

**BEFORE THE POLLUTION CONTROL BOARD  
OF THE STATE OF ILLINOIS**

JEET SINGH d/b/a	)	
AMAN FOOD & GAS,	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB 2023-090
	)	(LUST Appeal)
ILLINOIS ENVIRONMENTAL	)	
PROTECTION AGENCY,	)	
	)	
Respondent.	)	

**NOTICE**

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**PLEASE TAKE NOTICE** that I have today filed with the office of the Clerk of the Pollution Control Board **ILLINOIS EPA'S POST-HEARING BRIEF**, copies of which are herewith served upon you.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,  
Respondent



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217/782-5544  
217/782-9143 (TDD)  
Dated: July 27, 2023

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AMAN FOOD & GAS,	)	
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	)	(LUST Appeal)
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**ILLINOIS EPA'S POST-HEARING BRIEF**

**NOW COMES** the Respondent, the Illinois Environmental Protection Agency (“Illinois EPA” or “Agency”), by one of its attorneys, Melanie A. Jarvis, Assistant Counsel and Special Assistant Attorney General, and hereby, submits **ILLINOIS EPA'S POST-HEARING BRIEF** to the Illinois Pollution Control Board (“Board”).

**I. BURDEN OF PROOF**

Section 105.112(a) of the Illinois Pollution Control Board's procedural rules (35 Ill. Adm. Code 105.112(a)) provides that the **burden of proof shall be on a Petitioner**. As the Board, itself has noted, the primary focus of a reimbursement appeal must remain on the adequacy of the permit application and the information submitted by the applicant (Petitioner) to the Illinois EPA for review. See: John Sexton Contractors Company v. Illinois EPA, PCB 88-139 (February 23, 1989), p. 5. Simply, the ultimate burden of proof will remain on the party initiating an appeal (Petitioner) and what Petitioner presented for the Illinois EPA to review and render an opinion upon. See: John Sexton Contractors Company v. Illinois Pollution Control Board, 201 Ill. App. 3d 415, 425-426, 558 N.E.2d 1222, 1229 (1st Dist. 1990).

Petitioner must demonstrate to the Board that it satisfied this high burden before the Board may even entertain a review of the Illinois EPA's decision. The Petitioner in this case

requested a hearing on the matter. The Petitioner presented no testimony. The Petitioner failed to contest any fact within the record upon which the Illinois EPA based its opinion. The Petitioner clearly **failed** to meet its burden of proof and a ruling affirming the Illinois EPA's decision is appropriate and warranted.

## II. STANDARD OF REVIEW

Section 57.8(i) of the Environmental Protection Act ("Act") (415 ILCS 5/57.8) allows an individual to challenge a determination of the Illinois EPA to the Board pursuant to Section 40 of the Act (415 ILCS 5/40). Section 40 of the Act is the general appeal section for permits and has been used by the legislature as the basis for this type of review to the Board. When considering an Illinois EPA determination on a submitted corrective action plan and/or budget, the Board must determine whether the proposal(s), as submitted to the Illinois EPA, demonstrate compliance with the Act and Board regulations. See: Broderick Teaming Company v. Illinois EPA, PCB 00-187 (December 7, 2000).

The Illinois EPA's final decision, and the application, as submitted for review, frame the appeal. See: Todd's Service Station v. Illinois EPA, PCB 03-2 (January 22, 2004), p.4; See also: Pulitzer Community Newspapers, Inc. v. EPA, PCB 90-142 (Dec. 20, 1990). The Board must, therefore, look to the documents within the Administrative Record ("Record")<sup>1</sup> as the sole source of rendering an opinion on whether the Illinois EPA framed its determination consistently with the application and law. Petitioner has not challenged the sufficiency of the Record in this matter and presented no evidence or testimony at hearing.

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<sup>1</sup> Citations to the Administrative Record will hereinafter be made as, "A.R.\_\_\_\_." Citations to the Hearing Transcript will hereinafter be made as, "Trans\_\_\_\_."

### III. ISSUE

Whether Illinois EPA can approve the Petitioner's Corrective Action Budget Amendment when the bidding for the placement of concrete as an engineered barrier exceeded the cost of asphalt of 4 inches in depth.

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

### IV. FACTS

The facts in this case are found within the Administrative Record.

1. As part of a Corrective Action Plan ("CAP") and budget dated April 9, 2019, Petitioner submitted a request for an engineer barrier. A.R. 000399. A map detailing the engineered barrier was included in this submittal. A.R. 000441. A request for approval of the amount was included in the budget portion of the submittal. A.R. 000453. This paving, demolition, and well abandonment cost form indicated that 81.99 square feet of concrete at a thickness of 6.00 inches at a cost of \$5.63 was being requested for the placement of an engineered barrier at a total cost of \$461.60. A.R. 000453.
2. On August 6, 2019, the Illinois EPA issued a decision letter conditionally approving the plan with modifications. A.R. 000542. The important modification was number 2, which stated that the "proposed engineered barrier shown in Drawing 0016 should be a rectangle with identifiable points, so that the boundaries of the proposed engineered barrier can be more easily identified". A.R. 000542. This letter also approved \$2,008.40 in paving, demolition, and well abandonment costs. A.R. 000545.

3. On July 20, 2021, Petitioner submitted a Corrective Action Budget Amendment regarding the placement of an engineered barrier. A.R. 000548. This amendment concerned personnel costs only and a total of \$2, 811.22 in additional costs were approved for the budget. A.R. 000558
4. On August 2, 2021, the Illinois EPA received Petitioner's Corrective Action Completion Report ("CACR"). A.R. 000561. An engineered barrier of 237 square feet was proposed. A.R. 000602.
5. On December 3, 2021, the Agency rejected the CACR. A.R. 000739. Paragraph 3 is relevant to this appeal and states the "Engineered Barrier area shown on Drawing 0012B should be enlarged to encompass soil borings SB-1, SB-2, and SB-3 since soil samples in these locations were collected at similar depth as wall sample 8". A.R. 0000739.
6. Petitioner submitted a Corrective Action Budget Amendment on February 15, 2022. A.R. 000742. It was noted by Petitioner in this submittal that "the requested 'enlarged' engineered barrier area spans into areas of severely deteriorated and cracked concrete, requiring it to be repaved to be characterized as a sufficient engineered barrier". A.R. 000742. The engineered barrier was "enlarged from 238 square feet to 1,763 square feet". A.R. 000742. This resulted in a difference of 1,525 square feet. A.R. 000742. On page 000748 of the Administrative Record, the Petitioner requests approval for 1,525 square feet of concrete at 6 inches in thickness with a cost per square foot of \$3.23 for the placement of the engineered barrier for a total cost of \$4,925.75. At hearing, the Agency presented IEPA hearing exhibit 1

which was an enlarged map showing the placement of the engineered barrier. A smaller version of this map is also found at A.R. 000754.

7. On June 1, 2022, the Agency approved the amounts in the February 15, 2022 budget. A.R. 000755. This included the amount of \$4,925.75, which represents the cost of the engineered barrier.
8. The Petitioner submitted a Corrective Action Budget Amendment on August 29, 2022. A.R. 000761. The cover letter for this proposal stated that the “initial \$3.23 per square foot rate for the engineered barrier could not be met by the interested entities”. The letter goes on to indicate that bidding was then conducted with the winning bid being \$14.00 per square foot. A.R. 000761. This resulted in a request for \$21,350.00 for the replacement of concrete. A.R. 000767.
9. The Agency sent a decision letter on December 28, 2022 rejecting the August 29, 2022 Corrective Action Budget Amendment. A.R. 000803. Attachment A of this letter states as follows:

“The budget proposes additional costs for the placement of an engineered barrier that violate 35 Ill. Adm. Code 734.840(a). Costs associated with activities that violate any provision of the Act or Illinois Pollution Control board, Office of the State Fire Marshal, or Illinois EPA regulations are ineligible for payment from the fund pursuant to Section 57.6(a) of the Act and 35 Ill. Adm. Code 734.630(i).

In addition, the budget lacks supporting documentation. Such costs are ineligible for payment from the Fund pursuant to 35 Ill. Adm. Code 734.630(cc). The documentation/information in the Illinois EPA’s possession does not support the requests in the budget. Therefore, the costs are not approved pursuant to Section 57.7(c)(3) of the Act and 35 Ill. Adm. Code 734.630(dd) because they are unreasonable.

Pursuant to Section 57.7(c)(3) of the Act and 35 Ill. Adm. Code 734.850(b), owners and operators seeking payment must demonstrate to the Illinois EPA that the amounts requested in the budget are reasonable.

Furthermore, the budget proposes additional costs for placement of an engineered barrier that exceed the cost of installing an engineered barrier constructed of asphalt four inches in depth. Such costs are ineligible for payment from the Fund pursuant to 35 Ill. Adm. Code 734.630(ss).

*Pursuant to 35 Ill. Adm. Code 734.840(a), payment for costs associated with concrete, asphalt, and paving installed as an engineered barrier, other than replacement concrete, asphalt, and paving, must not exceed the Subpart H maximum payment amount for four inches of asphalt. The budget proposes additional costs associated with the placement of six inches of concrete to be used as an engineered barrier. The applicable costs associated with the placement of the engineered barrier were approved in the previous budget."*

This case was appealed to the Board February 3, 2023 and a hearing was held on June 22, 2023 before Hearing Officer Carol Webb.

## V. LAW

### **415 ILCS 5/57.6(a) Underground storage tanks; early action.**

Owners and operators of underground storage tanks shall, in response to all confirmed releases, comply with all applicable statutory and regulatory reporting and response requirements.

### **415 ILCS 5/57.7(c)(3) Leaking underground storage tanks; site investigation and corrective action.**

(c) Agency review and approval.

\*\*\*\*

(3) In approving any plan submitted pursuant to subsection (a) or (b) of this Section, the Agency shall determine, by a procedure promulgated by the Board under Section 57.14, that the costs associated with the plan are reasonable, will be incurred in the performance of site investigation or corrective action, and will not be used for site investigation or corrective action activities in excess of those required to meet the minimum requirements of this Title. \*\*\*

**35 Ill. Adm. Code 734.625 Eligible Corrective Action Costs.**

- a) Types of costs that may be eligible for payment from the Fund include those for corrective action activities for materials or services provided or performed in conjunction with corrective action activities. Such activities and services may include, but are not limited to, reasonable costs for:

\* \* \* \* \*

- 16) Costs for destruction and replacement of concrete, asphalt, or paving to the extent necessary to conduct corrective action if the concrete, asphalt, or paving was installed prior to the initiation of corrective action activities, the destruction and replacement has been certified as necessary to the performance of corrective action by a Licensed Professional Engineer and the destruction and replacement and its costs are approved by the Agency in writing prior to the destruction and replacement. The destruction and replacement of concrete, asphalt, and paving must not be paid more than once. Cost associated with the replacement of concrete, asphalt, or paving must not be paid in excess of the cost to install, in the same area and to the same depth, the same material that was destroyed (e.g., replacing four inches of concrete with four inches of concrete).

**35 Ill. Adm. Code 734.630 Ineligible Corrective Action Costs.**

Costs ineligible for payment from the Fund include, but are not limited to:

- i) Costs associated with activities that violate any provision of the Act or Board, OSFM, or Agency regulations.
- cc) Costs that lack supporting documentation.
- dd) Costs proposed as part of a budget that are unreasonable.
- ss) Costs associated with the installation of concrete, asphalt, or paving as an engineered barrier to the extent they exceed the cost of installing an engineered barrier constructed of asphalt four inches in depth. This subsection does not apply if the concrete, asphalt, or paving being used as an engineered barrier was replaced pursuant to Section 734.625(a)(16) of this Part.



**35 Ill. Adm. Code 734.840 Concrete, Asphalt, and Paving; Destruction or Dismantling and Reassembly of Above Grade Structures.**

- a) Payment for costs associated with concrete, asphalt, and paving installed as an engineered barrier, other than replacement concrete, asphalt, and paving, must not exceed the following amounts. Costs associated with the replacement of concrete, asphalt, and paving used as an engineered barrier are subject to the maximum amounts set forth in subsection (b) of this section.

Depth of Material	Maximum Total Amount Per Square Foot <sup>2</sup>
Asphalt and paving – 2 inches	\$1.65
3 inches	\$1.86
4 inches	\$2.38
Concrete - any depth	\$2.38

- b) Payment for costs associated with the replacement of concrete, asphalt, and paving must not exceed the following amounts:

Depth of Material	Maximum Total Amount Per Square Foot <sup>3</sup>
Asphalt and paving – 2 inches	\$1.65
3 inches	\$1.86
4 inches	\$2.38
6 inches	\$3.08
Concrete - 2 inches	\$2.45
3 inches	\$2.93
4 inches	\$3.41
5 inches	\$3.89
6 inches	\$4.36

For depths other than those listed in this subsection, the Agency must determine reasonable maximum payment amounts on a site-specific basis.

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<sup>2</sup> Please note that the amounts showed in this subsection of the regulation have been updated and do not reflect the current amount reimbursed for these activities by the Agency.

<sup>3</sup> Please note that the amounts showed in this subsection of the regulation have been updated and do not reflect the current amount reimbursed for these activities by the Agency.

### 35 Ill. Adm. Code 734.850(b) Payment on Time and Materials Basis

Maximum payment amounts for costs associated with activities that do not have a maximum payment amount set forth in other Sections of this Subpart H must be determined by the Agency on a site-specific basis, provided, however, that personnel costs must not exceed the amounts set forth in Appendix E of this Part. Personnel costs must be based upon the work being performed, regardless of the title of the person performing the work. *Owners and operators seeking payment must demonstrate to the Agency that the amounts sought are reasonable.* (Emphasis added).

### VI. ILLINOIS EPA'S ARGUMENT

The Illinois EPA is not contesting whether the bidding in this case was performed pursuant to the Act and regulations. The Illinois EPA is stating that bidding for concrete is not appropriate and allowed for **placement** of concrete when that bid is in excess of the amount allowed for the placement of asphalt of 4 inches in depth.

The Board's regulations set forth a difference between the "placement" of concrete as an engineered barrier and the "replacement" of concrete when previously placed concrete is removed when conducting remediation. 35 Ill. Adm. Code 734.840. The Board's rules limit the reimbursable amount for "placement" of concrete to the cost of "placement" of asphalt of four inches in depth. 35 Ill. Adm. Code 734.840(a). Therefore, in order to bid for "placement" of concrete, a bid for the "placement" of four inches asphalt would need to be done. And if a bid for asphalt is completed, then realistically, asphalt, instead of concrete, would need to be placed consistent with the bid.

Further, the regulations clearly state that the Illinois EPA cannot reimburse for "costs associated with the installation of concrete, asphalt, or paving as an engineered barrier to the extent they exceed the cost of installing an engineered barrier constructed of asphalt four inches in depth." 35 Ill. Adm. Code 734.630(ss). This section of the regulations then makes a clear distinction between placement of an engineered barrier and

replacement of concrete during remediation pursuant to Section 734.625(a)(16) of the regulations. 35 Ill. Adm. Code 734.625(a)(16) states costs are reimbursable for “costs for destruction and replacement of concrete, asphalt, or paving to the extent necessary to conduct corrective action if the concrete, asphalt or paving was installed prior to the initiation of corrective action activities, the destruction and replacement has been certified as necessary to the performance of corrective action by a Licensed Professional Engineer and the destruction and replacement and its costs are approved by the Agency in writing prior to the destruction and replacement.” That section further limits the reimbursement of the destruction and replacement of concrete, asphalt, and paving to not more than once, and such costs cannot be paid in excess of the cost to install, in the same area and to the same depth, the same material that was destroyed.

The Petitioner, in two of its submittals to the Agency, requested concrete **placement** for the installation of an engineered barrier where contamination continued to exist underground. A.R. 000453 and A.R. 000748. The Agency approved the placement of concrete in the amount of \$4,925.75 as requested by the Petitioner. A.R. 000755. The Petitioner, via these submittals, understood that when installing an engineered barrier over sections of the site where corrective action is not taking place, Section 734.840(a) was the section of the regulations to be followed. The Petitioner also seemed to be aware through their August 29, 2022 Corrective Action Budget Amendment that bidding could not be performed in relation to Section 734.840(a), because that submittal requested the “replacement” of concrete under Section 734.840(b) for the amount of \$21,350.00.

In Petitioner’s Corrective Action Budget Amendment dated February 15, 2022, it was noted that “the requested ‘enlarged’ engineered barrier area spans into areas of

severely deteriorated and cracked concrete, requiring it to be repaved to be characterized as a sufficient engineered barrier”. A.R. 000742. After the appeal was filed, the Agency requested that an inspector go out to the site to assess the condition of the concrete where the engineered barrier would be placed. See, IEPA hearing exhibits 2 through 13. When the hearing exhibits are compared to IEPA hearing exhibit 1, A.R. 000754, it is clear that the concrete that falls within the engineered barrier is not “severely deteriorated and cracked” as was represented to the Agency. In fact, most of the concrete appears to be recent and in good condition. So, there is some question as to whether placement of concrete to the extent requested by the Petitioner even needs to be done. However, these hearing exhibits are proffered to the Board so that they can have a reference as to what was being discussed at the hearing and not as to whether new concrete even needs to be placed as an engineered barrier, as the Petitioner has an approved CAP and Budget in the amount of \$4,925.75 for such a task. A.R. 000755.

In summary, bidding for the “placement” of concrete as an engineered barrier under the regulations is constrained to the cost of asphalt of four inches in depth and cannot be bid for a different type of barrier such as in this case, concrete of six inches in depth. Because the bid was not limited to the cost of asphalt of four inches in depth, the Illinois EPA could not approve the Corrective Action Budget Amendment at issue in this case, without being in violation of the Board’s regulations.

## **VII. RESPONSE TO PETITIONER’S ARGUMENT**

The Petitioner starts his brief with information related to the Consumer Price Index. The Illinois EPA points out that the Petitioner did not present this information for consideration at hearing, nor was this information presented to the Illinois EPA by the Petitioner within its submittals prior to

the final decision of the Agency. While the Board may take judicial notice of the information from the U.S. Department of Labor, the post hearing brief is not the appropriate place to present that information for the first time. This information should have been presented at hearing wherein the Agency could have been given the opportunity to challenge the statistics. Although the wording of the regulation and its intent is clear and looking to the regulatory history is unnecessary, as Doug Clay noted during the rulemaking for Part 734, if the Agency sees “certain costs are continually bid out and coming in higher than the maximum payment amount allowed in the rules, we will know it’s time to review the rules and adjust those amounts through rulemaking”. If the Illinois EPA received an inordinate amount of bids for a particular task, for which a subpart H rate was established, then Illinois EPA would be alerted that the subpart H rate was not sufficient to cover the cost of said task. Illinois EPA receives very few bid requests, which one can only speculate that it likely means the subpart H rates are too generous.

That being said, the information, regarding the consumer price index and the regulatory history, is irrelevant to the issue at hand in this case. The issue, as stated above, is whether Illinois EPA can approve the Petitioner’s Corrective Action Budget Amendment when the bidding for the placement of concrete as an engineered barrier exceeded the cost of asphalt of 4 inches in depth. The Petitioner tries to shoehorn the work done at the site into Section 734.840(b), however, that is the incorrect portion of the regulation. Section 734.840(b) is the section of the regulation meant for “replacement” of concrete that must be removed in order to perform corrective action activities. It is not meant for the “placement” of an engineered barrier. Section 734.625(a) lists eligible corrective action costs. That section states as follows:

- a) Types of costs that may be eligible for payment from the Fund include those for corrective action activities for materials or services provided or performed in conjunction with corrective action activities. Such activities and services may include, but are not limited to, reasonable costs for:

\* \* \* \* \*

- 16) Costs for destruction and replacement of concrete, asphalt, or paving ***to the extent necessary to conduct corrective action*** if the concrete, asphalt, or paving was installed prior to the initiation of corrective action activities, the destruction and replacement has been certified as necessary to the performance of corrective action by a Licensed Professional Engineer and the destruction and replacement and its costs are approved by the Agency in writing prior to the destruction and replacement. (Emphasis added).

As the above regulation states, destruction and replacement of concrete is an allowed expense, to the ***extent necessary*** to conduct corrective action. The removal and replacement of concrete for an engineered barrier is not a corrective action activity. If it was, there would have been no need for the separation of costs that are provided in Section 734.840. Further, there would have been no need for the wording in Section 734.630(ss). Section 734.630 lists the costs that are ineligible for payment from the Fund. Subsection ss states as follows:

- ss) Costs associated with the installation of concrete, asphalt, or paving as an engineered barrier to the extent they exceed the cost of installing an engineered barrier constructed of asphalt four inches in depth. This subsection does not apply if the concrete, asphalt, or paving being used as an engineered barrier was replaced pursuant to Section 734.625(a)(16) of this Part.

Under Petitioner's logic, all installation of concrete would be eligible for reimbursement from the Fund regardless of the provisions in Sections 734.630(ss) and 734.840(a) are met. Petitioner's logic makes these sections obsolete which is not the case at all. It was clearly the intent of the Board to separate out the replacement of concrete which is necessary to remove due to corrective action activities and the placement of an engineered barrier when leaving contamination in place. The Agency cannot take a blind eye to the Board's regulations. As a creature of statute, the Agency can only comply with the Act and regulations thereunder when performing its duties.

The Illinois EPA also points out that the area of the engineered barrier on the site is a separate area from the where the tanks are located and where corrective action activities took place. The maps included in the record, especially at A.R. 000754, clearly show the tank area to the north of and adjacent to the station building. Whereas the engineered barrier is east of the station building running from the building to the sidewalk facing 19<sup>th</sup> street. The engineered barrier and the tank area are two distinct places. Corrective action did not occur where the Petitioner has requested that the engineered barrier be placed. Further, as Illinois EPA hearing exhibits, 2 through 13 demonstrate, the concrete in the area of the engineered barrier is already in good shape.

Petitioner asserts that once a task from Sections 734.810 through 734.850 is identified and bidding is selected, the provisions of those sections are no longer relevant to applicable to determining the maximum payment amount for bidding. The Agency disagrees with this assertion. The provisions not related to the cost of the item or task being bid, must be complied with. Bidding does not alleviate the requirement of Section 734,840(a) that the cost of concrete for placement of an engineered barrier be the same as the cost of the placement of asphalt four inches in depth. Further, even if Petitioner's assertion were true, Petitioner cannot overcome the wording of Section 734.630(ss), which makes ineligible, costs associated with the installation of an engineered barrier to the extent that they exceed the cost of the installation of an engineered barrier constructed of asphalt four inches in depth.

### **VIII. CONCLUSION**

The Petitioner presented no evidence at hearing and has not met its burden of proof to show that the Agency erred in its decision. The facts and the law are clear and in favor of the Illinois EPA. Board regulations constrain the Illinois EPA from approving the Corrective Action Budget Amendment in this case because the bidding for the placement of concrete as an engineered barrier exceeded the cost of asphalt of 4 inches in depth.

**WHEREFORE:** for the above noted reasons, the Illinois EPA respectfully requests the Board find in favor of the Illinois EPA in this matter and against the Petitioner.

Respectfully submitted,

**ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,**

Respondent



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Dated: July 27, 2023

This filing submitted on recycled paper.



**CERTIFICATE OF SERVICE**

I, the undersigned attorney at law, hereby certify that on **July 27, 2023**, I served true and correct copies of **ILLINOIS EPA'S POST-HEARING BRIEF** via the Board's COOL system and email, upon the following named persons:

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ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,  
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