BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

PARKER'S GAS AND MORE, INC., Petitioner,	)	
v.	)	PCB 2019-079 (LUST Appeal)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, Respondent.	)	

NOTICE

Don Brown, Clerk
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph, Suite 11-500
Chicago, IL 60601
don.brown@illinois.gov

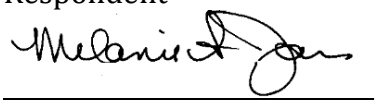
Carol Webb, Hearing Officer
Illinois Pollution Control Board
1021 North Grand Avenue East
P.O. Box 19274
Springfield, IL 62794-9274
carol.webb@illinois.gov

Patrick D. Shaw
Law Office of Patrick D. Shaw
80 Bellerive Road
Springfield, IL 62704
pdshaw1law@gmail.com

PLEASE TAKE NOTICE that I have today filed with the office of the Clerk of the Pollution Control Board **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 you.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,
Respondent



Melanie A. Jarvis
Assistant Counsel
Division of Legal Counsel
1021 North Grand Avenue, East
P.O. Box 19276
Springfield, Illinois 62794-9276
217/782-5544
217/782-9143 (TDD)
Dated: June 3, 2021

BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

PARKER'S GAS AND MORE, INC., Petitioner,	)	
v.	)	PCB 2019-079
	)	(LUST Appeal)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, Respondent.	)	

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

NOW COMES the Respondent, the Illinois Environmental Protection Agency ("Illinois EPA" or "Agency"), by one of its attorneys, Melanie A. Jarvis, Assistant Counsel and Special Assistant Attorney General, and hereby, as an alternative to its Motion to Dismiss and in an effort to expedite the review of the case, submits **ILLINOIS EPA'S CROSS MOTION FOR SUMMARY JUDGMENT OR IN THE ALTERNATIVE RESPONSE TO PETITIONER'S MOTION OF SUMMARY JUDGMENT** to the Illinois Pollution Control Board ("Board").

I. STANDARD FOR ISSUANCE AND REVIEW

A motion for summary judgment should be granted where the pleadings, depositions, admissions on file, and affidavits disclose no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Dowd & Dowd, Ltd. v. Gleason, 181 Ill.2d 460, 483, 693 N.E.2d 358, 370 (1998); McDonald's Corporation v. Illinois Environmental Protection Agency, PCB 04-14 (January 22, 2004), p. 2.

Section 57.8(i) of the Illinois Environmental Protection Act ("Act") (415 ILCS 5/57.8(i)) grants an individual the right to appeal a determination of the Illinois EPA to the Board pursuant to Section 40 of the Act (415 ILCS 5/40). Section 40 of the Act, the general appeal section for permits, has been used by the legislature as the basis for this type of appeal to the Board. Thus,

when reviewing an Illinois EPA determination of ineligibility for reimbursement from the Underground Storage Tank Fund, the Board must decide whether the application, as submitted, demonstrates compliance with the Act and Board regulations. Rantoul Township High School District No. 193 v. Illinois EPA, PCB 03-42 (April 17, 2003), p. 3.

In deciding whether the Illinois EPA's decision under appeal here was appropriate, the Board must look to the documents within the Administrative Record ("Record" or "AR").

II. BURDEN OF PROOF

Pursuant to Section 105.112(a) of the Board's procedural rules (35 Ill. Adm. Code 105.112(a)), the burden of proof shall be on the petitioner. In reimbursement appeals, the burden is on the applicant for reimbursement to demonstrate that incurred costs are related to corrective action, properly accounted for, and reasonable. Rezmar Corporation v. Illinois EPA, PCB 02-91 (April 17, 2003), p. 9.

III. ISSUE

The issue presented is whether the Petitioner can be reimbursed for $3,755.42 for actions that lack supporting documentation and exceed the minimum requirements of the Act or whether the Illinois EPA should reimburse for backfill that was acquired free-of-charge?

Based upon the express language of the Act and regulations thereunder, and the facts presented, the answer is NO.

IV. FACTS

If the Board looks solely to the Administrative Record, there exists no issue of material fact. This case is a matter of the application of the law. On August 16, 2018, the Illinois EPA received an application for payment that was dated August 13, 2018. (AR 0483). Within this application was a receipt showing that 26 loads of washout rock were received free of charge

from Clinard Ready Mix. (AR 0222). This application was approved in part and denied in part on November 15, 2018. (AR 0483). Specifically, the request was made for reimbursement from the Underground Storage Tank fund for the amount of $577,244.80 and after review of the application a voucher for $572,925.56 was prepared for submission to the Comptroller's office. (AR 0483). The November 27, 2017 letter, Attachment A, stated as follows:

1. "$3,755.42, deduction for costs for Remediation and Disposal, which lack supporting documentation. Such costs are ineligible for payment from the Fund pursuant to 3 5 Ill. Adm. Code 734.630(cc). Since there is no supporting documentation of costs, the Illinois EPA cannot determine that costs will not be used for activities in excess of those necessary to meet the minimum requirements of Title XVI of the Act. Therefore, such costs are not approved pursuant to Section 57.7(c)(3) of the Act because they may be used for site investigation or corrective action activities in excess of those required to meet the minimum requirements of Title XVI of the Act.

   520.195 tons at $6.70 per ton plus 7.75% sales tax are being cut from the Backfill line item because they were provided free of charge.

2. $563.82, deduction for costs for Consultant's Materials that were not approved in a budget. The overall goal of the financial review must be to assure that costs associated with materials, activities, and services must be reasonable, must be consistent with the associated technical plan, must be incurred in the performance of corrective·action activities, must not be used for corrective action activities in excess of those necessary to meet the minimum requirements of the Act and regulations, and must not exceed the maximum payment amounts set forth in 35 Ill. Adm. Code 734.Subpart H. Such costs are ineligible for payment from the Fund pursuant to Section 57.7(c)(3) of the Act and 35 Ill. Adm. Code 734.510(b) and 35 Ill. Adm. Code 734.605(a).

   Pursuant to 35 Ill. Adm. Code 734.605(a), costs for which payment is sought must be approved in a budget, provided, however, that no budget must be required for early action activities conducted pursuant to 35 Ill. Adm. Code 734.Subpart B other than free product removal activities conducted more than 45 days after confirmation of the presence of free product. The costs associated with Consultant's Materials were not approved in a budget and are, therefore, ineligible for payment.

   In addition, the costs exceed the minimum requirements necessary to comply with the Act. Costs associated with site investigation and corrective action activities and associated materials or services exceeding the minimum requirements necessary to comply with the Act are not eligible for payment from the Fund pursuant to Section 57.7(c)(3) of the Act and 35 Ill. Adm. Code 734.630(0).

> Finally, the costs are not reasonable as submitted. Such costs are ineligible for payment from the Fund pursuant to Section 57.7(c)(3) of the Act and 35 Ill. Adm. Code 734.630(dd).
>
> $563.82 for grass seed is being cut." (AR 0486-0487).

This case was appealed to the Board December 21, 2018 and Petitioner's Motion for Summary Judgement was filed on May 24, 2021.

V. ARGUMENT

There exists no issue of material fact. This case is a matter of the application of the law. The Board is going to note that the argument in this case is very similar to that in Piasa Motor Fuels v. Illinois EPA, PCB 2018-054, April 16, 2020, in which the Board held in favor of the Illinois EPA on this exact argument. Unfortunately, it must once again be noted that the maximum subpart H rate is just that, a maximum rate. Illinois EPA does not pay you more than what you actually spend for the item. When an item is **FREE**, expecting to be reimbursed for said item is a little excessive to say the least. The Illinois EPA paid for all expenses associated with backfilling the **FREE** material into the excavation. It only cut the cost for the **FREE** material. To save time, the Agency will quote the Board order in Piasa, which summarizes the argument to be made when a consultant gets material for **FREE**. In Piasa, the material was excavated from the same property whereas in this case, the material was obtained for **FREE**, but in both cases, the material was for no cost or otherwise, for **FREE**.

> "Based upon the time and material submission, the Agency approved reimbursement for loading of backfill from the stockpile into trucks, transportation and placement of backfill into the excavation as reasonable and incurred in performance of corrective action activities. Cross-MSJ at 11. Piasa did not explain why it excavated the backfill soil from its property, and the Agency found that "the cost requested for soil taken from another part of the owner's property for some unrelated project is unreasonable as the soil was free, and therefore it exceeded the minimum requirements of the Act." *Id*.

Piasa claims that, because the Agency already approved the backfill costs in general as part of the Plan, the Agency could not now reject the reimbursement of backfill-related costs under the approved budget amount.

The Agency argues that the $11,797.53 was properly denied because: (1) the Agency never approved the excavation of soil for backfill in the Plan or budget; (2) Section 734.825(b) does not address reimbursement for excavation and stockpiling of soil; (3) Subpart H rates did not apply because those activities were in excess of those necessary to meet the minimum requirements of the Act and regulations; (4) Piasa has not demonstrated that the excavation and stockpiling activities were incurred as part of the corrective action activities; and (5) the backfill material was obtained for free. Cross-MSJ at 9-11, *citing* 35 Ill. Adm. Code 734.825(b), Subpart H, *see also* John D. Warsaw v. IEPA, PCB 2018-083 (Oct. 17, 2019) (Board upheld denial of reimbursement of cost not approved within a corrective action plan or budget). The Agency's Cross-MSJ does not reference rejection of these costs as overburden.

The Board finds that there is no issue of material fact regarding this backfill dispute. The question of what the Agency may consider in reviewing reimbursement requests may be addressed in summary judgment.

Piasa should have disclosed in its proposed Plan its intent to use backfill excavated from its property. Section 734.605(a) states that costs for which reimbursement is sought must be approved in a budget. 35 Ill. Adm. Code 734.605(a). The Plan and budget must be detailed enough to permit Agency review. Section 734.510(b) of Board regulations regarding the Agency's review of plans and budgets provides:

> The overall goal of the financial review must be to assure **that costs associated with materials, activities, and services must be reasonable**, must be consistent with the associated technical plan, **must be incurred in the performance of corrective action activities**, must not be used for corrective action activities in excess of those necessary to meet the minimum requirements of the Act and regulations, and must not exceed the maximum payment amounts set forth in Subpart H of this Part. 35 Ill. Adm. Code 734.510(b) (emphasis added).

In this case, the Agency could not determine whether costs associated with excavating backfill from Piasa's property were reasonable or incurred in the performance of corrective activities, because the Plan did not disclose to the Agency that Piasa would take these actions. Piasa cannot now claim that the Agency approved general backfill actions and is thus barred from reviewing the reasonableness of reimbursing the cost of the specific backfill actions.

Where Piasa requests reimbursement for an activity that was not approved as part of its corrective action plan, Piasa must first submit an amended corrective action plan. *See* 35 Ill. Adm. Code 734.605(a). In the context of considering an amended

> plan, the Agency may properly determine whether the cost of that activity is reasonable and whether that activity is in excess of those necessary to meet the minimum requirements of the Act. *See* 35 Ill. Adm. Code 734.510(b), 630(dd).
>
> Even if Piasa can impute the Agency's general approval of the Plan to Piasa's excavation of backfill from its property, the Agency may still review those costs for reasonableness. Under Section 734.850(b), Piasa must demonstrate to the Agency that the costs for which Piasa seeks reimbursement on a time and material basis are reasonable. *See* 35 Ill. Adm. Code 734.850(b). Thus, under either circumstance, Piasa must demonstrate the reasonableness of the backfill excavation costs for which it sought reimbursement.
>
> Piasa did not disclose to the Agency its intent to excavate backfill from its property. The Agency did not approve a plan including the cost of excavating backfill from Piasa's property. **The Agency had the authority to determine that "the cost requested for soil taken from another part of the owner's property for some unrelated project is unreasonable as the soil was free, and therefore it exceeded the minimum requirements of the Act.**"" (Emphasis added) Piasa at 12

The Petitioner's attorney makes the same argument here as he did in Piasa. An argument that ultimately failed.

During the review of the reimbursement claim the Illinois EPA had questions regarding the backfill material due to the fact that no invoices were provided, just manifest tickets. The Illinois EPA sent an email to the consultant requesting the documentation to support their request. The consultant responded with manifests of the material and invoices and provided information that they were not charged for the purchase of the 520.16 tons of rock. The consultant also provided a letter from the provider that documented that there was "No charge for material." (AR 0222). The Agency then deducted $6.70 per ton which was the price on the invoices for some of the other stone backfill that was purchased for this project plus the 7.75% tax from the $24.30 subpart H rate for backfill. The Illinois EPA did reimburse for all the other costs associated with the 520.16 tons or 346.8 cubic yards to be reimbursed at the subpart H rate of $24.30 per cubic yard less the approximately $10.88 costs for the purchase of the backfill.

The Petitioner's Motion seems to indicate that the Illinois EPA cut everything from the claim for reimbursement associated with this backfill and that is simply NOT true.

Illinois EPA cut $3,755.42 for the actual amount of backfill that the Petitioner received for FREE. This equates as follows:

520.16 tons x $6.70 per ton = $3,485.31 – Cost of the Backfill, if it had been paid for.

$3,485.31 x 7.75% tax = $270.11 – Tax imposed upon the Backfill, if it had been paid for.

$3,485.31 + 270.11 = $3,755.42 – Total cost of Backfill plus Tax, if it had been paid for.

To calculate the appropriate subpart H rate to be applied to transportation and placement of the material, Illinois EPA calculated the appropriate rate as follows:

520.16 tons/1.5 tons per yard = 346.8 cubic yards

$3,755.42/346.8 cubic yards = $10.88 per cubic yard

Therefore, Illinois EPA allowed $24.30 - $10.88 = $13.42 for the transportation and placement of the 520.16 tons or 346.8 cubic yards of backfill material. Illinois EPA **only** disallowed the portion of the subpart H rate that was associated with the purchase portion of this small part of the backfill and not everything associated with it as the Petitioner erroneously contends. The LUST program is a **reimbursement** program, where you are **reimbursed** for your **costs**. If you get material for **FREE**, you have no costs, therefore, you have nothing to be reimbursed for. It is a commonsense concept that the program was based upon. The Illinois EPA was acting within the Act and regulations in making these cuts.

Here, as in Piasa, Petitioner takes the position that the Illinois EPA did not have the right to review the submitted claim. What they failed to point out, as in Piasa, is that these are maximum payment amounts and in order for the Illinois EPA to approve the amounts, the Petitioner needs to submit supporting documentation. When asked for supporting

documentation, what was received made clear that they were asking for reimbursement for something they had received for **FREE**. This is exactly the reason why this failsafe review by the Agency was put into the regulations.

Let us keep in mind that Chase Environmental received **FREE** backfill material. Chase Environmental did not pass the savings on to the client or the State of Illinois Leaking Underground Storage Tank Fund. And then, Chase Environmental on behalf of the Petitioner, based their argument that they should be reimbursed for something they received for **FREE** based upon a technicality they believe exists in the review process which the Board has already stated in Piasa does not exist, and for good reason apparently. This is the second case the Board has heard regarding consultants receiving **FREE** material and wanting reimbursement from the Fund and having no shame in taking the cases all the way to motions for summary judgement as if they were entitled to reimbursement from the LUST Fund for **FREE** material as a matter of law.

VI. ATTACHMENTS

The Illinois EPA would normally have no objection to Attachment B as it comes from the Illinois EPA website. However, this attachment is outdated as it is from April, 2009. This form was last updated in October of 2016. Therefore, it is not the version in effect at the time of appeal and it should be noted that it is not something that is normally reviewed when reviewing a claim for reimbursement. The Illinois EPA objects to Attachment B. The Illinois EPA objects to Attachment A, as it was not before the Agency at the time of the review and was never submitted to the Agency as part of the reimbursement claim. Information relating to Attachment A can be found within the record and the record should be the only document reviewed during a Motion for Summary Judgment as it contains all of the information as it was presented to the Agency.

The record was never contested in this case. The Illinois EPA asks that the Board strike both Attachment A and B.

VII. CONCLUSION

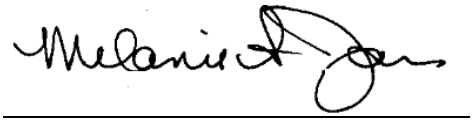
The facts and the law are clear and in favor of the Illinois EPA. The Petitioner did not justify the costs requested by submitting adequate documentation resulting in the costs being unreasonable and exceeding the minimum requirements of the Act. Requesting reimbursement for items that are received for **FREE** exceeds the minimum requirements of the Act and is de facto unreasonable. Further, the Illinois EPA asks that the Board strike Attachment A and Attachment B.

WHEREFORE: for the above noted reasons, the Illinois EPA respectfully requests the Board (1) DENY Petitioner's Motion for Summary Judgment and (2) **GRANT** summary judgment in its favor.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,

Respondent



Melanie A. Jarvis
Assistant Counsel
Division of Legal Counsel
1021 North Grand Avenue, East
P.O. Box 19276
Springfield, Illinois 62794-9276
217/782-5544, 217/782-9143 (TDD)
Dated: June 3, 2021

CERTIFICATE OF SERVICE

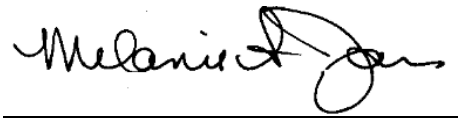
I, the undersigned attorney at law, hereby certify that on **June 3, 2021**, I served true and correct copies of **ILLINOIS EPA'S CROSS MOTION FOR SUMMARY JUDGMENT OR IN THE ALTERNATIVE RESPONSE TO PETITIONER'S MOTION OF SUMMARY JUDGMENT** via the Board's COOL system and email, upon the following named persons:

Don Brown, Clerk
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph, Suite 11-500
Chicago, IL 60601
don.brown@illinois.gov

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

Patrick D. Shaw
Law Office of Patrick D. Shaw
80 Bellerive Road
Springfield, IL 62704
pdshaw1law@gmail.com

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,
Respondent



Melanie A. Jarvis
Assistant Counsel
Division of Legal Counsel
1021 North Grand Avenue, East
P.O. Box 19276
Springfield, Illinois 62794-9276
217/782-5544
217/782-9143 (TDD)