

ILLINOIS POLLUTION CONTROL BOARD
August 11, 2022

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

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

Dersch Energies, Inc. (Dersch) owns an automotive repair facility in Lawrenceville, Lawrence County (site) at which underground storage tanks (USTs) leaked petroleum. Before Dersch removed USTs in 2005, a service station known as Croslow’s Shell operated there. As part of remediating its site, Dersch submitted a corrective action plan (CAP) and budget to the Illinois Environmental Protection Agency (IEPA or Agency or Illinois EPA). IEPA approved the plan but made 12 modifications to the budget on various grounds, three to costs for copies. Dersch requested that the Board reverse these modifications and approve the budget as submitted.

In an opinion and order on June 17, 2021, the Board decided the parties’ cross motions for summary judgment. The Board granted Dersch’s motion for summary judgment on the single issue of the budget for a measuring wheel but otherwise denied its motion. The Board denied IEPA’s motion for summary judgment. The Board directed its hearing officer to proceed to hearing on the remaining disputed modifications, and the hearing took place on September 15, 2021. The parties have submitted post-hearing filings.

For the reasons below, the Board finds that Dersch has met its burden of proving that approving its proposed corrective action budget would not violate the Act or the Board’s regulations, and the Board restores the contested amounts to Dersch’s proposed budget. The Board sets a deadline for Dersch to file a statement of legal fees that may be eligible for reimbursement and its arguments why the Board should exercise its discretion to direct IEPA to reimburse those fees and also sets a deadline for IEPA to respond.

This opinion first provides a procedural history of the case and addresses two preliminary matters before summarizing the factual background. After reviewing the statutory and regulatory background, the Board addresses the standard of review and burden of proof. Next, the Board reviews the record on each contested budget modification before deciding the issues. Then Board then addresses Dersch’s request that the Board award its legal fees before reaching its conclusion and 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 regularly conducted status conferences with the parties.

On March 31, 2017, IEPA submitted the administrative record of its determination (R.). After extending its statutory decision deadline to a specific date four times, Dersch on April 2, 2018, filed an open waiver of the deadline. *See* 415 ILCS 5/40(a)(2) (2020; 35 Ill. Adm. Code 101.308(c)(1)).

On November 30, 2020, Dersch filed a motion for summary judgment (Pet. Mot. SJ). The motion included a request that the Board take official notice of eight exhibits (Exhs. A-H), which the Board granted. Pet. Mot SJ at 8-10; *see Dersch Energies v. IEPA*, PCB 17-3, slip op. at 6 (June 17, 2021). On December 7, 2020, IEPA filed a motion to strike exhibits other than those in the administrative record. On December 10, 2020, IEPA responded to the motion for summary judgment (IEPA Resp.). On December 21, 2021, Dersch responded to the motion to strike. On December 24, 2020, Dersch filed a motion for leave to reply in support of its motion for summary judgment accompanied by its reply (Pet. Reply SJ).

On January 29, 2021, IEPA filed a motion for summary judgment (IEPA Mot. SJ). Dersch responded on February 16, 2021 (Pet. Resp.). On February 18, 2021, IEPA filed a motion for leave to reply in support of its motion for summary judgment, accompanied by its reply (IEPA Reply). On March 4, 2021, Dersch responded to IEPA's motion for leave.

In an order on June 17, 2021, the Board denied IEPA's motion to strike and granted both Dersch's and IEPA's motion for leave to reply. The Board then granted Dersch's motion for summary judgment on the single issue of the budget for a measuring wheel but otherwise denied its motion. The Board denied IEPA's motion for summary judgment. The Board directed its hearing officer to proceed to hearing.

The Board held a hearing on September 15, 2021, and the Board received the transcript (Tr.) on September 22, 2021. At hearing, Ms. Carol Rowe, President and Senior Geologist of CWM Company (CWM) (Tr. at 7), testified on behalf of Dersch, and Mr. Brad Dilbaitis, Project Manager for IEPA's leaking UST program (Tr. at 44), testified on behalf of IEPA. The Hearing Officer admitted into the record two exhibits of Dersch's. Tr. at 41-43. Exhibit 1 is the proposed corrective action budget from the IEPA record. Tr. at 11-12; R. at 83-89. Exhibit 2 is equipment rental information also from the IEPA record. Tr. at 20-21; R. at 23-24.

Following the schedule set by the hearing officer at the conclusion of the hearing (Tr. at 85), Dersch filed its post-hearing brief on October 8, 2021 (Pet. Brief), IEPA filed its post-hearing brief on October 22, 2021 (IEPA Brief), and Dersch filed its response brief on October 29, 2021 (Pet. Resp.).

Dersch's brief renewed its request that the Board take official notice of Exhibits A-H it had submitted with its motion for summary judgment. Pet. Brief at 2; Pet. Mot. SJ at 8-10.

On November 5, 2021, IEPA filed a motion for leave to reply (Mot. Leave) accompanied by its reply (IEPA Reply).

PRELIMINARY MATTERS

Official Notice

Dersch argues that "official notice can be taken at any time, so long as opposing parties are given an opportunity to contest the material." Pet. Brief at 2, citing 35 Ill. Adm. Code 101.630. Dersch renews its request from its motion for summary judgment that the Board take official notice of Exhibits A-H:

- 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. Pet. Brief
at 2; Pet. Mot. SJ at 8-10.

Dersch stresses that the Board took official notice of these exhibits in its summary judgment order. Pet. Brief at 2, citing Dersch Energies v. IEPA, PCB 17-3, slip op. at 2-6 (June 17, 2021). Dersch argues that there is no basis for the Board to reach a different conclusion on its renewed request. Pet. Brief at 2.

IEPA's response brief does not address Dersch's request that the Board take official notice of these exhibits. *See* IEPA Resp. Brief. When the Board decided the parties' cross motion for summary judgment, it denied IEPA's motion to strike Exhibits A-H. Dersch Energies v. IEPA, PCB 17-3, slip op. at 2-6 (June 17, 2021). The Board stated that "IEPA's motion has not persuaded the Board to overlook precedent and its own procedural rules concerning official notice." *Id.* at 6. Based on these factors, the Board again grants Dersch's request that it take official notice of Exhibits A-H.

Motion for Leave to Reply

IEPA argues that Dersch's response brief "makes several assertions that are simply untrue" and that it inappropriately shifts the burden of proof to IEPA. Mot. Leave at 1. IEPA argues that a reply is necessary "to correct these falsehoods and assumptions and point the Board to relevant caselaw." *Id.* IEPA further argues that a reply is necessary "to remind the Petitioner that the Burden of Proof rests solely on its shoulders and not with the Illinois EPA." *Id.* IEPA

concludes by requesting leave to file a reply in order “to prevent material prejudice.” *Id.*, citing 35 Ill. Adm. Code 101.500(e).¹

IEPA’s motion plausibly argues that leave is necessary to prevent material prejudice. The Board grants the unopposed motion, accepts IEPA’s reply, and addresses it where applicable below in its discussion of the contested budget modifications.

GENERAL FACTUAL BACKGROUND

Below, the Board first summarizes the record on the release from the USTs at the site. It then reviews the 2007 site investigation plan and the 2015 CAP and budget rejected by IEPA. The Board next summarizes the plan and budget proposed by Dersch in 2016 and IEPA’s July 12, 2016 determination that is the subject of this appeal.

Under “Board Discussion” below, the Board provides a more detailed factual background for each of the disputed modifications to Dersch’s proposed corrective action budget.

Release and Eligibility Determination

Dersch reported a release at its site known as Croslow’s Shell located at 1421 Lexington Avenue, Lawrenceville, Lawrence County. R. at 32, 33. On March 17, 2005, the Illinois Emergency Management Agency assigned the release Incident No. 2005-0374. *Id.* at 32. 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). *Id.* at 33. Tank removal also included excavating and disposing of approximately 443 tons of hydrocarbon-impacted backfill. *Id.* at 33, 34. Since tanks were removed from the site, it has been an automotive repair facility. *Id.* at 38. “The site is surrounded by commercial and residential properties.” *Id.*

Dersch’s original consultant, Applied Environmental Technologies (AET) “collected soil samples from the excavation walls, floors, and below pump dispensers in order to fully determine the extent of impacted soils from the release of products associated with this incident.” R. at 33-34; *see id.* at 66-67 (removal samples). “The excavation was backfilled with clean soil.” *Id.* at 34.

¹ To the extent that IEPA’s motion questions the basis for the hearing or testimony, the Board considers it well-settled that hearings “will be based exclusively on the record before the Agency” when it issued its determination. 35 Ill. Adm. Code 105.412; *see Dersch Energies v. IEPA*, PCB 17-3, slip op. at 1 (Aug. 25, 2016). The Board also considers it well-settled that information developed after the Agency’s decision typically is not admitted at hearing or considered by the Board, although the Board hearing affords petitioner the opportunity to challenge the Agency’s reasons for its decision. *See Alton Packaging Corp. v. PCB*, 162 Ill. App. 3d 731, 738, 516 N.E.2d 275, 280 (5th Dist. 1987); *Community Landfill Co. & City of Morris v. IEPA*, PCB 01-170 (Dec. 6, 2001), *aff’d sub nom. Community Landfill Co. & City of Morris v. PCB & IEPA*, 331 Ill. App. 3d 1056, 772 N.E.2d 231 (3rd Dist. 2002); *see also Dersch Energies v. IEPA*, PCB 17-3, slip op. at 1 (Aug. 25, 2016).

The Office of the Illinois State Fire Marshal determined that Dersch was 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, AET submitted a Stage 2 and 3 Site Investigation Plan for the site to IEPA. R. at 226; *see* R. at 32. The proposed plan addressed site-specific parameters including soil bulk density, soil particle density, moisture content, and organic carbon content. *Id.* at 243-44. The plan based these parameters in part on a sample collected from Boring No. 2 “on the north side of the property in an area that was believed to be out of the area of impaction.” R. at 244; *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 244. 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 based on Boring No. 2: soil bulk density, soil particle density, moisture content, and organic carbon content. 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, 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 Company, Inc. (CW³M) submitted a budget to IEPA. R. at 32, 40; *see* Pet. Mot. SJ, 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.

On March 27, 2014, CW³M began off-site drilling activities following AET’s plan for Stages 2 and 3 to define off-site impacts. R. at 34. On May 22, 2015, CW³M submitted a Site Investigation Completion Report to IEPA. Pet. Mot. SJ, Exh. E; *see* R. at 32, 40. 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; \$1,170.00 in remediation and disposal costs; \$36,377.59 in consulting personnel costs; and \$1,436.60 in consultant’s materials with a total cost of \$44,236.62. Pet. Mot. SJ, Exh. E (Appendix F).

IEPA approved the Site Investigation Completion Report on June 5, 2015. Pet. Mot. SJ, Exh. F; *see* R. at 32, 103. IEPA also approved the “actual costs budget for Stage 2 and 3.” Pet.

Mot. SJ, Exh. F. IEPA cautioned that payment from the UST Fund may be limited by statutory and regulatory authorities. *Id.*

2015 Corrective Action Plan and Budget

On November 19, 2015, CW³M submitted a CAP and budget to IEPA. R. at 32, 98.

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 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 in an area encompassing borings B-4, B-5, and B-6. Before excavating, Dersch proposed four additional borings to establish where it would be necessary. R. at 109; *see id.* at 131 (Proposed Soil Boring Location Map). After defining the area in which contamination exceeded Tier 2 Industrial-Commercial objectives, Dersch intended to propose an amended CAP for removing soil exceeding those limits. *Id.* at 109. Remaining soil contamination would be addressed by restrictions on use of land and groundwater. *Id.* at 109.

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). Although 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 for 15th Street. R. at 110; *see id.* at 134 (Proposed Highway Authority Agreement Map).

The proposed CAP 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 (parameters); *see* 35 Ill. Adm. Code 742.APPENDIX C, TABLES B, D.

The proposed CAP included a total budget of \$52,569.72: \$1,486.97 in drilling and monitoring well costs (R. at 142, 143); \$1,757,16 in analytical costs (*id.* at 142, 144-45); \$1,672.65 in paving, demolition, and well abandonment costs (*id.* at 142, 146-47); \$46,397.44 in consulting personnel costs (*id.* at 142, 148-54); and \$1,255.50 in consultant’s material costs (*id.* at 142, 155-57).

E-mail Communication

In a January 15, 2016 email, 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, citing 35 Ill. Adm. Code 734.410 (Remediation Objectives). He noted that these parameters had been analyzed from B-2 in October 2006, but the sample showed some contamination below Tier 1 objectives. R. at 97; *see id.* at 256, 265-68, 305 (2007 Site Investigation Plan). He added that "I agree mathematically with the calculations that you submitted but the parameters are not site-specific so I can't accept the calculations." *Id.* at 97.

The project manager concluded that, "[u]nfortunately, I don't see any way I'll be able to approve or modify the Corrective Action Plan the way it is." R. at 97. He added that "[i]t looks like we're going to need to do another geotechnical boring and analyze for the [35 Ill. Adm. Code] 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.*

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. The response continued 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 CAP. R. at 90. 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. Owners and operators seeking payment from the UST Fund for corrective action according to Tier 2 objectives must calculate those objectives with site-specific parameters. R. at 90; *see* 35 Ill. Adm. Code 734.410. IEPA determined that Dersch had calculated Tier 2 objectives "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).

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 CAP. R. at 28. Based on IEPA's January 21, 2016 determination (R. at 90-91), the plan "proposed to collect one soil sample to be analyzed for physical parameters" at the site (R. at 28). "The result will be used to more accurately determine the site-specific cleanup objectives at the site." R. at 28.

The plan proposed to advance a single soil boring north of existing monitoring well MW-9. R. at 37; *see id.* at 53 (Proposed Soil Boring Location Map). Dersch explained that this location is just beyond the limit of the soil and groundwater contamination plumes. *Id.* 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 nine to 11 feet bgs. *Id.* Dersch intended to analyze the samples to obtain site-specific parameters. *Id.* at 35.

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 CAP and budget. R. at 39. To address contaminated soil, Dersch expected to determine the extent of on-site soil exceeding Tier 2 clean-up objectives and then remove it. *Id.* 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 water supply wells were within 2,500 feet of the site, each was at least 1,848 feet from the USTs, and no well fell within the 200-foot setback zone. *Id.*

2016 Corrective Action Budget

Dersch submitted a corrective action budget of \$23,187.55, which included \$1,486.97 in drilling and monitoring well costs (R. at 79-80), \$430.85 in analytical costs (*id.* at 79, 81-82), \$20,444.43 in consulting personnel costs (*id.* at 79, 83-87), and \$825.30 in consultant's materials costs (*id.* at 79, 88-89).

IEPA Determination

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

STATUTORY AND LEGAL BACKGROUND

Title XVI of the Act and Part 734 of the Board's Regulations

Title XVI of the Act provides for the Leaking UST Program, which includes the UST Fund and requirements for reimbursement from it. 415 ILCS 5/57-57.18 (2020). Section 57.1(a) of the Act provides that "[a]n owner or operator of an underground storage tank who meets the definition of this Title [XVI] shall be required to conduct tank removal, abandonment and repair, site investigation, and corrective action in accordance with the requirements of the Leaking

Underground Storage Tank Program.” 415 ILCS 5/57.1(a) (2020). Part 734 of the Board’s rules establishes requirements including those for CAPs and budgets and IEPA’s review of them. 35 Ill Adm. Code 734.

For the purposes of Title XVI, a plan includes “[a]ny corrective action plan budget” submitted under Section 57.7(b) of the Act, which addresses corrective action. 415 ILCS 5/57.7(c)(5) (2020); *see* 415 ILCS 5/57.7(b) (2020).

Under Section 57.7(c)(3) of the Act, “the Agency shall determine . . . 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 [XVI].” 415 ILCS 5/57.7(c)(3) (2020); *see* 35 Ill. Adm. Code 734.620(o).

For purposes of payment from the UST Fund, corrective action activities “required to meet the minimum requirements of this Title [XVI]” generally include using “Tier 2 remediation objectives that are no more stringent than Tier 1 remediation objectives,” “industrial/commercial property remediation objectives,” and groundwater “institutional controls.” 415 ILCS 5/57.7(c)(3)(A) (2020).

Costs ineligible for payment from the UST Fund include those “that lack supporting documentation” (35 Ill. Adm. Code 734.630(cc)) and those “proposed as part of a budget that are unreasonable” (35 Ill. Adm. Code 734.630(dd)).

Section 57.7(c)(4) of the Act requires that “any action by the Agency to disapprove or modify a plan” must include the following elements:

- A) an explanation of the Section of the Act which may be violated if the plans were approved;
- B) an explanation of the provision of the regulations, promulgated under this Act, which may be violated if the plan were approved;
- C) an explanation of the specific type of information, if any, which the Agency deems the applicant did not provide the Agency; and
- D) a statement of specific reasons why the Act and the regulations might not be met if the plan were approved. 415 ILCS 5/57.7(c)(4) (2020).

IEPA’s determination to disapprove or modify a plan may be appealed to the Board. *Id.*

Standard of Review

The standard of review is whether Dersch’s proposed budget complies with the Act and the Board’s regulations. Prime Location Properties, LLC v. IEPA, PCB 09-67, slip op. at 29 (Aug. 20, 2009); *see also* Ted Harrison Oil Co. v. IEPA, PCB 99-127, slip op. at 5 (July 24,

2003). “[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 v. IEPA, PCB 03-214, slip op. at 15 (Apr. 1, 2004).

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 (consol.), slip op. at 11 (Feb. 2, 2006); *see* Illinois Ayers v. IEPA, PCB 03-214, slip op. at 15 (Apr. 1, 2004). The Board generally does not consider new information that was not before IEPA when it issued its final determination regarding the issues on appeal. Kathe’s Auto Serv. Ctr. v. IEPA, PCB 95-43, slip op. at 14 (May 18, 1995). The Board typically does not admit or consider information developed after the Agency’s decision, although the Board hearing allows the petitioner to challenge IEPA’s reasons for its decision. *See* Alton Packaging Corp. v. PCB, 162 Ill. App. 3d 731, 738, 516 N.E.2d 275, 280 (5th Dist. 1987); Community Landfill Co. & City of Morris v. IEPA, PCB 01-170 (Dec. 6, 2001), *aff’d sub nom. Community Landfill Co. & City of Morris v. PCB & IEPA*, 331 Ill. App. 3d 1056, 772 N.E.2d 231 (3rd Dist. 2002). The Board hearing “includes consideration of the record before the [Illinois] EPA together with the receipt of testimony and other proofs under the full panoply of safeguards normally associated with a due process hearing.” IEPA v. PCB, 138 Ill. App. 3d 550, 552 (3rd Dist. 1985).

IEPA’s denial letter frames the issues on appeal. Pulitzer Cmty. Newspapers, Inc. v. IEPA, PCB 90-142, slip op. at 6 (Dec. 20, 1990). This focus on IEPA’s letter “is necessary to satisfy principles of fundamental fairness because it is the applicant who has the burden of proof” to demonstrate that the reasons for denial are inadequate. *Id.*, citing Technical Svcs. Co. v. IEPA, PCB 81-105, slip op. at 2 (Nov. 5, 1981).

Burden of Proof

In an appeal of a final IEPA determination, “[t]he burden of proof shall be on the petitioner. . . .” 35 Ill. Adm. Code 105.112(a); *see* 415 ILCS 5/40(a)(1) (2020).

The standard of proof in UST appeals is the “preponderance of the evidence.” Freedom Oil Co. v. IEPA, PCB 03-54, 03-56, 03-105, 03-179, 04-02 (consol.), slip op. at 59 (Feb. 2, 2006). “A proposition is proved by a preponderance of the evidence when it is more probably true than not.” *Id.*, 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).²

BOARD DISCUSSION

In the following subsections, the Board separately discusses each of the disputed modifications to Dersch’s proposed corrective action budget. Each discussion begins with a summary of its factual background for that disputed modification.

² To the extent that the parties’ briefs address these burdens and standards, the Board considers them well-established by statutory, regulatory, and caselaw authorities.

Plan Preparation: Professional Geologist

IEPA modified Dersch's proposed corrective action budget by \$3,352.80, the full amount Dersch proposed for plan design and preparation by a Professional Geologist. R. at 3; *see id.* at 13, 83.

Factual Background of This Modification

Dersch's Proposed Budget. For "Corrective Action Plan Design and Preparation," Dersch's proposed budget included 30.00 hours by a Professional Geologist at \$111.76 per hour for a total cost of \$3,352.80. R. at 83.

IEPA rejected Dersch's 2015 CAP "because the Tier 2 calculations were done using default values" and "the parameters had to be determined on a site-specific basis." R. at 22. When it rejected the 2015 CAP, 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 "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 CAP. R. at 15.

IEPA's project manager stated 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 asserted 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 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. The consultant 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. He added that "[n]one of the information from the previous Corrective Action Plan has anything to do with this Corrective Action Plan." *Id.*

IEPA's project manager stated that, if Dersch intends to submit a subsequent plan based on site-specific parameters, then Dersch should submit only costs associated with the current plan to determine those parameters. R. at 15. He added 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 CAP 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. IEPA's project manager concluded that developing this CAP should not require 30 hours of a Professional Geologist's time in addition to the time of a Senior Project Manager and Engineer III. *Id.* at 13 (technical review notes).

IEPA's project manager testified that the plan consisted of four sections: narrative, maps, table, and budget. "The narrative portion of the plan was about eight pages long. Four of those pages were site history that is commonly taken directly from the site investigation completion report." Tr. at 47. He further testified that "[t]he tables had already been submitted" and "there were no new tables in there." *Id.* He added that he believed compiling the plan "was probably done by a senior administrative assistant. I think that was in the budget." *Id.* at 48; *see* R. at 83 (proposing three hours for CAP compilation by senior administrative assistant)

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 these 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) (2020). 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) (2020); 35 Ill. Adm. Code 734.630(dd).

Board Discussion

As noted above under "General Factual Background," Dersch in 2015 proposed a CAP including additional soil borings to determine the boundaries for soil excavation. On January 21, 2016, IEPA rejected both that CAP and its associated budget.

Dersch argues that, because IEPA denied its previous proposed CAP and required it to perform an additional soil boring, it necessitated preparing a new CAP. Pet. Brief at 8. IEPA did not take issue with submitting a CAP and budget to collect the additional boring. "If the

Agency believed that the plan should not have been submitted, the plan would have been denied, not approved.” IEPA Brief at 7.

Dersch asserts that each CAP must include all required information. Pet. Brief at 8-9, citing 415 ILCS 5/57.7(b)(2) (2020); 35 Ill. Adm. Code 734.335(a); R. at 43-46 (IEPA form). To prepare a new CAP, Dersch included information from the original 2015 CAP. Pet. Brief at 9, 10, citing Tr. at 15. IEPA acknowledges that Dersch’s proposed CAP “satisfied [Section] 734.335.” IEPA Brief at 8.

IEPA argues that Dersch’s “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.” Pet. Brief at 7, citing R. at 15. Since the current approved plan includes a single boring to obtain site-specific parameters, IEPA argues that costs to prepare the original 2015 CAP for soil borings to delineate soil contamination “should be submitted in the next plan and budget.” Pet. Brief at 7.

Dersch discounts IEPA’s argument and suggests that this position shows that IEPA “does not want to pay for the preparation of this plan.” Pet. Resp. at 3, 4. Dersch summarizes IEPA’s apparent position on the proposed budget for plan preparation: any work performed to prepare a denied plan cannot be reimbursed to prepare a subsequent revised or corrected plan. Pet. Resp. at 3. Dersch characterizes this as “plainly absurd.” *Id.* It argues that, if IEPA rejects a plan because it lacks required signatures, “the signatures need to be obtained and the plan resubmitted.” *Id.* Dersch argues that the Board’s regulations do not preclude reimbursement for preparation of a previous rejected plan. *Id.*

IEPA appears to withdraw from its position that these proposed costs should be submitted in a subsequent budget. *See* IEPA Brief at 7 (“If the Petitioner believes that the preparation costs for this plan should be included in a subsequent budget that is not true and was never the Agency’s intention.”). The Board is skeptical of this position, and it does not believe that IEPA has cited authority or persuasively argued that Dersch cannot include preparation costs from its denied 2015 CAP in its current budget proposal.

Dersch also disputes IEPA’s position that it could perform the additional soil boring without an approved plan and budget. Pet. Resp. at 2, citing IEPA Brief at 7. It argues that that it must at some time submit a plan and budget for the additional boring. Pet. Resp. at 2-3. Dersch adds that 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).

IEPA asserts that it modified the proposed budget for 30 hours for a Professional Geologist because documentation in the plan did not support it. IEPA Brief at 7. IEPA argued that it does not determine the reasonableness of these proposed budgets by reviewing “the plan and the last plan that was denied.” *Id.*

Dersch argues that its consultant, a professional geologist, reasonably prorated time used to prepare specific elements of the 2015 CAP and then applied it to preparing the new plan. Pet.

Brief at 10, citing R. at 18. First, the consultant “took the time necessary to develop the framework of the CAP, which was all the setups, the tables, the history information, all the way to the point of actually writing what was going to be in this plan.” Tr. at 14; *see id.* at 37-38. The consultant found that this setup work took “about 12 hours.” *Id.* at 14. She added that “[t]hen we had 17 1/2 hours into the actual writing of the balance of the document.” *Id.* The Board considers this testimony consistent with information the consultant provided to IEPA before it reached its determination. *See* R. at 18.

Dersch’s consultant assigned a professional geologist to write this CAP, “designing it so that it fit in with what happened the last time, where we’re going next, and he put all of the pieces and documents together.” Tr. at 14. Dersch argues that the record does not contradict it on this point (Pet. Resp. at 3), while IEPA’s determination to approve no costs “is entirely unreasonable” (Pet. Brief at 10). Dersch asserts that, because it incurred these costs before it submitted the corrective action plan, those costs “provide the best evidence that the budget estimate was reasonable.” Pet. Resp. at 4.

IEPA acknowledges that it approves reasonable costs to prepare an approved plan. IEPA Brief at 7. IEPA also acknowledges that it is “common” to include portions of a previous plan or budget in a subsequent plan or budget. *Id.* IEPA argues that it is “not allowed under law to approve costs associated with the preparation of a plan that was denied (*id.*), but IEPA approved Dersch’s proposed 2016 CAP without modification (R. at 1). IEPA suggests that, if information from the 2015 CAP is included in the current plan for single boring, “then it is eligible for payment under the preparation costs for this plan.” IEPA Brief at 7.

The Board has reviewed the record on this budget modification. The record persuasively identifies and documents elements of the 2015 CAP that Dersch incorporates into the current plan. The Board is not persuaded that Dersch must submit these preparation costs in a subsequent proposed budget. IEPA has not convincingly cited authority to support that position, and it suggests that costs for preparing the previous denied plan may be eligible for payment as costs for preparing the current plan. The Board concludes that Dersch has met its burden of proving that approving its proposed budget would not violate the Act or the Board’s regulations. In its order below, the Board reverses IEPA on this modification and restores to Dersch’s corrective action budget \$3,352.80, the full amount proposed for plan design and preparation by a Professional Geologist.

Plan Preparation: Draftsperson/CAD IV

IEPA modified Dersch’s proposed corrective action budget by \$334.05 by reducing five hours by a Draftsperson/CAD IV at \$66.81 per hour. IEPA approved one hour at that rate for a draftsperson to update a soil boring location map. R. at 4; *see id.* at 53 (Drawing 4A).

Factual Background of This Modification

Dersch’s Proposed 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.

In technical review notes, IEPA's project manager 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 stated that the Board's regulations do not require submitting a map with the CAP. R. at 4, citing 35 Ill. Adm. Code 734.335. Dersch included 12 maps, one of which updates a previously submitted map to show the location of the soil boring in the approved CAP. R. at 53 (Drawing 4A). IEPA stated that the other 11 maps are "not needed" and "not useful." *Id.* at 4.

IEPA modified the budget by \$334.05 by reducing five hours by a Draftsperson/CAD IV at \$66.81 per hour. 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) (2020), 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) (2020).

Board Discussion

Dersch states that the approved CAP included 12 maps.³ Pet. Brief at 11, citing R. at 49-60. Dersch's consultant testified that CAPs "typically include the maps pertaining to the whole project." Tr. at 16. Citing "the CAP form," she indicated that these maps are required. The record shows that IEPA's Corrective Action Plan Form requires soil and groundwater investigation results including site maps "showing soil sample locations, monitoring well locations, and plumes of soil and groundwater contamination." R. at 44. For the CAP, IEPA's form also requires submitting site maps. *Id.* at 45.

Testimony by Dersch's consultant illustrates a reason to require submitting maps with a proposed CAP. She explained that they would be a convenience to IEPA project managers who "want to have all of that in front of them at one time when they're reviewing a plan." Pet. Brief at 12, citing Tr. at 16. If the CAP refers to site investigation, then "you've got all the maps there." Tr. at 16. Because "[t]he maps describe everything that's been done to date at the site," the IEPA project manager would not "have to go back and look at the prior report to have the map in front of them." Pet. Brief at 12, citing Tr. at 16. Dersch argues that IEPA's project manager acknowledges this benefit. Pet. Brief at 12, citing Tr. at 49.

³ Dersch acknowledged that its index of maps lists a groundwater elevation map. Pet. Brief at 11, n.3. citing R. at 48. However, the plan instead included a second map of groundwater analytical results. Pet. Brief at 11, n.3, citing R. at 55, 60. Based on IEPA's justification for cutting these costs, Dersch suggests that its mistake is not material. Pet. Brief at 11, n.3.

IEPA argues that Dersch's CAP for single sample resembles a site investigation plan. IEPA Brief at 10. Under 35 Ill. Adm. Code 734.320(b)(4)(B), IEPA argues that "[a] site investigation plan to collect an on-site boring (or borings) requires one map." *Id.* The Board notes that IEPA approved Dersch's Site Investigation Completion Report on June 5, 2015. R at 32. This appeal concerns Dersch's proposed CAP, which IEPA approved without modification. R. at 1. IEPA has not persuaded the Board to apply site investigation requirements to a proposed CAP. To the extent IEPA argues that the maps were not all useful to review this proposed CAP, it does not follow that Dersch must submit them with a subsequent proposed CAP.

In addition, the Board notes Mr. Dilbaitis' testimony that some of these maps, such as soil contamination, "may have been prepared after site investigation." Tr. at 49. Although IEPA had earlier received some of the maps, the "cost had not been approved. The budget had not been approved for the preparation of these maps yet." *Id.* He clarified that IEPA had not approved the costs of maps in the budget submitted for the previous denied CAP. *Id.* at 65.

The Board has reviewed the record on this budget modification. The record persuades the Board that the maps submitted by Dersch are appropriately included in a proposed CAP. IEPA has not convincingly cited authority that any of these maps must be withheld from this CAP and submitted with a later plan. The record also demonstrates that IEPA has not previously approved costs to prepare these maps. The Board is not persuaded that the proposed budget for these maps exceeds the minimum requirements of the Act or that it lacks supporting documentation. The Board concludes that Dersch has met its burden of proving that approving its proposed budget would not violate the Act or the Board's regulations. In its order below, the Board reverses IEPA on this modification and restores to Dersch's corrective action budget \$334.05, reflecting the IEPA's modification of five hours by a Draftsperson/CAD IV at \$66.81 per hour.

Contaminant Transport Modeling: Senior Project Manager

IEPA modified Dersch's proposed corrective action budget by \$2,964.14, the full amount proposed to perform contaminant transport modeling and Tier 2 calculations. This amount included six hours proposed 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.

Factual Background of this Modification

Dersch's Proposed 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. Dersch's consultant testified that this work "would be primarily helping and reviewing the TACO calculation development and the modeling as it progressed." Tr. at 18.

In technical review notes, IEPA's project manager stated that "this is only an estimate on how long it will take the consultant to perform the modeling." R. at 13. He added that "the costs associated with the modeling should be submitted in the amended Corrective Action Plan that will be submitted to apply the modeling calculation." *Id.* When Dersch submits that 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 acknowledged that Dersch requires a CAP for the soil sample to determine site-specific parameters for Tier 2 TACO calculations. R. at 4. However, IEPA stated 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 and the hours required to perform the tasks are known.” *Id.* At that time, “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 asserted that Dersch’s proposal is “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 modification included the proposed 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) (2020).

Board Discussion

Dersch argues that IEPA approved a CAP that includes analyzing a soil sample to develop site-specific parameters. Pet. Brief at 14, citing R. at 3, 15. It adds that IEPA recognizes that Dersch must analyze the sample it collects. Pet. Resp. at 5, citing R. at 4, 15. Dersch emphasizes that its CAP includes determining clean-up objectives. Pet. Resp. at 5, citing R. at 36. Dersch argues that its CAP specifically refers to this analysis. Pet. Resp. at 5, citing R. at 36.

IEPA argues that costs to prepare Tier 2 objectives and perform modeling “should be included for the plan in which they are submitted/proposed for use.” IEPA Brief at 11, citing 415 ILCS 5/57.7(b)(3) (2020); 35 Ill. Adm. Code 734.335(b); Tr. at 68. The Board has reviewed these authorities cited by IEPA, which generally require that the budget and plan correspond to one another. It is not persuaded that either of these authorities requires Dersch to submit these proposed hours in a subsequent CAP.

IEPA also cites a statement by Dersch’s consultant recognizing that it would need to submit one plan to collect a TACO sample, recalculate TACO Tier 2 objectives, and then submit a CAP with any appropriate modifications. IEPA Brief at 12, citing R. at 96. The Board consider this statement consistent with Dersch’s proposed plan and budget.

Dersch argues that IEPA wishes to review the budget for the work it requires only after Dersch performs the work. It asserts that this is inconsistent with requiring plans and budgets.

Pet. Brief at 14. Dersch further argues that IEPA effectively requires 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. Brief at 15, citing City of Benton Fire Dep’t. v. IEPA, PCB 17-1, slip op. at 6 (Feb. 22, 2018).

Dersch dismisses IEPA’s position that the budget for this work “is only as estimate on how long it will take the consultant to perform the modeling.” Pet. Brief at 14, citing R. at 4. Dersch cites the Board rules providing that “[t]he budget must include . . . an *estimate* of all costs the development, implementation, and completion of the corrective action plan.” Pet. Brief at 14, citing 35 Ill. Adm. Code 734.335(b) (emphasis added).

IEPA determined that this proposed budget item lacked supporting documentation. R. at 4. Based on its experience and other plans, IEPA argues that consultants can “almost always” calculate Tier 2 soil remediation objectives within two hours. IEPA Brief at 11; Tr. at 51. “Modeling can generally be completed in a couple of hours as well.” *Id.* Even if the site requires calculating six site-specific objectives and modeling as many as 14 exceedances, IEPA asserts “this will not require 26 hours to calculate.” IEPA Brief at 12; Tr. at 50-51.

Dersch stresses that its consultant estimated the time required for this work based on experience with earlier projects. Pet. Brief at 15, citing Tr. at 19. Dersch emphasizes that its consultant “has decades of experience in performing and overseeing TACO analysis, and therefore her opinion has significant weight.” Pet. Brief at 15. She testified that these tasks likely required “10 to 15 hours to the TACO and the modeling, and we had additional hours in there to redo it after an excavation.” Tr. at 19. Dersch questions whether any support other than this experience could justify a proposed budget. *Id.* It adds that IEPA’s decision letter does not identify a “specific type of information” that Dersch did not provide. *Id.*, citing 415 ILCS 5/57.7(c)(4) (2020).

The Board has reviewed the record on this budget modification. The record persuades the Board that the hours for a Senior Project Manager proposed by Dersch are appropriately included in its approved CAP. While IEPA argues that these costs should be included in a subsequent CAP, it has not convincingly cited authorities that support this position. The Board is not persuaded that the proposed budget for these hours lacks supporting documentation or that it is flawed because it is an estimate of the hours required for the work. Dersch’s consultant testified on the expected time for this work based on experience with earlier projects. Also, the Board recognizes that its rules define a budget as an estimate of the costs for the CAP. The Board concludes that Dersch has met its burden of proving that approving its proposed budget would not violate the Act or the Board’s regulations. In its order below, the Board reverses IEPA on this modification and restores to Dersch’s corrective action budget \$728.94, reflecting the IEPA’s modification of six hours by a Senior Project Manager at a rate of \$121.49 per hour.

Contaminant Transport Modeling: Professional Geologist

IEPA modified Dersch’s proposed corrective action budget by \$2,964.14, the full amount proposed to perform contaminant transport modeling and Tier 2 calculations. This amount

included 20 hours proposed for a Professional Geologist at a rate of \$111.76 per hour for a total of \$2,235.20. R. at 4; *see id.* at 86.

Factual Background of This Modification

Dersch's Proposed 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. Dersch's consultant testified that this work includes "all the nuts and bolts of doing the TACO calculations. They're going to go through all the inputs." Tr. at 19.

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 of the TACO hours the site is expected to require, he asked "why do they need to be re-calculated later?" *Id.* Dersch's consultant acknowledged that "[p]reliminary" was probably not the best choice of words." *Id.* at 18. The consultant added that the proposal refers to calculations based on previous data to submit in the next CAP and that it may be necessary to perform additional modeling based on samples obtained during corrective action in order to determine boundaries for a groundwater ordinance. *Id.* at 18. IEPA indicated that it had "no problem" with this "clarification concerning the phrasing of the task." *Id.* at 16.

In technical review notes, IEPA's project manager stated that Dersch's proposed budget "is only an estimate on how long it will take a consultant to perform the modeling. R. at 13. IEPA asserted that Dersch should submit these modeling costs not for this CAP but in the subsequent CAP that applies the modeling calculations. *Id.* IEPA argued that, when Dersch submits a subsequent 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 acknowledged that Dersch's site requires an additional CAP to collect a soil sample to determine site-specific parameters. R. at 4. However, IEPA asserted that this should not change the point at which Dersch submits costs associated with calculating the Tier 2 objectives. *Id.*

IEPA stated 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 and the hours required to perform the tasks are known." R. at 4. At that time, "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 asserted that Dersch's proposal is "only an estimate on how long it will take the consultant to perform the modeling." R. at 4.

IEPA modified the budget by \$2,964.14, the full amount proposed to perform contaminant transport modeling and Tier 2 calculations. This included the proposed 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. *Id.* 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) (2020).

Board Discussion

Dersch argues that IEPA approved a plan that includes analyzing a soil sample to develop site-specific parameters. Pet. Brief at 14, citing R. at 3, 15. It adds that IEPA recognizes that Dersch must analyze the sample it collects. Pet. Resp. at 5, citing R. at 4, 15. Dersch emphasizes that its CAP includes determining clean-up objectives. Pet. Resp. at 5, citing R. at 36. Dersch argues that its CAP specifically refers to this analysis. *Id.*

IEPA argues that costs to prepare Tier 2 objectives and perform modeling “should be included for the plan in which they are submitted/proposed for use.” IEPA Brief at 11, citing 415 ILCS 5/57.7(b)(3) (2020); 35 Ill. Adm. Code 734.335(b); Tr. at 68. The Board has reviewed these authorities cited by IEPA, which generally require that the budget and plan correspond to one another. The Board is not persuaded that either of these authorities requires Dersch to withhold these proposed hours from this approved CAP and submit them in a subsequent CAP.

IEPA also cites a statement by Dersch’s consultant recognizing that it would need to submit one plan to collect a TACO sample, recalculate TACO Tier 2 objectives, and then submit a CAP with any appropriate modifications. IEPA Brief at 12, citing R. at 96. The Board does not consider this inconsistent with Dersch’s proposed plan and budget.

Dersch argues that IEPA wishes to review the budget for the work it requires only after Dersch performs the work. It asserts that this is not consistent with requiring plans and budgets. Pet. Brief at 14. Dersch further argues that IEPA effectively requires 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. Brief at 15, citing City of Benton Fire Dep’t. v. IEPA, PCB 17-1, slip op. at 6 (Feb. 22, 2018).

Dersch dismisses IEPA’s position that the budget for this work “is only as estimate on how long it will take the consultant to perform the modeling.” Pet. Brief at 14, citing R. at 4. Dersch cites the Board rules providing that “[t]he budget must include . . . an *estimate* of all costs the development, implementation, and completion of the corrective action plan.” Pet. Brief at 14, citing 35 Ill. Adm. Code 734.335(b) (emphasis added).

IEPA determined that this proposed budget item lacked supporting documentation. R. at 4. Based on its experience and other plans, IEPA argues that consultants can “almost always” calculate Tier 2 soil remediation objectives within two hours. IEPA Brief at 11; Tr. at 51. “Modeling can generally be completed in a couple of hours as well.” *Id.* Even if the site requires calculating six site-specific objectives and modeling as many as 14 exceedances, IEPA asserts “this will not require 26 hours to calculate.” IEPA Brief at 12; Tr. at 50-51.

Dersch stresses that its consultant estimated the time required for this work based on experience with earlier projects. Pet. Brief at 15, citing Tr. at 19. Dersch emphasizes that its consultant “has decades of experience in performing and overseeing TACO analysis, and therefore her opinion has significant weight.” Pet. Brief at 15. He testified that estimated that these tasks likely required “10 to 15 hours to do the TACO and the modeling, and we had additional hours in there to redo it after an excavation.” Tr. at 19. Dersch questions whether any support other than this experience could justify a proposed budget. *Id.* It adds that IEPA’s decision letter does not identify a “specific type of information” that Dersch failed to provide. *Id.*, citing 415 ILCS 5/57.7(c)(4) (2020).

The Board has reviewed the record on this budget modification. The record persuades the Board that the hours for a Professional Geologist proposed by Dersch are appropriately included in its approved CAP. While IEPA argues that these costs should be included in a subsequent CAP, it has not convincingly cited authorities that support this position. The Board is not persuaded that the proposed budget for these hours lacks supporting documentation or that it is flawed because it is an estimate of hours required for this work. Dersch’s consultant testified on the expected time for this work based on experience with earlier projects. Also, the Board recognizes that its rules define a budget as an estimate of the costs for the CAP. The Board concludes that Dersch has met its burden of proving that approving its proposed budget would not violate the Act or the Board’s regulations. In its order below, the Board reverses IEPA on this modification and restores to Dersch’s corrective action budget \$2,235.20, reflecting the IEPA’s modification of 20 hours by a Professional Geologist at a rate of \$111.76 per hour.

Consultant’s Materials: Photoionization Detector (PID) Rental

IEPA modified Dersch’s proposed corrective action budget by \$148.00, the entire proposed amount for a PID. R. at 5; *see id.* at 88.

Factual Background of This Modification

Dersch’s Proposed Budget. With the Description/Justification that it would be used “[t]o detect VOC [volatile organic compound] levels in soil samples,” Dersch proposed the use of a PID for one day at \$148.00 per day. R. at 88; *see* Tr. at 19-20. Although IEPA’s project manager initially did not see the need to use a PID, he later indicated that “it should obviously be used when drilling the boring. . . . It’s definitely better to be safe and use the PID.” R. at 21.

IEPA’s project manager asked Dersch how it determined its rate: “[w]hatever goes into the rate is what we’d like to see.” R. at 22. IEPA sought documentation to determine whether the proposed rate is appropriate. *Id.*

Dersch’s consultant responded that IEPA had never asked to provide a breakdown of equipment costs. The consultant did not have 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 in the past and then “adjusted for inflation a few times.” *Id.* at 18-19. The response included a list of equipment rental prices from Envirotech. *Id.* at 22-24. 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 information Dersch supplied as “just a product rental sheet from a company located in California.” R. at 16. He argued that “[i]t’s not appropriate to use to document the rate you charge for a PID because you wouldn’t be renting a PID from California.” *Id.* In addition, 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 explained that “[a] rental rate includes enough profit in the daily rate to account for company costs such as overhead and employee payroll. I don’t think it’s appropriate to make a profit off of equipment charges for equipment you own.” *Id.* at 16-17.

IEPA’s project manager suggested that the rate should be the total costs for the equipment divided by the expected number of days of use, including “any expected indirect costs” such as calibration, cleaning, and repair. R. at 17.

IEPA’s Determination. IEPA modified the budget by \$148.00, the entire proposed amount for 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) (2020).

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).

Board Discussion

IEPA argues that Dersch has proposed a budget of \$148 per day for equipment it owns and does not need to rent. IEPA Brief at 14. However, the Board’s UST rules 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. Brief at 17. IEPA argues that Dersch “provided no supporting documentation for why this rate should be reimbursed.” IEPA Brief at 15.

IEPA requested justification for the proposed rate based on the PID’s purchase price and expected use. IEPA Brief at 14; Tr. at 54-55. Dersch’s consultant testified that its PID cost approximately \$4,500 and would be expected to last five to six years. Tr. at 34. IEPA suggests that a rental rate of \$148 per day would allow the consultant to recover its purchase price quickly

enough that its proposed rate is unreasonable. IEPA Brief at 15. IEPA's project manager testified that IEPA had settled on \$75 per day as a reasonable and appropriate rate. Tr. at 55, 73, 75. Dersch argues that IEPA attempts to apply a rental rate that did not exist when it reviewed the proposed budget and has not been promulgated as rule. Pet. Resp. at 8., citing Tr. at 55. Dersch argues that IEPA "can certainly create generalize standards to make its job easier, but it must do so through rulemaking." Pet. Resp. at 9.

Dersch's consultant testified that IEPA sought to justify equipment rates by dividing the purchase price by the number of uses. Tr. at 21-22. Dersch stated that this calculation also needed to reflect "calibrations, breakdowns, repairs, maintenance, and parts." *Id.* at 22. Because the consultant did not track those costs and charged them as general overhead, it couldn't perform the calculation IEPA suggested. *Id.* Dersch argued that setting the rate in this manner presented "practical absurdities" and would not apply consistently to different consultants. Pet. Brief at 19. IEPA also discounted as "absolute nonsense" Dersch's position that it did not have data to set equipment rates with the purchase price and number of uses. IEPA Reply at 4. Dersch further argued that IEPA lacks authority to create consultant-specific rates (Pet. Brief at 19, citing 415 ILCS 5/57.14(a) (2020)) and that requiring this documentation effectively enforces an unpromulgated rule. Pet. Resp. at 7, 9.

Dersch's consultant argued that "the next best thing was really market rates, which was the rental sheets." *Id.* Dersch cited the rental rate sheet from Envirotech, an equipment rental company. Pet. Brief at 17, citing R. at 19-24; *see* Tr. at 21-22. Dersch noted a rental rate of \$150 per day for a model similar to the PID used by its consultant. Pet. Brief at 17, citing R. at 19; *see* Tr. at 22.

IEPA discounts Dersch's reliance on rental rates from Envirotech. Dersch stressed that its current equipment measures parts per billion, making it most similar to Envirotech's model renting at a rate of \$150 per day. *Id.* IEPA argued that, because its soil boring logs request concentrations in parts per million, this model exceeds the minimum requirements of the Act. *Id.* Dersch argues that the record does not indicate "that the PID purchased by the consultants is not commonly used in the environmental field." Pet. Resp. at 7. It also disputes any suggestion by IEPA that "a PID which can detect parts per billion is an extravagance." *Id.* Dersch suggests that, if it rounds analytical results that are more specific than a standard, doing so reflects common and accepted scientific practice. *Id.* Dersch disputes IEPA's claim that Dersch sought the highest PID rental rates online in order to set its reimbursement rate as high as possible. Pet. Resp. at 6, citing IEPA Brief at 15.

Dersch asserts that IEPA "simply did not believe that rental rates were a valid means" to justify these costs. Pet. Resp. at 6-7, citing R. at 54. Dersch argues, that, if IEPA objected only to this particular rental rate sheet, it was required to specifically identify the information it needed in its decision letter. Pet. Resp. at 7.

IEPA argued that neither its decision letter nor the record show that it applied an illegal rate. IEPA Reply at 2. IEPA stresses that its decision letter cited lack of documentation, unreasonableness, and exceeding requirements of the Act as its grounds for modifying the proposed budget. *Id.*

Dersch argues that IEPA's review is limited to whether costs associated with the CAP are reasonable. Pet. Brief at 20, citing 415 ILCS 5/57.7(c)(3) (2020). It asserts that it supplied information demonstrating that its budgeted rate of \$148 per day is reasonable and supported it with Board precedent. Pet. Brief at 20. Dersch stresses that the Board affirmed a 1991 IEPA determination that \$142 per day is a reasonable charge to use a PID. Pet. Brief at 18, citing Malkey v. IEPA, PCB 92-104, slip op. at 5 (Mar. 11, 1993). Dersch adds that the 2016 equivalent of this amount is approximately \$250. Pet. Brief at 18, Exh. H.

IEPA recognizes that a PID is necessary to implement Dersch's CAP: "[w]e have to know that the soil is clean, even if the area was previously investigated. . . . It's better to be safe and use the PID." R. at 21. However, IEPA's modification provided no budget for its use.

The Board has reviewed the record on this budget modification. The record persuades the Board that Dersch has documented a reasonable rate for the use of a PID. Dersch responded to IEPA by submitting rental information showing rates consistent with its proposal and supported by Board precedent. While IEPA may have "settled on" a rate of \$75 per day or consider it a reasonable budget, that amount is not plainly supported by the regulations, Board precedent, or the record in this case. The Board concludes that Dersch has met its burden of proving that approving its proposed budget would not violate the Act or the Board's regulations. In its order below, the Board reverses IEPA on this modification and restores to Dersch's corrective action budget \$148.00, the entire proposed amount for use of a PID.

Consultant's Materials: Gloves

IEPA modified Dersch's proposed corrective action budget by \$16.00, the entire proposed amount for disposable gloves. R. at 5; *see id.* at 88.

Factual Background of This Modification

Dersch's Proposed Budget. With the Description/Justification that they are to be used for soil sampling, Dersch proposed the use of one box of disposable gloves at \$16.00 per box. R. at 88; Tr. at 25. Dersch's consultant testified that the "rate was based on what was about the cost of a box of gloves typically, and I've seen what other consultants were charging for gloves, and I thought ours was less than theirs, so we stuck with the 16." Tr. at 26.

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. The project manager requested that the consultant provide 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 explained that "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." *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) (2020).

For costs that do not have a maximum payment amount in Subpart H of the UST rules, IEPA stated that Dersch must prove its cost is reasonable. R. at 5, citing 35 Ill. Adm. Code 734.850(b). IEPA argued 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. R. at 5, citing 35 Ill. Adm. Code 734.630(dd).

Board Discussion

While Dersch’s proposed budget included the cost of an entire box of gloves, IEPA stressed that the approved plan includes a single sample. IEPA Brief at 17-18. IEPA cited Dersch’s consultant, which acknowledged that it is not likely to “use more than a couple of pairs of gloves.” IEPA Brief at 17, citing R. at 17; *see Tr.* at 27 (estimating use of five to ten gloves).

Dersch stresses that IEPA’s instructions for its budget and billing forms list supplies such as “gloves” as an item provided by a consultant. Pet. Brief at 21, citing Knapp Oil Co. v. IEPA, PCB 16-13, slip op. at 6 (Sept. 22, 2016); Exh. G at 15. Dersch states that a consultant typically purchases gloves, which are then consumed in the course of corrective action. Pet. Brief at 21. Dersch’s consultant acknowledged that this project would not require using an entire box of gloves (*Tr.* at 26), and she estimated that it would require five to ten gloves (*id.* at 27). She

added that, when Dersch submitted its CAP, it wouldn't know how many gloves it would need. *Id.* at 28.

Dersch notes that IEPA requested information about gloves it would be using, including an invoice or receipt. Pet. Brief at 21-22, citing R. at 22. Dersch stressed that its submitted budget projected costs and suggested that IEPA would appropriately seek this payment information with a request for reimbursement. Pet. Brief at 22, citing 35 Ill. Adm. Code 734.605(b)(9). However, Dersch responded with information indicating that the price of the gloves it uses most commonly is \$15.93 per box. Pet. Brief at 22, citing R. at 20, 25.

Dersch's consultant states that projecting "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." Pet. Brief at 22, citing R. at 19; *see* Tr. at 26-27. Dersch argues 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." Pet. Brief at 22. Dersch elaborates that IEPA "reimbursed the cost of stocking the items, not individual purchases." *Id.* Its consultant argues that, "to provide the real cost of a box of gloves, they cannot be provided as a stock item." If treated instead as a field purchase, they "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." *Id.*, citing R. at 19; Tr. at 27. The consultant estimated that this would result in a cost of approximately \$20 per box of gloves. Tr. at 28.

Dersch argues that its consultant based the budget for gloves on the cost of a typical box of them and "what other consultants were charging for gloves." Pet. Brief at 23, citing Tr. at 26. Dersch concluded that its budget of \$16 is reasonable and that, if costs prove to be higher, "reimbursement would be capped at \$16." Pet. Brief at 23.

IEPA discounts the consultant's claim that it is difficult to provide the pricing information it requested. IEPA argues that a hypothetical \$20.00 box of 100 gloves results in a cost per glove of \$0.20.⁴ IEPA Brief at 17. IEPA suggests that, if Dersch's consultant expected to use one pair of gloves and wished to have a spare, it could propose a budget based on the cost of four gloves. IEPA argues that this pricing allows a consultant to avail itself of bulk purchasing for multiple types of gloves. *Id.*

IEPA concludes that the budgeted amount based on the price of an entire box of gloves is unreasonable for collecting a single sample and exceeds the requirements of the Act. IEPA Brief at 16, 18; Tr. at 55. IEPA adds that Dersch's consultant "provided no supporting documentation for why this rate should be reimbursed and it was therefore cut in full." IEPA Brief at 18.

IEPA does not dispute that Dersch would use disposable gloves to implement its CAP, but its modification provided no budget for them.

⁴ Although IEPA's brief states that "the cost per glove would be 2 cents" (IEPA Brief at 17), the Board considers this miscalculation an inadvertent error and corrects it here.

The Board has reviewed the record on this budget modification. The record indicates that, when preparing a plan, a consultant cannot necessarily determine which gloves will be required and how many will be used. Testimony shows that Dersch has based its budget proposal on the cost for a typical box of them and on rates charged by other consultants.

The Board recognizes the parties' arguments on the challenge of budgeting for and reimbursing costs of disposable items such as these. However, this record persuades the Board that Dersch has documented a reasonable rate in its proposed budget for a box of gloves for this CAP. Dersch submitted information showing costs consistent with its proposal. The Board concludes that Dersch has met its burden of proving that approving its proposed budget would not violate the Act or the Board's regulations. In its order below, the Board reverses IEPA on this modification and restores to Dersch's corrective action budget \$16.00, the entire proposed amount for gloves. This of course does not approve reimbursement of this amount, a request that is not now before the Board.

Consultant's Materials: Water Level Indicator

IEPA modified Dersch's proposed corrective action budget by \$28.00, the entire proposed amount for a water level indicator. R. at 5; *see id.* at 88.

Factual Background of This Modification

Dersch's Proposed Budget. With the Description/Justification that it is to be used to measure groundwater depth, Dersch proposed the use of a water level indicator for one day at \$28.00 per day. R. at 88; Tr. at 24.

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 could not project which of its indicators it would use at Dersch's site 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 proposed 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) (2020).

For costs that do not have a maximum payment amount in Subpart H of the UST rules, IEPA stated that Dersch must prove its costs are reasonable. R. at 6, citing 35 Ill. Adm. Code 734.850(b). IEPA argued 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).

Board Discussion

The Board's UST rules 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. Brief at 17. IEPA argues that Dersch "provided no supporting documentation for why this rate should be reimbursed." IEPA Brief at 19.

IEPA argues that, although it asked Dersch's consultant to explain its proposed rate, the 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." IEPA Brief at 19; Tr. at 56.

Dersch argues that the legal issues regarding the water level indicator largely "are the same as with the PID meter." Pet. Brief at 24. As with the PID, Dersch argues that "the rate for a water level indicator has been approved by the Agency for decades." *Id.*, citing R. at 19; Tr. at 24. 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. Brief at 24, citing R. at 19, 20.

However, Dersch supplied IEPA with equipment rental information showing a rate of \$30 per day for an indicator comparable to one used by Dersch's consultant. Pet. Brief at 24, citing R. at 23; Tr. at 24. Dersch stresses that this rate would not include "shipping, taxes, and the time we would have to spend ordering, cleaning and returning the items." Pet. Brief at 24. Since its proposed budget is lower than that market rental rate, Dersch argues that its cost is reasonable. Pet. Brief at 24.

IEPA concluded that it could not determine whether this budgeted cost is reasonable or whether it exceeds the minimum requirements of the Act. IEPA Brief at 19. IEPA argues that, without documentation it requested, it could not make these determinations, so its modification should be affirmed. *Id.*

The Board has reviewed the record on this budget modification. The record persuades the Board that Dersch has documented a reasonable rate for the use of a water level indicator. Before IEPA reached its determination, Dersch submitted rental information showing rates consistent with its proposal. The Board concludes that Dersch has met its burden of proving that approving its proposed budget would not violate the Act or the Board's regulations. In its order below, the Board reverses IEPA on this modification and restores to Dersch's corrective action budget \$28.00, the entire proposed amount for use of a water level indicator.

Consultant's Materials: Slug

Dersch's consultant testified that a slug is "a weighted instrument that records and helps you record changes in water level elevations after a period of time." Tr. at 25. IEPA modified Dersch's proposed corrective action budget by \$36.00, the entire proposed amount for a slug. R. at 6; *see id.* at 88.

Factual Background of This Modification

Dersch's Proposed Budget. With the Description/Justification that it is to be used to conduct 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 at Dersch's site 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 proposed 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) (2020).

For costs that do not have a maximum payment amount in Subpart H of the UST rules, IEPA stated that Dersch must prove its costs are reasonable. R. at 6, citing 35 Ill. Adm. Code 734.850(b). IEPA argued 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).

Board Discussion

IEPA asked Dersch's consultant how it determined the proposed daily rate and also requested the purchase price of its slug. IEPA Brief at 20, citing R. at 22.

Dersch argues that the legal issues regarding the slug largely "are the same as with the PID meter." Pet. Brief at 25. Dersch's proposed rate "was based upon renting a slug a long time ago, and so the consultant used that rental rate for the rate charged here." *Id.*; Tr. at 25. Dersch argues that "the rate has been approved by the Agency for decades." *Id.*, citing R. at 19; *see* Tr.

at 25. Dersch's consultant "has several slugs, none of which they have receipts for, and is not certain which one they will end up using." Pet. Brief at 25, citing R. at 19, 20.

Dersch supplied IEPA with equipment rental information showing a rate of \$60 per day for a slug comparable to one used by Dersch's consultant. Pet. Brief at 25, citing R. at 23; *see* Tr. at 25. Dersch stresses that this rate would not include "shipping, taxes, and the time we would have to spend ordering, cleaning and returning the items." Pet. Brief at 25. Since its budgeted amount is less than that rate, Dersch argues that its cost is reasonable. *Id.*

IEPA states that it could not determine whether this budgeted cost exceeds the minimum requirements of the Act, and it concludes that its modification should be affirmed. *Id.*

The Board has reviewed the record on this budget modification. The record persuades the Board that Dersch has documented a reasonable rate for the use of a slug. Before IEPA reached its determination, Dersch submitted rental information showing rates consistent with its proposal. The Board concludes that Dersch has met its burden of proving that approving its proposed budget would not violate the Act or the Board's regulations. In its order below, the Board reverses IEPA on this modification and restores to Dersch's corrective action budget \$36.00, the entire proposed amount for use of a slug.

Consultant's Materials: Mileage

IEPA modified Dersch's proposed corrective action budget by \$34.10 and approved mileage at a federal rate of \$0.54 per mile for a total of \$167.40. R. at 6-7, 13-14, 17.

Factual Background of This Modification

Dersch's Proposed Budget. With the Description/Justification that it is for "[o]ne round trip from Springfield Office for Drilling," Dersch proposed 310 miles of travel between Springfield and Lawrenceville at \$0.65 per mile for a total cost of \$201.50. R. at 88; Tr. at 29.

IEPA's Determination. Before its determination, IEPA's project manager stated that "mileage has to be approved at the Federal mileage rate or \$0.54." R. at 17. He testified that "when nothing is provided to indicate that the - that it's appropriate to charge over federal mileage rates, we don't approve anything over federal mileage rates." Tr. at 57. He testified that, although IEPA requested information, "they did say that they were using a truck, but I don't see that as being really necessarily providing documentation, and that truck gets better gas mileage than my car." *Id.* He added that IEPA would have needed documentation of how Dersch had derived the additional 12 cents per mile. *Id.* at 58.

IEPA modified the proposed budget by \$34.10 and approved mileage at a federal rate of \$0.54 per mile for a total of \$167.40. R. at 6-7, 13-14, 17. 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 costs 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) (2020). IEPA determined that the cost 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) (2020), 35 Ill. Adm. Code 734.630(dd).

Board Discussion

IEPA asserts that the federal mileage rate is reasonable if there is no documentation supporting a proposed higher rate. *Id.* IEPA concluded that Dersch's proposed rate "exceeded the minimum requirements of the Act." *Id.*

Dersch argues that IEPA's modification "is legally erroneous because it improperly imposes a rate without undergoing rulemaking." Pet. Brief at 26, citing 5 ILCS 100/1-65 (2020). Although Dersch acknowledges that agencies have adopted that rate through rulemaking, it generally applies to reimbursing use of privately-owned automobiles and not to heavy trucks used to transport drilling and excavating equipment. Pet. Brief at 26-27 (citations omitted). Dersch argues that "the purpose of the federal rate has never been to set market rates for business purposes." *Id.* at 28.

Dersch's consultant testified that an automobile would not be suitable for the plan because the size of the equipment "is better suited to the back of a truck." Tr. at 29. Based on fuel costs alone, Dersch asserts that the heavy-duty truck necessary for this project will cost at least 50 percent more than a standard passenger vehicle. Pet. Brief at 27, citing Tr. at 29.

Dersch argues that Subpart H rates for travel "are not limited to mileage reimbursements, but include payment of all of consultant costs for 'travel; per diem; mileage; transportation; [and] vehicle charges.'" Pet. Brief at 28, citing 35 Ill. Adm. Code 734.845. It adds that its proposed rate accounting for the vehicle to be used "is entirely consistent with the regulations." Pet. Brief at 28. Dersch argues that IEPA had not promulgated its mileage rate as a rule and that IEPA cannot enforce it. Pet. Resp. at 9.

Dersch concludes that it "did not exceed the minimum requirements of the Act because the Act does not impose the federal rate as a rule." Pet. Brief at 29. Dersch stresses that IEPA reduced its budget by \$0.11 per mile, an amount "insufficient to establish" that the budgeted rate was unreasonable for additional costs associated with heavy commercial vehicles. *Id.*

The Board has reviewed the record on this budget modification. The record persuades the Board that Dersch has documented a reasonable proposed budget for mileage. IEPA acknowledged that Dersch intended to use a truck to implement its CAP. Dersch accounted for the use of a heavy-duty truck and a higher mileage rate for it. IEPA cites and applies a federal mileage rate without persuasively arguing that the UST rules require applying it to this proposed budget item. The Board concludes that Dersch has met its burden of proving that approving its proposed budget would not violate the Act or the Board's regulations. In its order below, the Board reverses IEPA on this modification and restores \$34.10 to Dersch's corrective action budget for a total mileage budget of \$201.50.

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

IEPA first modified Dersch's proposed corrective action budget for copies by reducing the total number of pages for the CAP, budget, and associated maps from 1100 to 248, resulting in a modification of \$127.80. R. at 7, 88-89.

Second, for CAP, budget, and maps, IEPA modified the proposed budget by reducing the rate per page of copying to \$0.00, resulting in an additional modification of \$37.20. R. at 7, 88-89.

Third, for copying the reimbursement request, IEPA modified the proposed budget by reducing the rate per page to \$0.00, resulting in an additional modification of \$150.00. R. at 7, 88-89.

Factual Background of This Modification

Dersch's Proposed Budget. Dersch's budget proposed 2,100 copies in four sets. First, for "Field/Plan/Maps/Borelogs," Dersch proposed 100 copies at \$0.15 each for a total cost of \$15.00. R. at 88. Dersch's consultant testified that these include documents such as an IEPA letter, drilling plans, blank borelogs, and multiple maps. "[T]his all goes out to the field, gets filled out, and then some of the pieces end up getting copied again, especially the field reports and the maps for a file copy." Tr. at 30.

Second, for "Copies of Corrective Action Plan/Draft/Forms," Dersch proposed 800 copies at \$0.15 each for a total of \$120.00. *Id.* Dersch's consultant testified that typical case involves four copies of the plan. "We have the preliminary draft that goes out for review, and then there's a modified draft that goes back out to verify that all the changes that were needed were made. When that's complete, we send a draft to the client for them to sign and look over, and then we do a submittal to the agency and we have four copies." Tr. at 31.

Third, for "Copies of Corrective Action Budget," Dersch proposed 200 copies at \$0.15 each for a total cost of \$30.00. *Id.* at 89. Dersch's consultant testified that preparing copies of the budget follows "the same procedure" as copies of the plan. Tr. at 31.

Finally, for "Copies of Corrective Action Reimbursement," Dersch proposed 1,000 copies at \$0.15 each for a total cost of \$150.00. *Id.*

IEPA's Determination. 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.

The project manager responded that, for Freedom of Information Act (FOIA) requests, IEPA charges \$0.15 per copy in excess of 400 copies. R. at 14, 16; *see id.* at 27. He added that "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." R. at 16. IEPA's project manager testified that the rate of \$0.15 per copy is

“the highest we’ve seen.” Tr. at 59. Because the plan and budget combined total 62 pages, he calculated that Dersch’s proposed budget of \$165 for an original and a copy represents \$1.33 per page. R. at 14, 16.

IEPA first modified the proposed 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 for 1100 pages. *Id.* at 7, 88-89. IEPA received a 48-page plan and 14-page budget, and it argued that Dersch’s request represented nearly 18 copies of those documents. *Id.* at 7; Tr. at 59. IEPA reduced the number of pages for the CAP, budget, and associated maps from 1100 to 248 pages. R. at 7. IEPA also reduced the rate per page of copying these three documents to \$0.00, resulting in an additional \$37.20 in cuts. *Id.*

IEPA determined that the proposed costs lacked supporting documentation and were ineligible for payment from the UST Fund. R. at 7, 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) (2020). 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) (2020), 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 \$127.80.⁵ R. at 7; *see* Tr. at 59.

IEPA modified the entire remaining \$37.20 of Dersch’s request for copies of these three documents. 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) (2020). 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; Tr. at 60. 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).

⁵ 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 copies provided to IEPA, one copy to the owner or operator, and one copy to the consultant. R. at 14. 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).

IEPA separately 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 acknowledged that Dersch's reimbursement claim may require as many as 1,000 pages, but it modified this budget request solely because the rate per page was unreasonable. Tr. at 60. IEPA reduced the rate per page of copying the reimbursement request to \$0.00, resulting in an additional \$150.00 in cuts." R. at 7-8.

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); Tr. at 60. 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 cost may be used for activities exceeding those requirements, IEPA did not approve them. *Id.*, citing 415 ILCS 5/57.7(c)(3) (2020). 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) (2020), 35 Ill. Adm. Code 734.630(dd).

Board Discussion

Dersch first addressed the modification of the rate per page because it applies to all documents. Pet. Brief at 33. Also, Dersch argues that IEPA asked it only to support the copy rate. *Id.*, citing R. at 22.

Dersch argues that its proposed rate is the same IEPA charges for copies under FOIA. Pet. Brief at 31, citing 5 ILCS 140/6(b) (2020); R. at 20, 27. Dersch argues that IEPA's rate alone demonstrates that its proposed rate is reasonable. Pet. Brief at 31. Dersch adds that FOIA does not establish market rates but instead sets discounted copy rates to make records accessible to the public. Pet. Brief at 31. Dersch adds that other statutes authorize higher rates for functions such as professional services outside of government. Pet. Brief at 33, citing 735 ILCS 5/8-2001(d) (2020) (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. Dersch acknowledges that FOIA copy charges exempt the first 50 pages of copies. Pet. Brief at 31, citing 5 ILCS 140/6(b) (2020); 35 Ill. Adm. Code 1828.602(a). However, it argues that this exemption is not relevant beyond the specific objectives of FOIA. Pet. Brief at 33.

Dersch's consultant testified that it had increased its copy charge to \$0.15 per page after purchasing a new copier, consulting with its accounting firm on its charges, and considering what others charged through the UST program. Pet. Brief at 33, citing Tr. at 30.

The Board has reviewed the record on these budget modifications for the rate per page. The record persuades the Board that Dersch has cited statutory support and documented a reasonable proposed budget for the copying rate. The Board concludes that Dersch has met its

burden of proving that approving its proposed budget of \$0.15 per page would not violate the Act or the Board's regulations.

The Board next addresses IEPA's modification based on the number of pages proposed in the Dersch's budget.

IEPA discounted Dersch's proposed budget for 1100 pages of copies of its plan and budget. IEPA stresses that the combined length of these two documents is 62 pages. IEPA argues that Dersch has not explained this proposed higher number of copies. IEPA Brief at 24; *see* Tr. at 59.

IEPA states that "[t]wo copies are necessary to be sent to the Illinois EPA, one copy for the owner/operator, and one copy of the consultant." IEPA Brief at 25. IEPA argues that Dersch's consultant provided "no actual supporting documentation or reasonable explanation for the number of copies they requested. *Id.* IEPA concluded to reduce the number of copies to two because it could not determine "how many copies were actually needed." *Id.*

Dersch stresses that, when its consultant submitted the 2015 CAP, it stated that "the number of copies budgeted for reports and claims are not just the number of pages submitted to the Agency." *Id.*, citing R. at 99. That budget also included "drafts, client copies, and our own copies of reports, budgets, and claims." *Id.* Dersch argues that Board regulations require it to maintain a copy of submissions and other evidence. Pet. Brief at 34, citing 35 Ill. Adm. Code 734.655. Dersch also cited its consultant's testimony accounting for four copies of the CAP. Pet. Brief at 34, citing Tr. at 31. Dersch argues that IEPA nonetheless "only recognized the two copies of the CAP it received as necessary." Pet. Brief at 34, citing R. at 7.

Regarding the copies of plans, maps, and borelogs, Dersch emphasizes that "the field workers need copies of the documents to perform the work." Pet. Brief at 35. Dersch surmises that IEPA rejected these because none of the field copies were delivered to IEPA. *Id.*

Dersch stated that its consultant "does not typically count pages while the plan and budget are being put together." Pet. Brief at 34, citing Tr. at 31. Instead, it provides an estimate based on previous submissions. *Id.* Dersch concluded that it appropriately estimated the number for the budget stage. Pet. Brief at 35. "[T]he actual number of copies will be identified once all the work is performed and reimbursement is sought." *Id.*; *see* Tr. at 43. Dersch concludes that [t]his approach has been accepted by the Agency in the past." Pet. Brief at 35, citing Tr. at 32.

The Board has reviewed the record on the budget modifications based on the number of pages proposed. The record persuades the Board that Dersch has documented a reasonable proposed budget. IEPA acknowledges that a "reasonable estimate" of the copies required is four. IEPA Brief at 25. Dersch's consultant has accounted for these copies – including those that IEPA does not necessarily receive. At this budget stage, the Board concludes that Dersch has provided and supported a reasonable number of total pages for the documents it expects to prepare. The Board concludes that Dersch has met its burden of proving that approving its proposed budget would not violate the Act or the Board's regulations. The Board reverses IEPA on this modification and restores \$315.00 to Dersch's corrective action budget for copies.

Dersch's Request for Reimbursement of Legal Fees

Dersch's petition requested relief including a Board order awarding its attorney's fees. Pet. at 4; *see* 415 ILCS 5/57.8(l) (2020); 35 Ill. Adm. Code 734.630(g). Dersch renewed this request in its motion for summary judgment and response. Pet. Mot. SJ at 37; Pet. Reply SJ at 5. In its post-hearing brief and response, Dersch requested that the Board allow it to submit proof of its legal costs. Pet. Brief at 36; Pet. Resp. at 10.

The record does not now include the amount of these fees or Dersch's argument that they would be reimbursable under Section 57.8(l) of the Act. In its order below, the Board directs Dersch to file a statement of legal fees that may be eligible for reimbursement and its arguments that the Board should exercise its discretion to direct IEPA to reimburse those fees from the UST Fund. The order also sets a deadline for IEPA to respond.

CONCLUSION

For the reasons above, the Board finds that Dersch has met its burden of proving that approving its proposed corrective action budget would not violate the Act or the Board's regulations, and the Board restores the contested amounts to Dersch's proposed budget. The Board sets a deadline for Dersch to file a statement of legal fees that may be eligible for reimbursement and its arguments why the Board should exercise its discretion to direct IEPA to reimburse those fees and also sets a deadline for IEPA to respond.

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

ORDER

1. The Board grants Dersch's request that it take official notice of Exhibits A-H.
2. The Board grants IEPA's unopposed motion to reply and accepts its reply.
3. The Board reverses IEPA's modification of Dersch's proposed corrective action budget for plan design and preparation by a Professional Geologist and restores to Dersch's budget \$3,352.80, the full amount proposed.
4. The Board reverses IEPA's modification of Dersch's proposed corrective action budget for drafting and restores \$334.05, reflecting five hours by a Draftsperson/CAD IV at a rate of \$66.81 per hour.
5. The Board reverses IEPA's modification of Dersch's proposed corrective action budget for contaminant transport modeling and restores \$728.94, reflecting six hours by a Senior Project Manager at a rate of \$121.49 per hour.

6. The Board reverses IEPA's modification of Dersch's proposed corrective action budget for contaminant transport modeling and restores \$2,235.20, reflecting 20 hours by a Professional Geologist at a rate of \$111.76 per hour.
7. The Board reverses IEPA's modification of Dersch's proposed corrective action budget for a PID and restores \$148.00, the entire proposed amount for use of a PID.
8. The Board reverses IEPA's modification of Dersch's proposed corrective action budget for gloves and restores \$16.00, the entire proposed amount for gloves.
9. The Board reverses IEPA's modification of Dersch's proposed corrective action budget for use of a water level indicator and restores \$28.00, the entire proposed amount for use of a water level indicator.
10. The Board reverses IEPA's modification of Dersch's proposed corrective action budget for use of a slug and restores \$36.00, the entire proposed amount for use of a slug.
11. The Board reverses IEPA's modification of Dersch's proposed corrective action budget and restores \$34.10 for a total mileage budget of \$201.50.
12. The Board reverses IEPA's modification of Dersch's proposed corrective action budget and restores \$315.00, the entire proposed amount for copies.
13. Dersch is directed to file a statement of legal fees that may be eligible for reimbursement and its arguments why the Board should exercise its discretion to direct IEPA to reimburse those fees from the UST Fund. Dersch must file its statement by Monday, September 12, 2022, which is the first business day following the 30th day after the date of this order. IEPA may file a response within 14 days after being served with Dersch's statement.

IT IS SO ORDERED.

I, Don A. Brown, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above interim opinion and order on August 11, 2022, by a vote of 5-0.



Don A. Brown, Clerk
Illinois Pollution Control Board