BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

PIASA MOTOR FUELS, INC.,	)	
Petitioner,	)	
	)	
v.	)	PCB 2018-054
	)	(UST Appeal - Land)
ILLINOIS ENVIRONMENTAL	)	
PROTECTION AGENCY,	)	
Respondent.	)	

NOTICE

Don Brown, Clerk
Illinois Pollution Control Board
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Illinois Pollution Control Board
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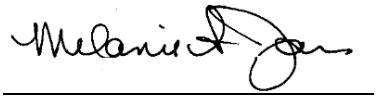
PLEASE TAKE NOTICE that I have today filed with the office of the Clerk of the Pollution Control Board **ILLINOIS EPA'S CROSS MOTION FOR SUMMARY JUDGMENT AND RESPONSE TO PETITIONER'S MOTION FOR SUMMARY JUDGMENT,** copies of which are herewith served upon you.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,
Respondent



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Dated: December 9, 2019

BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

PIASA MOTOR FUELS, INC., Petitioner,	)	
v.	)	PCB 2018-054 (UST Appeal - Land)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, Respondent.	)	

ILLINOIS EPA'S CROSS MOTION FOR SUMMARY JUDGMENT AND RESPONSE TO PETITIONER'S MOTION OF SUMMARY JUDGMENT

NOW COMES the Respondent, the Illinois Environmental Protection Agency ("Illinois EPA" or "Agency"), by one of its attorneys, Melanie A. Jarvis, Assistant Counsel and Special Assistant Attorney General, and hereby, as an alternative to its Motion to Dismiss and in an effort to expedite the review of the case, submits **ILLINOIS EPA'S CROSS MOTION FOR SUMMARY JUDGMENT AND RESPONSE TO PETITIONER'S MOTION OF SUMMARY JUDGMENT** to the Illinois Pollution Control Board ("Board").

I. STANDARD FOR ISSUANCE AND REVIEW

A motion for summary judgment should be granted where the pleadings, depositions, admissions on file, and affidavits disclose no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Dowd & Dowd, Ltd. v. Gleason, 181 Ill.2d 460, 483, 693 N.E.2d 358, 370 (1998); McDonald's Corporation v. Illinois Environmental Protection Agency, PCB 04-14 (January 22, 2004), p. 2.

Section 57.8(i) of the Illinois Environmental Protection Act ("Act") (415 ILCS 5/57.8(i)) grants an individual the right to appeal a determination of the Illinois EPA to the Board pursuant to Section 40 of the Act (415 ILCS 5/40). Section 40 of the Act, the general appeal section for permits, has been used by the legislature as the basis for this type of appeal to the Board. Thus,

when reviewing an Illinois EPA determination of ineligibility for reimbursement from the Underground Storage Tank Fund, the Board must decide whether the application, as submitted, demonstrates compliance with the Act and Board regulations. Rantoul Township High School District No. 193 v. Illinois EPA, PCB 03-42 (April 17, 2003), p. 3.

In deciding whether the Illinois EPA's decision under appeal here was appropriate, the Board must look to the documents within the Administrative Record ("Record" or "AR"). The Illinois EPA asserts that the Record and the arguments presented in this motion are sufficient for the Board to enter a dispositive order in favor of the Illinois EPA on all relevant issues. Accordingly, the Illinois EPA respectfully requests that the Board enter an order granting the Illinois EPA summary judgement.

II. BURDEN OF PROOF

Pursuant to Section 105.112(a) of the Board's procedural rules (35 Ill. Adm. Code 105.112(a)), the burden of proof shall be on the petitioner. In reimbursement appeals, the burden is on the applicant for reimbursement to demonstrate that incurred costs are related to corrective action, properly accounted for, and reasonable. Rezmar Corporation v. Illinois EPA, PCB 02-91 (April 17, 2003), p. 9.

III. ISSUES

1. The first issue presented is whether the Petitioner can be reimbursed for $1003.12 for actions that lack supporting documentation and exceed the minimum requirements of the Act.
2. The second issue presented is whether the Petitioner can be reimbursed for $11,797.53 for actions that exceed the minimum requirements of the Act, are unreasonable and were not included in a plan or budget.

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

IV. FACTS

There exists no issue of material fact. This case is a matter of the application of the law. On July 31, 2017, the Illinois EPA received an application for payment that was dated July 19, 2017. (AR 1528). This application was approved in part and denied in part on November 27, 2017. (AR 1579). Specifically, the request was made for reimbursement from the Underground Storage Tank fund for the amount of $20,776.86 and after review of the application a voucher for $7,720.42 was prepared for submission to the Comptroller's office. (AR 1579). The November 27, 2017 letter, Attachment A, stated as follows:

> 1. $1,003.12, deduction for costs for excavation, transportation and disposal costs for the contaminated soil, 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.
>
> Supporting documentation from Roxana Landfill added up to 2,419.83 cubic yards, but the reimbursement was requested for 2,435 yards.
>
> 2. $11,797.53, deduction for costs for the excavation of backfill material, which exceed the minimum requirements necessary to comply with the Act. Costs associated with site investigation and corrective action activities and associated materials or services exceeding the minimum requirements necessary to comply with the Act are not eligible for payment from the Fund pursuant to Section 57.7(c)(3) of the Act and 35 Ill. Adm. Code 734.630(0).
>
> In addition, the costs 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).
>
> In addition, the costs were not approved in a budget. The overall goal of the financial review must be to assure that costs associated with materials, activities, and services

> must be reasonable, must be consistent with the associated technical plan, must be incurred in the performance of corrective action activities, must not be used for corrective action activities in excess of those necessary to meet the minimum requirements of the Act and regulations, and must not exceed the maximum payment amounts set forth in 35 Ill. Adm. Code 734.Subpart H. Such costs are ineligible for payment from the Fund pursuant to Section 57.7(c)(3) of the Act and 35 Ill. Adm. Code 734.510(b) and 35 Ill. Adm. Code 734.605(a).
>
> Pursuant to 35 Ill. Adm. Code 734.605(a), costs for which payment is sought must be approved in a budget, provided, however, that no budget must be required for early action activities conducted pursuant to 35 lll. Adm. Code 734.Subpart B other than free product removal activities conducted more than 45 days after confirmation of the presence of free product. The costs associated with excavation of backfill material were not approved in a budget and are, therefore, ineligible for payment.
>
> 3. $255.80, adjustment in the handling charges due to the deduction(s) of ineligible costs. Such costs are ineligible for payment from the Fund pursuant to Section 57.1(a) of the Act and 35 Ill. Adm. Code 734.635. Costs are reimbursable on $153,810.77 minus ($1,003.12 and $11,797.52). (AR 1581).

This case was appealed to the Board on January 2, 2018 and Petitioner's Motion for Summary Judgement was filed on November 18, 2019.

V. ARGUMENT

Issue 1

There exists no issue of material fact. This case is a matter of the application of the law. The Petitioner submitted information regarding costs for excavation, transportation and disposal costs for the contaminated soil three times to the Agency and at no time did it submit any additional information that the missing amount of contaminated soil was disposed of at a landfill. As stated in the Agency's November 27, 2017 denial letter (AR 1579) (as well as the denial letters issued on July 10, 2014 (AR 1273) and December 11, 2014 (AR 1459)):

> "Supporting documentation from Roxana Landfill added up to 2,419.83 cubic yards, but the reimbursement was requested for 2,435 yards." (AR 1581).

Landfill's are required to keep accurate records regarding the amount of waste placed into their landfill. Since contaminated soil from leaking underground storage tank ("LUST") sites is placed as daily cover, the landfill is careful in keeping track of how much is placed in the landfill for that purpose. Landfills get paid by weight and volume of the waste. Since this is the case, it doesn't make sense that Roxana Landfill would short the amount of contaminated soil it received from Petitioner's site.

The Agency denied $1,003.12 for costs for the excavation, transportation, and disposal of contaminated soil. The owner/operator requested reimbursement of 2,435 cubic yards of soil. The reimbursement claim documented 3,629.74 tons of soil being disposed at the landfill. The Agency, using the conversion factor of 1.5 tons per cubic yard, reimbursed for 2,419.83 cubic yards of soil. (AR 1589).

Section 734.825(a)(1), 35 Ill. Adm. Code 734.825(a)(1) states as follows:

> Except as provided in subsection (a)(2) of this Section, the volume of soil removed and disposed must be determined by the following equation using the dimensions of the resulting excavation:
>
> (Excavation Length x Excavation Width x Excavation Depth) x 1.05.
>
> A conversion factor of 1.5 tons per cubic yard must be used to convert tons to cubic yards.

The Petitioner is arguing that pursuant to Section 734.825(a)(1), the dimensions of the excavation take precedent over the actual amount of soil that was documented in tons during the disposal of the soil at the landfill. The Illinois EPA disagrees with this idea. The measurement of an excavation is not exact. The consultant indicated on page 2 of the March 14, 2014 Corrective Action Documentation Report & Budget Amendment (AR 0584) that the difference in the original proposed excavation limits, 2,870 cubic yards of soil originally proposed to be removed, was greater than the 2,435 cubic yards the owner/operator requested (2,419.83 cubic yards were

reimbursed) because of the "actual site measurements differing slightly from the AutoCAD site map". It should also be noted that the depth of the excavation varied from 23 to 24 feet, see page 3 of same document. (AR 0585). This inexact method of determining the amount of soil removed should be used only when the actual amount of soil cannot be determined.

The Agency based its determination on the actual amount of soil that was hauled off the site and disposed at the landfill. The landfill invoices documented 3,629.74 tons of soil. The IEPA used the conversion factor of 1.5 tons per cubic yard as is required in Section 734.825(a)(1) to convert the 3,629.74 tons to 2,419.83 cubic yards of soil. [3,629.74 ÷ 1.5 = 2,419.83]. (AR 1589)

The Petitioner maintains that the Illinois EPA failed to use a swell factor. (Motion P 8) The swell factor would not be needed when one has an actual value such as weight of the material and in this case tons of soil disposed at the landfill. The swell factor is used for estimating volume. As stated above, there is no need to use an inexact method of determining the amount of soil removed when you have an actual amount that was removed. On page 9 of the Petitioner's February 1, 2013 Corrective Action Plan and Budget, (AR 0400), which was approved by the Agency, it states:

"Therefore, the following quantities are proposed for budgetary purposes."

The calculations in this section use the word "contingency" after the 1.05 swell factor in the calculation. Clearly the Petitioner knew that the swell factor was only used in the contingency that the actual amount of material removed could not be determined. Therefore, Petitioner knows that in cases such as this one, where the actual amount can be determined, the swell factor does not apply.

Further, the Petitioner argues that since the costs were under budget and equal to or less than the subpart H rate, the Illinois EPA did not have the authority to re-review the costs.

(Motion P. 11). This argument is ridiculous for so many reasons. The most obvious is that this review is not a re-review. Budgets are approved in the abstract with an upper limit set for reimbursement. The amount from the budget is an estimate which needs to be supported by documentation when applying for reimbursement. The subpart H rate is a maximum rate. It is not meant to be the actual rate paid regardless of what an owner/operator, or their consultant actually paid for the material or service. That would obviously unduly enrich consultants who can obtain materials or services for less than the subpart H rate but still ask for reimbursement for the higher amount. If the Illinois EPA could not review these costs at all, as the Petitioner suggest, then fraudulent claims against the fund could result.

Which brings us to just such a case. On Page 16 of the Petitioner's motion, King's 66, LUST Incident 89-2595 is mentioned in an attempt to justify the payment in this case. The Illinois EPA may have errored in approving more soil than was documented, however, it should be noted that this claim was submitted by Environmental Management Inc., ("EMI") and was part of a federal criminal investigation and a federal criminal case 13-CR-30080 and 13-CR-30081 brought in the United States District Court for the Central District of Illinois. The claim in the King's 66 case was rejected for payment by the Illinois Office of the Comptroller and the subject of an audit procedure. Any amount of the claim that was ultimately approved during this process was used as an offset payment against the restitution ($13,363,665.18) ordered in the case. This situation is exactly what the Agency tries to avoid when reviewing reimbursement requests.

The $1003.12 for costs associated with the excavation, transportation, and disposal of contaminated soil was properly denied by the Illinois EPA.

Issue 2

There exists no issue of material fact. This case is a matter of the application of the law. Unfortunately, it must once again be noted that the maximum subpart H rate is just that, a maximum rate. Illinois EPA does not pay you more than what you actually spend for the item. In the November 27, 2017 (AR 1579) determination letter, the Agency denied $11,797.53 for backfilling the excavation. This was the exact same amount the Agency previously denied in the December 11, 2014 (AR 1459) determination letter. In the July, 10, 2014 (AR 1273) determination letter, the Illinois EPA originally denied all the costs for this activity for lack of supporting documentation. After the Agency requested this information, the consultant would not provide needed backup documentation resulting in the denial letter.

The second submittal, dated August 19, 2014, (AR 1473) included a cost estimate that was for $64,836.57 (AR 1512) which is $7,857.57 over the amount requested for backfill reimbursement of $56,979.00. (AR 1495). The Illinois EPA approved costs of $45,181.47 using the Heartland breakdown figures. (AR 1511-1512). The only cost questioned by the Agency based upon the owner/operator's submitted documentation was for the excavation and stockpiling of soil to be used as backfill. The third request, dated July 19, 2017 (AR1528), for $11,797.53, was also denied resulting in this appeal.

In Petitioner's July 19, 2017 reimbursement submittal, Petitioner's consultant stated as follows:

> The majority of the backfill was clean soil excavated and hauled by HDR from a site owned by the property owner. Portable scales were rented to document the weights. There is no purchase invoice. (AR 1305)

Section 577(c)(1), 415 ILCS 5/57.7(c)(1), states the Agency can check compliance with approved corrective action measures when reviewing a reimbursement request. The Illinois

EPA never approved the owner to excavate soil for backfill in a corrective action plan or budget, so these costs/activities were properly denied. *See,* John D. Warsaw v. IEPA, PCB 2018-083, (October 17,2019), where the Board upheld the Agency's denial of reimbursement because the costs were not approved within a corrective action plan or budget.

The Illinois EPA also determined that the Subpart H rate for backfill did not apply in this situation. Section 734.825(b) (35 Ill. Adm. Code 734.825(b)) of the Board's regulations state:

> Payment for costs associated with the purchase, transportation, and placement of material used to backfill the excavation resulting from the removal and disposal of soil must not exceed a total of $20 per cubic yard.

The backfill material was not purchased therefore, the IEPA requested a time and material breakdown. The overall goal of the financial review is to assure that costs associated with materials, activities, and services must be reasonable, must be consistent with the associated technical plan, must be incurred in the performance of corrective action activities, must not be used for corrective action activities in excess of those necessary to meet the minimum requirements of the Act and regulations, and must not exceed the maximum payment amounts set forth in 35 Ill. Adm. Code 734.Subpart H.

Here, where the owner had material excavated from his own property to fill in the hole resulting from the remediation of a leaking underground storage tank, the Agency must determine if the costs are reasonable and do not exceed the minimum requirements of the Act. We go back to the axiom that the maximum subpart H rate is just that, a maximum rate. Illinois EPA does not pay you more than what you actually spend for the item. The soil here was free, in that it was excavated from another part of the owner's property.

It is unknown to the Agency as to why the owner wanted that soil excavated. One can only speculate that it would have some benefit to the owner, such as clearing the material out for

the building of a basement or leveling of the property. It is also unknown as to whether this separate project was also billed to the owner under a separate invoice. Either way, the cost requested for soil taken from another part of the owner's property for some unrelated project is unreasonable as the soil was free, and therefore it exceeded the minimum requirements of the Act.

The Illinois EPA has reimbursed the owner/operator $45,181.47 for loading of backfill material from the stockpile into trucks, the delivery of backfill material from the stockpile location to the excavation and the placement of the backfill material into the excavation. The amount of $11,797.53 for costs for the actual backfill material which was obtained for free was properly denied by the Agency.

Handling Charges

Handling charges are based upon the amount approved by the Agency for reimbursement and are revised based upon that amount. The deduction of handling charges was correct based upon the amount approve.

VI. CONCLUSION

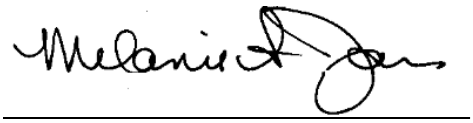
The facts and the law are clear and in favor of the Illinois EPA. The Petitioner did not justify the costs requested by submitting adequate documentation resulting in the costs being unreasonable and exceeding the minimum requirements of the Act. Further, the costs for excavation of backfill material was not approved in a corrective action plan or budget.

WHEREFORE: for the above noted reasons, the Illinois EPA respectfully requests the Board (1) DENY Petitioner's Motion for Summary Judgment and (2) **GRANT** summary judgment in its favor.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,

Respondent



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Dated: December 9, 2019

CERTIFICATE OF SERVICE

I, the undersigned attorney at law, hereby certify that on **December 9, 2019**, I served true and correct copies of **ILLINOIS EPA'S CROSS MOTION FOR SUMMARY JUDGMENT AND RESPONSE TO PETITIONER'S MOTION OF SUMMARY JUDGMENT** via the Board's COOL system and email, upon the following named persons:

Don Brown, Clerk
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Chicago, IL 60601

Carol Webb, Hearing Officer
Illinois Pollution Control Board
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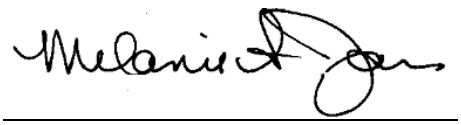

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