

ILLINOIS POLLUTION CONTROL BOARD
May 4, 2023

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

INTERIM OPINION AND ORDER OF THE BOARD (by M. Gibson):

Parker’s Gas & More, Inc. (Parker) was the owner or operator of a service station in 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) 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 that amount lacked supporting documentation. Parker requests that the Board reverse this modification and approve its full request for reimbursement.

For the reasons below, the Board finds that the record supports Parker’s request for reimbursement. IEPA’s decision to reduce the amount of the request is not based on the record and is therefore reversed. The Board sets deadlines for Parker to file a statement of legal fees and IEPA to respond. Parker must explain why the fees may be eligible for reimbursement and argue why the Board should exercise its discretion to direct IEPA to reimburse those fees.

The opinion first sets out an abbreviated procedural history and then decides two preliminary matters. Next, the Board summarizes the factual background and then addresses the legal background, including the standard of review, 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.

ABBREVIATED PROCEDURAL HISTORY

On December 21, 2018, Parker filed a petition for review (Pet.), which the Board accepted for hearing on January 17, 2019. 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.).

In an order on July 21, 2022, the Board denied the parties’ cross-motions for summary judgment and directed its hearing officer to proceed to hearing. The hearing took place as scheduled on November 15, 2022, and the Board received the transcript (Tr.) on November 22, 2022. Mr. Michael Dudas, an engineer for Hanson Professional Services who works part-time for Chase Environmental Group (Chase), testified for Parker. Tr. at 7, 28. Mr. Brian Bauer, Unit Manager in the UST section of IEPA, testified for IEPA. Tr. at 38.

Parker filed its post-hearing brief (Pet. Brief) on December 6, 2022; IEPA filed its response brief (IEPA Resp.) on December 20, 2022; and Parker filed its reply brief (Pet. Reply) on December 27, 2022.

PRELIMINARY MATTERS

Official Notice

Parker attached to its post-hearing brief two exhibits: Exhibit A is an IEPA decision letter dated November 27, 2017, to Piasa Motor Fuels. Pet. Brief at 12, citing Piasa Motor Fuels v. IEPA, PCB 18-54. Exhibit B is IEPA’s Budget and Billing Form updated April 2009. Pet. Brief at 12, citing Parker’s Gas & More v. IEPA, PCB 19-79, slip op. at 4-5 (July 21, 2022). Parker requests that the Board take official notice of the two exhibits. Pet. Brief at 12. In its response brief, IEPA requests that the Board strike Exhibits A and B. *See* IEPA Resp. at 13.

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. Under the Board’s procedural rules, parties will be notified of material noticed and given an opportunity to contest it. 35 Ill. Adm. Code 101.630(b).

Parker Exhibit A

Parker first requests that the Board take official notice of its Exhibit A, the decision letter appealed in Piasa Motor Fuels v. IEPA, PCB 18-54. Pet. Brief at 12. Parker asserts that the letter was filed with the petition for review in that case and is available from the Board’s Clerk. *Id.* Parker argues that the “[t]he Board may take official notice of its own records in other cases upon request in a post-hearing brief.” *Id.*, citing ESG Watts v. PCB, 282 Ill. App. 3d 43, 54-55, 668 N.E.2d 1015, 1023 (4th Dist. 1996).

The Board “may take judicial notice of matters of record in another administrative order, determination, or judgment, especially where these proceedings are related.” ESG Watts v. PCB, 282 Ill. App. 3d 43, 54, 668 N.E.2d 1015, 1023 (4th Dist. 1996). Both Piasa and this case are before the Board on appeal of an IEPA determination under the UST program. *See All Purpose Nursing Service v. Human Rights Comm’n.*, 205 Ill. App. 3d 816, 823, 563 N.E.2d 844, 848 (1st

Dist. 1990). IEPA itself asserts that “[t]he Board is going to notice that the argument in this case is very similar to that in Piasa Motor Fuels v. IEPA, PCB 18-54.” IEPA Resp. at 7. IEPA had an opportunity to contest taking notice of the IEPA decision letter, but it did not persuasively oppose Parker’s request with argument or citation to authority. *See* IEPA Resp. at 13. Having considered these authorities and factors, the Board grants Parker’s request to take official notice of its Exhibit A.

Parker Exhibit B

Parker also requests that the Board take official notice of its Exhibit B, which it obtained from IEPA’s website. Pet. Brief at 12. Parker states that this set of instructions from 2009 applied to the budget it submitted and IEPA approved in 2015. *Id.* at 12-13, citing R. at 4, 215. Parker stresses that, when the Board decided the parties’ cross-motions for summary judgment, it denied IEPA’s motion to strike these instructions as an exhibit to its motion. Pet. Brief at 12, citing Parker’s Gas & More v. IEPA, PCB 19-79, slip op. at 4-5 (July 21, 2022).

The Board notes that it previously accepted Parker’s Exhibit B as an exhibit when considering the parties’ motion for summary judgment. When it did so, the Board noted that “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.” Parker’s Gas & More v. IEPA, PCB 19-79, slip op. at 5 (July 21, 2022), citing Stop The Mega-Dump v. County Bd. Of DeKalb County, Ill. and Waste Mgmt. of Ill., PCB 10-103 (Mar. 17, 2011). In its response brief, IEPA requests that the Board strike Exhibit B without citing authority supporting that request. Having considered these factors, the Board grants Parker’s request to take official notice of its Exhibit B.

Motion to Strike Testimony

Hearing Objection to Testimony

After cross-examining Mr. Dudas, IEPA objected to his testimony on the basis of a “lack of foundation and knowledge as to this site.” Tr. at 33. IEPA argued that “he is not the P.E. [Professional Engineer] that was present at this site at the time, nor did he sign any of the documents at the time, and it seems like his experience is more with IDOT [Illinois Department of Transportation]” than with the UST program. *Id.* IEPA requested striking his testimony because “there’s a lack of foundation of his knowledge of this site.” *Id.*

Parker responded that “the objection is pretty late” and that “[t]here’s foundation given to all of his testimony.” Tr. at 33. Parker argued that “the basic standard for evidence at these hearings is whether or not the witness is providing information that people could rely upon.” *Id.*

The hearing officer overruled IEPA’s objection to Mr. Dudas’ testimony and allowed the testimony into the record. Tr. at 34.

IEPA’s Post-Hearing Request to Strike Testimony

IEPA renewed the objection in its response and moved to strike his testimony. IEPA Resp. at 5-6. IEPA argues that Parker did not provide a foundation for Mr. Dudas' knowledge of the site and Parker's request for reimbursement. IEPA Resp. at 5; *see* Tr. at 33. IEPA further argues that "the testimony was irrelevant" and is therefore inadmissible. IEPA Resp. at 6. IEPA requests that the Board strike Mr. Dudas' testimony because he does not have personal knowledge of this matter and was not offered as an expert under rules of evidence. *Id.*

Parker's Response

Parker cites the Board's procedural rules, which provide that "[a] party's objection to a hearing officer ruling made at hearing is waived if the party fails to file the objection within 14 days after the Board received the transcript." Pet. Reply at 2, citing 35 Ill. Adm. Code 101.502(b). Because the Board received the transcript of the hearing on November 22, 2022, IEPA's objection was due December 6, 2022. *See* Pet. Reply at 2. Because IEPA did not object by that deadline, Parker argues that IEPA waived its objection to Mr. Dudas' testimony. *Id.*

Mr. Dudas testified that he had not certified the plan and budget for the site in 2015 or the request for reimbursement in 2018. Tr. at 28-30, citing R. at 211, 349. However, Parker argues that he "is a professional engineer with experience, training and education relevant to all aspects of backfilling an excavation." Pet. Reply at 3; *see* Tr. at 6-7, 34-36. Mr. Dudas testified that his involvement with UST sites has including reviewing plans for early action; tank removals; preparing, reviewing, and certifying corrective action plans and corrective action completion reports. Tr. at 35.

Parker argues that Mr. Dudas "did not testify to matters solely in the personal knowledge of any other individual." Pet. Reply at 2. Parker also stresses the procedural rule providing that "[t]he hearing officer may admit evidence that is material, relevant, and would be relied upon by prudent persons in the conduct of serious affairs." *Id.* at 3, citing 35 Ill. Adm. Code 101.626(a).

Board Discussion

IEPA failed to timely appeal the hearing officer decision to allow the testimony of Mr. Dudas into the record. For that reason alone, the Board could deny the request to strike the testimony. However, Parker persuasively stresses that Mr. Dudas is a professional engineer with relevant involvement with UST sites, and IEPA has not convincingly challenged this background. Therefore, the Board finds that IEPA failed to make a convincing argument to overturn the hearing officer. The Board denies the motion to strike and will consider the testimony of Mr. Dudas in making its determination.

LIMITED FACTUAL BACKGROUND

The Board will provide a limited factual background in this opinion. For a complete factual discussion, see the Board order Parker's Gas & More v. IEPA PCB 19-79 (July 21, 2022). The Board will limit its factual background to IEPA's decision to reduce the

reimbursement request by \$3,755.42 in costs for remediation and disposal. R. at 486; *see id.* at 218.

IEPA-Approved Budget

On May 20, 2015, IEPA approved a corrective action plan and budget. R. at 215. The plan and budget approved Parker's corrective action budget (R. at 192-211) for total costs of \$709,246.73. The line items for the budget were:

Remediation and Disposal Costs of \$510,844.43. R. at 195.

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

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

Overburden Removal and Return costs for 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 sub-categories was \$506,470.75. *See* R. at 199.

Request for Reimbursement

On 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 yards of contaminated soil. *Id.*; *see* 35 Ill. Adm. Code 734.825(b)(1) (conversion factor).

Mr. Dudas testified that the general conversion factor back-calculates the volume, but the calculation may not reflect material properties including density, water content, air content, and compaction ratio. Tr. at 62.

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 18, 2018. R. at 302-17. These records show a total of 7,763.51 tons of material which translates to the 5,176.68 cubic yards.

The record also includes two invoices from Beaird 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 36 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. *Id.* at 329. The two invoices total \$91,058.

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 a volume of 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. This request equals the budgeted amount. *See* R. at 199.

Backfill

Chase backfilled the excavation with 7,221.52 tons of backfill. R. at 358. Applying the conversion factor, this weight represents a volume of 5,244.91 cubic yards. *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 \$362.31. *See* R. at 199, 294.

Central Stone Company. The record includes four invoices from Central Stone Company to Chase. R. at 240-42, 245.

Three of the four invoices refer to a plant site of “Richfield Quarry CS35.” R. at 240-41, 245. Each listed ticket number refers 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 for the material of \$5.00 per ton. *Id.*; *see id.* at 318-19, 324. 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 three Richfield Quarry invoices total \$38,020.54.

Mr. Dudas testified that the Richfield Quarry invoices refer by code to three-inch clean commercial material commonly used as the base of an excavation. Tr. at 15-16. He further

testified that this material would generally “backfill the majority of the excavation.” It would generally then be compacted and capped with a different material. *Id.*

The fourth Central Stone Company invoice refers to a plant site of “Florence Quarry CS33.” R. at 242. The record includes numbered load tickets from the Florence Quarry in Pittsfield to Chase. *Id.* at 324; 477-78. Each load listed in the invoice indicates a rate for the material of \$6.70 per ton. This invoice shows a tax rate of 7.75%. *Id.* at 242. The four loads listed in the invoice total 81.52 tons of material, which converts to 54.3 cubic yards. The invoice amount is \$588.52. *Id.*

Mr. Dudas testified that this Florence Quarry invoice refers by code to a coarse modified aggregate material. Tr. at 13-14. He added that this material would not typically be used as backfill because of its cost. However, the material may be necessary to meet project requirements and would commonly be used to cap a site. *Id.*

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

Additional Material. On 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.

In his testimony, Mr. Dudas describes washout rock as a mix of broken concrete, rock, sand, or soil commonly collected by ready-mix plants. Tr. at 16, 27. He added that washout rock is usually used only as backfill because it is not graded or poorly graded and would generally not meet project specifications. *Id.* at 17. Mr. Dudas testified that sources of washout rock typically try “to get rid of it because it takes up space.” *Id.* at 18, 27. He added that sources may charge to haul and weigh washout rock and commonly charge by the load. *Id.* at 18.

The record includes a series of 26 load tickets dated May 9-11, 2018. R. at 320-23. 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. Applying the conversion factor, this weight represents a volume of 346.77 cubic yards of washout rock. *Id.*; *see* 35 Ill. Adm. Code 734.825(b)(1) (conversion factor).

The record also includes an invoice dated May 11, 2018, from Crop Production Service for \$460.00 as a “Misc. Charge.” R. at 222, 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.

IEPA Review

Mr. Bauer testified that he and Melissa Owens, a former Account Technician for IEPA, discussed Parker's request for reimbursement with him. Tr. at 40-41, citing R. at 294. He added that Ms. Owens noticed that the request was missing documents and that "[t]here was no backfill documentation." Tr. at 42. Mr. Bauer testified that Ms. Owens emailed Matthew Rives of Chase "and asked him for additional information." *Id.*; see R. at 225. IEPA specifically questioned the purchase of backfill material. R. at 225, 239. Among other information, IEPA asked "[c]an you please provide invoices for the purchase of the backfill?" *Id.*

On October 1, 2018, Chase responded that "[t]hey were hidden behind all the material tickets, I have copied them and the checks for your review." R. at 225, 239. Mr. Bauer's testimony acknowledges that Mr. Rives submitted the additional information by email. Tr. at 42. He described the information as backfill receipts, either trucking tickets or receipts from purchasing backfill. *Id.* at 42-43. He testified that this information is important because the UST program reimburses for backfill that is actually placed into the excavation. *Id.* at 43.

IEPA examined this documentation and then sent Mr. Rives an email reporting that "[w]e can't figure out how you arrive at 5,244.91 cubic yards for backfill. Can you please walk me through it?" R. at 223; see Tr. at 44. Mr. Bauer testified that "the tonnage divided by 1.5 cubic yards – it did not add up to the 5,244.91 cubic yards that – that they had asked for reimbursement for." Tr. at 44-45. He testified that IEPA sought documentation that "they actually placed X amount of backfill in the excavation." Tr. at 44.

Chase responded that 5,175.67 cubic yards were removed from the excavation. It applied a swell factor of 1.05 under the Board's rules, which calculated a volume of 5,434.45 cubic yards, "which was never budgeted for in original plan." R. at 223; see 35 Ill. Adm. Code 734.825(a)(1).

Mr. Bauer testified that plan budgets may use this swell factor or fluff factor of five percent "because it's still hypothetical. It's not actually occurred yet." Tr. at 58. That factor provides a margin so "they don't have to come in for an amended budget if they go over a little bit." Tr. at 43, 58. He added that this factor is not used in reimbursements when IEPA addresses actual tonnage. *Id.* at 43, 59. He explained that landfills, quarries, and other providers "always bill on the tonnage" rather than volume. *Id.* at 43, 58-59. Mr. Bauer testified that IEPA "had no problem with how much was physically put into the hole." *Id.* at 59. He indicated that IEPA did not cut the difference between what was excavated from and what was placed back into the excavations. *Id.* at 59-60.

Mr. Bauer testified that Chase also responded with a letter indicating that it had obtained 26 loads of material free of charge. Tr. at 44; see R. at 222.

Chase emphasized that total remediation and disposal costs were less than budgeted amounts by a total of \$7,773.72. R. at 223. This amount includes a budget of \$4,373.68 for drum disposal, for which Parker did not request reimbursement. *Id.* at 295. Instead of

submitting an amended budget and another request for reimbursement, Chase asked that IEPA “move the budget numbers around in this section to make it work on your end.” *Id.* at 223. Chase indicated that IEPA “can subtract the extra disposal costs we didn’t use and add to the backfill cost.” *Id.*

IEPA Determination

Mr. Bauer testified that Ms. Owens added backfill tonnage from receipts. She calculated that there were “basically 520.195 tons that we didn’t have documentation for.” Tr. at 45. He further testified that “we assume that that was in the 26 loads that was for free.” *Id.*

Mr. Bauer testified that IEPA then examined “the invoice from the company that provided the other backfill that they charged for.” *Id.*, citing R. at 242. On that invoice, Central Stone Company charged a rate of \$6.70 per ton. R. at 242; *see* Tr. at 45. Mr. Dudas testified that this invoice is for more costly material that Chase would use only to cap an excavation and not to fill an excavation. Tr. at 68-69. Mr. Bauer’s testimony acknowledged that he used one of the invoices for particular material at a specific cost as the basis for IEPA’s deduction. *Id.* at 76. When asked why IEPA chose it, he testified that “I’m sure we just grabbed an invoice.” *Id.*

Mr. Bauer testified that “we took the 520.195 tons times \$6.70 per ton, 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.” Tr. at 46. He further testified that IEPA did not cut costs for transportation or placement of the backfill material but cut “just the purchase material costs. *Id.* at 47. Mr. Bauer testified that Chase “did backfill more cubic yards than they excavated. . . . We paid for more soil put back into the excavation so that would cover any, you know, fluff factor type issues, I think.” *Id.* at 47-48. He added that “[w]e paid for everything except for the purchase of the – of the 520 tons that they got for free.” *Id.* at 48.

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 these costs

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 (calculating modification).

LEGAL BACKGROUND

In the following subsection, the Board addresses the standard of review, burden of proof, and statutory and regulatory authorities.

Standard of Review

The Board must decide whether Parker's submission to IEPA would not violate the Act and the Board's rules. Ill. Ayers Oil Co. v. IEPA, PCB 03-214, slip op. at 8 (Apr. 1, 2004) (Ill. Ayers); Kathe's Auto Serv. Ctr. v. IEPA, PCB 96-102, slip op. at 13 (Aug. 1, 1996). "[T]he Board does not review the 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 the IEPA demonstrates compliance with the Act." Ill. Ayers, PCB 03-214, slip op. at 15, citing IEPA v. PCB, 115 Ill. 2d 65,70, 503 N.E.2d 343, 345 (1986).

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) (Freedom Oil Co.). The Board typically does not admit or consider information developed after the IEPA's decision, although the Board hearing allows the petitioner to challenge IEPA's reasons for its decision. See Alton Packaging Corp. v. PCB, 162 Ill. App. 3d 731, 738, 516 N.E.2d 275, 280 (5th Dist. 1987); Cnty. Landfill Co. & City of Morris v. IEPA, PCB 01-170 (Dec. 6, 2001), *aff'd. sub nom. Cnty. Landfill Co. & City of Morris v. PCB & IEPA*, 331 Ill. App. 3d 1056, 772 N.E.2d 231 (3rd Dist. 2002).

IEPA's denial letter frames the issues on appeal. Pulitzer Cmty. Newspapers, Inc. v. IEPA, PCB 90-142 (Dec. 20, 1990). This focus on IEPA's letter "is necessary to satisfy principles of fundamental fairness because it is the applicant who has the burden of proof" to demonstrate that the reasons for denial are inadequate. *Id.*, citing Technical Servs. Co. v. IEPA, PCB 81-105, slip op. at 2 (Nov. 5, 1981).

Burden of Proof

In appeals of final IEPA 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). "A proposition is proved by a preponderance of the evidence when it is more probably true than not." 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).

Statutory and Regulatory Authorities

Under the Act, reimbursement applications and review of applications are governed by Section 57.8 of the Act (415 ILCS 5/57.8 (2020)). Section 57.8(a)(1) of the Act provides in pertinent part that;

[i]n the case of any approved plan and budget for which payment is being sought, the IEPA shall make a payment determination within 120 days of receipt of the application. Such determination shall be considered a final decision. The IEPA’s review shall be limited to generally accepted auditing and accounting practices. In no case shall the IEPA 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) (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

IEPA argues that the issue presented by this appeal is whether Parker can be reimbursed \$3,755.42 for costs that lack supporting documentation. IEPA asserts that, under the Act, regulations, and facts of this case, “the answer is **NO**.” IEPA Resp. at 4 (emphasis in original).

However, Parker argues that it “has met its burden of proving by a preponderance of the evidence that no legal provision cited in the IEPA’s decision letter would be violated if the payment application was approved.” Pet. Brief at 21. Parker requests that the Board reverse IEPA’s determination, restore the modified amount, approve full payment, and award payment of its legal costs. *Id.* For the reasons articulated below, the Board finds that Parker’s reimbursement request is supported by the record.

The Board will first discuss the scope of IEPA’s review of a reimbursement request and then address the record of this proceeding in determining that Parker’s reimbursement request is supported by the record.

IEPA Review of Reimbursement Request

The Board notes that at summary judgment, Parker also argued that IEPA’s scope of review was limited. *See Parker’s Gas & More v. IEPA* PCB 19-79, slip op. at 14 (July 21, 2022). The Board disagreed with Parker’s argument noting that;

[i]n 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). *Parker’s*, slip op. at 10.

IEPA relies on *Piasa* to support its decision to reduce the reimbursement amount. IEPA opines that Parker “takes the position that the IEPA did not have the right to review the submitted claim.” IEPA Resp. at 11. IEPA argues that it must apply maximum payment amounts. For IEPA to approve payment, Parker “needs to submit supporting documents.” *Id.* In this case, IEPA argues that it received documentation that Parker sought “reimbursement for something they had received for **FREE**.” *Id.* (emphasis in original). IEPA asserts that Parker “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.” *Id.* (emphasis in original).

IEPA argues that, in both cases, “the material was for no cost or otherwise, for **FREE.**” *Id.* (emphasis in original). IEPA argues that Parker’s case “is very similar” to the petitioner’s in Piasa, “in which the Board held in favor of the Illinois EPA on this exact argument.” *Id.*, citing Piasa Motor Fuels v. IEPA, PCB 18-54, slip op. at 12-13 (Apr. 16, 2020).

Parker distinguishes Piasa, noting that the applicant requested payment for backfill, a majority of which had been excavated from the owner’s property and then transported and placed by the consultant or its contractors. Pet. Reply at 4. Parker emphasizes that IEPA denied reimbursement in Piasa because the costs had not been approved in the budget. *Id.* Parker argues that IEPA’s response brief “misses the point of the [Piasa] case.” Pet. Reply at 4. Parker asserts that the applicant in Piasa performed activities so different from those addressed by Subpart H rates for backfilling that performing those activities necessitated an amended corrective action plan. Pet. Reply at 4-5, citing Piasa Motor Fuels v. IEPA, PCB 18-54, slip op. at 13 (Apr. 16, 2020). Parker concludes that Piasa is inapplicable because that case did not present the same issues. Parker asserts that IEPA in this case did not reject its request for reimbursement because it had deviated from an approved plan. Pet. Reply at 5, 6. Parker adds that IEPA’s decision letter did not cite the issues it raised in Piasa. Pet. Reply at 5.

Board Discussion on Application of Piasa

The Board reiterates that “the approval of a budget, by itself, is insufficient to show that reimbursement is due.” Piasa, slip op. at 10, 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. *Id.* 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. Parker’s, slip op at 14.

However, IEPA’s reliance on Piasa is misplaced. In Piasa, the Board found that the corrective action plan did not include costs for excavation and backfill on site. Here the corrective action plan did include a line item for backfill material (*see* R. at 199). Specifically, the corrective action plan and budget approved by IEPA allowed for 5,230 cubic yards at a cost of \$24.30 per cubic yard for a total cost of \$127,089.00. Thus, the corrective action plan and budget did include the costs for backfill, and Parker’s request was consistent with the corrective action plan and budget. In this instance, the issue is that Parker received some fill free of charge, as a part of backfilling the site. Because the backfill was consistent the corrective action plan and budget, IEPA’s review is limited to:

generally accepted auditing and accounting practices. In no case shall the IEPA 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) (2020).

The Board is convinced that IEPA's arguments regarding applicability of Piasa mischaracterize Parker's position. Parker is arguing that IEPA assessed a charge for washout rock, and reduced the request for reimbursement by that charge, when the cost was within the approved plan and budget and supported with documentation. This argument does not challenge IEPA's ability to review the reimbursement request for consistency with the plan or to ensure that the work was performed. Rather, Parker is challenging IEPA's decision to reduce the requested reimbursement amount because some material was obtained free of charge. Therefore, the factual differences between Piasa and this case make the IEPA's reliance on Piasa misplaced.

IEPA Decision

IEPA denied reimbursement because the charges:

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 IEPA 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.

Parker asserts that "the statements and explanations in the letter are paramount." Pet. Brief at 14. IEPA's letter determined that there was not documentation for 520.195 tons of backfill in violation of Section 57.7(c)(3) of the Act and Section 734.630(cc) of the Board's UST rules. *Id.* citing 415 ILCS 5/57.7(c)(3) (2020); 35 Ill. Adm. Code 734.620(cc). Parker asserts the "none of the legal provisions cited would be violated." Pet. Brief at 14.

Parker argues that, when IEPA approves a plan and budget, that 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 are less than or equal to the amounts approved in such budget." Pet. Brief at 14-15, citing 415 ILCS 5/57.7(c)(1) (2020). When an applicant seeks payment under an approved plan and budget, "[t]he IEPA's review shall be limited to generally accepted auditing and accounting practices." 415 ILCS 5/57.8(a)(1) (2020). Parker argues that "[i]n no case shall the IEPA conduct additional review of any plan which was completed within the budget, beyond auditing for adherence to the corrective action measure in the proposal." Pet. Brief at 15, citing 415 ILCS 5/57.8(a)(1) (2020).

Under T-Town Drive Thru v. IEPA, PCB 07-85, slip op. at 29 (Apr. 3, 2008), IEPA maintains that it may request documentation of costs. During IEPA's review of Parker's request for reimbursement, IEPA questioned that "the backfill material due to the fact that no invoices were provided, just manifest tickets." IEPA Resp. at 10. IEPA reports that it emailed Parker's consultant to request documentation. *Id.* IEPA acknowledges that "[t]he consultant responded with manifests of the material and invoices and provided information that they were not charged for the purchase of 520.16 tons of rock." *Id.*, citing R. at 222.

Based on this information from the consultant, IEPA “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.” IEPA Resp. at 10; *see* 35 Ill. Adm. Code 734.835 (Subpart H: Soil Removal and Disposal), 734.870 (Increase in Maximum Payment Amounts). IEPA deducted \$3,755.42 from Parker’s request for reimbursement based on the amount of backfill Parker received free of charge “if it had been paid for.” IEPA Resp. at 10. IEPA asserts 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.* at 11 (emphasis in original).

IEPA argues that it reimbursed the other costs associated with the 520.16 tons of rock obtained free of charge. IEPA states that it based reimbursement on the Subpart H maximum rate of \$24.30 per cubic yard “less the approximately \$10.88 [per cubic yard] costs for the purchase of the backfill.” IEPA Resp. at 10-11. This calculation yielded a reimbursement of “\$13.42 [per cubic yard] for the transportation and placement of the 520.16 tons or 346.8 cubic yards of backfill material.” *Id.* at 11.

IEPA asserts that Parker’s main argument is “that since the IEPA did not identify any corrective action measures performed that were inconsistent with approved plan and since the costs were within the approved budget, the IEPA should have approved the application of payment.” IEPA Resp. at 12. IEPA acknowledges that “[t]he issue here is not the corrective action measures.” *Id.* It characterizes the “main issue” as Parker’s expectation of reimbursement for material that it obtained without cost. *Id.* IEPA asserts that it is “ludicrous” for Parker to expect reimbursement for “materials they did not purchase, even if they were approved to do so in a plan and budget.” *Id.*

Board Discussion

IEPA correctly sought additional information to establish that the reimbursement request was consistent with the corrective action plan and budget and for work performed at the site. *See* 35 Ill. Adm. Code 734.610. Parker provided that information, which IEPA acknowledges. *See* Tr. at 42. Although there understandably is no invoice for the materials received at no cost, the record shows that Chase paid to weigh that material, and IEPA stresses that it did not modify costs for transporting or placing it. IEPA has not contested the volume of material placed in the excavation, and it has not questioned the appropriateness of the material used as backfill. Instead, IEPA reduced the requested amount by calculating a “cost” for the material obtained free of charge. While the Board understands and appreciates IEPA’s concern that Parker is seeking reimbursement for materials not purchased, the record shows that Parker did expend the requested funds for backfilling at the site.

Mr. Dudas’ testimony generally addresses performing corrective action according to an approved plan and within an approved budget. He indicated that there is little if any control over corrective action costs such as labor, landfill charges, and transportation. He added that, in looking at the project as a whole within budgeted costs, it is often “trying to work out deals with quarries.” Tr. at 20. While the availability of backfill material free of charge may offer an opportunity to stay within an approved budget, Mr. Dudas indicated that transportation costs

from a distant location might conceivably make its total costs greater than purchased material from a nearby source. The Board understands that a consultant or contractor may weigh the costs of appropriate materials and associated costs such as transportation and labor in order to try to remain within a total budget for corrective action.

Parker provided documents that establish that \$127,451.31 was spent on backfill and related costs associated with the backfilling operations. Within this amount, Parker obtained some of the backfill material it used free of charge. There is no dispute that the material obtained at no cost and used for backfilling was appropriate. Because Parker's use of material was consistent with the plan and budget, IEPA's review is limited to generally accepted auditing and accounting practices. IEPA may not "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) (2020).

IEPA's review in this case did go beyond auditing and accounting practices. IEPA determined that because there was no receipt for the material itself, IEPA lacked supporting documentation and would reduce the reimbursement request. IEPA created a "cost" for the material obtained free of charge and then reduced the reimbursement of Parker's costs by that amount. IEPA states that the record lacks supporting documentation to allow IEPA to determine that the 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. However, the record does contain evidence of the costs associated with hauling, weighing, and handling of the backfill, and that evidence supports costs of \$127,451.31. *See e.g.*, 222, 228, 240, 241, and 329.

Simply because Parker supplemented purchased materials with material available at no cost to attempt to stay within budget is not sufficient reason to reduce reimbursement of the purchased materials. The record supports the request for reimbursement, as it establishes that Parker expended the requested funds, even with materials being supplemented free of charge. The Board concludes that that Parker has shown that its request did not lack supporting documentation and has met its burden of showing that its request would not violate the provisions cited by IEPA in its determination letter. The Board finds that IEPA's denial of \$3,755.42 in reimbursement was incorrect, and IEPA must reimburse Parker that amount.

Reimbursement of Legal Fees

Parker seeks reimbursement of its legal fees in this matter. *See* Pet. at 4; Pet. Br. At 21. The record does not now include the amount of these fees or Parker's argument that they would be reimbursable under Section 57.8(1) of the Act. 415 ILCS 5/57.8(1) (2020). In its order below, the Board directs Parker to file a statement of legal fees that may be eligible for reimbursement and its arguments that the Board should exercise its discretion to direct IEPA to reimburse those fees from the UST Fund. The order also sets a deadline for IEPA to respond.

CONCLUSION

The Board finds that the record supports Parker's request for reimbursement. IEPA's decision to reduce the amount of the request is not based on the record and is therefore reversed.

The Board sets deadlines for Parker to file a statement of legal fees and IEPA to respond. Parker must explain why the fees may be eligible for reimbursement and argue why the Board should exercise its discretion to direct IEPA to reimburse those fees.

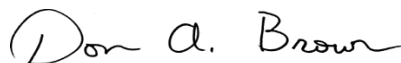
This interim opinion and order constitutes the Board's findings of fact and conclusions of law.

ORDER

1. The Board grants Parker's Gas & More (Parker) motion to take official notice of Exhibits A and B.
2. The Board denies the Illinois Environmental Protection Agency's (IEPA) motion to overrule the hearing officer and to strike the testimony of Parker's witness, Mr. Dudas.
3. The Board orders IEPA to reimburse Parker the \$3,755.42 deducted from Parker's request for reimbursement.
4. Parker is directed to file a statement of legal fees that may be eligible for reimbursement and its arguments why the Board should exercise its discretion to order reimbursement of legal fees from the UST fund. Parker must file the request by May 22, 2023, which is the first business day following the 30th day after the date of this order. IEPA may file a response within 14 days after being served with Parker's statement.

IT IS SO ORDERED.

I, Don A. Brown, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on May 4, 2023, by a vote of 3-0.



Don A. Brown, Clerk
Illinois Pollution Control Board