

ILLINOIS POLLUTION CONTROL BOARD
September 21, 2023

JEET SINGH d/b/a AMAN FOOD & GAS,)	
)	
Petitioner,)	
)	
v.)	PCB 23-90
)	(UST Appeal)
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Respondent.)	

PATRICK D. SHAW OF LAW OFFICE OF PATRICK D. SHAW APPEARED ON BEHALF OF PETITIONER; and

MELANIE A. JARVIS, DEPUTY CHIEF COUNSEL, LAND ENFORCEMENT, DIVISION OF LEGAL COUNSEL, ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, APPEARED ON BEHALF OF RESPONDENT.

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

Jeet Singh, doing business as “Aman Food & Gas,” (Singh) is the operator of a convenience store that sells gasoline in Rock Island County at which underground storage tanks (UST) leaked petroleum. The Illinois Environmental Protection Agency (IEPA) rejected Singh’s Corrective Action Budget Amendment for a six-inch concrete engineered barrier that would cost \$21,350. Singh requests that the Board reverse IEPA’s rejection and approve the budget as submitted.

For the reasons below, the Board finds that Singh’s budget amendment, as submitted to IEPA, would not violate any provisions of the Environmental Protection Act (Act) (415 ILCS 5 (2022)) or Board UST rules cited in IEPA’s decision letter. The Board therefore reverses IEPA’s rejection and orders IEPA to approve Singh’s budget amendment. The Board sets deadlines for Singh to file a statement of legal fees and IEPA to respond, after which the Board will issue a final opinion.

The interim opinion first sets out the procedural history of this case. 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.

PROCEDURAL HISTORY

On February 3, 2023, Singh filed a petition asking the Board to review a December 28, 2022 determination of IEPA (Pet.). On February 16, 2023, a Board order accepted Singh's petition for hearing. On February 17, 2023, Singh waived the decision deadline to September 30, 2023. On April 5, 2023, IEPA filed its administrative record (R.).

On June 22, 2023, the Board held a hearing. The Board received the transcript on June 26, 2023 (Tr.). IEPA offered 13 exhibits at hearing (Exhibits 1 through 13). The hearing officer admitted only Exhibit 1 into evidence. Exhibits 2 through 13 are photographs of Singh's site taken by an IEPA inspector after this appeal was filed. As explained below, the Board affirms the hearing officer's ruling to exclude Exhibits 2 through 13 from evidence.

On July 13, 2023, Singh filed his opening brief (Singh Br.). On July 27, 2023, IEPA filed a response brief (IEPA Resp. Br.). On August 4, 2023, Singh filed his reply brief (Singh Reply Br.).

FACTUAL BACKGROUND

Jeet Singh is "the operator of a convenience store that sells gasoline in Moline, County of Rock Island, Illinois, known as Aman Food & Gas." R. at 5, 11. On March 3, 2014, Singh "reported releases from three underground storage tanks at the site, which were subsequently removed." *Id.* at 5-6.

Corrective Action Budget

On April 9, 2019, Singh's environmental consultant, CW³M Company, submitted a Corrective Action Plan (CAP) that included an engineered barrier. R. at 410. In the "Paving, Demolition, and Well Abandonment Costs Form" of the CAP, Singh's consultant stated that "placement" of an 81.99 square foot 6-inch concrete barrier would cost \$5.63 per square foot, for a total cost of \$461.60. *Id.* at 453. The engineered barrier map in Appendix B to the CAP showed the boundaries of the proposed barrier. *Id.* at 441.

In a letter dated August 6, 2019, IEPA conditionally approved Singh's CAP with modifications. R. at 542; *see id.* at 536 (technical review notes of IEPA Project Manager Eric Kuhlman, Leaking Underground Storage Tank Section, Bureau of Land). IEPA stated that the engineered barrier "should be a rectangle with identifiable points, so that the boundaries of the proposed engineered barrier can be more easily identified." *Id.* at 536, 542. IEPA's decision letter stated that the modifications were necessary to "demonstrate compliance with Title XVI of the Act." *Id.* 542.

On July 20, 2021, Singh's consultant submitted a Corrective Action Budget Amendment that included personnel costs associated with the engineered barrier. R. at 548. The Corrective Action Budget Amendment did not include costs for the additional square footage of concrete. *Id.*; *see id.* at 553.

On August 2, 2021, Singh's consultant sent IEPA a Corrective Action Completion Report (CACR) describing the remedial activities completed in accordance with the approved CAP. R.

at 561, 565. The CACR stated that Singh installed the engineered barrier as “modified post-CAP as requested by the IEPA Project Manager.” *Id.* at 572. The engineered barrier was 237 square feet as shown on a map submitted with the CACR. *Id.* at 602.

In a letter dated November 17, 2021, IEPA Project Manager Kuhlman approved, with modifications unrelated to the engineered barrier, Singh’s July 20, 2021 Corrective Action Budget Amendment. R. at 558.

In a letter dated December 3, 2021, IEPA Project Manager Kuhlman rejected Singh’s CACR because, among other listed reasons, Singh needed to enlarge the engineered barrier to “encompass soil borings SB-1, SB-2, and SB-3.” R. at 739.

In response, Singh’s consultant submitted a Corrective Action Budget Amendment on February 15, 2022, that enlarged the engineered barrier from “238 square feet to 1,763 square feet” and requested costs associated with the additional 1,525 square feet. R. at 742. Singh’s consultant stated that, “[i]t has been noted in various correspondences with the Agency post-denial letter 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.”¹ *Id.* In the Paving, Demolition, and Well Abandonment Costs Form of the Corrective Action Budget Amendment, Singh’s consultant stated that “placement” of a 1,525 square foot 6-inch concrete barrier would cost \$3.23 per square foot for a total cost of \$4,925.75. *Id.* at 748. The engineered barrier map attached to the Corrective Action Budget Amendment as Appendix B showed the boundaries of the already installed barrier and the proposed expansion. *Id.* at 754.

In a letter dated June 1, 2022, IEPA Project Manager Kuhlman approved Singh’s February 15, 2022 Corrective Action Plan Budget. R. at 755.

On August 29, 2022, Singh’s consultant sent IEPA another Corrective Action Budget Amendment, including related bid documents, because the “initial \$3.23 per square foot rate for the engineered barrier could not be met by the interested entities.” R. at 761. Singh’s consultant stated that the “winning bid price for the engineered barrier area of 1,525 square feet was \$14.00 per square foot.” *Id.* In the Paving, Demolition, and Well Abandonment Costs Form of this Corrective Action Budget Amendment, Singh’s consultant stated that “replacement” of a 1,525 square foot 6-inch concrete barrier would cost \$21,350. *Id.* at 767.

IEPA Review

On December 15, 2022, IEPA Project Manager Brad Dilbaitis (Leaking Underground Storage Tank Section, Bureau of Land) reviewed Singh’s August 29, 2022 Corrective Action

¹ The administrative record that IEPA filed on April 5, 2023 does not appear to include correspondence between the parties on this point. *See* 35 Ill. Adm. Code 105.410(b)(2) (Agency record must include “[c]orrespondence with the petitioner and any documents or materials submitted by the petitioner to the Agency related to the plan or budget submittal or other request”).

Budget Amendment. R. at 758. In his review notes on the paving costs of \$21,350, Dilbaitis stated that “the concrete is being placed as a barrier, not replacement.” *Id.*

IEPA Determination

In a letter dated December 28, 2022, IEPA Project Manager Dilbaitis stated that Singh’s August 29, 2022 Corrective Action Budget Amendment was rejected because it:

proposes additional costs for the placement of an engineered barrier that violates 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). R. at 805; *see also id.* at 803, 804.

Additionally, the IEPA letter stated:

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. *Id.* at 805.

IEPA’s letter also stated that “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).” R. at 805.

Lastly, the IEPA stated:

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. R. at 805

LEGAL BACKGROUND

In this part of the opinion, the Board provides the standard of review, burden of proof, and statutory and regulatory authorities.

Standard of Review

The Board must decide whether Singh's budget submission to IEPA would violate the Act or 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 (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 (consol.), slip op. at 11 (Feb. 2, 2006). 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 (5th Dist. 1987); Cmty. Landfill Co. & City of Morris v. IEPA, PCB 01-170 (Dec. 6, 2001), *aff'd. sub nom. Cmty. Landfill Co. & City of Morris v. PCB & IEPA*, 331 Ill. App. 3d 1056 (3rd Dist. 2002).

IEPA's denial letter frames the issues on appeal. Pulitzer Cmty. Newspapers, Inc. v. IEPA, PCB 90-142, slip op. at 6 (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) (2022); 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, PCB 03-54, 03-56, 03-105, 03-179, 04-04 (consol.), slip op. at 59. "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

Section 57.6(a) of the Act states that "[o]wners 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 5/57.6(a) (2022).

Section 57.7(c)(3) of the Act states:

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. 415 ILCS 57.7(c)(3) (2022).

Section 734.625(a)(16) of the Board's UST rules states:

- a) Types of costs that may be eligible for payment from the Fund include those for corrective action activities and 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. Costs 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 734.625(a)(16).

Section 734.630(i) of the Board's UST rules states that costs ineligible for payment from the UST Fund include:

- i) Costs associated with activities that violate any provision of the Act or Board, OSFM, or Agency regulations. 35 Ill. Adm Code 734.630(i).

Section 734.630 of the Board's UST rules states that costs ineligible for payment from the UST Fund include:

- cc) Costs that lack supporting documentation.
- dd) Costs proposed as part of a budget that are unreasonable. 35 Ill. Adm. Code 734.630(cc), (dd).²

² IEPA's denial letter states that Singh's budget lacks supporting documentation and therefore is unreasonable. The denial letter does not explain the specific type of information lacking or specific reasons why Section 57.7(c)(3) of the Act or Section 734.630(cc) or (dd) may be violated if the budget were approved. See 35 Ill. Adm. Code 734.505(b). On appeal, IEPA

- ss) Costs associated with the installation of concrete, asphalt, or paving as an engineered barrier³ 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 734.630(ss).

Section 734.840(a) of the Board's UST rules (35 Ill. Adm. Code 734.840(a)) states:

- 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 ⁴
Asphalt and paving – 2 inches	\$1.65
3 inches	\$1.86
4 inches	\$2.38
Concrete – any depth	\$2.38

Section 734.840(b) of the Board's UST rules (35 Ill. Adm. Code 734.840(b)) states:

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

concedes that it “is not contesting whether the bidding in this case was performed pursuant to the Act and regulations.” IEPA Resp. Br. at 10.

³ Under the Board's UST rules, a corrective action completion report must include information on any “[e]ngineered barriers utilized in accordance with 35 Ill. Adm. Code 742 to achieve the approved remediation objectives.” 35 Ill. Adm. Code 734.345(a)(3)(A). Part 742 of the Board rules (35 Ill. Adm. Code 742) are the “Tiered Approach to Corrective Action Objectives” or “TACO.” An “engineered barrier” means “a barrier designed or verified using engineering practices that limits exposure to or controls migration of the contaminants of concern.” 35 Ill. Adm. Code 742.200.

⁴ The Board's UST rules require IEPA to annually adjust the Subpart H maximum payment amounts by a specified inflation factor. *See* 35 Ill. Adm. Code 734.870. As IEPA notes, the amounts quoted from the rule have been updated and do not reflect the current amounts reimbursed for these activities. IEPA Resp. Br. at 9, n.2.

Depth of Material	Maximum Total Amount per Square Foot ⁵
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.

Section 734.855 of the Board’s UST rules states:

As an alternative to the maximum payment amounts set forth in this Subpart H, one or more maximum payment amounts may be determined via bidding in accordance with this Section. Each bid must cover all costs included in the maximum payment amount that the bid is replacing. Bidding is optional. Bidding is allowed *only if the owner or operator demonstrates that corrective action cannot be performed for amounts less than or equal to maximum payment* [415 ILCS 5/57.7(c)(3)(C)] set forth in this Part. Once a maximum payment amount is determined via bidding in accordance with this Section, the Agency may approve the maximum payment amount in amended budgets and other subsequent budgets submitted for the same incident. 35 Ill. Adm. Code 734.855; *see also* 35 Ill. Adm. Code 734.800(a)(2) (“As an alternative to using the amounts set forth in Sections 734.810 through 734.850 of this Part, [another] 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.”).

BOARD DISCUSSION

The Board first discusses Singh’s use of bidding for the engineered barrier. The Board then discusses whether the proposed installation of the engineered barrier is “placement” or “replacement,” and therefore whether to affirm or reverse IEPA’s denial of Singh’s budget amendment.

Bidding Process

⁵ See footnote 4 above and IEPA Resp. Br. at 9, n.3.

Singh argues that, under Section 57.7(c)(3)(C) of the Act, “the reasonableness of costs of corrective action may be determined through any bidding process adopted by the Board.” Pet. at 3, *citing* 415 ILCS 5/57.7(c)(3)(C) (2022). According to Singh, Section 734.855 of the Board’s UST rules “make clear that bidding is ‘an alternative to the maximum payment amounts set forth in this Subpart H.’” Pet. at 3, *citing* 35 Ill. Adm. Code 734.855.

Additionally, Singh argues that IEPA’s determination letter does not reference “the applicable Board regulations concerning the bidding process” and does not acknowledge that “bidding was the basis for the budget submittal.” Pet. at 3. Therefore, according to Singh, “there is no dispute that all of the requirements of the bidding process were met, and as a matter of law the maximum payment amounts in Subpart H are not applicable.” *Id.*

Singh asserts that paving costs are “suitable for competitive bidding” and that the regulatory history of the Board’s Part 734 UST rules supports the use of competitive bidding here. Singh Br. at 12-13. According to Singh, IEPA is wrong in arguing that competitive bidding is “unavailable when an engineered barrier is involved.” Singh Reply Br. at 6. Singh further argues that IEPA seeks to read a limitation into the Board’s rules that “treats engineered barriers with disfavor compared to regular pavement.” *Id.* at 7.

IEPA does not contest “whether the bidding in this case was performed pursuant to the Act and regulations.” IEPA Resp. Br. at 10. Unlike Singh (Singh Reply Br. at 7-8), the Board does not read IEPA’s brief as arguing that bidding is prohibited for engineered barriers. Instead, as discussed below, IEPA asserts that when bidding is undertaken for placement of an engineered barrier, rule restrictions on which costs are reimbursable have *the effect* of limiting that bidding to placement of a four-inch asphalt engineered barrier. IEPA Resp. Br. at 10. Neither the Act nor the Board’s rules prohibit bidding as an alternative to the maximum payment amounts for concrete, asphalt, and paving in Section 734.840(a) or (b). *See* 415 ILCS 5/57.7(c)(3)(B), (C) (2022); 35 Ill. Adm. Code 734.840(a), (b), 734.800(a)(2), 734.855. IEPA also did not list Section 734.855 on bidding as a reason for rejecting Singh’s budget. R. at 805. Therefore, the Board finds that whether Singh’s bidding process violated the Act or Board rules is not at issue.

Placement or Replacement Engineered Barrier

IEPA argues that the issue on appeal is whether it “can approve [Singh’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.” IEPA Resp. Br. at 13. According to IEPA, 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.” *Id.* at 10, *citing* 35 Ill. Adm. Code 734.840. IEPA states that the “Board’s rules limit the reimbursable amount for ‘placement’ of concrete to the cost of ‘placement’ of asphalt at four inches in depth.” IEPA Resp. Br. at 10, *citing* 35 Ill. Adm. Code 734.840(a). Additionally, IEPA argues that Section 734.630 of the Board’s UST rules prohibits IEPA from reimbursing “costs associated with the installation of concrete, asphalt, or paving as an engineered barrier to the extent that they exceed the costs of installing an

engineered barrier constructed of asphalt four inches in depth.” IEPA Resp. Br. at 10, *citing* 35 Ill. Adm. Code 734.630(ss).⁶

Lastly, IEPA notes that under Section 734.625(a) of the Board’s UST rules, costs for destroying and replacing concrete may be eligible for reimbursement, but only to “the extent necessary to conduct corrective action.” IEPA Resp. Br. at 14, *citing* 35 Ill. Adm. Code 734.625(a)(16). IEPA argues that “removal and replacement of concrete for an engineered barrier is not a corrective action activity.” IEPA Resp. Br. at 14. According to IEPA, “the area of the engineered barrier on [Singh’s] site is a separate area from [] where the tanks are located and where corrective action activities took place”; further, “[c]orrective action did not occur where [Singh] has requested that the engineered barrier be placed.” *Id.* at 15.

Singh observes that IEPA “previously approved six-inches of concrete as an engineered barrier in the prior budget,” adding that “to the extent the [IEPA] determination letter seeks to reinstate the previous budget, that budget approved the placement of concrete, not asphalt.” Pet. at 3. According to Singh, “the record clearly states that [IEPA] directed that the engineered barrier ‘be enlarged’ to encompass soil borings SB-1, SB-2, and SB-3.” Singh Reply Br. at 4, *quoting* R. at 739. Singh asserts that the “purpose of an engineered barrier is ‘[t]o prevent exposure through the outdoor inhalation or soil ingestion exposure [route].’” Singh Reply Br. at 4, *quoting* Tr. at 30. Singh emphasizes it was IEPA which “determined that exposure risks extended from the source of the release to those sampling locations.” Singh Reply Br. at 4. The “precise design of the engineered barrier must utilize ‘engineering practices that limits exposure to or controls mitigation of the contaminants of concern.’” Singh Reply Br. at 4, *quoting* 35 Ill. Adm. Code 742.200 (definition of “engineered barrier”). Singh adds that a licensed professional engineer certified the engineered barrier as “complying with environmental laws and regulations as well as applicable engineering practices.” Singh Reply Br. at 4.

The Board finds that Singh proposed installing *replacement* concrete as an engineered barrier. IEPA’s denial letter and its brief on appeal ignore this fact. Most importantly, the

⁶ At hearing, IEPA offered into evidence photographs that its inspector took at Singh’s site after the appeal was filed. Tr. at 10-17. According to IEPA, the photographs show most of the existing concrete in good condition and, therefore, it is questionable whether “placement of concrete to the extent requested by the [Singh] even needs to be done.” IEPA Resp. Br. at 12. At the same time, IEPA explains that it did not offer the photographs as evidence of “whether new concrete even needs to be placed as an engineered barrier, as [Singh] has an approved CAP and Budget . . . for such a task.” *Id.* Instead, IEPA offered the photographs so the Board “can have a reference as to what was being discussed at the hearing.” *Id.* The hearing officer sustained Singh’s objection to admitting the photographs, but accepted them (Exhibits 2 through 13) as an offer of proof. Tr. at 18-19, 25-26; PCB 23-90 Hearing Report at 1 (June 22, 2023) (“photographs were accepted as an offer of proof for [IEPA] to make an argument for relevance in [its] brief.”). The Board finds that the hearing officer correctly excluded the photographs from evidence. The photographs were taken after IEPA issued its determination and are irrelevant to the denial grounds in that letter. Nor does the Board require the photographs as an aid to reviewing the hearing transcript. The Board affirms the hearing officer’s ruling to exclude Exhibits 2 through 13 from evidence.

Corrective Action Budget Amendment submitted by Singh on August 29, 2022—rejected by IEPA in the denial on appeal—twice stated “replacement.” R. at 761 (“we are submitting this budget amendment for the costs associated with the replacement engineered concrete barrier and the bidding process”); R. at 767 (form). IEPA argues that a form in Singh’s February 15, 2022 budget amendment used the word “placement” for the engineered barrier. IEPA Resp. Br. at 11. But in the same submittal to IEPA, Singh explained 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.” R. at 742. Moreover, from IEPA’s record, the fact that the footprint of the enlarged engineered barrier (R. at 754) had a concrete surface was made plain repeatedly through Singh’s site maps and boring logs. *See, e.g.*, R. at 31-34 (site maps in Singh’s 45-Day Report); R. at 317-327, 334-337 (site maps and boring logs in Singh’s Site Investigation Completion Report).

IEPA’s denial letter stated that Singh’s “additional costs for the placement of an engineered barrier” would violate Section 734.840(a) of the Board’s UST rules. R. at 805. The denial letter explained that under Section 734.840, “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.” *Id.*

Despite quoting it, IEPA’s denial letter overlooked the relevant text of Section 734.840(a)—“other than replacement concrete, asphalt, and paving.” 35 Ill. Adm. Code 734.840(a). By its own terms, subsection (a) of Section 734.840 makes clear both that subsection (b) applies in a replacement scenario and that replaced concrete may be used as an engineered barrier:

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)*. *Id.* (emphasis added).

Accordingly, IEPA’s reliance on Section 734.840(a) is misplaced for two reasons. First, it does not apply to “[c]osts associated with the replacement of concrete, asphalt, and paving used as an engineered barrier.” 35 Ill. Adm. Code 734.840(a). Second, Section 734.855 bidding, used here by Singh, is “an alternative to using the amounts set forth in Sections 734.810 through 734.850,” which, of course, includes Section 734.840(a). 35 Ill. Adm. Code 734.800(a)(2). Section 734.840(a) does not support IEPA’s decision.

IEPA’s denial letter also stated that the additional costs in Singh’s proposed budget amendment are ineligible under Section 734.630(ss) because they “exceed the cost of installing an engineered barrier constructed of asphalt four inches in depth.” R. at 805. IEPA is correct that the Section 734.630 list of “[c]osts ineligible for payment from the Fund” includes “[c]osts 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). But subsection (ss) goes on to say that “[t]his 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.” *Id.* (emphasis added). Thus, Section 734.630(ss), like Section 734.840(a), has an exception for *replacement* concrete, asphalt, or paving used as an engineered barrier.

Under Section 734.625(a)(16), among the “[t]ypes of costs that may be eligible for payment from the Fund” are, subject to specified conditions, “[c]osts for destruction and replacement of concrete, asphalt, or paving to the extent necessary to conduct corrective action.” 35 Ill. Adm. Code 734.625(a)(16). As IEPA’s denial letter failed to recognize that Singh proposed installing *replacement* concrete as an engineered barrier, the letter did not address Section 734.625(a)(16), the replacement exception to Section 734.630(ss).⁷ Nevertheless, IEPA maintains on appeal that the phrase “to the extent necessary to conduct corrective action” in Section 734.625(a)(16) supports its denial. IEPA claims that removing and replacing concrete for an engineered barrier is “not a corrective action activity.” IEPA Resp. Br. at 14. According to IEPA, “[i]t 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. *Id.*”

IEPA’s position seems to be that when placing or replacing concrete, asphalt, or paving, there are only two scenarios in which the costs may be reimbursed. IEPA Resp. Br. at 14-15. The first scenario, which entails no engineered barrier, involves replacing concrete, asphalt, or paving that had to be removed so contamination could be accessed for remediation. Singh calls this first scenario “solely replacement,” that is, “when pavement is being replaced solely as a consequence of corrective action activities other than the placement of engineered barriers.” Singh Reply Br. at 9-10. The second scenario involves placing an engineered barrier over contamination when leaving the contamination in place. Singh calls this second scenario “solely engineered barrier,” that is, “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.” *Id.*

The Board agrees with Singh that IEPA’s apparent dichotomy overlooks a third scenario: “engineered barrier and replacement,” that is, “when an engineered barrier is approved for a location where concrete, asphalt or paving is being replaced to install an engineered barrier.” Singh Reply Br. at 9-10. This third scenario is presented by Singh’s case. As discussed above, replacement concrete, asphalt, and paving for use as an engineered barrier is expressly contemplated by Sections 734.840(a) and 734.630(ss). Both the first and third scenarios (*i.e.*, the two replacement scenarios) may fall within Section 734.625(a)(16).

IEPA’s suggestion that no corrective action will take place where Singh’s enlarged engineered barrier is to be installed (IEPA Resp. Br. at 15) fails to recognize that an engineered barrier *is* corrective action. *See* 35 Ill. Adm. Code 734.115 (““Corrective Action”” *means*

⁷ IEPA’s denial letter also did not cite Section 734.630(oo), the corollary to Section 734.625(a)(16). *See* Ill. Adm. Code 734.630(oo) (ineligible costs include “[c]osts for the destruction and replacement of concrete, asphalt, or paving, except as otherwise provided in Section 734.625(a)(16) of this Part”).

activities associated with compliance with the provisions of Sections 57.6 and 57.7 of the Act [415 ILCS 5/57.2 (2022)].”). An engineered barrier’s purpose is to reduce the risk of exposure to contaminants from a UST release. IEPA required Singh to enlarge the engineered barrier because the soil samples from borings SB-1, SB-2, and SB-3 were collected at approximately the same depth as “wall sample 8.” R. at 739. The analytical results of soil sample 8 collected from the tank excavation’s eastern wall exceeded the Tier 1 soil remediation objectives for BETX (benzene, ethylbenzene, toluene, and total xylenes). R. at 7, 33, 34, 41. But the soil samples from borings SB-1, SB-2, and SB-3, located east of the excavation, were below the Tier 1 soil remediation objectives for BETX, as well as for MTBE (methyl tertiary-butyl ether). R. at 33, 34, 318, 535, 635, 783. IEPA therefore required that Singh extend the engineered barrier eastward to encompass the three locations meeting those objectives. R. at 324, 783; *see also* R. at 326, 407 (delineation of soil contamination plume). The work and costs for the engineered barrier have been certified by a licensed professional engineer. R. at 773. The Board finds that destroying and replacing concrete here is “necessary to conduct corrective action” within the meaning of Section 734.625(a)(16). Therefore, Section 734.630(ss) does not apply and IEPA erred in relying on it to deny Singh’s budget amendment.

Lastly, IEPA argues 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.” IEPA Resp. Br. at 10 (emphasis in original). According to IEPA, “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.” *Id.* at 12. IEPA further asserts that “to bid for ‘placement’ of concrete, a bid for the ‘placement’ of four inches of 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.” *Id.* at 10. Given this position and IEPA’s insistence that Singh’s engineered barrier would not be “replacement,” it is unclear why IEPA twice approved Singh’s budgets for a six-inch concrete engineered barrier. R. at 453, 542-546, 748, 755-757. However, as discussed above, Singh sought IEPA approval of the costs for *replacement* concrete as an engineered barrier. And IEPA’s denial letter identified no fault in Singh’s bidding process. The Board finds that nothing in Section 734.635(a)(16), the replacement exception to Section 734.630(ss), precludes the use of bidding.

Board Ruling

Because the Board finds that installation of the concrete engineered barrier here is “replacement” of existing concrete, Singh’s budget amendment is not subject to Section 734.840(a). Further, the cost restriction for a four-inch asphalt engineered barrier in Section 734.630(ss) is inapplicable because Singh meets that provision’s replacement exception. Accordingly, Singh’s budget amendment would not violate either rule cited in IEPA’s decision letter as grounds for denial. The Board finds that Singh met his burden of proof, reverses IEPA’s decision, and orders IEPA to approve the budget as submitted.

Reimbursement of Legal Fees

Singh seeks reimbursement of his legal fees. *See* Pet. at 3. The record does not now include the amount of these fees or Singh's argument that they would be reimbursable under Section 57.8(l) of the Act. 415 ILCS 5/57.8(l) (2022). In its order below, the Board directs Singh 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

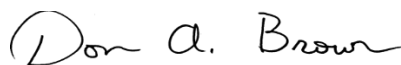
The Board finds that Singh's budget amendment would not violate either of the Board rules cited in IEPA's denial letter. The Board therefore reverses IEPA's decision and orders IEPA to approve the budget amendment as submitted. The Board sets deadlines for Singh to file a statement of legal fees and IEPA to respond. This interim opinion constitutes the Board's findings of fact and conclusions of law.

ORDER

1. The Board reverses IEPA's December 28, 2022 determination rejecting Singh's August 29, 2022 budget amendment.
2. The Board orders IEPA to approve Singh's budget of \$21,350 for the six-inch replacement concrete engineered barrier.
3. Singh 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. Singh must file the request by Monday, October 23, 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 Singh's statement.

IT IS SO ORDERED.

I, Don A. Brown, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above interim opinion and order on September 21, 2023, by a vote of 4-0.



Don A. Brown, Clerk
Illinois Pollution Control Board