BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

JESSE FOODMART, INC.,	)	
	)	
Petitioner,	)	
v.	)	PCB No. 2024-073
	)	(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, pursuant to Board Procedural Rule 101.302 (h), a PETITIONER'S RESPONSE TO ILLINOIS EPA'S CROSS MOTION FOR SUMMARY JUDGMENT, a copy of which is herewith served upon Respondent.

The undersigned hereby certifies that I have served this document by e-mail upon the above persons at the specified e-mail address before 5:00 p.m. on the 7th day of January, 2026. The number of pages in the e-mail transmission is 10 pages.

JESSE FOODMART, INC.,

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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

JESSE FOODMART, INC., Petitioner,	)	
v.	)	PCB No. 2024-073
	)	(LUST Permit Appeal)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, Respondent.	)	

PETITIONER'S RESPONSE TO IEPA'S CROSS MOTION FOR SUMMARY JUDGMENT

NOW COMES Petitioner, JESSE FOODMART, INC., by its undersigned counsel, responds to IEPA'S Cross Motion for Summary Judgment pursuant to Section 101.516(a) of the Board's Procedural Rules (35 Ill. Adm. Code § 101.516(a)), stating as follows:

INTRODUCTION

Petitioner filed its motion for summary judgment on October 29, 2025, and hereby incorporate it in this response in order to avoid re-arguing of facts and law already before the Board. Petitioner will use this Response as an opportunity to identify specific disagreements with the Cross Motion for Summary Judgment not previously anticipated or discussed in Petitioner's motion.

DISPUTED FACTS

The Agency assumes that only 12 borings were drilled on May 24, 2023 (Cross Motion, at p. 8) despite an invoice from Advanced Environmental Drilling & Contracting for 13 borings issued on May 25, 2023. (A.R.178) The Agency assumes that the 13th boring took place on

April 27, 2023, because only 12 samples were collected on May 24, 2025, without considering the possibility that a sample could not be collected from one of the borings advanced on May 24, 2023. The Cross Motion fails to demonstrate as an undisputed fact that only twelve borings were drilled on May 24, 2023.

OFFICIAL NOTICE

Respondent did not object to taking official notice of the documents attached to Petitioner's motion for summary judgment.

ARGUMENT

1. First Deduction – Drilling Costs Mistakenly Described as Confirmation Sampling ~~($253.60)~~.

Since the costs of confirmation drilling were not sought in the application for payment, proof of those costs was not included, nor required to be included. As stated above, there appears to be a disputed fact about the thirteenth boring that cannot be resolved in the record and given the relatively small size of this deduction, Petitioner no longer wishes to appeal this deduction.

2. Fourth Deduction – Tank Abandonment Subcontractor Labor and Equipment Improperly Deducted ($10,436.58)

The Agency seems to be arguing that the information in the record before the Board

supports payment of these costs, but it arrived too late. (Cross Motion at 15, discussing A.R. 195 & 200)) However, the Agency has not moved to strike any materials from the record.

More importantly, the Agency does not explain what information was needed to ensure that the payment application complied with relevant legal provisions or indeed what those relevant legal provisions might be. In order to deny any part of an application for a "lack of documentation," the Agency must explain "the specific type of information, if any, that the Agency needs to complete the review." (35 Ill. Adm. Code § 734.610(d)(1)) The application, as submitted, included the invoice from the contractor identifying who performed the work, when the work was performed, and how much was charged. (A.R.144) The application also included receipts for Bandy's other costs. (A.R.150- A.R.167) A description of the early action work performed was submitted with the 45-Day Report (A.R.014), which was reviewed and approved by the Agency. (A.R.91) The Petitioner provided an accounting of Bandy's costs through the invoices and receipts showing the dates and description of the work performed as required by Board regulations. (35 Ill. Adm. Code 734.605(b)(9)) Since the Petitioner provided documentation demonstrating how the costs were incurred, by whom, and that the work was a part of early action, the Agency must reimburse the requested amount. KB Sullivan v. IEPA, PCB 21-78, slip op. at 5 (Aug. 11, 2022)[1]

[1] While KB Sullivan dealt with consultant's costs of corrective action, the analysis applies even more so with respect to subcontractor's costs. Consultants are paid to help navigate owner/operators through the requirements of the LUST Program, and their invoices can be expected to be more responsive to the requirements set forth in the Board's regulations. On the other hand, subcontractors are generally performing work for which underground storage tank remediation is merely a subset of a trade in excavation, construction, hauling, backfilling and building supplies. They are responsible for making sure their part of the work, including staffing, is consistent with safety and union requirements, that are not subject to environmental regulation.

Despite the adequacy of this documentation, the Agency reviewer asked questions about the invoice, such as how were equipment charges assessed and how many Bandy personnel were on site. (A.R.198) Since the Agency reviewer understood the decision deadline was in two days, and possibly knew that the consultant would not know all the answers without asking the subcontractor, she suggested giving her a 30-day waiver which "will help avoid potential deductions due to ambiguity." (A.R.198) There was no claim that documentation was missing. Moreover, since the Agency accepted the waiver of the decision deadline, it necessarily determined the application was complete. See Metropolitan Pier and Exposition Authority v. IEPA, PCB 10-73, slip op. at 23 (July 7, 2011) (interpreting what is currently 35 Ill. Adm. 734.610(e) as only authorizing the Agency to request or accept a waiver of the decision deadline for a complete application). Petitioner answered all of the questions (A.R.196), and then and there it became the obligation of the Agency reviewer to decide whether the submittal complied with the substantive requirements of the Board's regulations, such as whether the number of personnel used by Bandy was unreasonable.

Since the application for payment was complete in fact and by operation of law, the Agency's bare argument in the Cross Motion that the submittal lacked supporting documentation without identifying any legal provision implicated is without basis.

3. Sixth and Seventh Deductions – Mileage ($100.30)

Petitioner agrees that the Agency reviewer was confused, but the information about the dates of consultant travel time were in the invoices included with the payment application. The denial reasons frame the issues in any appeal and the Agency reviewer incorrectly assumed fewer

trips than were actually documented in the payment application. The Cross Motion appears to agree with portions of Petitioner's Motion for Summary Judgment on this issue, but raises a new issue about the April 27, 2023, trip which was not raised in the denial reasons. (A.R.211 (decision letter makes cuts to May 24, 2023 and June 5, 2023 trips)) The Cross Motion does not support the Agency's decision that is under review and should be denied accordingly.

4. Tenth Deduction – Site Assessment/Background Information ($281.76)

The Agency is correct that Petitioner's Motion for Summary Judgment mistakenly identified this as a $704.40 cut.

The Agency decision letter made this cut with the explanation that "site assessment/background information" is ineligible as early action costs (A.R.212), or as the Agency review notes state: "$281.76 for Sr PM for OSFM SA." (A.R.220) She rejected the costs categorically. The Cross Motion for Summary Judgment doesn't support the Agency's reasons for making the cut, and attempts to shift the focus on issues not raised in the decision letter about the Agency reviewer being "unclear" about things. (Cross Motion, at 16) She did not find the submittal ambiguous enough to ask any questions, she made the deduction because she thought the work was "OSFM" work and therefore ineligible. The Cross Motion does not give any legal justification for this deduction.

5. Eleventh and Twelfth Deductions – Drilling to Confirm Release ($810.06)

First of all, the Agency decision letter did not cut any costs for the reason that they were incurred prior to notifying the Illinois Emergency Management Agency. Such costs are ineligible

pursuant to 35 Ill. Adm. Code 734.630(n). The Agency is precluded from raising any alleged issue with lack of compliance with that legal provision because it failed to identify this legal issue in its decision letter. Environmental Protection Agency v. Pollution Control Bd., 86 Ill. 2d 390 (1981)

Morever, the Cross Motion argues that work performed well after IEPA notification (May 8 and May 10, 2023) was properly cut because it was time "associated with a Site Assessment, which is required by OSFM and not Illinois EPA." (Cross Motion, at p. 17) This legal claim is not supported by any authority cited in the Cross Motion. Petitioner's Motion for Summary Judgment addresses the legal requirements of the LUST Program which won't be repeated here. (Petitioner's Mot. S.J., at pp. 20-22)

Furthermore, the Cross Motion erroneously assumes that the only activity that took place on April 27, 2023 was drilling, when the record (and Petitioner's motion for summary judgment) indicate that the Engineer III's fieldwork also included mapping the facility and gathering information about the site's characteristics. (A.R.013) The sample was prepared and transported to a laboratory to confirm or rule out the suspected release and for a waste characterization sample to permit disposal of any contaminated soil during early action activities. The reporting of a suspected release imposes an obligation under the Illinois Environmental Protection Act to gather information about the nature of the release and the property (35 Ill. Adm. Code 734.210(b) (initial abatement activities within 20 days). Information gathered at the time can be used to determine whether tanks can or should be removed or abandoned in order to obtain a corresponding permit for OSFM. The mapping was used to explain to OSFM why the tanks could not be removed (A.R.6), as well as for other planning and reporting activities.

The Agency erroneously believes that activities confirming a suspected release is OSFM related work that is improper for payment from the UST Fund without providing any legal authority for this unpromulgated rule. Until the tanks are removed or abandoned in place, tank owners or operators have to comply with both regulatory authorities.

6. Fifteenth and Sixteenth Deductions – Agency's Timing Policy Issues ($551.04)

As with previous deductions, the Agency fails to explain what information was needed to ensure that the payment application complied with relevant legal provisions or indeed what those relevant legal provisions might be. Having requested and accepted an extension of the decision deadline, the Agency conceded that it the application for payment was complete and cannot be denied for lack of documentation. Metropolitan Pier and Exposition Authority v. IEPA, PCB 10-73, slip op. at 23 (July 7, 2011) The Cross Motion therefore fails to identify any applicable legal provision that would be violated if the application for payment was approved.

7. Seventeenth – Handling Charges ($2,305.13)

There is no explanation given for why handling charges for the cost of disposal of demolition debris were rejected, only a restatement of the reasons Bandy Concrete's labor costs were disallowed. With respect to those labor costs, the Cross Motion does not assert that Bandy Concrete's labor costs are not eligible for handling charges beyond the reason given in the Fourth Deduction for disallowing them entirely.

With respect to hotel costs, the Cross Motion concedes that lodging is a direct cost of corrective action, but does not identify any legal authority for their disallowance as handling

charges. The only argument is a bare appeal to consequences that an unfavorable Board ruling would allow "handling charges for per diem, meals, mileage and other travel expenses as well." (Cross Motion, at p. 20) While some of those items may not necessarily result in third-party payments, the question is not whether this is desirable or not, but whether the Act or Board regulations treat them differently than other direct costs, such as postage. The absence of any supporting legal authority in the Cross Motion, indicate that the Agency is imposing an unpromulgated, and therefore invalid, rule prohibiting hotel costs for handling charges.

CONCLUSION

Petitioner has appealed ten cuts, totaling $15,298.47, from the application for payment Prior to the Agency decision, Petitioner agreed to deduct $560 for a laborer from the Bandy invoice, and corresponding handling charges of $44.80. Furthermore, Petitioner has decided not to contest the first deduction of $253.60 for drilling costs. Therefore Petitioner requests that the Board grant Petitioner's Motion for Summary Judgment in the amount of $14,440.07 and deny the Agency's Cross Motion for Summary Judgment accordingly.

WHEREFORE, Petitioner, JESSE FOODMART, INC., prays that the Board find the Illinois EPA erred in its decision, direct the Illinois EPA to pay 14,440.07, direct Petitioner to present a statement of legal fees for the Board's consideration, and grant such other and further relief as it deems meet and just.

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Petitioner,

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