

ILLINOIS POLLUTION CONTROL BOARD  
July 21, 2022

PARKER’S GAS & MORE, INC., )  
 )  
 Petitioner, )  
 )  
 v. ) PCB 19-79  
 ) (UST Appeal)  
 ILLINOIS ENVIRONMENTAL )  
 PROTECTION AGENCY, )  
 )  
 Respondent. )

OPINION AND ORDER OF THE BOARD (by C.M. Santos):

Parker’s Gas & More, Inc. (Parker) was the owner or operator of a service station at 101 East Outer Belt Drive in Clayton, Adams County (site or facility) at which underground storage tanks (UST) leaked petroleum. While performing corrective action at the site, Parker submitted to the Illinois Environmental Protection Agency (IEPA or Illinois EPA or Agency) a request for reimbursement of \$577,244.80 from the UST Fund. IEPA approved partial payment but modified the request by \$3,755.42. IEPA determined that remediation and disposal costs of this amount lacked supporting documentation. Parker requests that the Board reverse this modification and approve its full request for reimbursement. Both parties filed a motion for summary judgment.

For the reasons below, the Board denies the parties’ motion for summary judgment and directs its hearing office to proceed to hearing.

The opinion first sets out the procedural history and then decides three preliminary matters. Next, the Board summarizes the factual background and Parker’s petition. The Board then addresses the legal background, including summary judgment, the standard of review, the burden of proof, and relevant statutory and regulatory authorities. The Board’s discussion then decides the issues before the Board reaches its conclusion and issues its order.

**PROCEDURAL HISTORY**

On December 21, 2018, Parker filed a petition for review (Pet.). On January 17, 2019, the Board accepted the petition for hearing. On January 25, 2019, Parker waived its statutory 120-day decision deadline. *See* 415 ILCS 5/40(a)(2) (2020); 35 Ill. Adm. Code 101.308(c)(1).

After a status conference with the parties on July 16, 2019, the hearing officer reported that “[t]his case is part of a larger group of UST appeals involving the same parties. The status of this docket remains inactive as the parties work on other cases in this group.” After a status conference on October 13, 2020, the hearing officer reported that, “[i]f respondent can file the administrative record before the next status call [on November 9, 2020], then motions for

summary judgment will be scheduled.” On October 23, 2020, IEPA filed the administrative record of its determination (R.).

On May 24, 2021, Parker filed a motion for summary judgment (Pet. Mot. SJ). Attached to Parker’s motion were two exhibits:

- Pet. Exh. A Tons of Washout Rock
- Pet. Exh. B Instructions for Budget and Billing Forms (updated April 2009).

On June 3, 2021, IEPA submitted a filing entitled “Cross Motion for Summary Judgment, or in the Alternative, Response to Petitioner’s Motion for Summary Judgment” (IEPA Mot. SJ). On June 17, 2021, Parker responded to IEPA’s motion (Pet. Resp.). Attached to Parker’s response was a single exhibit:

- Pet. Exh. C: Instructions for Budget and Billing Forms (updated October 2016).

On June 24, 2021, IEPA filed a motion for leave to reply (Mot. Leave), accompanied by its Reply (IEPA Reply). On July 8, 2021, Parker responded to IEPA’s motion for leave (Pet. Resp. Leave). On July 12, 2021, IEPA submitted a filing entitled “Illinois EPA’s Response to Petitioner’s Opposition to Leave to Reply” (IEPA Mot. Reply).

### **PRELIMINARY MATTERS**

Below, the Board addresses preliminary matters. First, the Board construes IEPA’s July 12, 2021 filing as its reply. The Board declines to accept that filing but grants IEPA’s June 24, 2021 motion for leave to file a reply in support of its motion for summary judgment. Next, the Board separately denies IEPA’s requests to strike Parker’s Exhibits A and B.

### **IEPA’s Motion for Leave to Reply**

#### **IEPA’s Motion**

IEPA’s June 24, 2021 motion for leave to reply in support of its motion for summary judgment argues that “[t]he issue in this case is important and material prejudice may result if the Illinois EPA is not allowed to reply.” Mot. Leave at 1; *see* 35 Ill. Adm. Code 101.500(e). IEPA asserts that Parker’s arguments “require a response from the Illinois EPA.” Mot. Leave at 1.

#### **Parker’s Response**

On July 8, 2021, Parker responded that IEPA’s motion is “conclusory” and does not support its claim of material prejudice. Pet. Resp. Leave at 1, citing 35 Ill. Adm. Code 101.500(e). Parker argues that the reply is “simply reargument” that does not cite new facts or authorities to support “the fictitious transaction concocted by the Agency.” Pet. Resp. Leave at 1.

### **IEPA's July 12, 2021 Filing**

IEPA entitled its July 12, 2021 filing "Illinois EPA's Response to Petitioner's Opposition to Leave to Reply." IEPA disputes Parker's reference to a "fictitious transaction." IEPA Reply at 1; *see* Pet. Resp. Leave at 1. IEPA states that it "takes great offense to this statement because the only 'fictitious' transaction is the one being perpetrated against the State of Illinois by the Petitioner's consultant, Chase Environmental, by asking for reimbursement from a State Fund for something they received for **FREE**." IEPA Reply at 1 (emphasis in original).

Although IEPA entitled its filing a "Response," the timing and substance demonstrate that IEPA seeks to reply. The Board construes IEPA's July 12, 2021 filing as a reply in support of its June 24, 2021 motion for leave to reply in support of its motion for summary judgment.

However, IEPA as the moving party "will not have the right to reply, except as the Board or hearing officer permits to prevent material prejudice." 35 Ill. Adm. Code 101.500(e). IEPA's July 12, 2021 filing did not include a motion for leave to file. While it cites Section 101.500 of the Board's procedural rules, this filing does not argue that leave to reply is necessary to prevent material prejudice. IEPA may take "great offense" to Parker's response, but that offense does not persuade the Board to grant leave that IEPA did not request. Based on these factors, the Board does not accept IEPA's July 12, 2021 filing and does not consider it in determining whether to grant IEPA's June 24, 2021 motion for leave to reply.

### **Board Discussion**

The Board's rules provide the IEPA does not have the right to reply in support of its motion for summary judgment, except as the Board permits "to prevent material prejudice." 35 Ill. Adm. Code 101.500(e). IEPA has alleged that material prejudice "may result if it is not granted leave to reply." The Board grants IEPA's June 24, 2021 motion for leave to file and accepts its reply in support of its motion for summary judgment.

### **IEPA's Request to Strike Parker's Exhibit A**

Parker's Exhibit A identifies its source as pages 320-23 of the administrative record (R. at 320-23). Parker explains that its Exhibit A is a "summary of load tickets" for 520.16 tons of washout rock used as backfill material at the site. Pet. Mot. SJ at 4, citing R. at 320-23. Parker adds that its Exhibit A "contains material from the administrative record as an aid to the Board in identifying the source of Petitioner's calculations." Pet. Resp. at 1-2.

IEPA objects to Parker's Exhibit 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." IEPA Mot. SJ at 8. However, IEPA acknowledges that the information in the exhibit comes from its record. *See id.* IEPA argues that the Board should review only the record, "as it contains all of the information as it was presented to the Agency." *Id.* IEPA requested that the Board strike Parker's Exhibit A. IEPA Mot. SJ at 8-9.

Parker responded that IEPA “does not dispute the accuracy” of its Exhibit A, so there is no basis for striking it. *Id.* at 2.

The Board notes IEPA’s acknowledgment that the information in Parker’s Exhibit A comes from its administrative record. The exhibit cites the record to provide the specific source of that information. While IEPA requests that the Board strike the exhibit from Parker’s motion, it does not persuasively challenge the accuracy or the relevance of this information in it. Based on these factors, the Board denies IEPA’s request to strike Parker’s Exhibit A.

### **IEPA’s Request to Strike Parker’s Exhibit B**

Parker downloaded its Exhibit B from IEPA’s website in 2016. Pet. Mot. SJ at 7, n.4. It stresses that these “2009 instructions would have been the version in place when the Agency approved the relevant budget on May 20, 2015.” *Id.* at 7. Parker requested that the Board take official notice of its Exhibit B. *Id.*

Parker states that the Board may take official notice of “[m]atters of which the circuit courts of this State may take judicial notice; and [g]enerally recognized technical or scientific facts within the Board’s specialized knowledge.” Pet. Mot. SJ at 7, citing 35 Ill. Adm. Code 101.630(a).

Parker argues that IEPA instructions have been “admitted into evidence in at least three previous Board decisions.” Pet. Mot. SJ at 7, citing City of Benton Fire Dept. v. IEPA, PCB 17-1, slip op. at 2 (Feb. 22, 2018); Abel Investments v. IEPA, PCB 16-108, slip op. at 11 (Dec. 15, 2016); Knapp v. IEPA, PCB 16-103, slip op. at 2 (Sept. 22, 2016). Although Parker acknowledged that the Board had not taken official notice of the instructions in those cases, it argues that the Board has taken official notice of other similar forms. Pet. Mot. SJ at 7, citing Knapp v. IEPA, PCB 16-103, slip op. at 8, n.2 (Sept. 22, 2016). While IEPA forms are not themselves regulations, Parker argues that they “have regulatory weight” because Board regulations require using forms prescribed by IEPA. Pet. Mot. SJ at 7-8, citing 35 Ill. Adm. Code 734.135(a).

IEPA requested that the Board strike Parker’s Exhibit B. IEPA Mot. SJ at 8-9. IEPA reports that it would not normally object to Parker’s Exhibit B, “as it comes from the Illinois EPA website.” *Id.* at 8. However, it states that it updated the form in October 2016, so this 2009 version “is outdated” and “is not the version in effect at the time of appeal.” *Id.* IEPA adds that it does not ordinarily review this document when it considers a reimbursement claim. *Id.*

Parker argues that its Exhibit B provides the instructions “that were in place in 2015 when the budget was submitted and approved.” Pet. Resp. at 2, citing R. at 4, 215. In addition, Parker stresses that the language it cited from the 2009 instructions “is identical to the 2016 instructions.” Pet. Resp. at 2, citing Pet. Exh. B at 8; Pet. Exh. C at 9. It concludes that, because “it would not matter which version is used,” the Board should deny IEPA’s motion to strike Parker’s Exhibit B. Pet. Resp. at 2.

The Board may take official notice of “[m]atters of which the circuit courts of this State may take judicial notice; and [g]enerally recognized technical or scientific facts within the Board’s specialized knowledge.” 35 Ill. Adm. Code 101.630(a). In a recent case, IEPA objected to the Board taking official notice of documents including instructions for its budget and billing forms. *See Dersch Energies v. IEPA*, PCB 17-3, slip op. at 3-6 (June 17, 2021). In that case, the Board denied IEPA’s motion to strike:

taking official notice of documents in the public domain and specifically on the IEPA’s website is allowed by the Board’s rules and Board precedent. When considering whether to take official notice of materials on IEPA’s website, the Board stated that it will take administrative notice of the documents attached to the petitioner’s brief. *See generally Stop The Mega-Dump v. County Bd. of DeKalb County, Ill. and Waste Mgmt. of Ill.*, PCB 10-103 (Mar. 17, 2011); *see also People v. Young*, 355 Ill. App. 3d 317, 321 (2nd Dist. 2005). The documents are all documents created by the [IEPA] and available from the [IEPA]’s website. The Board finds that the [IEPA] is not prejudiced by the Board taking official notice of those documents. *McAfee v. IEPA*, PCB 15-84, slip op. at 2 (Mar. 5, 2015). *Dersch Energies, Inc. v. IEPA*, PCB 17-3, slip op. at 5-6 (June 17, 2021).

Based on its procedural rules and recent precedent, the Board is not persuaded to strike IEPA’s own forms. The Board denies IEPA’s request to strike Parker’s Exhibit B and takes official notice of it.

### **FACTUAL BACKGROUND**

In the following subsections addressing the record, the Board first summarizes the site and investigation of the release there. Next, the Board reviews the corrective action plan and budget. The Board then addresses Parker’s request for reimbursement and IEPA’s determination to modify it.

#### **Site and Investigation**

Parker was the owner or operator of a service station at 101 East Outer Belt Drive in Clayton, Adams County. R. at 1, 9, 11. The Illinois Emergency Management Agency assigned Incident No. 95-1012 to a release at the site associated with three tanks: Tanks 3 and 4, both 4,000-gallon gasoline tanks; and Tank 5, a 4,000-gallon diesel fuel tank. *Id.* at 1, 6. Parker’s site “is currently an unoccupied commercial property.” *Id.* at 29.

On July 18, 2007, the Office of the State Fire Marshal (OSFM) determined that Parker was “eligible to seek payment of costs in excess of \$10,000” from the UST Fund. R. at 1, 212, 272.

Investigation completed in March and April 2009 confirmed that “soil and groundwater contamination exceeding applicable Tier 1 Residential soil objectives and Class 1 Groundwater Standards remains on-site, on adjoining properties east and south of the site and in the Outer Belt Drive Right of Way (ROW) adjoining the south property boundary.” R. at 17.

In 2011, contaminant transport modeling showed that the potential migratory extent of groundwater contamination stemming from the release at the site “does not exceed the Clayton city limits.” R. at 17. Within those city limits, an ordinance prohibits the use of potable water supply wells. *Id.* Although the models were revised to reflect adjusted default values in 2013, the revised modeling “also indicates the potential migratory extent of groundwater exceeding Class I Groundwater Standards will not exceed Clayton city limits.” *Id.*

An August 2013 investigation identified “areas in which soils with contaminant concentrations below applicable objectives overlie soils with contaminant concentrations exceeding the objectives (commonly referred to as overburden).” R. at 17. The investigation advanced 14 soil borings identified as OS-1 through OS-14 within the identified soil contamination plume. *Id.* at 18; *see id.* at 44 (site map of sample locations), 167-81 (boring logs). The investigation confirmed that overburden within five feet of the surface along the site’s east boundary and on adjoining properties to the south and east had “contaminant concentrations below applicable objectives.” *Id.* at 18. However, shallow soils near boring locations OS-1 and OS-2 exceeded specified limits or objectives. *Id.*; *see id.* at 40-41 (Overburden Soil Analytical Summary).

### **Corrective Action Plan and Budget**

#### **Plan**

Impacts of Incident No. 95-1012 required remedial action extending off-site onto adjoining properties east and south of Parker and the ROW of East Outer Belt Drive along the south boundary. R. at 21. On February 13, 2015, Chase Environmental Group, Inc. (Chase) submitted a corrective action plan to IEPA on behalf of Parker. *Id.* at 4.

The plan proposed to excavate, transport, and dispose of petroleum-contaminated soil exceeding applicable objectives and limits from on-site and off-site areas. R. at 21. The plan identified separate soil abatement areas as A through D. *Id.*; *see id.* at 26 (calculated areas), 48 (map of proposed excavation areas). The plan also proposed to remove uncontaminated overburden from soil abatement areas and then return it to excavations as backfill material. *Id.* at 23.

Areas A and B are on-site and are “subject to site-specific Tier 2 Industrial/Commercial and Construction Worker Inhalation soil objectives as well as Tier 2 Soil Saturation Limits.” R. at 21. Based on analysis of soil samples from OS-1 through OS-4, “there will be no removal/replacement of overburden soil in Area A.” *Id.*; *see id.* at 26. The plan estimated that 1,465 cubic yards of contaminated soil would be excavated from Area A and transported off-site for disposal. *Id.* at 26.

For Area B, the plan proposed to remove overburden soil to a depth of five feet and return it “to the excavated area upon abatement of the underlying contaminated soil.” R. at 21. The plan estimated that 1,685 cubic yards of contaminated soil would be excavated from Area B and transported off-site for disposal. *Id.* at 26. It also estimated that 730 cubic yards of overburden soil would be removed and then returned to the excavation as backfill material. *Id.*

Area C adjoins residential property east of the site, and Area D is south of the site. R. at 21, 48. Both are “subject to the most stringent Tier 1 Residential soil objectives.” *Id.* at 21-22. For both areas, the plan proposed to remove overburden soil to a depth of five feet. *Id.* at 22. From Area C, the plan estimated removing 445 cubic yards of overburden to return to the excavation as backfill material and excavating 1,030 cubic yards of contaminated soil. *Id.* at 26. From Area D, the plan estimated removing 1,000 cubic yards of overburden to return to the excavation as backfill material and excavating 1,000 cubic yards of contaminated soil. *Id.*

The plan estimated that the four areas would require a total of 5,230 cubic yards of backfill from an off-site source. R. at 26, 27. It also estimated that 2,175 cubic yards of overburden material could be returned to excavations as backfill material. *Id.* at 26.

### **Budget**

Parker’s corrective action budget (R. at 192-211) proposed total costs of \$709,246.73, including “Remediation and Disposal Costs” of \$510,844.43. R. at 195.

Under “Excavation, Transportation, and Disposal of Contaminated Soil,” the budget included 5,230 cubic yards at a cost of \$69.25 per cubic yard for total costs of \$362,177.50. R. at 199.

Under “Backfilling the Excavation,” the budget included 5,230 cubic yards at a cost of \$24.30 per cubic yard for a total cost of \$127,089.00. R. at 199.

Under “Overburden Removal and Return,” the budget included 2,175 cubic yards at \$7.91 per cubic yard for a total cost of \$17,204.25. R. at 199.

The total budget for these three categories is \$506,470.75. *See id.*

In addition to these costs, the category of “Remediation and Disposal” also budgeted for disposal of 12 drums of solid waste at \$303.73 per drum for \$3,644.76 and disposal of four drums of liquid waste at \$182.23 per drum for \$728.92 for total drum disposal costs of \$4,373.68. R. at 200.

### **IEPA Approval**

In a letter dated May 20, 2015, IEPA approved the corrective action plan. R. at 215.

In the same letter, IEPA also approved a budget of \$709,246.73, including a total of \$533,874.68 in “Field Purchases and Other Costs.” R. at 195, 217. This amount included \$510,844.43 under “Remediation and Disposal” and \$23,030.25 under “Paving, Demolition, and Well Abandonment.” *Id.* at 195.

IEPA had previously approved a budget for “Field Purchases and Other Costs” of \$398,631.35. R. at 217. With its May 20, 2015 determination, IEPA had approved a total cumulative budget for this category of \$932,506.03. *Id.*

### **Corrective Action Activities**

With a letter dated August 21, 2018, Chase submitted a Corrective Action Progress Report to IEPA. R. at 357. Chase reported that soil abatement activities in the plan approved by IEPA in 2015 “were completed between May 1, 2018 and June 6, 2018.” *Id.* at 358.

### **Request for Reimbursement**

With a letter dated August 13, 2018, Chase submitted a Corrective Action Billing Package to IEPA on behalf of Parker. R. at 268.

### **Excavation, Transportation, and Disposal**

Soil abatement activities excavated 7,763.5 tons of petroleum-impacted soil and transported it to Hickory Ridge Landfill in Baylis, Illinois for disposal. R. at 358. Applying the conversion factor of 1.5 tons per cubic yard of excavated material, the plan abated 5,175.67 cubic yard of contaminated soil. *Id.*; *see* 35 Ill. Adm. Code 734.825(b)(1) (conversion factor).

The record includes two invoices from Hickory Ridge Landfill for disposal of waste from Parker, one dated May 15, 2018, and one dated May 31, 2018. The invoices reflect disposal of 5,175.68 cubic yards and a total invoice amount of \$131,979.67. R. at 296-300. The record also includes a summary of scale tickets billed to Chase for service to Parker from May 1, 2018, through May 21, 2018. R. at 302-17.

The record also includes two invoices from Beard Transport, Inc. to Parker. Under “Material Hauled or Service Provided,” the first dated May 15, 2018, refers to “trailer rental per hour hauling off materials from Clayton, IL to Hickory Ridge Landfill – and hauling back fill back into Clayton, IL for Chase Environmental” under 26 ticket numbers in the amount of \$27,060.00. R. at 327. The second dated June 6, 2018, refers similarly to “trailer rental per hour” under 89 ticket numbers in the amount of \$63,998.00 with a total for the two of \$91,058. *Id.* at 329.

Under “Remediation and Disposal Costs,” Parker submitted “Excavation, Transportation, and Disposal” costs of \$358,415.15 for 5,175.67 cubic yards of contaminated soil at a cost of \$69.25 per cubic yard. R. at 294; *see id.* at 296-317. These costs were less than the budgeted amount of \$362,177.50 by \$3,762.35. *See* R. at 199, 294.

### **Overburden**

For “Overburden Removal and Return,” Chase reported that “3,262.5 tons of clean overburden was temporarily stockpiled and returned to the excavation.” R. at 358. Applying the conversion factor, this weight represents 2,175 cubic yards of overburden. *Id.*; *see* 35 Ill. Adm. Code 734.825(b)(1) (conversion factor).

Parker submitted costs of \$17,204.25 for 2,175 cubic yards at \$7.91 per cubic yard.” R. at 294; *see id.* at 296-317. This request equals the budgeted amount. *See* R. at 199.



## **Backfill**

Chase backfilled the excavation with 7,221.52 tons of fill. R. at 358. Applying the conversion factor, this weight represents 5,244.91 cubic yards of backfill material. *Id.*; see 35 Ill. Adm. Code 734.825(b)(1) (conversion factor).

For “Backfilling the Excavation,” Parker submitted costs of \$127,451.31 for 5,244.91 cubic yards at \$24.30 per cubic yard. R. at 294; *see id.* at 296-317. Backfilling costs exceeded the budgeted amount of \$127,089.00 by \$361.31. *See* R. at 199, 294.

**Central Stone Company.** The record includes 19 numbered load tickets from the Florence Quarry of Central Stone Company in Pittsfield to Chase. R. at 318-19, 324; 476-82. It also includes four invoices corresponding to the 19 load tickets. R. at 240-42, 245.

Three of the four Central Stone Company invoices refer to a plant site of “Richfield Quarry CS35.” R. at 240-41, 245. For each load ticket, these three invoices refer to a material quantity of “1 Load.” Comparing the tons listed on the corresponding load tickets to the dollar amounts on the invoices shows a rate of \$5.00 per ton. *Id.* The Richfield Quarry invoices show a tax rate of 6.5%. *Id.* These three invoices account for a total of 7,159 tons of material, which converts to 4,772.67 cubic yards.

The fourth Central Stone Company invoice refers to a plant site of “Florence Quarry CS33.” R. at 242. For each load ticket, it indicates a rate of 6.70 per ton. The four loads listed in the invoice total 81.52 tons of material, which converts to 54.3 cubic yards. This invoice shows a tax rate of 7.75%. *Id.*

Combined, the four invoices from Central Stone Company account for 7,240.5 tons of backfill material, which converts to 4,827 cubic yards.

**Additional Material.** In a letter dated October 5, 2018, Clinard Ready Mix stated that “Chase Environmental group received 26 loads of washout rock on May 9 to the 11th. No charge for material. No scale available on site was weighed at Corp Product Services.” R. at 222.

The record includes a series of 26 load tickets dated May 9-11, 2018. R. at 320-23; *see* Pet. Mot. SJ, Pet. Exh. A. The ticket form includes a line to designate “Load of:”, and many of the forms refer to “wash rock.” *See* R. at 320-23. The total weight reported by the 26 load tickets is 520.16 tons. *See* R. at 320-23.

The record also includes an invoice dated May 11, 2018 from Crop Production Service for \$460.00 as a “Misc. Charge.” R. at 228, 266; *see id.* at 221, 224 (Handling Charges Form). Under invoice notes, it refers to “Scale use from Chase Environmental Group.” *Id.* at 228, 266. In its review notes, IEPA asked Chase whether its request for reimbursement included “proof of payment of \$460 for Crop Production?” *Id.* at 223. Chase responded that it had paid an attached invoice/receipt with a credit card. *Id.*; *see id.* at 228, 266.

**Total Backfill Material.** Combined with backfill material reflected in the four Central Stone Company invoices, additional material brings the total weight to 7,760.66 tons and the total volume to 5,173.8 cubic yards of backfill material.

### **Drum Disposal**

While Parker's budget for "Remediation and Disposal" included \$4,373.68 in drum disposal costs (R. at 200), its request for reimbursement did not include any of these costs (R. at 295).

### **Summary**

Chase noted that total remediation and disposal costs were less than the budgeted amounts by \$7,773.72. R. at 223; *compare id.* at 195 (Budget Summary) *and id.* at 281 (Chase invoice).

### **IEPA Determination**

When reviewing Parker's request for reimbursement, IEPA stated that it "had questions regarding the backfill material since no invoices were provided, just manifest tickets." IEPA Mot. SJ at 6. IEPA requested documentation to support the request. *Id.* IEPA acknowledges that Parker's 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. *Id.* The consultant also documented that there was "no charge for material." *Id.*, citing R at 222.

During its review, IEPA stated that it "can't figure out how you arrive at 5,244.91 cubic yards for backfill." R. at 223. Chase responded that 5,175.67 cubic yards were removed. It argued that applying a swell factor of 1.05 under the Board's rules results in a volume of 5,434.45 cubic yards, "which was never budgeted for in original plan." *Id.*; *see* 35 Ill. Adm. Code 734.825(a)(1). Instead of submitting an amended budget and another request for reimbursement, Chase requested that IEPA "move the budget numbers around in this section to make it work on your end." R. at 223. Chase indicated that IEPA "can subtract the extra disposal costs we didn't use and add to the backfill cost." *Id.* Chase emphasized that total remediation and disposal costs were less than budgeted amounts by a total of \$7,773.72. This amount includes a budget of \$4,373.68 for drum disposal, for which Parker did not request reimbursement.

In a letter dated November 15, 2018, IEPA approved reimbursing \$572,925.56 of the requested amount of \$577,244.80. R. at 483. IEPA modified the reimbursement by \$3,755.42 in costs for remediation and disposal. *Id.* at 486; *see id.* at 218. IEPA stated that costs in this amount

lack supporting documentation. Such costs are ineligible for payment from the Fund pursuant to 35 Ill. Adm. Code 734.630(cc). Since there is not supporting documentation of costs, the Illinois EPA cannot determine that costs will not be used for activities in excess of those necessary to meet 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. R. at 486.

IEPA accounted for the amount of this modification: “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.” R. at 486; *see id.* at 294 (IEPA review notes).

### **SUMMARY OF PARKER’S PETITION**

Parker’s petition alleges that it performed corrective action according to a plan to excavate, transport, and dispose of contaminated soil and a budget of \$709,246.73, both of which IEPA approved on May 20, 2015. Pet. at 1-2. The petition further alleges that Parker relied on the availability of suitable backfill material “that could be obtained free of charge, so long as it was handled and transported by Petitioner’s consultant.” *Id.* at 2.

The petition further alleges that IEPA approved partial payment after deducting \$3,755.42, “purportedly because backfill material was provided free of charge.” Pet. at 3. The petition alleges that Parker did not request reimbursement for this backfill material. *Id.*

The petition alleges that IEPA’s modification cites Section 57.7(c)(3) of the Act, “which governs budgets, and does not apply to the application for payment being reviewed.” Pet. at 3, citing 415 ILCS 5/57.7(c)(3) (2020).

The petition also alleges that IEPA cites 35 Ill. Adm. Code 734.630(cc) to argue that the modified amount lacks supporting documentation “without explaining what document is missing.” Pet. at 3.

The petition further alleges that the costs Parker sought in its request for reimbursement “are less than the amounts approved in the budget.” Pet. at 3, citing 415 ILCS 5/57.7(c)(1), 57.8(a)(1) (2020).

Parker requests that the Board find that IEPA erred in its decision, direct IEPA to approve the total reimbursement request, award payment of attorney’s fees, and grant “such other and further relief as it deems meet and just.” Pet. at 3.

### **LEGAL BACKGROUND**

In the following subsection, the Board first provides the legal background to the motions for summary judgment before addressing the standard of review, burden of proof, and statutory and regulatory authorities.

### **Summary Judgment**

Summary judgment is appropriate when the pleadings, depositions, admissions, affidavits, and other items in the record show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Adames v. Sheahan, 233 Ill. 2d 276, 295, 909 N.E.2d 742, 753 (2009); Dowd & Dowd, Ltd. v. Gleason, 181 Ill. 2d 460, 483, 693 N.E.2d 358, 370 (1998); 35 Ill. Adm. Code 101.516(b). A genuine issue of material fact precluding summary judgment exists when “the material facts are disputed, or, if the material facts are undisputed, reasonable persons might draw different inferences from the undisputed facts.” Adames, 233 Ill. 2d at 296, 909 N.E.2d at 753; Adams v. Northern Illinois Gas Co., 211 Ill. 2d 32, 43, 809 N.E.2d 1248, 1256 (2004).

When determining whether a genuine issue of material fact exists, the record “must be construed strictly against the movant and liberally in favor of the opponent.” Adames, 233 Ill. 2d at 295-96, 909 N.E.2d at 754; Purtill v. Hess, 111 Ill. 2d 229, 240, 489 N.E.2d 867, 871 (1986). Summary judgment “is a drastic means of disposing of litigation, and therefore, should be granted only when the right of the moving party is clear and free from doubt.” Adames, 233 Ill. 2d at 296, 909 N.E.2d at 754; Purtill, 111 Ill. 2d at 240, 489 N.E.2d at 871. “Even so, while the nonmoving party in a summary judgment motion is not required to prove [its] case, [it] must nonetheless present a factual basis, which would arguably entitle [it] to a judgment.” Gauthier v. Westfall, 266 Ill. App. 3d 213, 219, 639 N.E.2d 994, 999 (2d Dist. 1994).

### **Standard of Review**

The Board must decide whether Parker’s submission to IEPA demonstrated compliance with the Act and the Board’s rules. Illinois Ayers Oil Co. v. IEPA, PCB 03-214, slip op. at 8 (April 1, 2004); Kathe’s Auto Service Center v. IEPA, PCB 96-102, slip op. at 13 (Aug. 1, 1996). The Board’s review is generally limited to the record before IEPA at the time of its determination. Freedom Oil Co. v. IEPA, PCB 03-54, 03-56, 03-105, 03-179, 04-04 (cons.), slip op. at 11 (Feb. 2, 2006); *see also* Illinois Ayers, PCB 03-214, slip op. at 15 (“the Board does not review [IEPA’s] decision using a deferential manifest-weight of the evidence standard,” but “[r]ather the Board reviews the entirety of the record to determine that the [submission] as presented to [IEPA] demonstrates compliance with the Act”).

IEPA’s denial letter frames the issues on appeal. Pulitzer Cmty. Newspapers, Inc. v. IEPA, PCB 90-142 (Dec. 20, 1990).

### **Burden of Proof**

In appeals of final Agency determinations, “[t]he burden of proof shall be on the petitioner. . . .” 35 Ill. Adm. Code 105.112(a), citing 415 ILCS 5/40(a)(1), 40(b), 40(e)(3), 40.2(a) (2020); Ted Harrison Oil v. IEPA, PCB 99-127, slip op. at 5-6 (July 24, 2003). The standard of proof in UST appeals is the “preponderance of the evidence.” Freedom Oil Co., slip op. at 59 (Feb. 2, 2006), citing McHenry County Landfill, Inc. v. County Bd. of McHenry County, PCB 85-56, 85-61, 85-62, 85-63, 85-64, 85-65, 85-66 (consol.), slip op. at 3 (Sept. 20,

1985) (“A proposition is proved by a preponderance of the evidence when it is more probably true than not.”).

### **Statutory and Regulatory Authorities**

Section 57.7(c)(3) of the Act provides in pertinent part that, when approving any corrective action plan and budget, IEPA must determine that the costs associated with the plan will not be used for “corrective action activities in excess of those required to meet the minimum requirements of this Title.” 415 ILCS 5/57.7(c)(3) (2020).

The Board’s UST regulations provide that “[c]osts ineligible for payment from the Fund include . . . [c]osts that lack supporting documentation.” 35 Ill. Adm. Code 734.630(cc).

### **BOARD DISCUSSION**

The parties agree that summary judgment is appropriate. *See* IEPA Mot. SJ at 4; IEPA Reply at 2. Parker argues that, when parties file cross-motions for summary judgment, “they agree that that no issues of material fact exist and invite the court to decide the issues presented as questions of law.” Pet. Resp. at 1, citing Village of Oak Lawn v. Faber, 378 Ill. App. 3d 458, 462 (1st Dist. 2007). However, “[t]he mere filing of cross-motions for summary judgment does not establish that there is no issue of material fact, nor does it obligate the Board to render summary judgment.” Prairie Rivers Network v. PCB, 2016 Ill. App. (1st) 150971 (Feb. 26, 2016).

In this appeal of a determination regarding reimbursement from the UST Fund, IEPA’s denial letter frames the issues. IEPA modified Parker’s request for reimbursement by \$3,755.42 in costs for remediation and disposal because they lack supporting documentation. “Since there is not supporting documentation of costs, the Illinois EPA cannot determine that costs will not be used for activities in excess of those necessary to meet minimum requirements of Title XVI of the Act.” R. at 486.

The Board must determine whether this case presents a genuine issue of material fact. It must decide whether Parker’s request for reimbursement include information sufficient to determine that the requested reimbursement will not violate the Act and Board regulations.

Below, the Board first addresses the parties’ arguments concerning IEPA’s authority to review a request for reimbursement before turning to Parker’s request and IEPA’s modification.

### **Scope of IEPA’s Review**

Parker argues that that IEPA has a limited scope of review when considering a request for reimbursement. When IEPA approves a plan and budget, it “shall be considered final approval for purposes of seeking and obtaining payment from the Underground Storage Tank Fund if the costs associated with the completion of any such plan are less than or equal to the amounts approved in such budget.” Pet. Mot. SJ at 9, citing 415 ILCS 57/57.7(c)(1), 57.8(a)(1) (2020).

Parker argues that IEPA improperly modified a request for reimbursement that was within its approved budget.

The Board disagrees. In a recent case, the Board concluded that “the approval of a budget, by itself, is insufficient to show that reimbursement is due.” Piasa Motor Fuels v. IEPA, PCB 18-54, slip op. at 10 (Apr. 16, 2020), citing 35 Ill. Adm. Code 734.610(c). The Board characterized IEPA’s review of a request for reimbursement as “extensive.” *Id.* That review may include “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.” *Id.* (emphasis in original), citing 35 Ill. Adm. Code 734.610(c). The Board found that IEPA may require that a request fully document and support costs for which it seeks reimbursement. Piasa Motor Fuels v. IEPA, PCB 18-54, slip op. at 10 (Apr. 16, 2020). The Board cannot agree that IEPA must approve an entire request for reimbursement simply because the amount of the request is within the total approved budget.

### **Sufficiency of Information**

Parker argues that IEPA’s review requires it to determine whether the application includes all necessary supporting documentation. Pet. Mot. SJ at 12, citing 35 Ill. Adm. Code 734.605(b), 734.610(a)(1). If it does not, IEPA’s decision letter must provide “[a]n explanation of the specific type of information . . . that the Agency needs to complete the review.” Pet. Mot. SJ at 12, citing 35 Ill. Adm. Code 734.610(d)(1). Parker argues that the decision letter does not identify missing information and does not suggest information that IEPA might review. Pet. Mot. SJ at 12.

When reviewing Parker’s request for reimbursement, IEPA “had questions regarding the backfill material since no invoices were provided, just manifest tickets.” IEPA Mot. SJ at 6. IEPA requested documentation to support the request. *Id.* IEPA acknowledges that Parker’s 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. *Id.* The consultant also documented that there was “no charge for material.” *Id.*, citing R at 222.

Based on this information, IEPA 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.” IEPA Mot. SJ at 6. IEPA argues that it reimbursed all other costs associated with 520.16 tons or 346.8 cubic yards “at the subpart H rate of \$24.30 per cubic yard less the approximately \$10.88 costs for the purchase of the backfill. *Id.*

Parker acknowledges that IEPA raised an issue with backfill provided free of charge. Pet, Mot. SJ at 12, citing R. at 222. However, Parker argues that IEPA ultimately found no authority that might be violated if it approved the request. Pet. Mot. SJ at 12, citing 35 Ill. Adm. Code 734.610(d)(2). Parker concludes that it met its burden of proving that no provision identified by IEPA would be violated if IEPA approved the application. Pet. Mot. SJ at 12-13.

Based on IEPA’s decision letter, Parker argues that “[t]he sole issue in this appeal is whether the application ‘lack[ed] supporting documentation.’” Pet. Resp. at 2, citing R. at 486.

Parker first argues that IEPA's decision letter "does not identify what documentation was lacking." Pet. Resp. at 2; *see* 35 Ill. Adm. Code 734.610(d)(1). Second, Parker argues that IEPA acknowledges requesting and receiving documentation. IEPA Mot. SJ at 6, citing R. at 222. Parker also cites IEPA's argument that, "[w]hen asked for supporting documentation, what was received made clear that they were asking for reimbursement for something they had received for **FREE**." IEPA Mot. SJ at 7-8 (emphasis in original).

Parker suggests that IEPA confuses the issue of what supporting documentation must be submitted with the separate issue of any substantive issue that documentation may raise. Pet. Resp. at 3. Parker argues that, in T-Town Drive Thru v. IEPA, PCB 07-85, slip op. at 29 (Apr. 3, 2008), the Board found that the applicant failed to provide invoices documenting its claim. However, it argues that the Board did not reach any conclusion about invoices that were not part of the record. Pet. Resp. at 3, citing T-Town Drive Thru v. IEPA, PCB 07-85, slip op. at 2 (June 19, 2008) (denying petitioner's motion to reconsider).

Parker argues that the record and IEPA's arguments fail to identify supporting documentation that the Agency needed. Pet. Resp. at 3-4, citing 35 Ill. Adm. Code 734.605(b). Parker concludes that "there is no legal basis for the Board to conclude that the application for payment lacked supporting documentation." Pet. Resp. at 4.

Construing the record strictly against Parker, the Board cannot determine that there is no genuine issue of material fact on whether the information Parker submitted to IEPA was sufficient to support reimbursement. The Board agrees that IEPA can request documentation of costs and can modify a request for reimbursement based on that information. However, this record does not persuade the Board that Parker is entitled to judgment as a matter of law, and the Board believes that the information submitted by Parker raises factual issues to address at hearing.

### **Backfilling Costs**

To support its position that backfilling costs should have been reimbursed as requested, Parker relies on IEPA's Instructions for the Budget and Billing Forms:

Backfilling the Excavation:

Include in the "Cost per Cubic Yard (\$)" all costs associated with the purchase, transportation, and placement of clean material used to backfill the excavation resulting from the removal and disposal of soil, including but not limited to all non-consulting personnel (subcontractors), trucker/equipment operator labor, trucker/equipment operator travel and per diems, truck charges, visqueen truck liner, backhoe charges, equipment, equipment mobilization, backfill material (clay, sand, gravel), barriers, cones, tape, permit fees, traffic control, and other materials and related expenses. Pet. Mot. SJ at 13, citing Pet. Exh. A at 8.

Parker argues that these instructions clarify that costs for material are only one component of costs for backfilling an excavation. Pet. Mot. SJ at 13.

Parker argues that less than 15% of the backfill material that it used was washout rock. Pet. Mot. SJ at 13. While Parker acknowledges that there was no charge for the material itself, it “needed to be acquired, hauled to scales for weighing, transported to the job site and placed in the excavation.” *Id.* Parker elaborates that these costs included “the cost of scales to weigh the washout rock and of the various other backfill materials that were incorporated into the excavation with the washout rock.” *Id.* at 13-14.

Parker surmises that IEPA’s objection is that, while less than 15 percent of the backfill material itself was free of charge, “there are no regulatory rates for backfill material costs as a separate item.” Pet. Mot. SJ at 14. Because backfill may consist of combinations of various materials, Parker questions “why one portion of the backfill material is to be evaluated for cost and none other.” *Id.* Parker asserts that, if “backfill work is certified by a licensed professional engineer and is equal to or less than the budget approved by the Agency, the backfill material used cannot be second-guessed after buried in the ground.” *Id.*

IEPA disagrees and stresses that reimbursement rates in Subpart H are maximum rates. IEPA Mot. SJ at 4; *see* 35 Ill. Adm. Code 734.Subpart H. IEPA clarifies that it does not pay “more than what you actually spend for the item.” Pet. Mot. SJ at 4. IEPA argues that it “paid for all expenses associated with backfilling the **FREE** material into the excavation” and “only cut the cost for the **FREE** material. *Id.* (emphases in original). IEPA asserts that, when an item is **FREE**, expecting to be reimbursed for said item is a little excessive to say the least.” *Id.* (emphasis in original).

IEPA argues that this case is similar to Piasa Motor Fuels v. IEPA, PCB 18-54, in which the Board held in favor of IEPA “on this exact argument.” IEPA Mot. SJ at 4. From the Board’s decision in that case, IEPA emphasizes that IEPA had 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.**” *Id.* at 6 (emphasis in original), citing Piasa Motor Fuels v. IEPA, PCB 18-54, slip op. at 12 (Apr. 16, 2020).

Parker discounts IEPA’s reliance on Piasa Motor Fuels v. IEPA, PCB 18-54 (Apr. 16, 2020). It argues that, in that case, IEPA rejected backfill costs because the petitioner had not included backfill excavation costs in its corrective action plan and budget. Pet. Resp. at 4. Parker stresses that, in this case, IEPA’s decision letter instead claimed a “lack of supporting documentation.” *Id.* at 5.

IEPA dismisses Parker’s question whether IEPA would “have a problem if the backfill material cost one dollar?” IEPA Reply at 4; *see* Pet. Resp. at 6. IEPA indicate that it would have reimbursed the cost of backfill material purchased at that price. IEPA Reply at 4. IEPA stresses that “backfill material in this case was only provided for **FREE** because the provider’s scale was broken.” IEPA Reply at 4. It adds that Parker’s consultant “received this material for **FREE** due to an accident of circumstances and still failed to pass the savings on to the owner, the client, and Illinois EPA.” *Id.*



Construing the record strictly against Parker, the Board cannot determine that there is no genuine issue of material fact on reimbursement for backfill material. The parties have strenuously disputed IEPA's modification. The record indicates that Parker's budget may not have fully reflected work in its corrective action plan. It also indicates that its request for reimbursement exceeded its approved budget at least for backfilling the excavation. Parker does not persuasively argue that IEPA can simply re-classify elements of an approved budget as suggested by Parker's consultant. This record does not persuade the Board that Parker is entitled to judgment as a matter of law, and the Board believes that the reimbursement for backfill material raises factual issues to address at hearing.

### **IEPA Cost Calculations**

Parker argues that, because IEPA apparently believed that all backfill material must have a cost, it attempted to calculate the cost of washout rock available free of charge as if it had been purchased. Pet. Mot. SJ at 14. Parker further argues that IEPA opportunistically relied on more expensive backfill material from a specific quarry to increase its modification. *Id.* It also argues that IEPA overlooked the availability of handling charges. *Id.*

Parker argues that IEPA lacks authority to set rates for reimbursement of washout rock. Pet. Mot. SJ at 14, citing 5 ILCS 100/5-25 (2020). Parker further argues that IEPA erred by setting a rate for the washout rock. Pet. Mot. SJ at 14.

Parker asserts that IEPA's decision penalizes the use of recycled material as backfill. Pet. Mot. SJ at 15. Parker stresses the statutory policy "to promote the conservation of natural resources and minimize environmental damage by . . . encouraging and effecting the recycling and reuse of waste materials." *Id.*, citing 415 ILCS 5/20(b) (2020).

IEPA accounts for its \$3,755.42 modification of Parker's request for reimbursement for backfill:

$520.16 \text{ tons} \times \$6.70 \text{ per ton} = \$3,485.31$  – Cost of the Backfill, if it had been paid for.

$\$3,485.31 \times 7.75\% \text{ tax} = \$270.11$  – 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. IEPA Mot. SJ at 7.

To calculate the Subpart H rate for transporting and placing the material, IEPA calculated as follows:

$520.16 \text{ tons} / 1.5 \text{ tons per yard} = 346.8 \text{ cubic yards}$

$\$3,755.42 / 346.8 \text{ cubic yards} = \$10.88 \text{ per cubic yard}$ . IEPA Mot. SJ at 7.

IEPA argues that it allowed \$13.42 for the transportation and placement of the 520.16 tons or 346.8 cubic yards of backfill material. IEPA Mot. SJ at 7. It argues that that rate reflects \$24.30, the Subpart H maximum rate, less \$10.88. *Id.* IEPA further argues that it “**only** disallowed the portion of the subpart H rate that was associated with the purchase portion of this small part of the backfill.” *Id.* (emphasis on original).

IEPA asserts that the UST program “is a **reimbursement** program, where you are **reimbursed** for your **costs**.” IEPA Mot. SJ at 7 (emphasis in original). It argues that, “[i]f you get material for **FREE**, you have no costs, therefore, you have nothing to be reimbursed for.” *Id.* (emphasis in original). IEPA argues that it acted within the Act and regulations when it modified Parker’s request for reimbursement. *Id.*

Citing *Piasa*, IEPA argues that Parker must submit supporting documentation. IEPA Mot. SJ at 7. IEPA argues that its supporting documentation indicated that Parker requested “reimbursement for something they had received for **FREE**.” *Id.* at 8 (emphasis in original). IEPA argues that “[t]his is exactly the reason why this failsafe review by the Agency was put into the regulations.” *Id.* IEPA argues that “Chase Environmental received **FREE** backfill material” and did not seek to “pass the savings on to the client or the State of Illinois Leaking Underground Storage Tank Fund.” *Id.* (emphasis in original). IEPA concludes that “[t]his is the second case the Board has heard regarding consultants receiving **FREE** backfill material and wanting reimbursement from the Fund and having no shame in taking the case all the way to motions for summary judgment as if they were entitled to reimbursement from the LUST Fund for **FREE** material as a matter of law.” *Id.* (emphasis in original).

Noting IEPA’s repeated emphasized use of the word “free,” Parker argues that IEPA raises a matter of policy that is not based on legal authority. Pet Resp. at 6. Parker further argues that “[t]here are no costs for backfill material alone,” and IEPA did not consider whether “the money saved from washout rock offset fuel, labor, or other higher than expected costs.” *Id.* Parker asserts that it was “punitive” for IEPA to assess it at the cost of a superior good to increase the deduction from the reimbursement claim. *Id.* It argues that Board regulations do not authorize the IEPA “to invent such a rate.” *Id.*

Parker requested for reimbursement of 5,244.1 cubic yards of backfill material at \$24.30 per cubic yard. IEPA Reply at 3; *see R.* at 294; *see also* 35 Ill. Adm. Code 734.825 (Subpart H rates). IEPA stresses that it reimbursed Parker for “4898.11 cubic yards of backfill material at the approved rate of \$24.30. The 4898.11 cubic yards had supporting documents in the form of invoices for the purchase of backfill material from Florence Quarry and Richfield Quarry and transportation of the material from Lumley Trucking, LLC, and the placement was provided by Chase Environmental Group, Inc.” IEPA Reply at 3; *see R.* at 318-326. IEPA emphasizes that it reimbursed “\$13.42 per cubic yard for the transportation and placement of the backfill material which is the same amount reimbursed for transportation and placement for the 4898.11 cubic yards reimbursed at the Subpart H rate.” IEPA Reply at 4; *see id.* at 6.

IEPA argues that Parker’s request for reimbursement did not include an invoice for 346.8 cubic yards of backfill, which is subject to the maximum rates in Subpart H of the Board’s UST regulations. IEPA Reply at 3, citing 35 Ill. Adm. Code 734.835(b). IEPA “deducted \$10.88 per

cubic yard . . . for the 346.8 cubic yards the consultant received for **FREE.**” IEPA Reply at 3 (emphasis in original). IEPA concludes that it deducted \$3,755.42 from Parker’s request for reimbursement because those costs lacked supporting documentation. *Id.* at 2, citing R. at 294, 486.

Construing the record strictly against IEPA, the Board cannot determine that there is no genuine issue of material fact on its modified reimbursement for backfill material. While IEPA’s calculations are clear, the Board is not persuaded that these precise calculations are required in this case by the Act or regulations. This record does not persuade the Board that IEPA is entitled to judgment as a matter of law, and the Board believes that IEPA’s modification raises factual issues to address at hearing.

### **CONCLUSION**

Having construed the record against the non-moving parties, the Board cannot conclude that the record presents no dispute of material facts concerning IEPA’s modification of Parker’s request for reimbursement from the UST Fund. The Board cannot conclude that either Parker or IEPA is entitled to judgment as a matter of law. The Board denies the parties’ motions for summary judgment and directs its shearing officer to proceed to hearing.

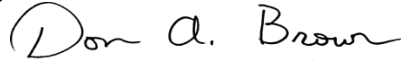
This opinion and order constitutes the Board’s findings of fact and conclusions of law.

### **ORDER**

1. The Board construes IEPA’s July 12, 2021 filing as a reply in support of its motion for leave to reply in support of its motion for summary judgment. Because Parker did not request leave to file a reply, the Board does not accept the July 12, 2021 filing and does not consider it in determining whether to grant IEPA’s June 24, 2021 motion for leave to reply.
2. The Board grants IEPA’s June 24, 2021 motion for leave to reply in support of its motion for summary judgment.
3. The Board denies IEPA’s request to strike Parker’s Exhibit A.
4. The Board denies IEPA’s request to strike Parker’s Exhibit B and takes official notice of it.
5. The Board denies Parker’s motion for summary judgment.
6. The Board denies IEPA’s motion for summary judgment.
7. The Board directs its hearing officer to proceed to hearing.

IT IS SO ORDERED.

I, Don A. Brown, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on July 21, 2022, by a vote of 3-0.

A handwritten signature in cursive script that reads "Don A. Brown". The signature is written in black ink and is positioned above a horizontal line.

Don A. Brown, Clerk  
Illinois Pollution Control Board