BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

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

NOTICE OF FILING AND PROOF OF SERVICE

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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 Response to Illinois EPA's Cross Motion for Summary Judgment or In the Alternative Response to Petitioner's Motion of 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 14th day of March, 2023. The number of pages of this filing, other than exhibits, is10.

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

BY: LAW OFFICE OF PATRICK D. SHAW

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PETITIONER'S RESPONSE TO ILLINOIS EPA'S CROSS MOTION FOR SUMMARY JUDGMENT OR IN THE ALTERNATIVE RESPONSE TO PETITIONER'S MOTION OF SUMMARY JUDGMENT

NOW COMES Petitioner, J.D. STREETT & COMPANY, INC., by its undersigned counsel, pursuant to Section 101.516(a) of the Board's Procedural Rules (35 Ill. Adm. Code § 101.516(a)), responds to Illinois EPA's Cross Motion for Summary Judgment or In the Alternative Response to Petitioner's Motion of Summary Judgment ("Cross Motion") as follows:

INTRODUCTION

While the Illinois EPA's filing describes itself as a cross motion for summary judgment, or alternatively a response to Petitioner's motion for summary judgment, there is no response to the factual and legal arguments in Petitioner's motion . First, the Illinois EPA completely ignores supporting documentation in the payment application and fails to explain or provide specific reasons why such supporting documentation is insufficient. Second, the Illinois EPA completely ignores the regulatory language found in its own legal argument that limits a full accounting to supporting documentation "relied upon by the owner or operator in developing the application for payment." (35 Ill. Adm. Code § 734.610(c)) From the Illinois EPA's posture it appears that it has a uniform internal rule requiring subcontractor invoices in all cases, even if the information is available in another form.

I. The Application for Payment Supplies the Needed Information.

The Board regulations do not define "supporting documentation," Friends of the Environment, PCB 16-102, slip op. at p. 5 (July 21, 2016), which means that the term will differ based upon the content of each submittal. An invoice may be one means of providing information to process an application, but it is not the only means. An accounting may include "a review of invoices or receipts" (35 Ill. Adm. Code § 734.610(c)), as well as other documents that supply the information (35 Ill. Adm. Code § 734.605(b)(9) (application must include "invoices, receipts, and supporting documentation showing the dates and descriptions of the work performed")) As to the latter point of authority, it is important that nowhere in the Cross Motion is the absence of "dates and descriptions" of subcontractor's work alleged.

Confusingly, the Illinois EPA cites and emphasizes documentation needed to seek reimbursement for handling charges. (Cross Motion, at pp. 7-8, & 9) Proof that a subcontractor has been paid is only required when handling charges are requested. (35 Ill. Adm. Code § 734.605(b)(9)) Implicit in that specific requirement is that proof that subcontractors have been paid is not required where, as here, handling charges were not sought. The record shows what the subcontractor charged, (A.R.0175 (Sub Contractor Agreement)), as well as what it paid in cash for the backfill material (A.R.0221 - A.R.0229 (backfill tickets)), and nowhere does the Cross Motion feign ignorance as to what the subcontractor charged. Nor does the Cross Motion answer the Illinois EPA reviewer's own question: "What about this contract? It's not exactly an invoice, but it has an amount." (A.R.0173)

There are two Board decisions cited in the Cross Motion that address supporting

documentation for costs of backfilling and none involving costs of tank removal.[1] For purposes of reimbursement for costs of backfilling, the Board's regulations set maximum payment amounts based upon the volume of the excavation backfilled and a "conversion factor of 1.5 tons per cubic yard must be used to convert tons to cubic yards." (35 Ill. Adm. Code § 734.825(b))

In Freedom Oil Co. v. IEPA, PCB 10-46 (August 9, 2012), the owner/operator unsuccessfully challenged the regulatory conversion factor as an arbitrary and capricious rule as applied to its situation. Id. at pp. 15-18. The Cross Motion incorrectly characterizes the Board's decision as upholding a determination that subcontractor invoices were required. Cross Motion, at p. 9. To the Contrary, the Illinois EPA in Freedom Oil relied on an invoice from the backfill supplier to pay Freedom Oil substantially all it requested. Id. at p. 11. Specifically, the backfill supplier invoices showed 748.27 tons of gravel were provided, which was equal to 498.9 cubic yards using the conversion factor. Id. at p. 17. The consultant provided a different measurement (560 cubic yards) based upon the "size of the excavation" using unspecified methodology. Id. at p. 17. Given that Freedom Oil did not and could not challenge the accuracy of the weight of the gravel as measured by the supplier (Id.), the issue before the Board was solely the challenge to the conversion factor rule. The Board rejected the challenge and found that reimbursement for backfilling activities was properly calculated based upon the documentation from the backfill supplier, plus the conversion factor. Applying Freedom Oil to the present case should result in affirmance of Petitioner's application.

[1] The Board's decision in Clarendon Hills Bridal Center v. IEPA, PCB 93-55 (Feb. 16, 1995), should be disregarded entirely as it concerns a case that arose prior to the enactment of Title XVI of the Illinois Environmental Protection Act (P.A. 88-496, § 15 (effective Sept. 13, 1993)), and by extension the Board's LUST regulations, including Subpart H rates.

In Friends of the Environment v. IEPA, PCB 16-102 (July 21, 2016), there were no documents showing weight measurements from the backfill supplier at all. Friends requested reimbursement for $1,982.40 for backfilling costs, but "[n]o document lists the cost for purchasing the backfill material." (Id. at p. 3) Purchase tickets were needed to show "how much was paid for the backfill material or what quantity of material [the subcontractor] transported." Id. Again, the tickets in the administrative record herein show the quantity and cost of the backfill material. (A.R.0221 - A.R.0229 (backfill tickets))

Both of these cases addressing backfill documentation reinforce the importance of documentation from the backfill supplier, which were provided herein. While the Subpart H rates are maximum payment amounts, those rates are considered reasonable. T-Town Drive Thru v. IEPA, PCB 07-85, slip op. at 22 (April 3, 2008) Documentation showing the quantity of backfill material acquired from the supplier was provided and demonstrates that the costs for which payment is sought are reasonable.

There is no particular discussion of tank removal activities in the Cross Motion other than mentioning that the subcontractor of a tank removal needs a permit to perform the work, and the Illinois EPA needs to ensure that the work was done in accordance with the Act and regulations. (Cross Motion, at p. 10) Tank removal activities must comply "with the regulations promulgated by the Office of the State Fire Marshal." (415 ILCS 5/57.6(b)) The Office of the State Fire Marshal regulations require a licensed UST contractor to perform a tank removal. (41 Ill. Adm. Code 172.40(a); see also 41 Ill. Adm. Code 172.30 ("UST Activity" for which license is required includes UST removal)) The Office of the State Fire Marshal was present during the tank removal to ensure that the work met the legal requirements for a tank removal. (A.R.0012 (Site

Assessment Results Report); A.R.0054 - A.R.0056 (Log of Underground Storage Tank Removal/Piping Removal)) The Illinois EPA's role in overseeing OSFM certainly must stop once it has been documented that OSFM did in fact oversee the tank removal for compliance with its own regulations.

One final observation to make about the cases cited in the Cross Motion are the overall costs of early action activities sought. Freedom Oil Co. v. IEPA, PCB 10-46 (August 9, 2012) ($84,652.35 sought; $67,632.30 approved); Friends of the Environment v. IEPA, PCB 16-102 (July 21, 2016) ($43,974.55 sought; $24,146.98 approved); see also Dickerson Petroleum v. IEPA, PCB 09-87 (Dec. 2, 2010) (clean-up objectives attained upon completion of corrective action, $84,090.69 sought; $67,780.63 approved). While Petitioner does not argue that the demonstrably low cost of this work herein ($21,884.08 before the $5,000 deductible) should be dispositive of all issues, the Board should cast a skeptical eye that the supporting documentation herein is somehow inadequate.

II. In Addition, the Illinois EPA Cannot Require Documents that the Owner Does Not Possess or May Not Exist.

The Illinois EPA asserts that it may require subcontractor's invoices pursuant to its right to conduct a full audit. (Cross Motion, at p. 7 & 10) The regulatory right to a "full accounting" is set forth in the following Board regulations:

> **(b) When conducting a review of any application for payment, the Agency may require the owner or operator to submit a full accounting supporting all claims as provided in subsection (c) of this Section.**
>
> **(c) The Agency's review may include a review of any or all elements and 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. 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.**

(734 Ill. Adm. Code § 734.610(b) & (c) (emphasis added))

Nothing contained in the administrative record or the Cross Motion evidence that the requested subcontractor's invoices were "relied upon" by Petitioner in developing the application for payment. Instead, the undisputed evidence is that the owner did not in fact rely upon the subcontractor invoices since it did not have any. (A.R.0174 ("the owner doesn't have any invoices from Robert Ellis & Sons."); A.R.0173.5 ("the owner doesn't have these invoices")) This is substantiated by the contracts submitted to support the application – neither Petitioner, nor its consultant, were in privity with Robert Ellis & Sons. (Mot. S.J., at p. 8) Furthermore as argued in the previous section, substantial documentation was provided consistent with past Illinois EPA approvals, so there would have been no need for additional, redundant documentation to support the costs sought.

A basic rule of statutory construction requires courts "to give effect to each paragraph, sentence, clause, and word. A court should construe a statute, if possible, so that no term is rendered superfluous or meaningless." McAffee v. IEPA, PCB 15-84, slip op. at 15 (Mar. 5, 2015). The rules governing the interpretation of regulatory language are the same as those applied in construing statutes, and the Board will not read language out of its regulations. American Bottom Conservancy v. IEPA, PCB 06-171, slip op. at 30 (May 6, 2010).

"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.' 35 Ill. Adm.

Code 734.610(c). The Agency may also review documents to ensure that the application for payment is consistent with work proposed and actually performed. 35 Ill. Adm. Code 734.610(c)." Knapp Oil Co. v. IEPA, PCB 2016-103, slip op. at 9 (Sept. 22, 2016) The plain meaning of the "relied upon" limitation is supported by the additional right of "review of any plans, budgets, or reports previously submitted for the site." (734 Ill. Adm. Code § 734.610(c)) While it might otherwise seem absurd to give the Illinois EPA permission to review its own files for the site, it's necessitated to avoid the potential potential problem of an owner claiming it did not rely upon any previous plans, budgets or reports. Reading the provision as a whole, the "relied upon" language clearly intended to be a restriction on documentation Illinois EPA may require for review, though there is an express "carve-out" for Illinois EPA's own files on the site. Any other interpretation not only reads the "relied upon" language out of the regulation, it renders the "carve-out" superfluous.[2]

The "relied upon" language was not raised in any of the cases cited in the Cross Motion. In Freedom Oil v. IEPA, PCB 10-46 (Aug. 9, 2012), an invoice for the costs of backfill material was submitted, and a challenge to the conversion factor was unsuccessfully raised. In Friends of the Environment v. IEPA, PCB 16-102 (July 21, 2016), the issue was not raised, and there may have been reasons not to raise the issue given evidence suggesting the owner and consultant were alter-egos. Id. at 2, FN7 ("functionally indistinguishable").

Similarly, the issue of "relied upon" was nowhere raised in the third Board decision cited

[2] This interpretation is consistent with other Board regulations, namely the records retention requirements that obligate owners to "maintain . . . all financial information and data used in the preparation or support of applications for payment." (734 Ill. Adm. Code 734.665(a)) (emphasis added)) There is no obligation to maintain records that were not used, nor ever in the possession of the owner.

in the Cross Motion. T-Town Drive Thru v. IEPA, PCB 07-85 (Apr. 3, 2008) As with Friends of the Environment, there were likely reasons the issue was not raised. The case involved laboratory analysis submitted for payment as "stock items" on a field purchase form. Id. at pp. 5-6. By submitting this work as stock items or field purchases, the consultant was claiming that the lab work was internal as part of its own "bundle of services" for which only a portion was performed by the laboratory. Id. at 24. Notably, consultant fees were also charged separately for collecting and shipping samples on a time and materials basis. Id. at 24. At no point was it argued that laboratory invoices were unavailable or otherwise not "relied upon," as these costs were characterized (albeit unsuccessfully) as consultant's services.[3]

In summary, the Illinois EPA has failed to demonstrate that Petitioner relied upon the requested invoices that were never in Petitioner's possession. When this fact was pointed out during the review process, the Illinois EPA completely ignored it as irrelevant. When the Illinois EPA issued in determination letter, it completely ignored the fact again and failed to provide any explanation or reason for doing so. The Illinois EPA continued to do so in its Cross Motion as well.

[3] The Petitioner in T-Town was not claiming that the laboratory costs were part of a subcontract agreement. A stock item is something a consultant purchases to have available when needed, such as a box of gloves. A field purchase might be a bag of ice acquired near the site for sample preservation. These are reimbursable as consultant's costs on a time and materials basis. (35 Ill. Adm. Code 734.845) As such, the actual underlying controversy was not whether the laboratory work was performed as part of corrective action costs, or even whether the costs were reasonable (T-Town, slip op. at 22 (Subpart H maximum payments amounts are by definition reasonable)), but whether consulting costs should be included within stock items.

CONCLUSION

By a preponderance of the evidence, Petitioner has demonstrated that the invoices, receipt and supporting documentation in the payment application satisfy the requirements of the Act and regulations promulgated thereunder. Alternatively, the preponderance of the evidence demonstrates that the subcontractor's invoices were not relied upon by Petitioner in preparing the application for payment and therefore cannot justify Illinois EPA's refusal to pay the early action costs sought.

WHEREFORE, Petitioner, J.D. STREETT & 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. STREETT & COMPANY, INC.,
Petitioner

By its attorney,
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