7(c)(3) of the Act because they may be used for site investigation or corrective action activities in excess of those required to meet the minimum requirements of Title XVI of the Act.

    Pursuant to 35 Ill. Adm. Code 734.850(b) for costs associated with activities that do not have a maximum payment amount set forth in pursuant to 35 Ill. Adm. Code 734 Subpart H must be determined on a site specific basis and the

> owner/operator must demonstrate to the Agency the amounts sought for reimbursement are reasonable. The Agency has requested additional documentation to support the rate requested for copies pursuant 35 Ill. Adm. Code 734.505(a). The documentation was either not provided or fails to provide sufficient information for the Agency to make a site-specific reasonableness determination.
>
> In addition, without supporting documentation for the rate requested the copies are not reasonable as submitted. Such costs are ineligible for payment from the Fund pursuant to Section 57.7(c)(3) of the Act and 35 Ill. Adm. Code 734.630(dd). (A.R. 007).

The Consultant's Materials Costs requested a total of 2,100 copies at a rate of $0.15 per copy for a total of $315.00. The Agency noted two issues with this request. The amount of copies requested and the per copy charge.

The Petitioner requested a total of 1,000 pages for the plan and the budget, which was 62 pages total (48 pages for the plan and 14 pages for the budget). The 1,000-page request represents over 16 copies of the plan and budget. The Agency requires the submission of two copies. The question was asked and remains unanswered: What are the other copies for?

Another question asked by the Agency was how was the $0.15/copy determined? So, the Agency project manager emailed Petitioner's consultant on June 14, 2016 and asked the following:

> "The Consultant's Materials Costs requests a total of 2,100 copies for the plan, budget and claim at $0.15 per copy. How did you determine the $0.15 per copy?" (A.R. 022).
>
> The consultant replied on June 28, 2016 and stated:
>
> "By the way, on item 6, we are attaching a page from the IEPA website that shows we are charging the same price per copy as IEPA itself. We assume IEPA charges a reasonable rate, and our rate matches yours." (A.R. 017).
>
> To which the Agency replied on July 1, 2016:

> "The IEPA website shows that we pay $0.15 per copy after 400 copies. We actually pay less than $0.15 per copy for paper, much less depending on how many pages exceeding 400 are requested. In fact, you'd have to FOIA over 10,000 pages of documents to reach a point where you could round up to $0.15 per copy. But now everything in our DocuWare system is now accessible online and most LUST documents don't even need to go through FOIA. The plan (48 pages) and budget (14 pages) are 62 pages total. The Consultant's Materials Costs requests a total of 1,100 pages for the Corrective Action Plan and Budget at $0.15 per copy. I don't think $165.00 is an appropriate cost for the paper used in this Corrective Action Plan and Budget and the copy (124 pages). It's $1.33 per page for the amount of paper that you submitted to the Agency." (A.R. 015).

It is relatively easy to determine how many copies of a plan/budget will be needed to be made and distributed. A reasonable estimate is 4. Two copies are necessary to be sent to the Illinois EPA, one copy for the owner/operator, and one copy of the consultant. After the discussion with the consultant became nonproductive and no actual supporting documentation or reasonable explanation for the number of copies they requested, the Agency cut the number of copies to two because it was unable to determine through this discussion how many copies were actually needed and a reasonable rate for those copies. The supporting documentation was just not there. Instead of complying with reasonable requests to explain what was going on, there was misdirection and non-answers, leaving the Illinois EPA no choice but to cut the copies.

GENERAL ARGUMENT

After events bringing to light a consultant defrauding the fund, the Illinois EPA decided to look at the Consultant's Materials Costs to gather information and ensure that the costs being requested were reasonable, could be supported and were not exceeding the requirements of the Act. Unfortunately, as seen here, our efforts were met with resistance instead of cooperation. One study of a consultant's material costs for 2014 resulted in an estimated reimbursement of over $50,000 for the use of a PID for the year alone. (A.R. 016).

Keep in mind that this piece of equipment costs around $4,500 to own. (Trans. 34). The same study found reimbursement of $20,000 for gloves, $20,000 for a metal detector, $25,000 for use of a digital camera and $30,000 for the use of a measuring wheel. (A.R. 016). Obviously while the amounts in this case seem to be small in amount, they add up over a year or longer. This is an overall problem that the Illinois EPA is trying to address with asking consultants to support their material costs. The information gathered over time may result in a proposed Board regulation. As it stands right now though, the costs this Petitioner requested were not reasonable and they failed to provide supporting documentation sufficient to show that the requested costs did not exceed the minimum requirement of the Act. This Petitioner's consultant delayed, blamed the Agency for being unfair, called out Agency's staff's income and further tried to distract the Agency from the task at hand. They would also like to have the Board believe that they run their business in such a way that they keep no record of their expenses and income and are unable to give a per item cost analysis. They also would lead the Board to believe that they do not depreciate their assets and are unable to tell the Agency or the Board what the cost is to maintain and use an item per day. Normal business practices seem to be beyond their ability. This is absolute nonsense. The reality is that they are unable to support the costs because they are well aware that they exceed the minimum requirements of the Act and are unreasonable.

CONCLUSION

The Illinois EPA has been created by the Illinois General Assembly through the Act with specific authorities and duties. The Agency is a creature of statute and cannot legally go beyond the statutes in carrying out its duties. The Illinois EPA cannot approve budget costs that are unreasonable, lack supporting documentation and exceed the minimum

requirements of the Act and regulations thereunder. The Petitioner's costs in this case are all three of the above and therefore cannot legally be approved. Petitioner's cause must fail.

WHEREFORE: for the above noted reasons, the Illinois EPA respectfully requests the Board **AFFIRM** the Illinois EPA's July 12, 2016 Decision.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,

Respondent

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Dated: **October 22, 2021**

CERTIFICATE OF SERVICE

I, the undersigned attorney at law, hereby certify that on **October 22, 2021**, I served true and correct copies of **RESPONDENT'S POST-HEARING BRIEF** via the Board's COOL system and email, upon the following named persons:

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ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,
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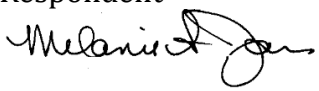

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