

ILLINOIS POLLUTION CONTROL BOARD
November 16, 2023

J.D.STREETT & COMPANY, INC.,)
)
 Petitioner,)
)
 v.) PCB 22-27
) (UST Appeal)
ILLINOIS ENVIRONMENTAL)
PROTECTION AGENCY,)
)
 Respondent.)

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

On December 10, 2021, J.D. Streett & Company, Inc. (petitioner) filed a petition appealing an Illinois Environmental Protection Agency (IEPA) decision denying a request for reimbursement of \$11,791.28 for early action activities involving the clean-up of a leaking underground storage tank system (UST). The parties filed cross motions for summary judgement.

For the reasons discussed below the Board finds that there is no genuine issue of material fact and summary judgment is appropriate. The Board grants petitioner’s motion for summary judgment for \$3,340.34 in costs for backfill of the tank field. The Board denies IEPA’s motion on that issue, finding that the record before IEPA at the time of its decision contains sufficient documentation to support the request for reimbursement. Accordingly, the Board reverses IEPA’s decision on backfill costs. Second, the Board grants IEPA’s motion on and affirms IEPA’s denial of reimbursement of \$8,450.94 for tank removal costs. The Board denies petitioner’s motion on that issue because the IEPA record does not contain documentation to support that request for reimbursement. The Board directs petitioner to file a statement of eligible legal fees.

The Board’s interim opinion begins below with the procedural history and the undisputed facts of this matter. After providing the legal background, the Board determines if summary judgement is appropriated, and then discusses the issues. The Board concludes by reaching its decision and issuing an interim order.

PROCEDURAL BACKGROUND

Petitioner filed this appeal on December 10, 2021, and the Board accepted it for hearing on December 16, 2021. IEPA filed the administrative record on October 11, 2022 (R.). On January 30, 2023, petitioner filed a motion to supplement the record, which the hearing officer granted on January 31, 2023. On February 7, 2023, petitioner filed a motion for summary judgement (Mot.). IEPA responded with a cross-motion for summary judgement on February 28, 2023 (IEPA Mot.). Petitioner filed a response to IEPA’s motion on March 14, 2023 (Resp.).

FACTS

Petitioner operated a gasoline station and convenience store at 3225 South Park Avenue, Herrin, Williamson County from August of 1996 until early 2021 (site). R. at 7, 57, 64. The site was assigned LPC# 1990405102 and on February 1, 2021, a gasoline release from the two tanks at the site was reported the Illinois Emergency Management Agency (IEMA) *Id.* at 1. IEMA assigned Incident No. 2021-0114 to the release. *Id.* Petitioner's consultant, CSD Environmental Services, Inc. (CSD), stated that the tanks would be removed. *Id.* at 2.

Petitioner contracted with Neumayer Equipment Company, Inc. (Neumayer) for tank removal, in addition to CSD. R. at 69, 214-15. A permit to remove the underground storage tanks and all associated piping was submitted to the Office of the State Fire Marshal (OSFM) by Robert Ellis & Sons on February 11, 2021. *Id.* at 69, 127. Robert Ellis & Sons is a subcontractor hired by Neumayer to perform the environmental work for a lump sum rate at the site. *Id.* at 175-176.

After permit approval, the tanks and piping were removed on March 4, 2021, in the presence of an OSFM Storage Tank Safety Specialist. R. at 69. The OSFM indicated that contamination was found in the pipe trench of both tanks and water was present in the excavation. *Id.* at 54-56. OSFM verified that Robert Ellis & Sons workers had the necessary certifications. *Id.* at 55. CSD was also on-site to provide oversight for the owner, collect soil samples and take photographs. *Id.* at 55, 69, 128-231.

The underground storage tanks were previously backfilled with CA-16 chip stone, that was removed and stockpiled nearby in order to access the tanks. R. at 67. Soil samples were collected from the floor and sidewalls of the excavation, and the backfill was returned to the excavation. *Id.* at 66-67. The tanks were hauled to a local scrapyards for recycling. *Id.* at 70. Between March 8, 2021 and March 15, 2021, 186.74 tons of CA06 Rock was backfilled into the void left by the removal of the underground storage tanks. *Id.*

On March 16, 2021, OSFM determined that petitioner was "eligible to seek payment of costs in excess of \$5,000" from the Underground Storage Tank Fund. R. at 7. On March 25, 2021, CSD Environmental Services submitted a 45-Day Report for the incident to IEPA. *Id.* at 58. The 45-Day Report certified that the most stringent Tier 1 remediation objectives had been met by early action activities and requested issuance of a No Further Remediation letter. *Id.* at 60, 70-71. On April 20, 2021, IEPA approved the 45-Day Report and issued a No Further Remediation Letter. *Id.* at 139-143.

On August 23, 2021, petitioner submitted a billing package for reimbursement for the early action activities in the amount of \$21,884.08. R. at 184. These costs included \$3,340.34 for backfilling the void from the removed tanks and \$8,450.94 for removal of the two underground storage tanks. *Id.* at 187-89.

The billing package contains tickets for backfill from both Anna Quarries (65.54 tons) and the Southern Illinois Stone Quarry (121.20 tons). R. at 221-29. The billing package further

included invoices and check stubs for payments from petitioner to Neumayer in the amount of \$40,371.25. *Id.* at 216-19. The billing package included Neumayer's contract with petitioner and Neumayer's invoice for work associated with removal of the underground storage tank systems and backfilling the voids. *Id.* at 213-215. Neumayer presented invoices totaling \$40,371.25. *Id.* at 213-218. Neumayer invoices indicated that the amount of \$11,791.28 was being sought for reimbursement: \$8450.94 for removal of the tanks and \$3,340.34 for backfill. *Id.* at 213.

The record includes proof that petitioner paid Neumayer \$40,371.25 for its work. R. at 218.

On September 28, 2021, IEPA sought additional information from petitioner's consultant asking for invoices for the backfill from each vendor, not just the ticket manifests. *Id.* at 173-174. IEPA also sought invoices for Robert Ellis & Sons. *Id.* Petitioner responded that it does not have invoices from Robert Ellis & Sons as Neumayer paid for that work pursuant to the contract in the record. *Id.* Petitioner also indicated that the tickets for backfill show the amount charged. *Id.* Petitioner explained that the billing package documented the work was completed. *Id.* A copy of the subcontract agreement between Neumayer and Robert Ellis & Sons was provided to IEPA. *Id.* at 175-76.

IEPA continued to ask for copies of invoices from Robert Ellis & Sons, as that is the entity on the permit for removal of the tanks. R. at 173-74. Petitioner asked that IEPA explain what regulation requires submission of the subcontractor's invoice. *Id.* at 173. IEPA indicated that the amount was not sufficient information. *Id.*

On November 5, 2021, IEPA issued its determination and deducted costs for tank removal (\$8,450.94) and backfill (\$3,340.34). R. at 241-45. IEPA's denial letter cited provisions of the Environmental Protection Act (Act) (415 ILCS 5 (2022)) and the Board's petroleum UST rules (35 Ill. Adm. Code 734). R. at 244. Regarding the backfill costs, IEPA's letter stated:

\$3,340.34, deduction for costs for backfill, which lack supporting documentation. Such costs are ineligible for payment from the Fund pursuant to 35 Ill. Adm. Code 734.630(cc). Since there is no supporting documentation of costs, the Illinois EPA cannot determine that costs will not be used for activities in excess of those necessary to meet the minimum requirements of Title XVI of the Act. Therefore, such costs are not approved pursuant to Section 57.7(c)(3) of the Act because they may be used for site investigation or corrective action activities in excess of those required to meet the minimum requirements of Title XVI of the Act.

In addition, deduction for site investigation or corrective action costs for backfill that are not reasonable as submitted. Such costs are ineligible for payment from the Fund pursuant to Section 57.7(c)(3) of the Act and 35 Ill. Adm. Code 734.630(dd).

Documentation/invoices provided do not match the amount requested for reimbursement. Invoices for the purchase of the backfill material as well as from the contractors/subcontractors that actually performed (transported and placed the backfill material) the work needs to be provided. R. at 244.

Regarding the costs for UST removal, IEPA's letter stated:

\$8,450.94, deduction for costs for UST removal, which lack supporting documentation. Such costs are ineligible for payment from the Fund pursuant to 35 Ill. Adm. Code 734.630(cc). Since there is no supporting documentation of costs, the Illinois EPA cannot determine that costs will not be used for activities in excess of those necessary to meet the minimum requirements of Title XVI of the Act. Therefore, such costs are not approved pursuant to Section 57.7(c)(3) of the Act because they may be used for site investigation or corrective action activities in excess of those required to meet the minimum requirements of Title XVI of the Act. In addition, deduction for site investigation or corrective action costs for UST removal that are not reasonable as submitted. Such costs are ineligible for payment from the Fund pursuant to Section 57.7(c)(3) of the Act and 35 Ill. Adm. Code 734.630(dd).

An invoice from the company that removed the USTs and was listed on the OSFM permit was not submitted to the Illinois EPA. R. at 244-45.

LEGAL BACKGROUND

Summary Judgement

Summary judgment is appropriate when the pleadings, depositions, admissions, affidavits, and other items in the record show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Adames v. Sheahan, 233 Ill. 2d 276, 295, 909 N.E.2d 742, 753 (2009); Dowd & Dowd, Ltd. v. Gleason, 181 Ill. 2d 460, 483, 693 N.E.2d 358, 370 (1998); 35 Ill. Adm. Code 101.516(b). A genuine issue of material fact precluding summary judgment exists when “the material facts are disputed, or, if the material facts are undisputed, reasonable persons might draw different inferences from the undisputed facts.” Adames, 233 Ill. 2d at 296, 909 N.E.2d at 753; Adams v. Northern Illinois Gas Co., 211 Ill. 2d 32, 43, 809 N.E.2d 1248, 1256 (2004).

When determining whether a genuine issue of material fact exists, the record “must be construed strictly against the movant and liberally in favor of the opponent.” Adames, 233 Ill. 2d at 295-96, 909 N.E.2d at 754; Purtill v. Hess, 111 Ill. 2d 229, 240, 489 N.E.2d 867, 871 (1986). 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.” Adames, 233 Ill. 2d at 296, 909 N.E.2d at 754; Purtill, 111 Ill. 2d at 240, 489 N.E.2d at 871. “Even so, while the nonmoving party in a summary judgment motion is not required to prove [its] case, [it] must nonetheless present a factual basis, which would arguably entitle [it] to a judgment.” Gauthier v. Westfall, 266 Ill. App. 3d 213, 219, 639 N.E.2d 994, 999 (2d Dist. 1994).

Standard of Review

The Board must decide whether petitioner's submission to IEPA demonstrated compliance with the Act and the Board's rules. Illinois Ayers Oil Co. v. IEPA, PCB 03-214, slip op. at 8 (April 1, 2004); Kathe's Auto Service Center v. IEPA, PCB 96-102, slip op. at 13 (Aug. 1, 1996). The Board's review is generally limited to the record before IEPA at the time of its determination. Freedom Oil Co. v. IEPA, PCB 03-54, 03-56, 03-105, 03-179, 04-04 (cons.), slip op. at 11 (Feb. 2, 2006); *see also* Illinois Ayers, PCB 03-214, slip op. at 15 ("the Board does not review [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 [IEPA] demonstrates compliance with the Act").

IEPA's denial letter frames the issues on appeal. Pulitzer Cmty. Newspapers, Inc. v. IEPA, PCB 90-142 (Dec. 20, 1990).

Statutory and Regulatory Authorities

Section 57.7(c)(3) of the Act provides in pertinent part that, when approving any site investigation or corrective action plan and budget, IEPA must determine that the costs associated with the plan 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 5/57.7(c)(3) (2022).

Subpart of Part 734 is titled "Early Action" and includes Section 734.200, which provides in pertinent part that "[n]o work plan or corresponding budget" is "required for conducting early action activities . . ." 35 Ill. Adm. Code 734.200. Section 734.210 of the Board's regulations further addresses early action at a leaking UST site. Subsections (f) and (g) provide:

- f) *Notwithstanding any other corrective action taken, an owner or operator may, at a minimum, and prior to submission of any plans to the Agency, remove the tank system, or abandon the underground storage tank in place, in accordance with the regulations promulgated by the Office of the State Fire Marshal (see 41 Ill. Adm. Code 160, 170, 180, 200). The owner may remove visibly contaminated fill material and any groundwater in the excavation which exhibits a sheen. For purposes of payment of early action costs, however, fill material shall not be removed in an amount in excess of 4 feet from the outside dimensions of the tank.* [415 ILCS 5/57.6(b)] Early action may also include disposal in accordance with applicable regulations or ex-situ treatment of contaminated fill material removed from within 4 feet from the outside dimensions of the tank.
- g) For purposes of payment from the Fund, the activities set forth in subsection (f) of this Section must be performed within 45 days after initial notification to IEMA of a release plus 14 days, unless special

circumstances, approved by the Agency in writing, warrant continuing such activities beyond 45 days plus 14 days. The owner or operator must notify the Agency in writing of such circumstances within 45 days after initial notification to IEMA of a release plus 14 days. Costs incurred beyond 45 days plus 14 days must be eligible if the Agency determines that they are consistent with early action.

BOARD NOTE: Owners or operators seeking payment from the Fund are to first notify IEMA of a suspected release and then confirm the release within 14 days to IEMA pursuant to regulations promulgated by the OSFM. See 41 Ill. Adm. Code 170.560 and 170.580. The Board is setting the beginning of the payment period at subsection (g) to correspond to the notification and confirmation to IEMA. 35 Ill. Adm. Code 734.210(f) and (g).

Section 734.220 sets forth the procedures to apply for payment of early action Costs:

Owners or operators intending to seek payment for early action activities, excluding free product removal activities conducted more than 45 days after confirmation of the presence of free product, are not required to submit a corresponding budget plan. The application for payment may be submitted to the Agency upon completion of the early action activities in accordance with the requirements at Subpart F of this Part, excluding free product removal activities conducted more than 45 days after confirmation of the presence of free product. Applications for payment of free product removal activities conducted more than 45 days after confirmation of the presence of free product may be submitted upon completion of the free product removal activities. 35 Ill. Adm. Code 734.220.

Subpart F of Part 734 is titled “Payment from the Fund” and includes Section 734.605. Section 734.605(b) provides a list of elements to be included in a complete application for payment. The relevant subsections provide:

- 9) An accounting of all costs, including but not limited to, invoices, receipts, and supporting documentation showing the dates and descriptions of the work performed; and
- 10) Proof of payment of subcontractor costs for which handling charges are requested. Proof of payment may include cancelled checks, lien waivers, or affidavits from the subcontractor. 35 Ill. Adm. Cod 734.605(b)(9) and (10).

Section 734.610(a)(1) requires IEPA to review an application to determine:

Whether the application contains all of the elements and supporting documentation required by Section 734.605(b) of this Part. 35 Ill. Adm. Code 734.610(a)(1).

Section 734.610(c) allows that IEPA's review:

may include a review of any or all elements and supporting documentation relied upon by the owner or operator in developing the application for payment, including but not limited to a review of invoices or receipts supporting all claims. The review also may include the review of any plans, budgets, or reports previously submitted for the site to ensure that the application for payment is consistent with work proposed and actually performed in conjunction with the site. 35 Ill. Adm. Code 734.610(c).

Section 734.630 provides that "[c]osts ineligible for payment from the Fund include:"

- (cc) [c]osts that lack supporting documentation;
- (dd) [c]osts proposed as part of a budget that are unreasonable. 35 Ill. Adm. Code 734.630(cc) and (dd).

DISCUSSION

The first issue the Board will discuss is whether summary judgment is appropriate. If there are genuine issues of fact, the Board must deny both motions. However, if there are no genuine issues of fact, the Board must decide whether the documentation petitioner provided to IEPA is sufficient to support petitioner's claim for reimbursement.

Summary Judgment

The Board may only grant summary judgment in an appeal of an IEPA determination when there is no genuine issue of material fact. 35 Ill. Adm. Code 101.515(b). Both parties alleged in their summary judgment motions that no genuine issue of material fact exists. But agreement of the parties alone "does not establish that there is no issue of material fact, nor does it obligate the Board to render summary judgment." Prairie Rivers Network v. Illinois Pollution Control Bd., 2016 IL App (1st) 150971 at ¶ 24; 50 N.E.3d 680, 684 (Feb. 26, 2016). In this instance, however, the Board agrees with the parties. The record is complete and the Board is asked to interpret the law and apply that law to the undisputed facts. Therefore, the Board finds that there are no genuine issues of material fact in the administrative record, and summary judgment is appropriate.

Denial of Reimbursement

IEPA denied reimbursement for two specific items in its denial letter. The denial letter frames the issues on appeal. The Board must decide whether petitioner's application as submitted to IEPA demonstrates that granting the requested reimbursement would not violate the provisions of the Act or Board rules cited in IEPA's denial letter. On November 5, 2021, IEPA issued its determination and deducted costs for tank removal (\$8,450.94) and backfill (\$3,340.34). R. at 244-45.

Reimbursement for Tank Removal

Removal of the Tank. The issue in this appeal is not whether the tanks were removed, as petitioner maintains. *See* Mot. at 10. Petitioner is correct that the IEPA record includes a narrative description of the tank removal, including a description of the work performed and the dates. *Id.*; R. at 69. And OSFM was on site for tank removal and verified the removal of the tank. Mot. at 10; R. at 12. IEPA does not dispute that the tanks were removed; rather, IEPA denies reimbursement for lack of supporting documentation. IEPA Mot. at 8. The Board finds the evidence of removal of the tanks is sufficient and that there is no issue in this appeal regarding removal of the tank, merely reimbursement for the work.

Supporting Documentation. The Board reviewed the case law and the arguments of the parties in determining that the record before IEPA does not support petitioner's claim for reimbursement for tank removal. The Board agrees with petitioner that IEPA may seek documents that the owner relied upon in developing the application. Mot. at 12. To support this position, petitioner relies on Knapp Oil Co. v. IEPA, PCB 16-103 (Sept. 22, 2016). Knapp states that IEPA "may review supporting documentation relied upon by the owner or operator in developing the application for payment, including but not limited to a review of invoices or receipts supporting the claim." *Id.* slip op. at 9. However, petitioner claims that "supporting documentation" is not defined by the Board regulations and therefore the term will differ based on the content of the submittal. Resp. at 3, *citing* Friends of the Environment, NFP v. IEPA, PCB 16-102 (July 21, 2016).

Petitioner argues that there is no evidence that it "relied upon" the subcontractor's invoices in developing the application for reimbursement. Resp. at 7. Rather, petitioner argues that it did not have any invoices from the subcontractor. *Id.* Petitioner notes that the Board's rule states that IEPA's review may include "supporting documentation relied upon by the owner or operator" and petitioner argues that the phrase should be given effect. *Id.*, *citing* McAffee v. IEPA, PCB 15-84, slip op. at 15 (Mar. 5, 2015); 35 Ill. Adm. Code 734.610(c).

The Board is unconvinced by petitioner's argument and agrees with IEPA that the request for reimbursement fails to contain documentation supporting the requested reimbursement for tank removal. IEPA Mot. at 8. IEPA maintains that the issue is whether the subcontractor performed the work for which invoices were not provided. *Id.* IEPA compares the issues in this case with T-Town Drive Thru, Inc. v. IEPA, PCB 07-85 (Apr. 3, 2008). In T-Town, the Board noted that the subcontractor invoice is not proof of payment, but does document the actual cost incurred and the work performed. *Id.* IEPA asserts that like T-Town, IEPA cannot determine if the costs are eligible absent the invoices from the subcontractors. IEPA Mot. at 9.

IEPA also relies upon Freedom Oil Company v. IEPA, PCB 1046 (Aug. 9, 2012) in support of its argument. According to IEPA, in that case it requested invoices from all subcontractors performing work and the Board affirmed IEPA's decision denying reimbursement. IEPA Mot. at 9.

The Board is persuaded that the language of Section 734.610(c) and the analysis in T-Town control in this matter. Section 734.610(c) allows IEPA to review “any and all elements and supporting documentation” relied upon by the owner, and that may include invoices or receipts supporting the claim. 35 Ill. Adm Code 734.610(c). A copy of the subcontract between Neumayer and Robert Ellis & Sons is in the record. R. at 175-76. The contract simply states that Neumayer contracts with Robert Ellis & Sons to perform work “per plans and specification as more fully described below.” *Id.* at 175. The contract does not contain any more detail, except to indicate that Neumayer agrees to pay Robert Ellis & Sons \$29,800 for the work. *Id.* This sum exceeds the total Neumayer asserts is reimbursable by several thousand dollars. *See Id.* at 213.

Petitioner argues the agreement is a lump sum agreement that does not require an invoice. Mot. at 10-11. However, the Board agrees with IEPA that the information provided is not sufficient to demonstrate that the work performed was consistent with the Act and Board regulations. The record does not contain an explanation of what work was performed, merely evidence that work was performed. Neumayer simply states that \$8,450.94 is the amount reimbursable. R. at 213. The Board finds this case analogous to T-Town, where the Board found that a subcontractor’s invoices were needed in order to establish that the charges were necessary and therefore whether the work performed was necessary to meet the requirements of the Act and Board rules. The Board finds no evidence in this record that explains the work performed by Robert Ellis & Sons, merely that the tanks were removed. In this instance, IEPA correctly sought clarification of the costs, including invoices from the subcontractor to document the work performed. The Board finds that the application as submitted seeking reimbursement for tank removal does not meet the requirements of the Act and Board regulations.

Inappropriate Denial Reasons. Finally, petitioner maintains that IEPA’s statements concerning approval of a budget are not applicable in this instance. Mot. at 13-14. Petitioner notes that the reimbursement sought is for early action, and no budget is associated with early action. Early action is performed without plans and budgets. *Id.* at 14.

The Board agrees that IEPA’s reference to Section 734.630(dd) is incorrect; however, IEPA does also cite Section 735.630(cc) as a denial reason. Section 734.630(cc) provides that ineligible costs are those which lack supporting documentation, and as explained above the Board finds a lack of supporting documentation. 35 Ill. Adm. Code 734.630(cc). The inadvertent citation to Section 34.630(dd) does not impact the Board’s decision.

Conclusion. The Board is unconvinced by petitioner’s arguments that the record supports reimbursement for tank removal by Robert Ellis & Sons. The record does not include an invoice, or even a description of the work performed by Robert Ellis & Sons. Petitioner’s claim that it does not need to produce such an invoice because it did not rely on that invoice is without merit. The Board affirms IEPA’s denial of \$8,450.94 for tank removal because the costs are not supported with proper documentation, contrary to 35 Ill. Adm. Code 734.630(cc).

Backfill

While this issue is similar to the issue of tank removal, the Board is unconvinced by IEPA's arguments. The record before IEPA contains invoices from the quarries where the backfill was purchased, and an explanation of what was done at the site. R at 221-29. While there is no invoice from Robert Ellis & Sons, and the record does not support reimbursement for tank removal, the record does provide support for reimbursement of backfill. As petitioner notes, the 45-day report indicates that 186.74 tons of CA06 rock was placed in the tank field after removal of the tanks. Mot. at 11; R. at 70. Petitioner points to receipts from two quarries for a total of \$1,973.22. *Id.*

IEPA relies on Friends in support of its position that the subcontractor's invoices for the backfill must be included in the request for reimbursement. IEPA Mot. at 9-10. IEPA explains that petitioner hired a contractor to perform a tank removal and a subcontractor was hired to perform the actual work. IEPA Mot. at 10. The subcontractor was issued a permit to perform the work and IEPA argues that it needs those invoices and supporting documentation in order to determine if the work was done in accordance with the Act and regulations. *Id.* IEPA asserts that as in Friends, without that information it is impossible for the IEPA to do its statutory duty and reimburse the petitioner for the costs requested. *Id.* In contrast, petitioner argues that it is well established that backfill tickets are needed to document how much backfill was used. Mot. at 11, *citing Friends*. Petitioner opines that in Friends, backfilling costs were rejected because the record did not include purchase tickets. Mot. at 12. Petitioner asserts that in this case the backfill tickets document "what was purchased, who purchase it, when it was purchased, and the cost of the materials." *Id.*

The Board agrees with petitioner that IEPA's reliance on Freedom Oil and Friends is misplaced. Resp. at 4. In Freedom Oil, the owner unsuccessfully challenged the conversion factor and in fact IEPA relied on an invoice from the backfill supplier to reimburse the owner/operator. *Id.* Here petitioner provided documentation from the backfill supplier, while in Friends there was no documentation showing weight measurements from the backfill supplier. *Id.* In this instance, the IEPA's record establishes that the tank field was backfilled with 186.74 tons of CA06 rock. R. at 70. The record includes invoices from two quarries for the purchase of the rock. R. at 221-29. Therefore, the Board finds that the record includes sufficient documentation for backfill in compliance with 35 Ill. Adm. Code 734.630(cc). IEPA's denial letter also cites Section 57.7(c)(3) of the Act (415 ILCS 5/57.7(c)(3) (2022)), but that provision applies only to IEPA's consideration of "site investigation" or "corrective action" plans and budgets, not "early action." *See* McAfee, PCB 15-84, slip op. at 15-16 (Mar. 5, 2015); *see also* 35 Ill. Adm. Code 734.200 ("No work plan or corresponding budget must be required for conducting early action activities, excluding free product removal activities conducted more than 45 days after confirmation of the presence of free product."). The Board reverses IEPA's decision rejecting the reimbursement of \$3,340.34 for backfill.

Conclusion. The IEPA record includes invoices for the purchase of rock used for backfill at petitioner's site. The record also includes evidence that the backfill was placed in the tank field. This type of evidence is consistent with documentation IEPA and the Board accepted in allowing reimbursement for backfill in prior cases. Therefore, the Board finds the record supports petitioner's request for reimbursement of \$3,340.34 for backfill.

Legal Fees

Petitioner requests that the Board “award payment of attorney’s fees.” Mot. at 14. The Act gives the Board discretion to authorize payment of legal fees if the UST owner or operator prevails before the Board. 415 ILCS 5/57.8(1) (2022); *see also* 35. Ill. Adm. Code 734.630(g). The record, however, does not contain a request for a specific amount of legal fees. Petitioner also did not justify why the Board should exercise its discretion under Section 57.8(1) in this case. The Board directs petitioner to file a statement of eligible legal fees and justify why the Board should use its discretion to reimburse those fees under Section 57.8(1) of the Act. Petitioner must file its statement by December 18, 2023. IEPA may file response by January 2, 2024.

CONCLUSION

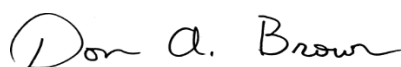
The Board finds there is no genuine issue of material fact and summary judgment is appropriate. The Board grants in part and denies in part the parties’ respective cross motions for summary judgment. First, the Board grants petitioner’s motion concerning IEPA’s denial of \$3,340.34 in reimbursement for costs to backfill the tank field. The Board therefore denies IEPA’s motion on that issue and reverses that part of IEPA’s denial. The IEPA record contains sufficient documentation to support the request for reimbursement of these backfill costs. Second, the Board grants IEPA’s motion regarding its denial of \$8,450.94 in reimbursement for costs to remove the tanks. Therefore, the Board denies petitioner’s motion on that issue and affirms that part of IEPA’s denial. The IEPA record does not contain documentation to support the request for reimbursement of these tank removal costs.

This opinion constitutes the Board’s interim findings of fact and conclusions of law in this matter.

ORDER

The Board upon review of the IEPA record finds that reimbursement for \$3,340.34 in costs to backfill the tank field will not violate the Act or Board regulations. The Board therefore reverses IEPA’s decision denying reimbursement of the requested backfill costs. The Board affirms IEPA’s denial of \$8,450.94 for tank removal costs as the IEPA record does not contain supporting documentation. Therefore, the Board grants petitioner’s motion for summary judgment in part and denies it in part. The Board also grants IEPA’s motion for summary judgment in part and denies it in part. As provided in this interim opinion, petitioner is directed to file a statement of eligible legal fees, to which IEPA may respond.

I, Don A. Brown, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above interim opinion and order on November 16, 2023, by a vote of 3-0.



Don A. Brown, Clerk
Illinois Pollution Control Board