

BEFORE THE POLLUTION CONTROL BOARD  
OF THE STATE OF ILLINOIS

J.D. STRETT & COMPANY, INC.,)	)	
Petitioner,	)	
v.	)	PCB: 2022-027
	)	(LUST Permit Appeal)
ILLINOIS ENVIRONMENTAL )	)	
PROTECTION AGENCY,	)	
Respondent.	)	

**NOTICE OF FILING AND PROOF OF SERVICE**

TO: Carol Webb, Hearing Officer	Melanie Jarvis
Illinois Pollution Control Board	Division of Legal Counsel
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PLEASE TAKE NOTICE that I have today electronically filed with the Office of the Clerk of the Illinois Pollution Control Board, Petitioner's Motion for Summary Judgment, copies of which are herewith served upon the above persons.

The undersigned hereby certifies that a true and correct copy of this Notice of Filing, together with a copy of the documents described above, were today served upon the Hearing Officer and Division of Legal Counsel by electronic-mail, this 7<sup>th</sup> day of February, 2023. The number of pages of this filing, other than exhibits, is 16.

Respectfully submitted,  
J.D. STRETT & COMPANY, INC.,  
Petitioner,

BY: LAW OFFICE OF PATRICK D. SHAW

BY: /s/ Patrick D. Shaw

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	)	(LUST Permit Appeal)
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**PETITIONER’S MOTION FOR SUMMARY JUDGMENT**

NOW COMES Petitioner, J.D. STRETT & COMPANY, INC., by its undersigned counsel, moves for summary judgment pursuant to Section 101.516(b) of the Board’s Procedural Rules (35 Ill. Adm. Code § 101.516(b)), stating as follows:

**ISSUE PRESENTED**

Whether the documentation submitted to the Agency was sufficient by a preponderance of the evidence to determine that the cost was incurred for approved work.

**STATEMENT OF UNDISPUTED FACTS**

J.D. Strett & Company, Inc. (“J.D. Strett”), of Maryland Heights, Missouri, operated a gasoline station and convenience store at 3225 South Park Avenue, Herrin, Illinois from August of 1996 until early 2021. (A.R.006; A.R.0057; A.R.0064)<sup>1</sup> The site was assigned LPC# 1990400008. (A.R.0057) On February 1, 2021, a gasoline release was reported from the two

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<sup>1</sup> There are several typographical errors in the administrative record regarding the address, including in the initial No Further Remediation letter. (R.0149) This does not appear to be material to any issue herein.

tanks at the site to the Illinois Emergency Management Agency (“IEMA”). (R.0001) IEMA assigned Incident No. 2021-0114 to the release. (A.R.0001) J.D. Streett’s consultant, CSD Environmental Services, Inc., stated that the tanks would be removed. (A.R.0002)

A permit to remove the underground storage tanks and all associated piping was submitted to the Office of the State Fire Marshal (“OSFM”) by Robert Ellis & Sons of Murphysboro, Illinois on February 11, 2021. (A.R.0069; A.R.0127) Robert Ellis & Sons was subcontracted to perform the environmental work for a lump sum rate for the prime contractor, Neumayer Equipment Company, Inc. of St. Louis, Missouri. (A.R.0214-R.0215) The permit was approved on February 15, 2021. (A.R.0127) The tanks and piping were removed on March 4, 2021, in the presence of an OSFM Storage Tank Safety Specialist. (A.R.0069) The OSFM Log of Underground Storage Tank Removal/Piping Removal indicated that contamination was found in the pipe trench of both tanks and water was present in the excavation. (A.R.0054-A.R.056) OSFM also verified that Robert Ellis & Sons workers had the necessary certifications. (A.R.0055) CSD Environmental Services was also on-site to provide oversight for the owner, collect soil samples and take photographs. (A.R.0069; A.R.0128 - A.R.0131)

The underground storage tanks had been backfilled with CA-16 chip stone, which was removed and stockpiled nearby in order to access the tanks. (A.R.0067) Soil samples were collected from the floor and sidewalls of the excavation, and the backfill was returned to the excavation thereafter. (A.R.0066-R.0067) After cleaning, the tanks were hauled to a local scrapyard for recycling. (A.R.0070) Between March 8 and 15, 2021, 186.74 tons of CA06 Rock was backfilled into the void left by the removal of the underground storage tanks. (A.R.0070)

On March 16, 2021, OSFM determined that J.D. Streett was “eligible to seek payment of

costs in excess of \$5,000” from the Underground Storage Tank Fund. (A.R.0007)

On March, 25, 2021, CSD Environmental Services submitted a 45-Day Report for the incident to the Illinois Environmental Protection Agency (“IEPA”). (A.R.0058) The 45-Day Report certified that the most stringent Tier 1 remediation objectives had been met by early action activities and requested issuance of a No Further Remediation letter. (A.R.0060; A.R.0070 - A.R.0071)<sup>2</sup> On April 20, 2021, the 45-Day Report was approved and a No Further Remediation Letter was issued. (A.R.0139) The address on the Letter was subsequently corrected. (A.R.0152) The corrected No Further Remediation Letter was then recorded. (A.R.0162)

On August 23, 2021, J.D. Streett submitted a billing package for reimbursement for the early action activities in the amount of \$21,884.08. (A.R.0184) These costs included laboratory analysis and consulting costs in the amount of \$10,092.80, but since these are not at issue in the appeal, they will not be discussed in any detail herein.

The portion of the billing package at issue requested \$3,340.34 for backfilling the void from the removed tanks and \$8,450.94 for removal of the two underground storage tanks:

**Backfilling the Excavation:**

<b>Number of Cubic Yards</b>	<b>Cost per Cubic Yard (\$)</b>	<b>Total Cost</b>
<b>124.50</b>	<b>26.83</b>	<b>\$3,340.34</b>

(A.R.0187)

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<sup>2</sup> “The owner or operator must determine whether the areas or locations of soil contamination exposed as a result of early action excavation (e.g., excavation boundaries, piping runs) or surrounding USTs that remain in place meet the most stringent Tier 1 remediation objectives of 35 Ill. Adm. Code 742 for the applicable indicator contaminants.” (35 Ill. Adm. Code 734.210(h))

Product Stored in UST	Size (gallons)	Abandoned or Removed	Cost (\$)	Did UST have a release?
Gasoline	12,000	Removed	\$4,225.47	Yes
Gasoline	10,000	Removed	\$4,225.47	Yes

(A.R.0189)

The billing package contains tickets for backfill from Anna Quarries (65.54 tons) and from the Southern Illinois Stone Quarry (121.20 tons). (A.R.0221-R.0229) The billing package further included invoices and check stubs for payments from JD Streett to Neumayer Equipment Company in the amount of \$40,371.25. (A.R.0216-R.0219) The billing package also includes Neumayer Equipment's contract with JD Streett, and its invoice for work associated with removal of the underground storage tank systems and backfilling the voids in the amount of \$11,791.28. (A.R.0213 - A.R. 0215)

On September 28, 2021, Nicole Howland, an IEPA Account Technician II, e-mailed the consultant asking for two things in order to complete her review of the billing package:

- 1. I need invoices for the backfill from each vendor, not just the ticket manifests.**
- 2. The permit for tank removal has Robert Ellis & Sons listed as the company to perform the removal. I do not have any invoices from this company. The invoices submitted are from Neumayer.**

(A.R.0174.5)

In response, the consultant explained that Neumayer was the party with whom J.D. Streett contracted; Neumayer was paid for that work pursuant to a contract and invoices contained in the billing package; J.D. Streett does not have any invoices from Robert Ellis & Sons; tickets for the backfill show the amount charged; the billing package documented that the work was completed;

and the information submitted has been approved in the past. (A.R.0173; A.R.0173.5; A.R.0174; A.R.0174.5) The consultant obtained a copy of the subcontract agreement between Neumayer and Robert Ellis & Sons and submitted it to the Agency. (A.R.0173; A.R.0175; A.R.0175.5; A.R.0176) Howland explained that invoices need to be from Robert Ellis & Sons because they are the permitted company. (A.R.0173-R.0174) The consultant repeatedly asked what regulation requires invoices only to be from the permitted company. (A.R.0173.5) Howland then asked her supervisor, Brian Bauer, whether the subcontract agreement was sufficient, noting that it is “not exactly an invoice, but it has an amount.” (A.R.0173) Bauer replied that “No that won’t work.” (A.R.0173)

On November 5, 2021, the IEPA issued its determination letter approving \$5,092.80, which cut all costs for removing the underground storage tanks and backfilling. (A.R.0241) The IEPA also applied a \$5,000 deductible which is not at issue here. The letter offered these explanations concerning backfilling costs (#1) and tank removal costs (#2):

**1. ... Documentation/invoices provided do not match the amount requested for reimbursement. Invoices for the purchase of the backfill material as well as from the contractors/subcontractors that actually performed (transported and placed the backfill material) the work needs to be provided.**

...

**2. ... An invoice from the company that removed the USTs and was listed on the OSFM permit was not submitted to the Illinois EPA.**

(A.R.0244-A.R.0245)

On December 10, 2021, J.D. Streett timely filed a petition asking the Board to review the Agency determination. (See Board Order of December 16, 2021)

**LEGAL STANDARDS AND SCOPE OF REVIEW**

The Agency's refusal to pay or authorize only partial payment may be appealed to the Board. See 415 ILCS 5/57.8(i). The question posed herein is "whether the application, as submitted to the Agency, would not violate the Act and Board regulations." Metropolitan Pier & Exposition Authority v. IEPA, PCB 10-73, slip op. at 51 (July 7, 2011). This does not entail review of every statute, regulation and interpretation thereof, for "on appeal before the Board, the Agency's denial letter frames the issue." Evergreen FS v. IEPA, PCB 11-51, slip op. at 16 (June 21, 2012) This denial letter must give written notification of the specific type of information the Agency needed to complete its review, an explanation of the legal provisions that might be violated if the application for payment is approved, and a statement of the specific reasons why those legal provisions may be violated. (35 Ill. Adm. § 734.610(d))

Within the context of issues identified in the Agency decision letter, Petitioner has the burden of proof in these proceedings. Evergreen FS v. IEPA, PCB 11-51, slip op. at 16 (June 21, 2012) The standard of proof in UST appeals is a "preponderance of the evidence." Id. "A proposition is proved by a preponderance of the evidence when it is more probably true than not." Id.

The Board has promulgated rules for summary judgments: "If the record, including pleadings, depositions and admissions on file, together with any affidavits, shows that there is no genuine issue of material fact, and that the moving party is entitled to judgment as a matter of law, the Board will enter summary judgment." (35 Ill. Adm. Code § 101.516(b)) This motion for summary judgment is based upon the record as supplemented by agreement of the parties and approval of the Hearing Officer. A party opposing a motion for summary judgment may not rest

on its pleadings, but must "present a factual basis which would arguably entitle [it] to a judgment." Gauthier v. Westfall, 266 Ill. App. 3d 213, 219 (2d Dist. 1994).

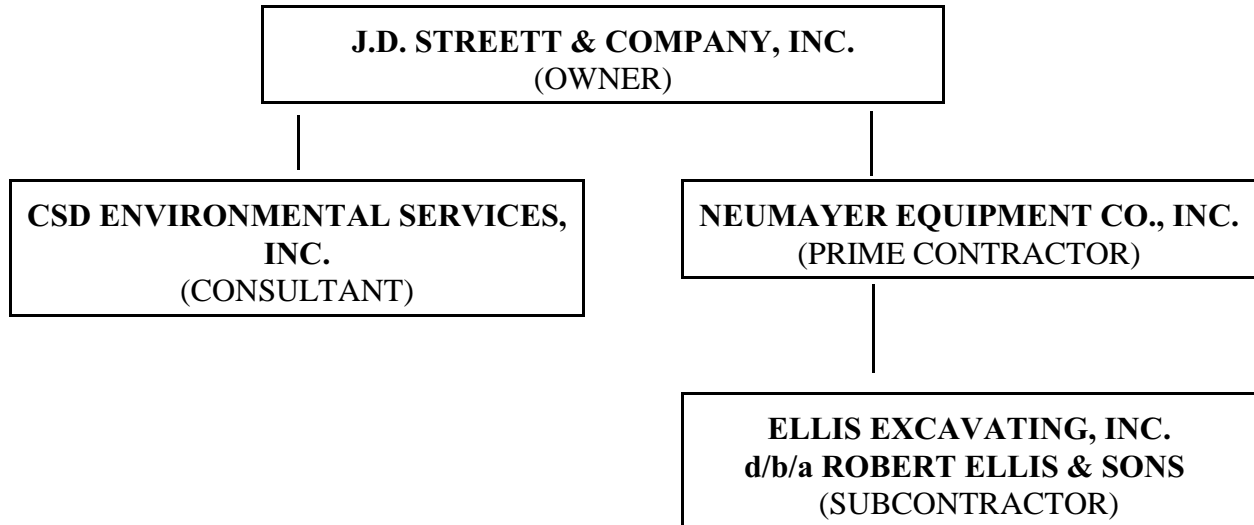
### **ARGUMENT**

The business arrangements touched on by this appeal are not necessarily novel, but may differ sufficiently from other appeals that they deserve review. J.D. Streett contracted with Neumayer Equipment for a tank removal, which included dismantling and removing the canopy and dispensers and other activities related to the tank removal, though not any resurfacing or paving. (A.R.0214 - A.R.0215) The environmental work was expected to be performed through a subcontractor. (A.R.0215) The contract price was a lump sum amount of \$40,371.25, with \$4,000.00 due upon acceptance, the remainder due upon completion. (A.R.0215)

In turn Neumayer Equipment entered into a subcontract agreement with Ellis Excavating, Inc., doing business as Robert Ellis & Sons. (A.R.0175 - A.R.0176) The subcontract, attaches the Quote (i.e., the contract between J.D. Streett and Neumayer Equipment) and requires Robert Ellis & Sons to provide the labor and material for the project in exchange for a lump sum amount of \$29,800. (A.R.0175)

In addition, J.D. Streett retained an environmental consulting firm, CSD Environmental Services, Inc. (A.R.004-A.R.006 (20-Day Certification)) The LUST Program necessitates work performed subject to the oversight of licensed professionals. (E.g., 415 ILCS 5/57(5); 415 ILCS 5/57.7(f)) Frequently, the consulting firm acts as the general contractor, but not here. The following flow chart summarizes the roles on this project:





On February 10, 2021, Neumayer Equipment signed the contract with J.D. Streett, and Neumayer Equipment sent an invoice to J.D. Streett for the \$4,000 owed under that contract. (A.R.0216) J.D. Streett issued a check on February 19, 2001 for \$3,960, which appears to have been the result of a one-percent discount for prompt payment. (A.R.0217)

Tanks were removed on March 4, 2001, by Robert Ellis & Sons, in the presence of personnel from CSD Environmental Services and OSFM. (A.R.0069) Between March 8 and March 15, 2021, the void from the removed tanks was backfilled. (A.R.0070) On March 24, 2021, Neumayer Equipment sent an invoice to J.D. Streett for the \$36,371.25 remaining on the contract. (A.R.0218) J.D. Streett sent a check for \$36,371.25 on April 5, 2021. (A.R.0219) Neumayer Equipment issued an invoice to J.D. Streett for that portion of the work involving removal of dispensers, piping and USTs from the site in the amount of \$11,791.28. (A.R.0213)

The administrative record also includes evidence of payments to various vendors: receipt from U.S. Postal Service (A.R.0204); invoice from laboratory (A.R.0206); receipt from County Clerk (A.R.0211); and load tickets for backfill from two quarries (A.R.0221 - A.R.0229).

**I. J.D. STRETT DOCUMENTED PERFORMANCE OF THE WORK.**

The applicable regulations do not require an invoice from a permitted subcontractor so long as documentation shows the dates and descriptions of the work performed. The goal of the Agency's review of payment applications is to determine "whether there is sufficient documentation to demonstrate that the work was completed in accordance with the requirements of this Part." (35 Ill. Adm. Code § 734.610(a)(2)) A complete application for payment must include "[a]n accounting of all costs, including but not limited to, invoices, receipts and supporting documentation showing the dates and descriptions of the work performed." (35 Ill. Adm. Code § 734.605(b)(9) (emphasis added)) However, if handling charges are requested, additional proof of payment of subcontractors is required. (35 Ill. Adm. Code § 734.605(b)(10)) Handling charges were not requested herein.

While there are numerous regulatory requirements for early action, most are not at relevant here. The primary applicable provision is that the tank system, as well as certain contaminated fill material or groundwater, may be removed. (35 Ill. Adm. Code § 734.210(f)) The removal of underground storage tanks must be in accordance with regulations promulgated and under the jurisdiction of OSFM. (Id.) No contaminated fill material or groundwater was removed. While any backfill returned to the excavation must be analyzed as soil samples (35 Ill. Adm. Code § 734.210(h)(1)(D)), the non-soil fill material present here (rock) could not be sampled (A.R.0067). There are no plans or budgets for early action either. (415 ILCS 5/57.7(c)(3)) Even given the limited regulatory requirements, it remains true that the removal of underground storage tanks is the most well-documented activities that take place in the LUST Program, as the OSFM will be present to ensure that the tanks are properly removed, thus ending

its jurisdiction over the site.

**A. PROOF THAT THE TANKS WERE REMOVED.**

The most detailed evidence of the tank removal is contained in the 45-Day Report prepared by the Consultant who was present “on-site to provide oversight for the owner and to collect soil samples.” (A.R. 0069) This document contains a narrative of the tank removal and cleaning operations, which includes the dates and description of the work performed. (A.R.0069) There are photographs of the excavated tank system. (A.R.0128 - A.R.0131) This documentation is certified as accurate by the owner/operator, consultant and licensed professional engineer under the threat of the severe sanctions. (A.R.0063) The Agency approved the 45-Day Report on April 20, 2021, finding that the information in the 45-Day Report was sufficient to close the site. (A.R.0139) A similar certification as to accuracy of the billing package was made as well. (A.R.0195)

Moreover, an OSFM Storage Tank Safety Specialist was on-site during the removal of the underground storage tank system, verifying that the tank removal was performed properly. (A.R.0012 (Site Assessment Results Report); A.R.0054 - A.R.0056 (Log of Underground Storage Tank Removal/Piping Removal)) The primary requirement for tank removal work is compliance with OSFM requirements (35 Ill. Adm. Code § 734.210(f)) and with respect to this portion of the work, an OSFM Storage Tank Safety Specialist was present to observe the subcontractor was properly licensed and properly completed the work. OSFM also documented the nature of the work performed and the date.

Furthermore, the record includes the subcontract agreement between Neumayer

Equipment and Robert Ellis & Sons. (A.R.0175 - A.R.0176) This is a lump sum agreement that does not necessarily require an invoice. Once the work was performed and the contractor was paid by the owner, the entire amount was due to the subcontractor. By comparison, time and materials arrangements reflect a flexible contract price which is subsequently established through periodic invoicing which gives notice of the balance due. The subcontract agreement serves the function of an invoice as it provides the cost for all of the work (\$29,800), although the costs incurred under the contract herein was more than the amount sought in the billing package which was only \$11,791.28.

By a preponderance of the evidence the documents in the record support that the underground storage was properly removed on March 4, 2021.

**B. PROOF OF THE QUANTITY AND COST OF BACKFILL MATERIAL.**

The 45-Day Report further explains that “[u]pon completion of all UST removal work, RES provided and placed a total of 186.74 tons of CA06 rock into the tank field between March 8 and 15, 2021. This backfilling work was necessary to fill the void from the removed USTs.” (A.R.0070) Rock tickets from two quarries identify a total of 186.74 tons of rock were purchased from two quarries for a total of \$1,973.22, and was paid in cash. (A.R. 0221 (Agency handwritten notes)) The dates on the tickets also support that backfilling was performed between March 8 and 15, 2021. As discussed in the previous section, the subcontractor agreement in the record shows that backfilling the void was performed pursuant to a lump sum agreement.

It is well established that backfill tickets are needed to document how much backfill was placed into an excavation. Friends of the Environment v. IEPA, PCB 16-102 (July 21, 2016). In

that case, the consultant was retained to provide all services for remediation of the underground storage tank release. All backfilling costs were rejected for want of purchase tickets for the sand backfill. Id. at 3 (“No document lists the cost for purchasing the backfill material.”) The purchase tickets are needed to show “how much was paid for the backfill material or what quantity of material [the subcontractor] transported.” Id.<sup>3</sup>

The backfill tickets document what was purchased, who purchased it, when it was purchased and the cost of the material. Along with the subcontract agreement showing the lump sum cost amount incurred for the work, these documents demonstrate by a preponderance of evidence the documentation required by the Board’s regulations.

**II. IN ADDITION, THE AGENCY CAN ONLY REQUIREMENT FINANCIAL INFORMATION RELIED UPON BY THE OWNER OR OPERATOR.**

While the documentation submitted in the billing package supports that the early action work was performed, an additional issue is that the Agency demanded documents that the Owner did not possess (and may not even exist) under threat of non-payment for all of the physical work from removing tanks and backfilling the hole. “When it receives a request for payment, the Agency may review ‘supporting documentation relied upon by the owner or operator in developing the application for payment, including but not limited to a review of invoices or receipts supporting all claims.’” Knapp Oil Co. v. IEPA, PCB 16-103, slip op. at 9 (Sept. 22,

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<sup>3</sup> While purchase tickets are conventionally used for backfill, these tickets are tantamount to an invoice. Backfill is not sold on a lump sum basis, but based upon rates that require weighing each load to determine the cost for a given load. The tickets memorialize the transaction as an invoice would.

2016) (quoting 35 Ill. Adm. Code § 734.610(c)) (emphasis added)) Pursuant to the clear language of the Board's regulations, the Agency may review technical or financial information relied upon in developing the application for payment.<sup>4</sup> The word "rely" means "to be dependent," as in the system on which we rely for water. See Merriam Webster's Collegiate Dictionary (10<sup>th</sup> ed. 1993). The Agency was informed that not only did the owner not have specific invoices, the information relied upon by the owner was more than adequate to show the dates and description of the work performed. (A.R.0173.5 (identifying "the UST removal permit, the OSFM site assessment report, the OSFM inspector's log of removal, backfill tickets, photographs, etc. etc.)) This information has been adequate for the Agency in the past, and it is fundamentally unfair to create new inflexible documentation requirements without prior notice and comment rulemaking.

**III. THE REMAINING LEGAL PROVISIONS CITED IN THE DETERMINATION LETTER ARE LEGALLY INAPPLICABLE TO EARLY ACTION.**

Under the statutory and regulatory provisions governing early action, there are certain activities that must be taken within forty-five days after initial notification to IEMA, including early action activities "prior to submission of any plans to the Agency." (415 ILCS 5/57.6(b); see also 35 Ill. Adm. Code § 734.210 (Early Action requirements)) "[N]o budget must be required

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<sup>4</sup> The significance of this "relied upon" condition for supporting documentation is reflected in the remaining portion of the regulation: "The review also may include the review of any plans, budgets, or reports previously submitted for the site to ensure that the application for payment is consistent with work proposed and actually performed in conjunction with the site." (35 Ill. Adm. Code § 734.610(c)) While giving the Agency permission to review its own records for the site seems unworthy of the need for explicit permission, the "relied upon" requirement could possibly exclude it in some cases otherwise.

for early action activities.” (35 Ill. Adm. Code 734.605(a) (Applications for Payment)) This provision allows for substantial and speedy remediation of the immediate area which is the source of the contamination.

The IEPA Determination Letter cites purported violations of the following provisions:

**In approving any plan submitted pursuant to subsection (a) or (b) of this Section, the Agency shall determine, by a procedure promulgated by the Board under Section 57.14, that the costs associated with the plan are reasonable, will be incurred in the performance of site investigation or corrective action, and will not be used for site investigation or corrective action activities in excess of those required to meet the minimum requirements of this Title. The Agency shall also determine, pursuant to the Project Labor Agreements Act, whether the corrective action shall include a project labor agreement if payment from the Underground Storage Tank Fund is to be requested.**

(415 ILCS 5/57.7(c)(3) (emphasis added))

**Costs ineligible for payment from the Fund include, but are not limited to . . . [c]osts proposed as part of a budget that are unreasonable.**

(35 Ill. Adm. Code § 734.630(dd) (emphasis added))

Early action activities are performed without plans and budgets, and the speed at which early action is performed necessarily precludes achieving the standards to be expected with planning and budgeting.

### **CONCLUSION**

WHEREFORE, Petitioner, J.D. STRETT & COMPANY, INC., prays that: (a) the Board find the Agency erred in its decision, (b) the Board direct the Agency to reimburse the costs as submitted (subject to the deductible), (c) the Board award payment of attorney’s fees; and (d) the Board grant Petitioner such other and further relief as it deems meet and just.

J.D. STRETT & COMPANY, INC.,  
Petitioner

By its attorney,  
LAW OFFICE OF PATRICK D. SHAW

By: /s/ Patrick D. Shaw

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