BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

ABEL INVESTMENTS, LLC, Petitioner,	)	
v.	)	PCB 2016-108
	)	(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 Post-Hearing Reply Brief**, copies of which are herewith served upon the above persons.

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 26th day of October, 2016. The number of pages in the e-mail transmission is 14 pages.

ABEL INVESTMENTS, LLC,

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PETITIONER'S POST-HEARING REPLY BRIEF

NOW COMES Petitioner, ABEL INVESTMENTS, LLC (hereinafter "Abel"), by its undersigned counsel, for its post-hearing reply brief, states as follows:

I. MEASURING WHEEL

A. Reasonableness of the Cost of the Measuring Wheel Was Not Raised as an Objection Independent from the Issue of Indirect Costs.

With respect to the measuring wheel as an indirect cost, Petitioner maintains the issue is controlled by Knapp Oil Co. v. IEPA, PCB 16-103 (Sept. 22, 2016), and there is nothing the Agency argues with respect to that issue different from the arguments made by the Agency in Knapp.

However, the Agency seeks to alternatively argue that even if the Board finds that the measuring wheel is not an indirect cost, "the amount the Petitioner charged for them certainly is unreasonable." (Resp. Brief, at p. 7) Pursuant to Section 57.7(c)(4) of the Act, the Agency denial letter must specify the provisions of the Act or Board regulations that would be violated and "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)(C)&(D)) The Agency has a duty to specify reasons for

the denial or be precluded from doing so. Environmental Protection Agency v. Pollution Control Bd., 86 Ill. 2d 390, 405 (1981).

Pursuant to Board regulations, "a reasonable rate may be charged for the usage of such materials, supplies, equipment, or tools." (35 Ill. Adm. Code § 734.630(h)) This provision is not cited anywhere in the decision letter. With respect to the measuring wheel, the only specific reason given for why that the Act and regulations would be violated was:

> The Illinois EPA considers a measuring wheel to be an indirect cost of doing business.

(R.122 & R.125 (underlining in original))

This is consistent with the project reviewer notes. (R.135 ("indirect") & R.137 ("indirect")) It is also consistent with the Agency reviewer's explanation for the cuts at hearing:

> **Q. . . . You cut $54 for indirect corrective action costs for a measuring wheel. So could you please explain that cut?**
>
> **A. Management has made a decision that a measuring wheel is an indirect cost and we are now not paying that. We don't consider it to be reimbursable.**

(Hrg. Trans. at p. 46)

The Agency reviewer never mentioned the word "reasonable" are any of its variants. The Agency's attempt to raise "reasonableness" as an alternative ground is based upon the testimony of Brian Bauer, who does not appear to have been involved in the underlying decision (Hrg. Trans. at pp. 56 & 65), but was called to testify as to the basis of the Agency's rulemaking decision. In summary, he testified that management decided that the average cost of a measuring wheel is "nominal," the Agency could not find a rental price for measuring wheels, but he recalls the average price to purchase a new one to be around $40 to $60, and the Agency concluded that

"all consultants" were charging an unreasonable rate based upon this purchase price. (Hrg Trans. at p. 62) Clearly the new Agency rule against reimbursing for measuring wheels as indirect costs is premised on the belief that all of the consultants are charging an unreasonable amount.

There is some relationship between the rule against indirect costs and against unreasonable costs. An indirect cost should be treated as overhead to be "paid" out of the consultants "time" as opposed to materials. To the extent a cost is truly an indirect cost, it not only violates the specific rule, it is also an unreasonable cost as it is already paid out of consultant's "time." Accordingly, the Agency denial letter's legal description states that:

> **[I]ndirect corrective action costs for personnel, materials, service, or equipment charged as direct costs. Such costs are ineligible for payment from the Fund pursuant to 35 Ill. Adm. Code 734.630(v). In addition, such costs are not approved pursuant to Section 57.7(c)(3) of the Act because they are not reasonable.**

(R.122 & R.125)

In summary, neither the testimony, nor the record, indicate that reasonableness of the charge was raised as an issue independent from indirect costs.

B. The Agency Decision That All Measuring Wheel Costs Are Nonreimbursable Was an Illegal Rulemaking.

Agency management made a section-wide decision that measuring wheels are non-reimbursable costs, and announced its decision at a section meeting to staff. (Hrg. Trans. at pp. 46 & 51) As discussed in the previous section, Brian Bauer testified to the basis of that section-wide decision. (Hrg. Trans. at p. 62) Bauer's testimony regarding that section-wide decision is simply the testimony of a secret, illegal rulemaking. A policy of general applicability that does not undergo public notice and comment proceedings "is not valid or effective against any person

or party and may not be invoked by an administrative agency for any purpose." Kaufman Grain Co. v. Director of the Department of Agriculture, 179 Ill. App. 3d 1040, 1044 (4th Dist. 1988).

Under the Administrative Procedure Act, a rule is an "agency statement of general applicability that implements, applies, interprets, or prescribes law or policy." (5 ILCS 100/1-70) None of the exceptions apply, and the policy cannot be described as merely internal, as the Agency here is arguing that the policy is binding on all consultants, but more importantly, the Agency is arguing that the alleged factual underpinnings of that policy are to be used against Petitioner as if they were findings made in evaluating the underlying application. Specifically, the Agency wants the Board to find that (a) a measuring wheel is not available for rent, and (b) a new measuring wheel costs from $40 to $60. (Resp. Brief, at p. 7) None of these alleged facts are in the administrative record.

This proceeding is required to be based upon the Agency's record (35 Ill. Adm. Code § 105.412), though the courts have held that the purpose of the hearing is to give the applicants a "means of disputing any contrary evidence relied on by EPA." IEPA v. PCB, 138 Ill. App. 3d 550, 551-52 (3rd Dist. 1985). As part of this process, the Agency is required to file with the Administrative Record *inter alia* "[a]ny other information the Agency relied upon in making its determination." (35 Ill. Adm. Code § 105.410(b)(4)) The Agency did not file any information in the Administrative Record pertaining to the lack of a rental market for measuring wheels or purported purchase prices. The Board cannot consider this information, as it was not a basis of the Agency's decision, it was the basis of an illegal rulemaking, which was not subject to public notice and comment.

The prejudice to the public from the Agency's misconduct is clear. The information relied upon by the Agency in developing its invalid rule is false, as would have been easily demonstrated through an open, public process.[1] "The public should have been given an opportunity to participate in the rulemaking process, thereby enabling the [agency] to apprise itself of potential problems before establishing new rules." Berrios v. Rybacki, 190 Ill.App.3d 338, 348 (1st Dist. 1989). The prejudice to petitioner is also clear, since the Agency seeks to rely on evidence that was not contained in the Administrative Record, nor relied upon by the Agency reviewer, and thus would deny petitioner's rights to fundamental fairness. IEPA v. PCB, 138 Ill. App. 3d 550, 551-52 (3rd Dist. 1985).

II. SUPPORTING DOCUMENTATION FOR BUDGETS.

Petitioner's consultant completed the Agency's budget forms, and there is no complaint herein that some important information is missing from the forms. The consultant herein went beyond the budget forms to explain how its business is organized:

> **CW3M Company works in a similar structure as the Agency. Numerous personnel are involved with various components, i.e. phase review and approval of plans, budgets, and correspondence. In our opnion, this is a highly efficient work plan that limits mistakes, keeps costs down, and ensures quality work. Please note multiple personnel are listed for the completion of**

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[1] Attached hereto as Exhibit A is an example of an online quote from a rental company, Reed's Rent All & Sales, Inc. of Kankakee, Illinois, which leases measuring wheels for $19 per day, plus "[t]ax, damage waiver and other fees." http://www.reedsrentall.com/equipment.asp?action=category&category=77&key=MEAWZ (accessed Oct. 24, 2016) This exhibit is not submitted to assert a reasonable rate for measuring wheels as additional information would be required to do so, but the Board is asked to take judicial notice of the legislative fact that there is a lease market for measuring wheels. See People v. Davis, 65 Ill.2d 157, 163 (1976). That is, the premise of the Agency's invalid rulemaking is false.

certain tasks. Some reviewers have mistakenly interpreted this as an error or duplication; it is not. The method for calculating personnel time in the proposed budget has been approved by the Agency in other incidents, such as, incident numbers 2011-0575, 2012-0695, 2013-0450, and 2012-1125. These hours have been found reasonable and justified as an estimate for the work proposal. These hours should be deemed reasonable as more than one person is required to debvelop plans and budgets and to check for accuracy of the plan, budget, bore logs, reimbursement claims, and analytical, which is needed to finalize the plan and budget. Different personnel contribute to different components of the tasks. This is no diferent than the Agency's review process, which includes project managers, unit managers, fiscal reviewers, etc. Multiple personnel touch each letter or plan with individual tasks on assisgnments. Many plans and budgets are even taken to committees.

(R.0001)

Still, the Agency reviewer complained of a lack of justification, some of which was sought over the phone and some not at all.

Q. Was there a place in the application to provide justification?

A. We're here on an appeal.

Q. I'm sorry. What did you say?

A. We are here at an appeal.

(Hrg. Trans. at p. 55)

At various locations in the Agency's response brief, the complaint is made that costs lack "supporting documentation," which the Board has recently noted is not defined in the regulations. Friends of the Environment v. IEPA, PCB 16-102, at p. 5 (July 21, 2016). "It does, however, use the term when setting requirements for the reimbursement application and Agency review of that application." Id. (emphasis added). All of the regulations expressly dealing with "supporting documentation" are at the payment stage, as opposed to the budget stage. (See 35 Ill. Adm. Code § 734.605(b)(9) (application for payment must include "invoices, receipts, and

supporting documentation showing the dates and descriptions of the work performed"); § 734.610(a)(1) (application for payment must include "all of the elements and supporting documentation required by Section 734.605(b)"); § 734.610(b) ("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.")

This should not be too surprising since a budget is an estimate of future events, normally there is no documentation other than past experience and professional judgment. Costs have not yet been incurred. The Board regulations generally provide that "[c]osts ineligible for payment from the Fund include . . . [c]osts that lack supporting documentation." (35 Ill. Adm. Code § 734.630(cc)) However, as a budget is *an estimate of future costs*, there are no actual costs that can be documented. Moreover, Section 734.630(cc) is only expressly cited as a provision that would be violated in less than half of the budget cuts made herein, namely those involving the Senior Project Manager and travel time.[2]

More importantly, with respect to "supporting documentation" claims, the Agency denial letter fails to contain "an explanation of the specific type of information, if any, which the Agency deems the applicant did not provide the Agency." (415 ILCS 5/57.7(c)(4)(C)) In past Board decisions concerning "supporting documentation," a specific document was alleged to be needed. Friends of the Environment v. IEPA, PCB 16-102, at p. 2 (July 21, 2016) (downstream

[2] The Agency is required to specifically reference the provisions that would be violated if the application were approved. Section 630(cc) of the Board's Part 734 regulations is only cited in the Agency denial letter for the following cuts: Stage One #4; Stage Two #1; Stage Two #4, and Stage Two #5. (R.0121- R.0125)

invoices); T-Town Drive Thru v. IEPA, PCB 07-85, at p. 7 (Apr. 3, 2008) (laboratory invoices). As the Agency argued in T-Town, invoices or other proof of payment to a third-party are normal and expected requirement for "reimbursement in any institutional accounting situation," whether for "taxicab fares and parking garage fees" or payment for laboratory vendors. T-Town, at p. 17.

At every point, the Agency mentions the lack of "supporting documentation," it fails to state what document they need. Despite the clear, but narrow rulings in Friends of the Environment and T-Town, any requirement for supporting documentation necessitates a finding that the document exists and serves a proper purpose under the Act and Board regulations.

III. CONSULTANT'S BUSINESS ORGANIZATION IS NOT SUBJECT TO REGULATION UNDER THE ACT.

Despite the Agency's contrary claims (Reply Brief, at p. 13), consultants are not regulated by the Agency. The LUST Program regulates "owners and operators." When the Agency attempted to regulate consultants by subjecting them to audit and record retention rules, the Board rejected this attempt to expand regulation past "owners and operators." (R2004-022(A), at p. 71 (Dec 1, 2005) (Second Notice). Consultants are hired by owners/operators to perform the work required under the program. Individuals within a consulting firm may be regulated by the Department of Professional Regulations, which require that only people licensed as geologist or engineers practice geology or engineering. (225 ILCS 745/15 (defining practice of geology); 225 ILCS 325/4 (defining practice of professional engineering))

Generally speaking in the absence of a direct duty, business organizations are evaluated in the courts under the business judgment rule, in that absent evidence of bad faith, business decisions are presumed to be valid exercises of business judgments. Duffy v. Orlan Brook

Condo. Owners' Ass'n, 2012 IL App (1st) 113577, ¶ 24. Accordingly, "courts ordinarily will not interfere with management decisions on the basis of their wisdom or lack thereof," though the rule addresses allegations of mismanagement and does not insulate the business from accountability for duties arising in contract or tort. Willmschen v. Trinity Lakes Improvement, 362 Ill.App.3d 546 (2nd Dist. 2005).

The consultant herein made a business decision to open a branch office in Marion to help serve clients in Southern Illinois. It currently has sufficient business to keep a geologist gainfully employed there. Under the rule the Agency seeks to enforce, any time that geologist is the person the Agency perceives to be the project manager, he must oversee field work. If this inflexible rule is adopted by the Board, it would mean that the consultant would no longer enjoy the flexibility of planning work at multiple nearby sites in one day where the Agency has assigned (in its mind) different project managers. That is, the Agency's rule would impose additional costs on the LUST Fund in other circumstances.

The consultant also made a business decision regarding how to assign work required to be "conducted or prepared under the supervision of a Licensed Professional Engineer or Licensed Professional Geologist." (35 Ill. Adm. Code § 734.310(b)) There are no doubt numerous ways to approach this, including having the licensed professional prepare most of the work, but the business decision herein was to conduct the work as a team, in which the licensed professional engineer approves documents primarily prepared by technical personnel. The Agency's rule would require the licensed professional engineer to work solely with a bookkeeper who lacks any technical background, which would end up costing the LUST Fund more as well.

Finally, the consultant does not maintain what the Agency insists is a conventional

project manager. Technical oversight and compliance review is supplied by a senior project manager, a position recognized in the Board's regulations. All the Board regulations state is that the senior project manager must have 12 years of experience, whereas a project manager need only have 8 years. (35 Ill. Adm. Code Part 734, Appendix E) In any event, all businesses of sufficient size provide oversight and review of subordinate positions, whether in the private sector or in government. Eliminating such oversight, particularly under the confused assertion that the subordinate can oversee him or herself is a poor business practice.

The advantage of employing the equivalent of a business judgment rule to consultant's personnel time is that it would not require the Board to make broad, overarching resolutions on how all consultant must structure their staffs. Consulting businesses vary based upon size, location and experience. Furthermore, Board regulations with respect to job titles is quite vague, lacking much, if any, intelligible principle to differentiate when a certain job title is more appropriate than another, particular with such vague distinctions as that between the "project manager" and the "senior project manager." The drafting of the rule as such appears to contemplate enforcement only in situations where bad-faith can be imputed, from which the business judgment rule does not offer a shield.

IV. MISCELLANEOUS STATEMENTS, NOT TRUE.

The Agency erroneously claims that Shirlene South testified that work was being done by an Engineer III or Professional Geologist that "the Illinois EPA normally sees done by the Senior Account Technician." (Response Brief, at p. 9 (citing Hrg. Trans. at pp. 47-48)) This claim is subsequently repeated with respect to "tasks normally performed by a Senior Account

Technician." (Id. at pp. 9-10) Shirlene South did not testify as to what the Agency normally sees, she testified solely as to her personal assumptions: "it appears to be something that an account technician would do." (Hrg. Trans. at p. 47) She simply believes as a matter of personal idiocyncracy that engineers and geologists don't deal with money. (Hrg. Trans. at p. 47)

The Agency erroneously alleges that there were hours billed for a senior account technician at Stage 2, but not Stage 1 (Response Brief, at p. 10), apparently to insinuate that the unlicensed engineer performed bookkeeping work. The record indicates that a senior account technician helped prepare Stage 1 submittals. (R.0056)

The Agency erroneously alleges that the professional geologist is providing oversight of himself, and thus oversight by the Senior Project Manager is duplicative. (Response Brief, at p. 12) In only one instance is the professional geologist providing oversight, and that is when he went to and from the field to oversee the drilling subcontractor. (R.0055) Otherwise, the professional geologist is budgeted to prepare both the Stage 2 Budget, as well as the Site Investigation Completion Report with oversight from the Senior Project Manager. (R.0066; R.0069) In the field, he supervised the drilling crew, but when he is preparing technical documents, he is not overseeing himself preparing those documents and did not bill himself as doing so. The Agency is creating a false duplication by tasking the professional geologist as "responsible for oversight" (Resp. Brief at 12) where he is not tasked with doing so in the budget, and then striking the oversight in the budget as duplicative.

CONCLUSION

WHEREFORE, Petitioner, ABEL INVESTMENTS, prays that: (a) the Board find the Agency erred in its decision with respect to the nine items identified in the initial brief, (b) the Board direct the Agency to approve the budgets accordingly, (c) the Board award payment of reasonable attorney's fees; and (d) the Board grant Petitioner such other and further relief as it deems meet and just.

Respectfully submitted,

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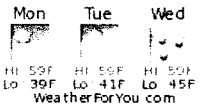

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