BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

ABP PROPERTIES, LLC	)	
Petitioner,	)	
	)	
v.	)	PCB No. 2025-001
	)	(UST Permit Appeal)
ILLINOIS ENVIRONMENTAL	)	
PROTECTION AGENCY,	)	
Respondent.	)	

NOTICE OF FILING AND PROOF OF SERVICE

TO: Carol Webb, Hearing Officer
Illinois Pollution Control Board
1021 N. Grand Avenue East
P.O. Box 19274
Springfield, IL 62794-9274
(carol.webb@illinois.gov)

Richard Kim
Division of Legal Counsel
1021 North Grand Avenue East
P.O. Box 19276
Springfield, IL 62794-9276
(richard.kim@illinois.gov)

PLEASE TAKE NOTICE that I have today electronically filed with the Office of the Clerk of the Illinois Pollution Control Board, pursuant to Board Procedural Rule 101.302 (d), PETITIONER'S MOTION FOR LEAVE TO FILE REPLY IN SUPPORT OF PETITIONER'S MOTION FOR SUMMARY JUDGMENT INSTANTER, a copy of which is herewith served upon the attorneys of record in this cause.

The undersigned hereby certifies that a true and correct copy of this Notice of Filing, together with a copy of the document described above, was today served upon the Hearing Officer and Division of Legal Counsel by electronic-mail, this 27th day of September, 2024. The number of pages of this filing is 9.

Respectfully submitted,
ABP PROPERTIES, LLC
Petitioner,

BY: LAW OFFICE OF PATRICK D. SHAW

BY: /s/ Patrick D. Shaw

Patrick D. Shaw
LAW OFFICE OF PATRICK D. SHAW
80 Bellerive Road
Springfield, IL 62704
217-299-8484
pdshaw1law@gmail.com

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

ABP PROPERTIES, LLC Petitioner, v. ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, Respondent.	))))))))	 PCB No. 2025-001 (UST Permit Appeal)

PETITIONER'S MOTION FOR LEAVE TO FILE REPLY IN SUPPORT OF PETITIONER'S MOTION FOR SUMMARY JUDGMENT INSTANTER

NOW COMES Petitioner, ABP PROPERTIES, LLC, by its undersigned counsel, pursuant to Section 101.500(e) of the Procedural Rules of the Illinois Pollution Control Board (35 Ill. Adm. Code § 101.500(e)), and move for leave to file a reply instanter in support of Petitioner's Motion for Summary Judgment, stating as follows:

1. On August 29, 2024, Petitioner filed its motion for summary judgment.

2. On September 19, 2024, Respondent filed Illinois EPA's Response to Petitioner's Motion for Summary Judgment.

3. Illinois EPA's Response raises legal issues not mentioned in the Illinois EPA decision letter, which Petitioner would be materially prejudiced if it were unable to address.

4. Illinois Pollution Control Board rules authorize the filing of a motion seeking permission to file a reply within 14 days after service of the response. (35 Ill. Adm. Code 101.500(e))

5. This motion is filed fourteen days from service of the response and seeks leave to file the reply instanter.

WHEREFORE, Petitioner, ABP PROPERTIES, LLC, requests that the Board authorize permission to file the attached reply instanter, and for such other and further relief as the Board deems meet and just.

Respectfully submitted,

ABP PROPERTIES, LLC
Petitioner,

BY: LAW OFFICE OF PATRICK D. SHAW

BY: /s/ Patrick D. Shaw

Patrick D. Shaw
LAW OFFICE OF PATRICK D. SHAW
80 Bellerive Road
Springfield, IL 62704
217-299-8484
pdshaw1law@gmail.com

Electronic Filing: Received, Clerk's Office 09/27/2024

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

ABP PROPERTIES, LLC Petitioner,	)	
	)	
v.	)	PCB No. 2025-001
	)	(UST Permit Appeal)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, Respondent.	)	

PETITIONER'S REPLY IN SUPPORT OF SUMMARY JUDGMENT

NOW COMES Petitioner, ABP PROPERTIES, LLC, by its undersigned counsel, replies in support of summary judgment as follows:

I. THERE ARE NO DISPUTED ISSUES OF MATERIAL FACT.

The Illinois EPA states that "[t]here is a genuine issue of material fact," (Resp. at p. 7), and does so without identifying a single material fact in dispute. 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). The facts presented in the "FACTS" section of Illinois EPA's Response are entirely consistent, if not the same, as those presented in Petitioner's "STATEMENT OF UNDISPUTED FACTS." "The issue to be decided is the legal sufficiency of IEPA's denial reason, as stated in the denial letter. The parties pose legal arguments, but do not disagree on the facts as presented." KB Sullivan v. IEPA, PCB 21-78, slip op. at 3 (Aug. 11, 2022) Since there is no factual dispute, the Board should consider the merits of the motion for summary judgment.

Electronic Filing: Received, Clerk's Office 09/27/2024

II. BIDDING IS AVAILABLE WHENEVER CORRECTIVE ACTION CANNOT BE PERFORMED FOR LISTED COSTS, IRREGARDLESS OF ALLEGATIONS OF INFLATION, TIMELINESS OR RESPONSIBILITIES.

The Illinois EPA argues that bidding is not appropriate for any "cost increase due to inflation" which are "not a result of any action taken by the IEPA." (Response, at p 8) There is nothing in the Illinois Environmental Protection Act or the Board's regulations that excludes bidding under conditions of inflation. There are two statutory principles that guide the competitive bidding process:

> **Any bidding process adopted under Board rules to determine the reasonableness of costs of corrective action shall (i) be optional and (ii) allow bidding only if the owner or operator demonstrates that corrective action cannot be performed for amounts less than or equal to maximum payment amounts adopted by the Board.**

(415 ILCS 5/57.7(c)(3)(C))

Plainly, the only limitation on bidding is that corrective action cannot be performed, and there is no dispute that Petitioner's consultant "could not find a licensed contractor to perform the job for the approved Subpart H Maximum Payment amounts." (Response, at p. 6) Yet, the Illinois EPA quotes to Section 57.7(c)(3)(C) as authority that Petitioner must demonstrate some additional requirements beyond the fact that the listed rates were insufficient to perform corrective action. There is nothing in Section 57.7(c)(3)(C) that excludes bidding in case of inflation, or in the Board's regulations. In construing a statute, the language of the statute must be given its plain and ordinary meaning, "not depart[ing] from the plain statutory language by reading into it exceptions, limitations, or conditions not expressed by the legislature." In re Estate of Ellis, 236 Ill. 2d 45, 51 (2009)

Nor does Petitioner agree that the Illinois EPA has no responsibility here. It was never expected that the listed rates from 2006 would achieve a sort of immortality. The Illinois EPA is required to constantly evaluate whether costs in the Board's regulations reflect prevailing market rates:

> **Agency Review of Payment Amounts**
>
> **No less than every three years the Agency must review the amounts set forth in this Subpart H and submit a report to the Board on whether the amounts are consistent with the prevailing market rates. The report must identify amounts that are not consistent with the prevailing market rates and suggest changes needed to make the amounts consistent with the prevailing market rates. The Board must publish notice of receipt of the report in the Environmental Register and on the Board's web page.**

(35 Ill. Adm. Code 734.875 (emphasis added))

The Illinois EPA has never complied with this obligation, not even after the Board ruled that 2013 legislation had "resulted in the maximum rates in Subpart H being out of date." Burgess v. IEPA, PCB 15-186, slip op. at 20 (Nov. 5, 2015) Moreover, bidding was intended to prove the Illinois EPA with information to comply with this obligation. "The inclusion of competitive bidding in these new rules will allow the Agency to determine market rates based on the bids." Proposed Amendments To: Regulation of Petroleum Leaking Underground Storage Tanks (35 Ill. Adm. Code 732), R04-22(a), slip op. at 68 (Feb. 17, 2005) The Illinois EPA is responsible for monitoring prevailing market costs and recommending updates to Subpart H and rejecting competitive bidding only makes its legal responsibilities harder to perform.

Petitioner does not agree that it did not act in a timely manner, but timeliness is irrelevant under the Illinois EPA's interpretation of Section 734.800 of the Board's regulations. It's interpretation would apply any time a budget had previously been approved, whether the

subsequent budget is filed months or years later. It would apply if the delays are caused by the Illinois EPA or by something else, perhaps a pandemic. It would apply if the contractor went out of business just before the start date. It would apply to the initial steps in the corrective action plan, as well as to the final steps in the corrective action plan. All of these circumstances are irrelevant to the Illinois EPA's interpretation of Section 734.870, which if accepted by the Board would create circumstances in which the UST Fund will simply not pay corrective action costs.

The Illinois Administrative Procedures Act states that:

> **Each rule that implements a discretionary power to be exercised by an agency shall include the standards by which the agency shall exercise the power. The standards shall be stated as precisely and clearly as practicable under the conditions to inform fully those persons affected.**

(5 ILCS 100/5-20)

If the Agency possessed discretionary authority to reject subsequent budgets due to inflation or on grounds of untimeliness, the standards would have to be stated clearly in the regulations, and they are not. This is not simply a matter of the absence of a rule implementing such discretion, but that Section 734.870 does not apply to budgets based on competitive bidding. (35 Ill. Adm. Code 734.800(a))

III. THE PURPOSE OF SECTION 734.870 IS NOT TO REDUCE AGENCY WORKLOADS AT THE EXPENSE OF PAYING NECESSARY CORRECTIVE ACTION COSTS.

The Illinois EPA argues that its interpretation of Section 734.870 is consistent with a goal of reducing a "steady stream of budget revisions." (Response, at p. 8) When the legislature wanted to limit submittals, it has done so. (415 ILCS 5/57.8 (requests for payment can be made

"no more frequently than once every 90 days.")) There is no such limit on the frequency of budgets (415 ILCS 5/57.7), ostensibly because of the greater importance placed on advancing corrective action.

The purpose of Section 734.870 is to adjust listed amounts in Subpart H annually by an inflation factor, and therefore any part of Section 734.870 must be intended to address the application of the inflation factor. Notably, the Illinois EPA has not stated whether or not the inflation factor in Section 734.870 applies to costs arrived at through competitive bidding. Nor has the Illinois EPA explained why Section 734.870 is only expressly applicable to the first method for determining maximum payment amounts. (Compare 35 Ill. Adm. Code 734.800(a)(1) with id. § 734.800(a)(2))

The policy concern with the inflation adjustment factor is that it is automatic, requiring no demonstration that the increase is needed in order to perform corrective action, though without Section 734.870(d)(1), the increase would still require a budget amendment. A budget amendment is an engineered document, the preparation of which would also have to be reimbursed from the UST Fund. Together, these additions to the budget might not entail large amounts, or take that much time to prepare or for review, but they do constitute a class of potential liabilities for which there is no evidence that they would be needed in order to perform corrective action. It is entirely consistent with the purpose of the LUST Program to pay corrective action costs from the UST Fund based upon the presumptive rates, but require an additional demonstration through bidding that higher costs are indeed necessary to perform corrective action.

Electronic Filing: Received, Clerk's Office 09/27/2024

CONCLUSION

By a preponderance of the evidence, the motion for summary demonstrates that as a matter of law Section 734.870(d)(1) does not bar a subsequent budget amendment utilizing competitive bidding, so long as there is a demonstration that corrective action "cannot be performed for amounts less than or equal to maximum payment amounts adopted by the Board." (415 ILCS 5/57.7(c)(4)(C)(ii))

WHEREFORE, Petitioner, ABP PROPERTIES, LLC, prays that the Board find the Agency erred in its decision, direct the Agency to approve the budget amendment as submitted, allow Petitioner to submit proof of legal costs, and for such other and further relief as it deems meet and just.

ABP PROPERTIES, LLC,
Petitioner

By its attorneys,
LAW OFFICE OF PATRICK D. SHAW

By: /s/ Patrick D. Shaw

Patrick D. Shaw
LAW OFFICE OF PATRICK D. SHAW
80 Bellerive Road
Springfield, IL 62704
217-299-8484
pdshaw1law@gmail.com