

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

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

NOTICE

Don Brown, Clerk
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Patrick D. Shaw
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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 REQUEST FOR LEAVE TO REPLY AND POST-HEARING REPLY**, copies of which are herewith served upon you.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,
Respondent



Melanie A. Jarvis
Assistant Counsel
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866-273-5488 (TDD)
Dated: **November 5, 2021**

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RESPONDENT'S REQUEST FOR LEAVE TO REPLY

NOW COMES the Respondent, the Illinois Environmental Protection Agency ("Illinois EPA"), by one of its attorneys, Melanie A. Jarvis, Assistant Counsel and Special Assistant Attorney General, and, pursuant to Section 101.500(e) of the Illinois Pollution Control Board's ("Board") procedural rules (35 Ill. Adm. Code 101.500(e)), hereby files a motion for leave to file a reply to the Petitioner's Post-Hearing Reply Brief and in support thereof states as follows:

Petitioner makes several assertions that are simply untrue and place the burden upon the Illinois EPA instead upon the Petitioner where it belongs. He states that hearing testimony should be taken as truth when in fact that the only thing taken as fact is the Administrative record which was in front of the Agency at the time of its decision. Anything said at hearing cannot add to what was in front of the Illinois EPA at that time if it is new in nature. The Illinois EPA needs to reply in order to correct these falsehoods and assumptions and point the Board to relevant caselaw. Further it needs to remind the Petitioner that the Burden of Proof rests solely on its shoulders and not with the Illinois EPA.

For the reasons stated herein, the Illinois EPA hereby respectfully requests that the Hearing Officer allow the Illinois EPA to file a reply to the Petitioner's response to prevent material prejudice.

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,
Respondent



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RESPONDENT'S POST-HEARING REPLY

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 Reply in the above captioned matter.

ARGUMENT

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**. 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 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 rendering an opinion on whether the Illinois EPA framed its determination

¹ Citations to the Administrative Record will hereinafter be made as, "A.R.____." Citations to the Hearing Transcript will hereinafter be made as, "Trans ____."

consistently with the application and law. Petitioner has not challenged the sufficiency of the Record in this matter.

What is in the record at the time of the decision letter is the important part of this appeal. Explanations at hearing are all well and good but were those explanations in front of the Illinois EPA at the time the decision was made. Carol Rowe had **multiple opportunities** to converse with Agency staff and explain the personnel costs to them. She **did not take** these opportunities. Further, her explanations at hearing were self-serving and still did not explain how they complied with the regulations and did not exceed the minimum requirements of the Act and regulations thereunder.

Petitioner's attorney continues to harp on the misspeak of an Agency staff member. The Agency is not held to the comments of its project manager and the comments of the project manager are not enough to bind the Agency. **The project manager is not the Agency and the Agency takes no action until it issues a formal decision letter. White and Brewer Trucking v. IEPA, PCB 1996-250, (March 20, 1997).**

It is absolutely clear from the decision letter and the record, which governs in this case, that **no illegal rate was used**. Petitioner can point to nowhere in the record where an illegal rate 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**. I am sure that the Petitioner's attorney would be ecstatic if that were the case, but it wasn't. **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.

As stated in Respondent's brief, the reason the Agency was looking at these costs was due to a major federal case where a consultant was found guilty of 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: **November 5, 2021**

This filing submitted on recycled paper.

CERTIFICATE OF SERVICE

I, the undersigned attorney at law, hereby certify that on **November 5, 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:

Don Brown, Clerk
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