BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

JEET SINGH d/b/a AMAN FOOD & GAS, Petitioner,	)	
v.	)	PCB 2023-090 (UST 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 4th day of August, 2023. The number of pages of this filing, other than exhibits, is 16.

Respectfully submitted,

JEET SINGH d/b/a AMAN FOOD & GAS,
Petitioner,

BY: LAW OFFICE OF PATRICK D. SHAW

BY: /s/ Patrick D. Shaw

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PETITIONER'S POST-HEARING REPLY BRIEF

NOW COMES Petitioner, JEET SINGH d/b/a AMAN FOOD & GAS, pursuant to Section 101.610(k) of the Pollution Control Board's Procedural Rules (35 Ill. Adm. Code § 101.610(k)), for its post-hearing reply brief stating as follows:

OBJECTION TO IMPROPER EVIDENCE AND ARGUMENT

On pages 5, 6, 12 and 15 of the Response Brief, the Agency references and argues from exhibits that were not admitted into evidence and without any attempt to challenge the Hearing Officer's ruling. The Hearing Officer sustained Petitioner's objection to the admittance of all Agency exhibits. (Hrg. Trans. at pp. 25-26) They were allowed as an offer of proof. (Id. at 26) The subsequent Hearing Report similarly restated that all of the Agency's exhibits were not admitted and the "photographs were accepted as an offer of proof for the Agency to make an argument for relevance in their brief." (Hearing Report, at p. 1)

Pursuant to Board regulations, "an 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 receives the hearing transcript." (35 Ill. Adm. Code § 101.502(b)) The transcript was filed with the Board on June 26, 2023, and fourteen days therefrom was July 10, 2023. The failure to file a timely objection to

the Board is sufficient to sustain the Hearing Officer's ruling. See Parker's Gas & More v. IEPA, PCB 19-79, slip op. at 4 (May 4, 2023). Furthermore, an offer of proof provides a means by which a party can show "she has not been given the opportunity to prove her case" because evidence was improperly barred. People v. Way, 2017 IL 120023 ¶ 33. It is not grounds to simply ignore the Hearing Officer's ruling.

The information before the Hearing Officer was that Trent Benanti, a unit manager, reviewed the decision letter drafted by Brad Dilbaitis, the project manager. (Trans. at pp. 20-21) Dilbaitis was present in the hearing room, but did not testify. (Id. at 21) Benanti had never been to the site, nor did he have any personal knowledge of whether the photographs presented a fair and accurate representation of the site. (Id.) The pictures were taken after the decision letter was issued herein, and he did not know whether they reflected conditions at the site at an earlier date. (Id. at 22-22, 29-30) Benanti testified that the decision letter appealed herein did not raise any issues with the condition of the pavement. (Id. at 22-23)

The legal relevancy defects with the exhibits are obvious and indisputable. The Agency's response brief itself recites the blackletter law that the decision letter frames the issues in the appeal. (Resp. Brief, at p. 3) Beyond relevancy, however, foundation for the photographs was not provided. "A sufficient foundation is laid for a still photograph, a motion picture, or a videotape by testimony of any person with personal knowledge of the photographed object at a time relevant to the issues that the photograph is a fair and accurate representation of the object at that time." Perry v. Perry, 2012 IL App (1st) 113054, ¶ 48. Benanti denied that he had personal knowledge of the photographed object at all.

The references to the exhibits should therefore be stricken from the record. Furthermore,

the extraordinary conduct by the Agency in disregarding the Hearing Officer's ruling justifies a strong inference that the Agency does not believe its decision letter was written to withstand review.

Without waiving any objection, the record clearly states that the Agency directed that the engineered barrier "be enlarged" to encompass soil borings SB-1, SB-2, and SB-3. (R. at 739) The purpose of an engineered barrier is "[t]o prevent exposure through the outdoor inhalation or soil ingestion exposure [route]." (Hrg. Trans. at p. 30) The Agency determined that exposure risks extended from the source of the release to those sampling locations. The precise design of the engineered barrier must utilize "engineering practices that limits exposure to or controls migration of the contaminants of concern." (35 Ill. Adm. Code 742.200 (TACO definition of "engineered barrier") An engineered barrier must be designed with "an assessment of their long-term reliability and operating and maintenance plans." (35 Ill. Adm. Code 734.335(a)(6) (requirements of Corrective Action Plans)) Because the installation of an engineered barrier entails ongoing responsibility for current and future property owners (35 Ill. Adm. Code 742.1100(d)), the boundaries of the engineered barrier should be identifiable to future owners. (R. at 542 (Agency requiring engineered barrier to be "a rectangle with identifiable points")) The enlarged engineered barrier approved by the Agency is a rectangular shape that extends to SB-1, SB-2 and SB-3 and little more. (R. at 754) The engineered barrier was certified by a licensed professional engineers as complying with environmental laws and regulations as well as applicable engineering practices. (R. at 752) In communications with the EPA, it was noted that the enlarged area "spans into" areas with severely deteriorated and cracked concrete (R. at 742), i.e. at the perimeter of the engineered barrier where surrounding conditions pose threats of

undermining an engineered barrier. What was approved here was simply a rectangular area that extends perhaps inches beyond SB-1, SB-2 and SB-3. The negative insinuation the Agency seeks to convey with these improper arguments is simply without any legal or factual basis.

RESPONSE TO AGENCY'S BURDEN OF PROOF ARGUMENT

The Agency claims that by not presenting testimony at hearing, Petitioner failed to meet its burden of proof and the Board should therefore issue a ruling in the Agency's favor. (Response Brief, at p. 3) This is balderdash, a party does not need to present evidence at hearing to prevail. E.g., PAK-AGS v. IEPA, PCB 15-14, slip op. at 3 (Dec. 4, 2014) (no testimony) This is particularly true where the issue presented is one of legal interpretation.

Petitioner requested a hearing in this matter instead of filing a summary judgment motion for a number of reasons. One reason is that setting a hearing date is one of the must useful tools for getting the administrative record filed. A second reason is that the burden of proof is higher to prevail on a motion for summary judgment. E.g., Dersch Energies v, IEPA, PCB 17-3, slip op. at 12 (June 17, 2021) (denying cross-motions for summary judgment based on the proposition that summary judgment "is a drastic means of disposing of litigation, and therefore, should be granted only when the right of the moving party is clear and free from doubt.")

Time is of the essence here as the costs derived from the lengthy and detailed competitive bidding process are a year old and it is believed that costs have continued to rise in the meantime. Proceeding straight to hearing was deemed the best course of action under the circumstances.

RESPONSE TO AGENCY'S INTERPRETATION OF BOARD REGULATIONS

A. The Board Regulation's Do Not Exempt Engineered Barriers from Competitive Bidding.

The Board's regulations clearly state that competitive bidding is available as an alternative to the presumptive maximum payment amounts in Subpart H. The Agency has for reasons that are unclear decided that this option is unavailable when an engineered barrier is involved. The Agency in effect seeks a modification of clear language in the Board's regulations by inserting an exception that does not exist:

> **As an alternative to using the amounts set forth in Sections 734.810 through 734.850 but not Section 734.840(a) of this Part, the second method for determining the maximum amounts that can be paid for one or more tasks is bidding in accordance with Section 734.855 of this Part. As stated in that Section, when bidding is used, if the lowest bid for a particular task is less than the amount set forth in Sections 734.810 through 734.850, the amount in Sections 734.810 through 734.850 of this Part may be used instead of the lowest bid.**

(35 Ill. Adm. Code § 734.800(a)(2) (with added language implied by Agency's argument))

As administrative rules and regulations have the force and effect of law, they "must be construed under the same standards which govern the construction of statutes." People ex rel. v. Illinois Commerce Com'n, 231 Ill.2d 370, 380 (2008) The primary objective in interpreting an agency's regulation is to ascertain and give effect to the intent of the agency, and "[t]he surest and most reliable indicator of intent is the language of the regulation itself." Id.

The Agency relies on three regulatory provisions, two of which were included in the Agency decision letter, none of which mention the availability of competitive bidding or incorporate by reference any regulations pertaining to competitive bidding. The plain language of Part 734 does not support the Agency's legal claims. Where regulatory language is clear, "it must be given effect without resort to further aids of construction, and a court may not read into

it any exceptions, conditions, or limitations that the agency did not express." Radaszewski ex rel. Radaszewski v. Garner, 805 N.E.2d 620, 623 (2nd Dist. 2003).

The Agency appears to be asking the Board to read into the regulations a limitation on competitive bidding for pavement based on whether it falls within Section 734.840(a) which references engineered barriers, and Section 734.840(b) which does not expressly mention engineered barriers. Undersigned counsel does not agree with the distinction being drawn here, but neither Section 734.840(a) nor Section 734.840(b) mention or reference the availability or non-availability of competitive bidding to determine costs. The distinction being drawn is without a difference in the plain language of the regulations. Competitive bidding is an alternative method of determining "the amounts set forth in Sections 734.810 through 734.850," which obviously includes all of Section 734.840. (35 Ill. Adm. Code § 734.800(a)(2))

This limitation the Agency seeks to insert into the Board's regulations treats engineered barriers with disfavor compared to regular pavement. "If the language of a particular regulation is ambiguous, we then look to the purpose and necessity of the regulation, the evils sought to be remedied and the goals to be achieved." People ex rel. v. Illinois Commerce Com'n, 231 Ill.2d 370, 382 (2008) The regulations at issue herein have a clearly prescribed purpose, which is to allow payment "for any costs associated with . . . correction action from the Underground Storage Tank Fund." (415 ILCS 5/57(4)) An engineered barrier is corrective action, while the replacement of concrete that was damaged in order to perform corrective action (i.e., remove contaminated soil or leaking underground storage tank systems) is not itself corrective action, but a consequential cost of corrective action or in terms of the statute a cost "associated" with corrective action. To interpret the Board's regulations as providing preferable terms for

pavement when it is not corrective action is contrary to the purpose of the enabling statute and creates absurd results. See People v. Carpenter, 385 Ill.App.3d 156, 161 (2nd Dist. 2008) ("a court should not construe a regulation in a manner that would lead to consequences that are absurd, inconvenient, or unjust.")

The Agency concedes that "the bidding in this case was performed pursuant to the Act and regulations" (Resp. Brief, at p. 10), as it should because no objection was raised in the determination letter. Consequently it is undisputed that the submittal demonstrated "that corrective action cannot be performed for amounts less than or equal to maximum payment" set forth in the Board's regulations. (415 ILCS 5/57.3(c)(3)(C); see also 35 Ill. Adm. Code 734.855 (quoting the statute in setting forth the process for making such demonstrations)) Petitioner recognizes that the subject regulations also seek to make sure costs payed from the Fund are "reasonable." (415 ILCS 5/57.7(c)(3)) A reasonable cost cannot be below the cost to perform the work, that would be an absurd and unjust result.

In interpreting the provisions relied upon in the Agency's Response Brief (Section 734.625(a)(16), Section 734.630 and Section 734.840), it is also important to recognize that their language originated prior to the introduction of competitive bidding. As discussed in more detail in Petitioner's Post-Hearing Brief, the 2004 rulemaking introduced broad, controversial changes to the Leaking Underground Storage Program in the form of maximum payment amounts. Proposed Amendments To: Regulation of Petroleum Leaking Underground Storage Tanks (35 Ill. Adm. Code 732), R04-22(a) (Jan. 22, 2004) (hereinafter "R04-22(a)) The Agency's proposed rule filed with the Board on January 22, 2004 did not include any conception of competitive bidding, which would only emerge later in the Third Errata Sheet. R04-22(a), slip op. at 13 (Feb.

17, 2005) (First Notice) Attached hereto as an Addendum or the three provisions relied upon by the Agency as introduced in the original January 22, 2004, Agency proposal. These provisions appear very much the same or similar as they do today. The plain language of these provisions does not purport to address when competitive bidding is available because it was not an option at the time it was drafted. In other words, the language could not have been intended to address competitive bidding.

In summary, the plain language of the provisions relied upon the Agency would not be violated if the costs derived from competitive bidding were approved.

B. The Agency's Erroneously Interprets Section 734.840 of the Board's Regulations.

The Agency draws a distinction between payment of costs of pavement under Section 734.840(a) and 734.840(b) of the Board's regulations, which is irrelevant to this appeal because neither subsection mentions or addresses when competitive bidding is allowed. If one of them referred to competitive bidding, but the other did not, a reasonable inference might be drawn that a different treatment for competitive bidding was intended.. But that is not the case here. For the sake of not waiving an argument, however, the Agency's distinction is also not based upon the plain language of the Board's regulations.

There are three situations in which pavement will be paid from the LUST Fund. First, when an engineered barrier is approved for a location where pavement does not need to be replaced, such as a site with dirt, gravel or grass surfaces. Second, when an engineered barrier is approved for a location where concrete, asphalt or paving is being replaced to install an engineered barrier. Third, when pavement is being replaced solely as a consequence of

corrective action activities other than the placement of engineered barriers. A short description would be (1) solely engineered barrier; (2) engineered barrier and replacement; and (3) solely replacement. Of these three situations, the Board's regulations address the first two in Section 734.840(a) and the third in Section 734.840(b):

a) [Situation 1] Payment for costs associated with concrete, asphalt, and paving installed as an engineered barrier, <u>other than replacement concrete, asphalt, and paving,</u> must not exceed the following amounts. [Situation 2] <u>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 instead of this subsection (a).</u>

Depth of Material		Maximum Total Amount per Square Foot
Asphalt and paving –	2 inches	$1.65
	3 inches	$1.86
	4 inches	$2.38
Concrete –	any depth	$2.38

b) [Situation 3] 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
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
	8 inches	$5.31

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

(35 Ill. Adm. Code 734.840) (emphasis and "Situations" added)

The Agency's interpretation renders the underlined language superfluous. See People v. B.V. (In re Q.P.), 2022 IL App (1st) 220354 ("A reasonable construction must be given to each word, clause, and sentence of a statute, and no term should be rendered superfluous.") The Agency's interpretation also ignores the purpose of the Act and regulations promulgated thereunder by discriminating against engineered barriers, which are corrective action, in favor of regular pavement (solely replacement).

Furthermore, the Agency's interpretation is contrary to the regulatory history. After First Notice, opportunity was given members of the public to file questions to the Agency. On May 4, 2005, the following question was asked of the Agency and answered:

> **27. Is the cost for the placement of an engineered barrier pursuant to 742.1105 eligible for reimbursement? For the purposes of reimbursement, is it required that the design of said barrier be approved by the Agency prior to implementation? If yes, why then would the same proposed rates not apply for engineered barriers as they do for replacement of surface materials?**

R04-22(a), Prefiled questions of Daniel A. King of United Science Industries (May 4, 2005)

> **27. The depth of material being replaced (e.g. 12 inches of concrete) may be greater than the depth of the same material when it is used to create an engineered barrier. [Situation 1] For material being installed solely an engineered barrier and not as replacement material, the Illinois EPA proposed maximum payment amounts for the depths needed to create an engineered barrier. [Situation 2] In cases where replacement material is also used as an engineered barrier, the Illinois EPA envisions the replacement material falling under the maximum payment amounts for replacement material (Section 734.840(b))**

R04-22(a), Illinois Environmental Protection Agency's Response to Prefiled Questions (June 15, 2005 (emphasis and “Situations” added)

In other words, the Agency’s testimony was that where, as here, pavement is being replaced for placement of an engineered barrier, costs fall under Section 734.840(b). At the time of the testimony, the language of Section 734.840(b) had been updated as part of First Notice, and is the same today. See Appendix hereto. At the very least, the Agency’s testimony dispenses with the false-binary that there is only placement of engineered barriers and replacement of pavement, when frequently pavement may be both.

The policies underlying these distinctions make complete sense. If the material being replaced is 12 inches of concrete then 12 inches of concrete are to be paid whether or not the replacement material is being used as an engineered barrier. Property with 12 inches of concrete has an established need for a higher load-bearing capacity for traffic than one with an unpaved surface. Four inches of asphalt would quickly get torn up in locations that necessitate 12 inches of concrete. These rules were not intended to create the absurd result that prioritize pure replacement pavement over replacement pavement to be used for an engineered barrier.

Therefore, to the extent a difference between Section 734.840(a) and Section 734.840(b) is deemed significant in determining whether competitive bidding is available, the Agency testified in rulemaking that Petitioner’s situation falls under Section 734.840(b).

CONCLUSION

It is undisputed that the corrective action plan cannot be performed pursuant to the presumed Subpart H rates, and that Petitioner complied with the requirements for competitive bidding. The Agency's contention that engineered barriers are uniquely exempted from competitive bidding is not supported by the plain language of the Board's regulations, the purposes of UST regulations, nor the history of the regulations relied upon.

WHEREFORE, Petitioner, JEET SINGH d/b/a AMAN FOOD & GAS, prays that the Board find the Agency erred in its decision, direct the Agency to approve the budget as submitted, award payment of attorney's fees and grant Petitioner such other and further relief as it deems meet and just.

JEET SINGH d/b/a AMAN FOOD & GAS,
Petitioner

By its attorneys,
LAW OFFICE OF PATRICK D. SHAW

By: /s/ Patrick D. Shaw

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Addendum

REGULATORY PROVISIONS IN INITIAL AGENCY PROPOSAL PRIOR TO COMPETITIVE BIDDING

Section 734.630 Ineligible Corrective Action Costs . . .

tt) 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;

Section 734.625 Eligible Corrective Action Costs . . .

[(a)] (16) Costs for destruction and replacement of concrete, asphalt, or paving to the extent necessary to conduct corrective action if the concrete, paving, or asphalt 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. All such costs shall be submitted in a single application for payment and shall not be submitted prior to the Agency's issuance of a No Further Remediation Letter pursuant to Subpart G of this Part. Costs associated with the replacement of concrete, asphalt, or paving shall not be paid in excess of the cost to install, to the same area and depth, the same material as was destroyed;

Section 734.840 Replacement of Concrete, Asphalt, or Paving; Destruction or Dismantling and Reassembly of Above Grade Structures

a) Payment for costs associated with the replacement of concrete, asphalt, or paving shall not exceed the following amounts:

Depth of Replacement Material	**Maximum Total Amount per Square Foot**
Two inches of asphalt or paving	**$1.51**
Three inches of asphalt or paving	**$1.70**
Four inches of concrete, asphalt, or paving	**$2.18**

For depths other than those listed above, the Agency shall determine reasonable maximum payment amounts on a site-specific basis.

LANGUAGE OF SECTION 734.840(A) & (B) AT FIRST NOTICE

Section 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 instead of this subsection (a).

Depth of Material		Maximum Total Amount per Square Foot
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
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
	8 inches	$5.31

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

R04-22(a), slip op. at 311-312 (Feb. 17, 2005) (First Notice)