

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

ABP PROPERTIES, LLC,)	
Petitioner,)	
)	
v.)	PCB 2025-001
)	(LUST Appeal)
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
Respondent.)	

NOTICE

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

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,
Respondent



Rich Kim
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Dated: September 19, 2024

**BEFORE THE POLLUTION CONTROL BOARD
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ABP PROPERTIES, LLC,)	
Petitioner,)	
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v.)	PCB 2025-001
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ILLINOIS EPA'S 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, Rich Kim, Assistant Counsel and Special Assistant Attorney General, and hereby submits **ILLINOIS EPA'S 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").

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. ISSUE

The issue presented is whether an owner/operator is precluded by 35 Ill. Adm. Code 734.870 from utilizing competitive bidding as an alternative method for determining maximum payment amounts after the Illinois EPA has previously approved costs under 35 Ill. Adm. Code 734.800(a)(1)?

Based upon the express language of the Act and regulations thereunder, and the facts presented, the answer is **YES**.

IV. LAW

Sec. 57.7(c) Agency review and approval.

- (1) Agency approval of any plan and associated budget, as described in this subsection (c), shall be considered final approval for purposes of seeking and obtaining payment from the Underground Storage Tank Fund if the costs associated with the completion of any such plan are less than or equal to the amounts approved in such budget.

Section 734.800 Applicability

- a) Methods for Determining Maximum Amounts. This Subpart H provides three methods for determining the maximum amounts that can be paid from the Fund for eligible corrective action costs. All costs associated with conducting corrective action are grouped into the tasks set forth in Sections 734.810 through 734.850 of this Part.
 - 1) The first method for determining the maximum amount that can be paid for each task is to use the maximum amounts for each task set forth in those Sections, and Section 734.870. In some cases the maximum amounts are specific dollar amounts, and in other cases the maximum amounts are determined on a site-specific basis.
 - 2) As an alternative to using the amounts set forth in Sections 734.810 through 734.850 of this Part, the second method for determining the maximum amounts that can be paid for one or more tasks is bidding in accordance with Section 734.855 of this Part. As stated in that Section, when bidding is used, if the lowest bid for a particular task is less than the amount set forth in Sections 734.810 through 734.850, the amount in Sections 734.810 through 734.850 of this Part may be used instead of the lowest bid.
 - 3) The third method for determining maximum amounts that can be paid from the Fund applies to unusual or extraordinary circumstances. The maximum amounts for such circumstances can be determined in accordance with Section 734.860 of this Part.

Section 734.825 Soil Removal and Disposal

Payment for costs associated with soil removal, transportation, and disposal must not exceed the amounts set forth in this Section. Such costs must include, but are not limited to, those associated with the removal, transportation, and disposal of contaminated soil exceeding the applicable remediation objectives or visibly contaminated fill removed pursuant to Section 734.210(f) of this Part, and the purchase, transportation, and placement of material used to backfill the resulting excavation.

- a) Payment for costs associated with the removal, transportation, and disposal of contaminated soil exceeding the applicable remediation objectives, visibly contaminated fill removed pursuant to Section 734.210(f) of this Part, and concrete, asphalt, or paving overlying such contaminated soil or fill must not exceed a total of \$57 per cubic yard.
 - 1) 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:

$(\text{Excavation Length} \times \text{Excavation Width} \times \text{Excavation Depth}) \times 1.05.$

A conversion factor of 1.5 tons per cubic yard must be used to convert tons to cubic yards.

- 2) The volume of soil removed from within four feet of the outside dimension of the UST and disposed of pursuant to Section 734.210(f) of this Part must be determined in accordance with Appendix C of this Part.
- b) 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.
- 1) Except as provided in subsection (b)(2) of this Section, the volume of backfill material must be determined by the following equation using the dimensions of the backfilled excavation:
 $(\text{Excavation Length} \times \text{Excavation Width} \times \text{Excavation Depth}) \times 1.05.$
A conversion factor of 1.5 tons per cubic yard must be used to convert tons to cubic yards.
 - 2) The volume of backfill material used to replace soil removed from within four feet of the outside dimension of the UST and disposed of pursuant to Section 734.210(f) of this Part must be determined in accordance with Appendix C of this Part.

Section 734.870 Increase in Maximum Payment Amounts

- d) Adjusted maximum payment amounts must be applied as follows:
 - 1) For costs approved by the Agency in writing prior to the date the costs are incurred, the applicable maximum payment amounts must be the amounts in effect on the date the Agency received the budget in which the costs were proposed. Once the Agency approves a cost, the applicable maximum payment amount for the cost must not be increased (e.g, by proposing the cost in a subsequent budget).

V. FACTS

On October 7, 2021, a Corrective Action Plan and Budget Amendment was submitted for the site. (AR3-AR229). In relevant part, the plan proposed to excavate 697.66 cubic yards of contaminated soil. (AR16). In the accompanying Budget Amendment, the amount of

contaminated soil to be excavated and backfilled was listed as 967.66 cubic yards at the Subpart H Maximum Payment amounts of \$77.23 per cubic yard for ETD and \$27.10 per cubic yard for backfill. (AR60). On February 9, 2022, this Corrective Action Plan was approved by the Agency and the budget was modified to 698 cubic yards of soil to be excavated and backfilled with the agreement of ABP's consultant. (AR230-AR237). The Petitioner did not appeal the Agency's final decision letter dated February 9, 2022.

In early November 2023, over 2 years from the corrective action plan submission and almost 21 months after the approved plan and budget modification, Petitioner's consultant put out the excavation and backfilling work out for bid when it could not find a licensed contractor to perform the job for the approved Subpart H Maximum Payment amounts. (AR238, AR249-AR252). On November 3, 2023, Petitioner's consultant received two bids. (AR249-AR252). Cross Construction, Inc. bid \$128,781.00 (\$93,881.00 for ETD and \$34,900.00 for backfilling). (AR249-AR250). Carter X LLC bid \$128,362.20 (\$93,811.20 for ETD and \$34,551.00 for backfilling). (AR251-252),

On November 22, 2023, Petitioner submitted a Corrective Action Budget Amendment based upon the lower of the two bids received, which was \$55,539.86 above the previously approved Subpart H Maximum Payment amounts and sought total approval of \$62,890.94, including consultant's costs. (AR238-AR252). The Budget Amendment did not seek payment for any additional soil to be removed/backfilled or other additional work from the previously approved Corrective Action Plan. (Id.) On May 21, 2024, the Illinois EPA rejected the budget amendment entirely. (AR256-260).

This case was appealed on July 5, 2024, and Petitioner's Motion for Summary Judgement was filed on August 29, 2024.

VI. ARGUMENT

There is a genuine issue of material fact. On October 7, 2021, the Petitioner submitted its Corrective Action Plan and Budget Amendment seeking ETD of contaminated soil and backfilling at the date-relevant Maximum Subpart H Payment amount adjusted by the annual inflation factor under Sections 734.800(a)(1) and 734.825(a) and (b). Four months later, on February 9, 2022, the Agency approved the plan and modified the budget to reflect the correct cubic yardage of soil removal (698 cubic yards instead of 968 cubic yardage). The February 9, 2022, final decision letter approved the Subpart H Maximum Payment amounts of \$77.23 per cubic yard for ETD and \$27.10 per cubic yard for backfill.

The Corrective Action Plan and Budget submitted on October 7, 2021, and subsequently approved with modifications on February 9, 2022, relied on the applicable Subpart H rates. The approval of these rates is subject to Section 734.870(d)(1) which states “[o]nce the Agency approves a cost, the applicable maximum payment amount for the cost must not be increased (e.g. by proposing the cost in a subsequent budget).” The budget that was submitted on November 27, 2023, which requested rates for ETD of contaminated soil and backfilling that were previously approved on February 9, 2022, is clearly prohibited pursuant to Section 734.870(d)(1).

Section 734.800 establishes that there are three different ways for determining maximum payment amounts. The first method is using the maximum payment amount listed in Subpart H. The second method is to determine the maximum amount through bidding pursuant to Section 734.855. The third method for determining the maximum payment amount would apply to unusual or extraordinary circumstances in accordance with Section 734.860. The owner/operator could use any of these three methods for determining the maximum payment

amount at the time of their original submittal of the Corrective Action Plan and Budget submitted on October 7, 2021. The submittal of the amended budget on November 27, 2023, is an attempt to circumvent Section 734.870(d)(1) and seeks approval of costs that have increased due to inflation. The cost increase due to inflation are not a result of any action taken by the IEPA but are a factor of the owner/operator not pursuing the required abatement measure in a timely manner.

Section 734.870 establishes how the IEPA increases the Subpart H rates while prohibiting owners and operators from increasing the rates once approved by the IEPA. This is an incentive to the owner/operator to conduct their work in a timely manner so that their remediation is reimbursed. This provision also provides relief for the IEPA so that the steady stream of budget revisions doesn't overwhelm IEPA staff. Section 57.7(c)(3)(C) of the Act and Section 734.855 state that "*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*".

Agency approval of any plan and associated budget is considered final approval for purposes of seeking and obtaining payment from the Underground Storage Tank Fund. (415 ILCS 5/57.7(c)(1)). Petitioner did not appeal the February 9, 2022, IEPA final decision letter approving the Subpart H Maximum Payment amounts. Instead, Petitioner submitted a Corrective Action Budget Amendment based upon subsequent bidding in early November 2023, over two years after the submission of its Corrective Action Plan and almost 21 months after the Agency's final decision. The Budget Amendment did not seek payment for any additional soil to be removed/backfilled or any other additional work from the previously approved Corrective Action Plan. In effect, Petitioner is requesting the Agency to change or modify its February 9,

2022, final decision, when it does not have the authority to do so. Reichhold Chemicals, Inc. v. Pollution Control Board, 204 Ill.App. 3d 674, 561 N.E.2d 1343 (3d Dist. 1990).

Petitioner cites the Board's recent decision in Singh v. IEPA, PCB 23-90 (Sept. 21, 2023) in its Motion for Summary Judgment. In Singh, the same consultant in this matter submitted a Corrective Action Plan proposing "placement" of an 81.99 square foot concrete barrier at a cost of \$5.63 per square foot. (Id. at 2). The Agency conditionally approved the plan with modifications including that the proposed engineered barrier "should be a rectangle with identifiable points". (Id.) The consultant subsequently sent a Corrective Action Completion Report where an engineered barrier of 237 square feet was installed. (Id. at 2-3). The CACR was rejected by the Agency since the engineered barrier needed to "encompass soil borings SB-1, SB-2, and SB-3." (Id. at 3).

The consultant then submitted a Corrective Action Budget Amendment that enlarged the engineered barrier from 238 square feet to 1,763 square feet and requested additional costs for "placement" of a 1,524 square foot 6-inch concrete barrier at \$3.23 per square foot. (Id.) This Corrective Action Plan Budget was approved. (Id.) The consultant then submitted another Corrective Action Budget Amendment stating that "replacement" of a 1,525 square foot 6-inch concrete barrier would cost \$21,350 at a bidding price of \$14.00 per square foot. (Id.)

Singh is distinguishable from the current case. Multiple plans for an engineered barrier based upon "placement" of concrete were denied or modified to change its size and shape. (Id. at 2-3). In its Corrective Action Budget Amendment that was the basis of that appeal, the consultant stated bidding was done for "replacement" of the additional 1,525 square foot 6-inch concrete barrier. (Id. at 3). The Board in Singh ultimately found that the installation of the concrete engineered barrier was "replacement" of existing concrete and not "placement" (Id. at

13). However, as an initial matter, the Board found that whether the bidding process used violated the Act or Board rules was not at issue on appeal. (Id. at 9).

VII. CONCLUSION

Based upon the pleadings, there is a genuine issue of material fact, and the Petitioner is not entitled to judgment as a matter of law.

WHEREFORE: for the above noted reasons, the Illinois EPA respectfully requests the Board **DENY** Petitioner's Motion for Summary Judgment.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,

Respondent



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Dated: September 19, 2024

This filing submitted on recycled paper.

CERTIFICATE OF SERVICE

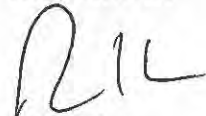
I, the undersigned attorney at law, hereby certify that on **September 19, 2024**, I served true and correct copies of **ILLINOIS EPA'S RESPONSE TO PETITIONER'S MOTION OF SUMMARY JUDGMENT** via the Board's COOL system and email, upon the following named persons:

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