BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

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

NOTICE OF FILING AND PROOF OF SERVICE

TO: Carol Webb, Hearing Officer
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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 Brief, copies of which are herewith served upon the above persons.

The undersigned hereby certifies that a true and correct copy of this Notice of Filing, together with a copy of the documents described above, were today served upon the Hearing Officer and Division of Legal Counsel by electronic-mail, this 6th day of December. The number of pages of this filing, other than exhibits, is 22.

Respectfully submitted,

PARKER'S GAS & MORE, INC.
Petitioner,

BY: LAW OFFICE OF PATRICK D. SHAW

BY: /s/ Patrick D. Shaw

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PETITIONER'S POST-HEARING BRIEF

NOW COMES Petitioner, PARKER'S GAS & MORE, INC., by its undersigned counsel, pursuant to the briefing schedule entered by the Hearing Officer at hearing, states as follows:

ISSUE PRESENTED

Whether a portion of the backfill material which was provided at no cost violated either 415 ILCS 5/57.7(c)(3) or 35 Ill. Adm. Code 734.630(cc) such as to justify setting a rate for that portion of the backfill material and deducting it from the application for payment.

STATEMENT OF UNDISPUTED FACTS

Parker's Gas & More ("Parker") was the owner/operator of a service station in the City of Clayton, County of Adams, Illinois, which was assigned LPC# 0010105006. (R.0001; R.0006) In 1995, an incident was reported from three underground storage tanks at the property, and assigned Incident Number 95-1012. (R.001) On July 18, 2007, the Office of the State Fire Marshal determined that Petitioner was eligible to seek payment for corrective action costs. (R.0001)

On February 13, 2015, Chase Environmental Group ("Chase") submitted a corrective

action plan to the Agency on behalf of Parker, which proposed the excavation, transportation and disposal of petroleum contaminated soil located on-site and off-site. (R.006) In addition, applicable site remediation objectives would be achieved by the additional use of a highway authority agreement, land use restriction and groundwater ordinance. (R.006) After the contaminated soil was removed, the excavation was to be backfilled with an estimated 5,230 yds^3 of backfill material obtained from an off-site source. (R.0027) This would be in addition to the estimated 2,175 yds^3 of overburden material that could be returned to the excavation. (R.0026)

The corrective action plan was accompanied by a budget which estimated total corrective action costs at $709,246.73. (R.0195) Of particular relevance to this appeal was this portion of the Remediation and Disposal budget:

Excavation, Transportation, and Disposal of contaminated soil . . .:

Number of Cubic Yards	Cost per Cubic Yard ($)	Total Cost
5,230.00	69.25	$362,177.50

Backfilling the Excavation:

Number of Cubic Yards	Cost per Cubic Yard ($)	Total Cost
5,230.00	24.30	$127,089.00

Overburden Removal and Return:

Number of Cubic Yards	Cost per Cubic Yard ($)	Total Cost
2,175.00	7.91	$17,204.25

(R.0199 (totaling $506,470.75))

On May 20, 2015, the Agency approved the corrective action plan and budget without any modifications or deductions. (R.0215) Thereafter, Chase performed the soil abatement activities

proposed in the corrective action plan. (R.0357 - R.0358) The Corrective Action Progress Report stated that "5,175.67 yds^3 of contaminated soil were abated, 2175 yds^3 of overburden was returned to the excavation and 5244.91 yds^3 of backfill materials were placed in the resulting excavation during the May/June 2018 soil abatement activities." (R.0358

On August 13, 2018, Petitioner's consultant submitted the Corrective Action Billing Application for the work performed, totaling $577,244.80. (R.0268; R.0281) Reimbursement for remediation and disposal of soils was sought as follows:

Excavation, Transportation, and Disposal of contaminated soil . . .:

Number of Cubic Yards	Cost per Cubic Yard ($)	Total Cost
5,175.67	69.25	$358,415.15

Backfilling the Excavation:

Number of Cubic Yards	Cost per Cubic Yard ($)	Total Cost
5,244.91	24.30	$127,451.31

Overburden Removal and Return:

Number of Cubic Yards	Cost per Cubic Yard ($)	Total Cost
2,175.00	7.91	$17,204.25

(R.0294 (totaling $503,070.71))

Thus, the work was completed below the amount approved in the budget, though the internal items varied:

	Budget	**Application**	**Difference**
Excavating:	$362,177.50	$358,415.15	($3,762.35)
Backfilling:	$127,089.00	$127,451.31	$362.31
Overburden:	$17,204.25	$17,204.25	------
TOTAL:	$506,470.75	$503,070.71	($3,400.04)

Chase did not utilize a swell factor[1] of 1.05 for backfill in the initial budget and asked that in lieu of requiring it to submit an amended budget and additional request for reimbursement, the Agency credit costs under budget. (R.0223) The Agency reimbursed the backfilling costs in consideration of the swell factor and this issue was not a reason for any cuts made to the payment request. (R.0486; see also Hrg. Trans. at p. pp. 47-48 (Bauer testimony))

Instead, this appeal arises from twenty-six loads of washout rock received from Clinard Ready Mix, Inc. (R.0222) Clinard Ready Mix, Inc. did not charge for this material, but the loads were weighed at Corp Product Services for $460.00. (R.0222; R.0266) The loads were hauled by Beaird Transport, Inc. (R.0327 - R.0330) The load tickets for washout rock totaled 520.16 tons. (R.0320 - R.0323) Using the Board's conversion formula, the washout rock was just 346.77 yds^3 of the 5,244.91 yds^3 of the backfill used, which is just under ten percent.[2]

In summary, a portion of the backfill material was essentially free, though the washout rock still needed to be loaded in trucks, weighed, transported and placed in the excavation.

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[1] The volume of soil "must be determined by the following equation using the dimensions of the resulting excavation: (Excavation Length x Excavation Width x Excavation Depth) x 1.05." (35 Ill. Adm. Code 734.825(a)(1)

[2] "A conversion factor of 1.5 tons per cubic yard must be used to convert tons to cubic yards." (35 Ill. Adm. Code 734.825(b)(1))

The Agency did not solicit additional information concerning the washout rock, but proceeded to establish a charge for the washout rock in order to deduct that amount from reimbursement. The Agency calculated that the washout rock weighed a total of 520.195 tons. (R.0294) Then the Agency assumed that the quantity of aggregate and washout rock would be the same, *i.e.* the same densities, moisture content, compaction. (R.0294) Then the Agency assumed that the price of washout rock would be the same as the aggregate purchased from Florence Quarry ($6.70 per ton) (R.0263) and subject to the same sales tax as well (7.75%). (R.0294; R.0263) By way of comparson, the rock from the Richfield Quarry was $5.00 per ton with a 6.50% sales tax. (R.259 - R.261) In summary, assuming the washout rock weighed 520.195 tons and assuming it had been purchased for the same price and the same quantieis as the aggregate from the Florence Quarry, the Agency concluded that the washout rock cost $3,755.42. (R.0294 (Agency review notes)) There are no communications in the record indicating that this deduction had been discussed with the consultant.

On November 15, 2018, the Agency approved the application for payment in part by reimbursing $572,925.56 of the $577,244.80 requested. (R.0483) The Agency cut $3,755.42 for costs of Remediation and Disposal with the following description:

1. **$3,755.42, deduction for cots for Remediation and Disposal, which 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.**

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.0486)

On December 21, 2018, Petitioner timely filed a petition asking the Board to review the Agency determination. (See Board Order of Jan. 17, 2019) The petition only appealed the first deduction in the Agency decision letter.

SUMMARY OF HEARING TESTIMONY

Following denial of parties' motions for summary judgment, a hearing was held on November 15, 2022. One witness testified for each party and no exhibits were admitted into evidence, though excerpts from the Administrative Record were occasionally relied upon.

TESTIMONY OF MICHAEL DUDAS

Michael Dudas is a licensed professional engineer with certifications and training from the American Concrete Institute and from the Illinois Department of Transportation relating to asphalt, concrete and documentation of contract quantities. (Hrg Trans. at p. 6)[3] Dudas has worked for several companies on underground storage tank remediation projects, including Chase Environmental Group, the consultant for Parker's Gas & More, Inc. (Hrg. Trans. at pp. 7, 34-35) With respect to underground storage tank projects, he's been involved with preparing and reviewing plans, reports and reimbursement applications. (Hrg. Trans. at p. 7 & 35) He currently works as a design engineer for Hanson Professional Services, while working part-time with

[3] The transcript reads "contract quarry course for DOT certification," but there is no such course; Dudas has a certification from DOT for documentation of contract quantities.

Chase Environmental Group. (Hrg. Trans. at p. 7)

Dudas described the work at the Parker's Gas & More site as a "pretty standard" soil abatement project involving removal of contaminated soil to a landfill, bringing back clean backfill to refill the excavated hole, and sampling to demonstrate achievement of the objectives of the corrective action plan. (Hrg. Trans. at p. 8) He explained that backfill is budgeted by delineating the volume of the excavation and then typically adding a swell factor to arrive at the quantity of backfill that will be needed. (Hrg. Trans. at p. 10) The Agency must approve the quantity and the rate in the budget. (Id.)

There are no specifications for backfill material other than it must be clean. (Hrg. Trans. at p. 9-10) Typically, sand is a useful backfill material. (Hrg. Trans. at p. 11) Sometimes soft conditions at the site necessitate larger aggregate materials, but frequently the determining factor is the associated trucking expense. (Hrg. Trans. at pp. 10-12) Dudas explained:

> **So trucking is a high expense to what we do. So if there's a quarry, even if they have soil for $4 let's say and if it's an hour away and there's something that's you know, 30 minutes and the rocks' $5, it might be, you know, more conducive to grab that too.**

(Hrg. Trans. at p. 12)

Dudas explained that the lack of material certification requirements for backfill material is "kind of how we can make it work within budget." (Hrg. Trans. at p. 12) They have the flexibility to use different materials with different cost and proximity to the site. (Hrg. Trans. at p. 11-12) This is unlike most of the cost components which are set: labor costs are governed by prevailing wage law, usually there is only one landfill that is close, and equipment costs are generally determined by the size of the excavation. (Hrg. Trans. at pp. 10-12)

Dudas then explained the nature of the materials used for backfill identified in the billing package. The materials originating from the **Florence Quarry** were course modified aggregate six (CMO6), which was probably recycled, and would be the type of material that might be used at a gravel lot. (Hrg. Trans. at pp. 13-14) It would not be something typically used for backfill because it is "cost prohibitive," but would be the type of material to cap the entire site. (Hrg. Trans. at p. 14) The materials originating from the **Richfield Quarry** were three-inch clean commercial rock to backfill a majority of the excavation with something a litter bigger than can bridge the soft subgradient conditions. (Hrg. Trans. at p. 16) This larger rock could then be capped with the aggregate from the Florence Quarry. (Id.)

The third type of backfill material from **Clinard Ready Mix** consisted of washout rock, which would be a kind of mix of broken concrete or rock or sand or dirt the ready-mix plants accumulate as part of their business. (Hrg. Trans. at pp.16-18) The material is generally not useful for most commercial uses because there is no gradation to it. (Hrg. Trans. at p. 17) It is essentially clean construction debris. (Hrg. Trans. at p. 27) Sometimes this type of material is charged a price, but frequently a ready mix plant is simply trying to get rid of it. (Hrg. Trans. at p. 18) Recently, Dudas indicated he was charged twenty to twenty-five dollars a load for similar material. (Id.) The charges are usually to have somebody out there to weigh and load. (Id.)

Dudas further explained that the washout rock wasn't free, trucks need to be paid to transport it, and many other costs go into the total unit rate, such as permits, traffic safety, and special testing. (Hrg. Trans. at p. 22-23) The application for reimbursement documents the tonnage of backfill material delivered and is the basis for calculating the volume to be reimbursed at the total unit rate approved in the budget. (Hrg. Trans. at p. 24)

Dudas further explained that the conversion rate from tons to yards in the regulations does not necessarily reflect real world conditions. (Hrg. Trans. at p. 25) The regulations price backfilling by the cubic yard of the excavation, not by tons, and the conversion factor utilized by the regulations does not take into account the different densities, moisture content and compaction. (Hrg. Trans. at pp. 61-64) However, at the end of the day cubic yards is the measure for payment, not tons. (Hrg. Trans. at p. 64)

TESTIMONY OF BRIAN BAUER

Brian Bauer is the unit manager in the LUST Section and has been employed with the Agency for over 30 years. (Hrg. Trans. at p. 38) While Melissa Owen was the account technician assigned to review this billing package, Bauer supervised her as her technical liaison. (Hrg. Trans. at p. 40) Some of his notes are in the record. (Hrg. Trans. at pp. 40-41 (referring to page 294 in the record, which contains the calculations for the deductions at issue herein))

Bauer explained that the Agency documentation submitted by Chase was short by "basically 520.195 tons," which they assumed was in the 26 loads of washout rock. (Hrg. Trans. at p. 45) To calculate a charge for the wash out rock, they looked at an invoice from the company that provided the other backfill. (Hrg. Trans. at p. 45) "So we took the 520.195 tons times $6.70 per ton, [which] gave us $3,485.31. They also charged a tax on there of 7.75 percent, which was $270.11. So we deducted $3,755.42 from the claim." (Hrg. Trans. at p. 46) He did not recall why he used the invoice from one quarry rather than another or what basis he might have used to make that decision. (Hrg. Trans. at p. 76) "I'm sure we just grabbed an invoice . . .." (Id.)

Bauer insisted that the Agency did not cut the cost for transportation or other items; they "just cut . . . the cost for the rock." (Hrg. Trans. At p. 46) Furthermore, the Agency did not make deductions for backfilling more cubic yards than excavated in order to allow for any fluff factor type of issues. (Hrg. Trans. at pp. 47-48)

In reviewing reimbursement requests, Bauer explained that the agency does not review the nature of the material used, just to make sure "it comes from a clean source." (Hrg. Trans. at p. 49) LUST sites can use clean construction debris material, but not if it is free. (Hrg. Trans. at pp. 49-50) He understands that Chase might have chosen a different combination of transportation and materials depending on the cost of those items. (Hrg. Trans. at pp. 49-50)

In order for Chase to get reimbursed for the amount requested in the billing package, Bauer testified that they would need to provide an invoice showing they bought the backfill material. (Hrg. Trans. at p. 52) He said it was possible that a one dollar invoice might be sufficient, but for twenty-six loads, "I don't think that would change my decision." (Hrg. Trans. at pp. 52-53) Bauer referenced the $6.70 per ton paid for "similar backfill materials at this particular facility" as an appropriate purchase rate. (Id.) On the other hand, perhaps one dollar would be sufficient (Hrg. Trans. at p. 55)

LEGAL STANDARDS AND SCOPE OF REVIEW

The Agency's refusal to pay or authorize only partial payment may be appealed to the Board. See 415 ILCS 5/57.8(i). The question posed herein is "whether the application, as submitted to the Agency, would not violate the Act and Board regulations." Metropolitan Pier & Exposition Authority v. IEPA, PCB 10-73, slip op. at 51 (July 7, 2011). This does not entail review of every statute, regulation and interpretation thereof, for "on appeal before the Board, the Agency's denial letter frames the issue." Evergreen FS v. IEPA, PCB 11-51, slip op. at 16 (June 21, 2012) This denial letter must give written notification of the specific type of information the Agency needed to complete its review, an explanation of the legal provisions that might be violated if the application for payment is approved, and a statement of the specific reasons why those legal provisions may be violated. (35 Ill. Adm. § 734.610(d))

As to the issues identified in the Agency decision letter, Petitioner has the burden of proof in these proceedings. Evergreen FS v. IEPA, PCB 11-51, slip op. at 16 (June 21, 2012) The standard of proof in UST appeals is a "preponderance of the evidence." Id. "A proposition is proved by a preponderance of the evidence when it is more probably true than not." Id.

The Board has previously found that the administrative record was insufficient to resolve the factual issues herein and directed the parties to proceed to hearing. Opinion and Order of the Board, p. 19 (July 21, 2002) Such a hearing "includes consideration of the record before the EPA together with the receipt of testimony and other proofs under the full panoply of safeguards normally associated with a due process hearing." Illinois Environmental Protection Agency v. Illinois Pollution Control Board, 138 Ill. App. 3d 550, 552 (3rd Dist. 1985) "[T]he hearing before the Board is the petitioner's first opportunity to explain how the Agency record supports

the application." Illinois Ayers Oil Co. v. IEPA, PCB 03-214, slip op. at 15 (April 1, 2004). Therefore, there is no inconsistency between the record being the basis for the Board's review and the propriety of considering testimony about the record. Id. at 17 (rejecting Agency's argument to disregard testimony from witness explaining the record that was not before the Agency at the time it made its decision).

OFFICIAL NOTICE

Pursuant to 35 Ill. Adm. Code 101.630, Petitioner requests that the Board take Official Notice of two exhibits hereto. The Board may take official notice of "matters of which the circuit courts of this State may take judicial notice; and generally recognized technical or scientific facts with the Board's specialized knowledge." (35 Ill. Adm. Code § 101.630(a))

Exhibit A hereto is the Agency denial letter at issue in Piasa Motor Fuels v. IEPA, PCB 18-54 (April 16, 2020) This Agency denial letter is taken from the Petition for Review dated January 2, 2018 and on file with the Clerk of the Pollution Control Board. The IEPA was a party to the proceedings and presented testimony explaining the caste at hearing herein. (Hrg. Trans. at pp. 56-58) The Board may take official notice of its own records in other cases upon request in a post-hearing brief. ESG Watts v. Pollution Control Board, 282 Ill. App. 3d 43, 54-55 (4th Dist. 1996)

Exhibit B hereto is the IEPA Instructions for the Budget and Billing Forms (4/2009), which was downloaded from the Agency's website. The Board took official notice of this Instruction previously over the Agency's objection. Opinion and Order of the Board, pp. 4-5 (July 21, 2002) The 2009 Instruction was in effect in 2015 when Chase submitted the budget to

the Agency and when the Agency approved the budget. (R.0004; R.0215) While the instructions were updated October of 2016, these updates do not appear to make any material changes of any relevance herein, and moreover it was in 2015 that the plan and budget was set.

ARGUMENT

Since the issue in this appeal is framed by the Agency decision letter, the statements and explanations in the letter are paramount. The decision letter states that 520.195 tons of backfill were provided free of charge in violation of Section 734.630(cc) of the Board regulations (35 Ill. Adm. Code § 734.630(cc)), and Section 57.7(c)(3) of the Act (415 ILCS 5/57.7(c)(3)). The decision letter does not claim that the backfill material was not approved in the underlying plan and budget. Compare with Piasa Motor Fuels v. IEPA, PCB 18-54, slip op. at 13 (April 16, 2020) (affirming Agency's denial of reimbursement for cost of excavating backfill onsite without specific approval in plan and budget)

In assessing a charge for washout rock that was consistent with the plan and within budget, the Agency exceeded its scope of review for payment applications. Furthermore, none of the legal provisions cited would be violated. Section 57.7 of the Act governs plans and budgets, not applications for payment. (415 ILCS 5/57.7) Section 734.630(cc) of the Board's regulations pertain to incomplete payment applications, and the Agency did not identify any missing information in its denial letter. In addition, Petitioner disputes that backfilling was completely free for the reason that costs associated with loading, transporting and placement of the backfill, as well as expenses associated with weighing the backfill material were involved. Finally, the Agency's remedy of assessing a fabricated backfill charge is without legal basis and arbitrary.

I. THE AGENCY EXCEEDED ITS SCOPE OF REVIEW OF PAYMENT SOUGHT WITHIN THE BUDGET.

When the Agency approves a plan and budget, such approval "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 or less than or equal to the amounts approved in such budget." (415 ILCS 57/57.7(c)(1)) Accordingly, the Agency's scope of permitted review is limited when payment is sought:

> **In no case shall the Agency conduct additional review of any plan which was completed within the budget, beyond auditing for adherence to the corrective action measures in the proposal.**

(415 ILCS 5/57.8(a)(1))

Here, the testimony of Brian Bauer made clear that there were no issues with use of the washout rock material for backfill. The Agency review of backfill material only ensures "it comes from a clean source." (Hrg. Trans. at p. 49) Use of recycled or construction demolition debris material is appropriate in the LUST Program. (Id.) The Agency's only problem is that the material cost was free. (Id.) There is no suggestion in the record that use of the washout rock was inconsistent with the work proposed in the plan. The issue is solely cost of acceptable material.

In contrast, in the case the Agency relies on, Piasa Motor Fuels v. IEPA, PCB 18-54 (April 16, 2020), the Board found that the activity of excavating backfill from the owner's own property needed to be disclosed in the corrective action plan to allow the Agency to determine whether or not the costs of this means of obtaining backfill was reasonable and not excessive. Id. at 13. Specifically, the Board affirmed the Agency's deductions made pursuant to 35 Ill. Adm. Code § 510(b)(costs "must be incurred in the performance of corrective action activies") and 35 Ill. Adm. Code 605(a) ("Costs for which payment is sought must be approved in a budget"). Cf. Exhibit A (denial reason 2). None of those legal grounds was raised in the Agency decision letter

herein.

Instead, the purported problem is a ready-mix company did not charge for some washout rock, and it's not clear whether twenty dollars a load, one dollar or a mere peppercorn would resolve this problem. Hopefully, if there is one thing that the hearing illuminated it is that the cost of material is not an independent factor from all of the other costs of backfilling an excavation. The costs of transportation are high enough that the distance traveled is a key, overriding factor in choice of material used. There can be little doubt that if the ready-mix plant charged $3,755.42 for the washout rock, the consultant would not have arranged for a special trip to get it, let alone pay an additional $460 to weigh it.

Backfilling is budgeted on a total unit rate, and there are a lot costs that go into it:

> **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.**

(Ex. B, at p. 8 (Agency Budget Instructions))

What this Instruction does as a practical matter is put the risk of all these costs on the contractor since they are to be estimated when the budget is submitted. If traffic or local permitting issues arise, they were supposed to be included when the budget was submitted for approval. Some of these costs will vary more or less, and some will not be relevant at all. It is the consultant's job to get all of the backfill work performed within the rate approved by the Agency at the budget stage. If the Agency can raise issues with components of the rate at the

payment stage, then the purpose of the pre-work budgeting process is defeated. See Evergreen FS v. IEPA, PCB 11-51, slip op. at 21 (June 21, 2012) (finding that the Agency erroneously raised issues at the payment stage for work performed that was consistent with the plan and budget).

Because the Agency's review of the payment application did not identify any corrective action measures performed that were inconsistent with the approved plan and since the costs were within the approved budget, the Agency should have approved the application of payment.

II. NONE OF THE LEGAL PROVISIONS CITED IN THE AGENCY DECISION LETTER WOULD BE VIOLATED IF PAYMENT WAS APPROVED.

The Agency is required to approve payment applications unless a provision of the Act or the Board's regulations might be violated. The Agency has identified two provisions:

First, the Agency decision letter stated that "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.0486). As a matter of law Section 57.7(c)(3) of the Act would not be violated because that provision contains the legal standards applicable for review of site investigation plans and budgets and corrective action plans and budgets. (415 ILCS 5/57.7(c)(3)) The Agency's authority to review payment applications is contained in Section 57.8 of the Act, which provides an entirely different framework. (415 ILCS 5/57.8; Cf. Knapp Oil Co. v. IEPA, PCB 16-103, slip op. at 9 (Sept. 22, 2016) (containing brief summary of the plan, budget and reimbursement process in finding that the Agency had failed to recognize the relevant distinctions).

Second, the Agency stated that the "costs for Remediation and Disposal . . . lack supporting documentation. Such costs are ineligible for payment from the Fund pursuant to 35 Ill. Adm. Code 734.630 (cc)." (R.0486) This is also legally incorrect. Board regulations specify the documents required for a payment application in 35 Ill. Adm. Code § 734.605(b)), and the Agency's review of the application requires it to determine "[w]hether the application contains all of the elements and supporting documentation required by Section 734.605(b) of this Part" (35 Ill. Adm. Code § 734.610(a)(1)) If there is any information missing, the Agency decision letter must provide "[a]n explanation of the specific type of information . . . that the Agency needs to compete the review." (35 Ill. Adm. Code § 734.610(d)(1)) There is no missing information identified in the Agency decision letter and nothing in the Agency's decision letter even suggests there is information that could be supplied to permit Agency review.

To be clear, Petitioner is not claiming that no documentation was needed to support use of the washout rock. Chase submitted information identifying the material, its source, where it was weighed, how many loads were used and how many tons of material were used. The documentation submitted was adequate for Brian Bauer to make a deduction based upon the weight of the washout rock placed in the excavation.

Instead, the Agency complained that some backfill was "provided free of charge" based upon documentation contained in the billing package. (R.0222) That is, the Agency apparently believed that supporting documentation raised an issue, but ultimately did not and could not find any legal provision that "may be violated if the application for payment is approved." (35 Ill. Adm. Code § 734.610(d)(2)) It is not necessary to expect that every issue the Agency may flag will be addressed by a statute or regulation, but if none can be located, then the application for

payment must be granted. Petitioner's burden of proof in this proceeding is merely to establish that no provision identified by the Agency would be violated if the application was approved, and that burden is met.

III. THE AGENCY'S REMEDY OF ASSESSING A FABRICATED BACKFILL CHARGE IS ARBITRARY AND WITHOUT LEGAL BASIS.

The washout rock material obtained from Clinard Ready Mix is a type of clean construction demolition material that ready mix plants accumulate as part of their primary business of producing and delivering ready-mix concrete. Such material can be recycled, but generally its reuse is limited by how long it can be stored before running into issues concerning speculative accumulation or storage space. Without gradation specifications, such material is not useful for many engineered applications, at least beyond filling a simple hole. Thus ready-mix operations are incentivized to move such material on hand for whatever they can get, frequently at little or no cost to pay for loading and weighing the material. (Hrg. Trans. at p. 18)

While in the narrowest sense, there was no charge for the washout rock as Clinard Ready Mix did not receive any money for it, in the broader sense, arrangements had to be made to rent a scale, load the material to take it to the scale and then haul it to the excavation site. Similarly in another sense, we recognize that Brian Bauer intended to only deduct the "cost" of the washout rock from the total reimbursement for backfilling, but the cost of backfill material is inexorably bundled with the related cost of transportation, both as a matter of practice and as a matter of the Board regulations which utilizes a total unit rate.

The calculations used by Brian Bauer to create a "cost" for the washout rock demonstrate

the arbitrary basis of the Agency's decision herein. By using an invoice from the Florence Quarry, apparently randomly taken from the billing package, the calculation fails to account for the difference in the quality and nature of the different materials. Foremost, it would be cost prohibitive to use the aggregate from the Florence Quarry for common backfill because of its higher quality and use for purposes greater than simply filling a hole. (Hrg. Trans. at p. 14) In addition, because the Florence Quarry aggregate would have a different density than the washout rock, the volume would not be constant between the two. (Hrg. Trans. at pp. 61-63) The only way to know how much Florence Quarry aggregate would be needed to fill a space currently occupied by washout rock would be to conduct density testing. (Id.) So the formula used to quantify a "cost" for the washout rock is based upon Brian Bauer's erroneous assumption that the two different materials are "similar" (Hrg. Trans. at pp. 52-53), so that the volume and the price per cubic ton would be the same.

Furthermore, the Agency's fabricated charge penalizes the use of recycled material that may be available from time to time to backfill the excavation because such material is free or relatively inexpensive. It is the public policy of the State of Illinois "to promote the conservation of natural resources and minimize environmental damage by . . . encouraging and effecting the recycling and reuse of waste materials." (415 ILCS 5/20(b)) Not only did the use of the washout rock from the ready-mix company not violate the Act or regulations promulgated thereunder, but such an interpretation that discouraged reuse of available recycled materials would be inconsistent with the purpose of the Act.

CONCLUSION

Petitioner has met its burden of proving by a preponderance of the evidence that no legal provision cited in the Agency's decision letter would be violated if the payment application was approved. Accordingly, Petitioner prays that judgment be entered in its favor, the Agency be directed to approve the payment application in full, the Board award payment of legal costs herein, and the Board grant Petitioner such other and further relief as it deems meet and just.

PARKER'S GAS & MORE, INC.,
Petitioner

By its attorneys,
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