

ILLINOIS POLLUTION CONTROL BOARD
February 6, 2025

ABP PROPERTIES, LLC,)	
)	
Petitioner,)	
)	
v.)	PCB 25-1
)	(UST Appeal)
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Respondent.)	

INTERIM OPINION AND ORDER OF THE BOARD (by J. A. Van Wie):

On July 5, 2024, ABP Properties, LLC (ABP) timely filed a petition asking the Board to review a May 21, 2024 determination of the Illinois Environmental Protection Agency (Agency or IEPA). *See* 415 ILCS 5/40(a)(1) (2022); 35 Ill. Adm. Code 101.300(b), 105.402, 105.404. The Agency’s determination concerns ABP’s leaking underground storage tank (UST) site located at 120 West First Street in Gibson City, Ford County. On August 29, 2024, ABP filed a motion for summary judgment.

For the reasons discussed below, the Board finds that there is no genuine issue of material fact and summary judgment is appropriate on the legal issue presented, and grants the motion for summary judgment. The Board remands the case to the Agency and directs the Agency to approve ABP’s budget request.

The Board’s opinion begins below with the procedural history, and then sets forth the legal background. The Board then delineates the undisputed facts of this matter. Next, the Board discusses the issue and whether summary judgment is appropriate. The Board concludes by reaching its decision and issuing its order.

PROCEDURAL BACKGROUND

ABP filed this petition on July 5, 2024 (Pet.). On July 22, 2024, ABP waived the decision deadline to December 31, 2024. On July 24, 2024, the Agency filed its administrative record on appeal (Rec.). On September 6, 2024, ABP waived the decision deadline to April 19, 2025.

On August 29, 2024, ABP filed a motion for summary judgment (MSJ). The Agency filed its response to the motion on September 19, 2024 (Resp.). On September 27, 2024, ABP filed a motion for leave to file reply in support of its motion, along with the reply (Reply). The Board grants the unopposed motion for leave and accepts ABP’s reply.

LEGAL BACKGROUND

The Board first describes the standards it applies when considering motions for summary judgment. After that, the Board sets forth the Board regulations allegedly violated, along with pertinent definitions.

Standard for 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.

“In a summary judgment proceeding, the burden of persuasion is always on the moving party to establish that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law.” Performance Food Group Co., LLC v. ARBA Care Center of Bloomington, LLC, 2017 IL App (3d) 160348, ¶ 18. The party moving for summary judgment may meet its initial burden of production by “presenting facts which, if uncontradicted, would entitle it to judgment as a matter of law.” Estate of Sewart, 236 Ill. App. 3d 1, 8 (1st Dist. 1992). Once the party moving for summary judgment “produces such evidence, the burden of production shifts to the party opposing the motion, who . . . is required to come forth with some facts which create a material issue of fact.” *Id.* “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).

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, 04-02 (consol.), slip op. at 59 (Feb. 2, 2006). “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).

Issue Presented

ABP challenges an Agency determination regarding ABP's Gibson City leaking UST site. Pet. at 1; Pet., Exh. A. In its determination, the Agency rejected ABP's amended corrective action plan budget, stating that the maximum amounts could not be increased once the Agency already approved costs. ABP appealed the determination on the grounds that the Agency's determination was erroneous. In its motion for summary judgment, ABP argues that the amended corrective action plan budget utilized competitive bidding as an alternative method for determining the maximum amounts under Section 734.870 of the Board's rules after the Agency had previously approved costs under Section 734.800(a)(1) of the Board's rules.

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.

* * *

- C) Any bidding process adopted under Board rules to determine the reasonableness of costs of corrective action shall (i) be optional and (ii) allow bidding only if the owner or operator demonstrates that corrective action cannot be performed for amounts less than or equal to maximum payment amounts adopted by the Board. 415 ILCS 57.7(c)(3)(C) (2022).

Section 57.8(a)(5) of the Act states:

- (5) In the event that costs are or will be incurred in addition to those approved by the Agency, or after payment, the owner or operator may submit successive plans containing amended budgets. The requirements of Section 57.7 shall apply to any amended plans. 415 ILCS 57.8(a)(5) (2022).

Section 734.800 of the Board's UST rules, Applicability, provides, in relevant part:

- a) Methods for Determining Maximum Amounts. This Subpart H provides three methods for determining the maximum amounts that can be paid from the [Underground Storage Tank] 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. 35 Ill. Adm. Code 734.800(a).

Section 734.870 of the Board's UST rules, Increase in Maximum Payment Amounts, provides that:

- a) The inflation factor must be calculated each year by dividing the latest published annual Implicit Price Deflator for Gross National Product by the annual Implicit Price Deflator for Gross National Product for the previous year. The inflation factor must be rounded to the nearest 1/100th. In no case must the inflation factor be more than five percent in a single year.
- b) Adjusted maximum payment amounts must become effective on July 1 of each year and must remain in effect through June 30 of the following year. The first adjustment must be made on July 1, 2006, by multiplying the maximum payment amounts set forth in this Subpart H by the applicable inflation factor. Subsequent adjustments must be made by multiplying the latest adjusted maximum payment amounts by the latest inflation factor.

- c) The Agency must post the inflation factors on its website no later than the date they become effective. The inflation factors must remain posted on the website in subsequent years to aid in the calculation of adjusted 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).**
 - 2) For costs not approved by the Agency in writing prior to the date the costs are incurred, including, but not limited to, early action costs, the applicable maximum payment amounts must be the amounts in effect on the date the costs were incurred.
 - 3) Owners and operators must have the burden of requesting the appropriate adjusted maximum payment amounts in budgets and applications for payment. 35 Ill. Adm. Code 734.870 (emphasis added).

FACTS

ABP operated a self-service fueling station at 120 West First Street, Gibson City, Ford County, Illinois (Site). Mot. at 2; A.R. at 007, 025. The Site was assigned LPC #0530100002. *Id.*; A.R. at 003. On October 5, 2016, a leak or spill from three gasoline underground storage tanks at the site was reported to the Illinois Emergency Management Agency, which assigned Incident Number 2016-0917. *Id.*; A.R. at 001. The gasoline tanks and a heating oil tank discovered during excavation were removed as part of early action. Mot. at 3; A.R. at 007-008. Thereafter, site investigation activities were conducted, and the Site Investigation Completion Report was approved on June 13, 2019. *Id.*; A.R. 009-011, 253.

On October 7, 2021, a corrective action plan and budget was submitted for the site, which proposed, in relevant part, to excavate 697.66 cubic yards of contaminated soil. Mot. at 3; Resp. at 5; A.R. at 022, 003-229. The area extends through a majority of the areas surrounding the pump islands and beneath the canopy. Mot. at 3; A.R. at 042. In the accompanying budget, the amount of contaminated soil to be excavated and backfilled was originally given as 967.66 cubic yards, a transposition error. A.R. at 060; *see* Mot. at 3; *see* Resp. at 6. The costs were based on the maximum payment amounts listed in Subpart H of the Board's regulations, adjusted by the inflation factor, and were listed as \$77.23 per cubic yard for excavation, transportation, and disposal, and \$27.10 per cubic yard for backfill. A.R. 060; Mot. at 3; Resp. at 6; *see* 35 Ill. Adm. Code 734.800.

On February 9, 2022, the Agency approved the Corrective Action Plan and modified the budget to reflect 698 cubic yards of soil to be excavated and backfilled, with the agreement of ABP's consultant. Mot. at 3; Resp. at 6; A.R. at 230-233. The budget included in the February 9, 2022 Corrective Action Plan approved maximum payment amounts for 698 cubic yards of soil, to be excavated, transported, and disposed of at a cost of \$77.23 per cubic yard (total amount of \$53,906.54), and for 698 cubic yards of soil to be backfilled at a cost of \$27.10 per cubic yard (total amount \$18,915.80). Mot. at 3; A.R. at 060, 232-233; *see* Resp. at 6.

ABP did not appeal the Agency's final decision letter dated February 9, 2022. Resp. at 6.

ABP's consultant was unable to find a licensed contractor able to perform the job within the adjusted Subpart H Maximum Payment amounts listed in the February 9, 2022 Corrective Action Plan budget, so ABP put the work out for public bid. Mot. at 4; Resp. at 6; A.R. at 238, 249-252. Two bids were received. A.R. at 244-252. On November 22, 2023, ABP submitted a Corrective Action Plan Budget Amendment based on the lowest bid received, which was \$55,539.86 above the previously approved budget that used the Subpart H Maximum Payment amounts. Mot. at 4; Resp. at 6; A.R. at 240-252. The budget amendment requested total approval of \$62,890.94, the sum of the increase in costs from the lowest bid as well as the consultant's costs in preparing and conducting the bid. Mot. at 4; Resp. at 6; A.R. at 239-252. The budget did not seek payment for any additional soil to be removed or backfilled or for other additional work. Resp. at 6; A.R. at 239-252.

On May 21, 2024, the Agency rejected the budget amendment entirely. Mot. at 5; Resp. at 6; A.R. at 256. In its denial letter, the Agency stated its reasoning that bidding could not be used to increase previously approved maximum amounts:

Pursuant to 35 Ill. Adm. Code 734.870(d)(1), for costs approved by the Illinois EPA in writing prior to the date the costs are incurred, the applicable maximum amounts must be the amounts in effect on the date the Illinois EPA received the budget in which the costs were proposed. Once the Illinois EPA approves costs, the applicable maximum amounts must not be increased, e.g., by proposing the costs in a subsequent budget. The owner or operator is attempting to increase the applicable maximum amounts by proposing the costs in a subsequent budget.

A.R. at 259; Mot. at 4.

The Agency reviewer's notes on this decision provide:

The consultant has submitted an amended CAP Budget. This is for the costs for soil removal which exceeds the amount we approved previously. They state they cannot get the soil removed for that amount, and they received bids for doing the work. However, we cannot approve these costs because we have already approved a rate for soil removal and the regulations state that once a rate has been approved, a new rate cannot be applied to the work. This entire CAP

Budget is for getting bids and a new rate for soil removal. Therefore, it will all be denied.

A.R. at 254-255; Mot. at 4.

DISCUSSION

In ruling on a motion for summary judgment the Board first determines if there is a genuine issue of material fact, so the Board will first examine that question. If there is no genuine issue of material fact, the Board proceeds to the legal analysis. That discussion follows the factual analysis.

Question of Fact

The burden is on ABP to establish that there is no genuine issue of material fact. ABP's motion includes a "Statement of Undisputed Facts" section, and the Agency's response includes a "Facts" section. *See* Mot. at 2; Resp. at 5. The Agency claims that there is a genuine issue of material fact. Resp. at 7. In its reply, ABP argues that the Agency states, but does not substantiate, that there is a genuine issue of material fact. Reply at 1. ABP asserts that the facts presented by the Agency in its response are consistent with or identical to the facts in ABP's motion. *Id.*

The Board's review finds that the Agency has not challenged any of the facts set forth by ABP, and that these facts are supported by the Agency's record on appeal. The parties have, in fact, plead identical or consistent facts in their motions and responsive filings. The Agency offers no specifics on material facts that may be at issue, nor could the Board find any in this record. Thus, construing the facts strictly against ABP, the Board finds that there is no genuine issue of material fact.

Rather, the parties' disagreement concerns the interpretation of law, specifically Subpart H. The Board now turns to its discussion of whether, as a matter of law, ABP is entitled to summary judgment on the issue of whether bidding is an available alternative method for determining maximum amounts after the Agency approved costs using the amounts set forth in Sections 734.810 through 734.850. Therefore, the Board finds that summary judgment is appropriate and will proceed to discuss the merits of the motion.

Legal Analysis

The legal issue in this record is whether, as a matter of law, Section 734.870(d)(1) bars a subsequent budget amendment utilizing competitive bidding as an alternative method for determining reimbursement costs after the Agency approved costs using the amounts in Sections 734.810 through 734.850. The Board must determine whether the record supports a demonstration that corrective action "cannot be performed for amounts less than or equal to maximum payment amounts adopted by the Board" initially approved by IEPA. 425 ILCS 5/57.7(c)(4)(C)(ii) (2022).

ABP argues that the Board's UST regulations do not preclude an amended budget based on competitive bidding. Mot. at 7. ABP argues that Section 734.800 provides three methods for determining the maximum amounts that can be paid from the UST Fund, and that each method is governed by different provisions. Mot. at 7; 35 Ill. Adm. Code 734.800(a). The methods are: (1) presumptive, listed rates (Section 734.870(d)(1)), or the "Subpart H" rates; (2) competitive bidding (Section 734.870(d)(2)); and (3) unique or extraordinary circumstances (Section 734.870(d)(3)). Mot. at 7-11; 35 Ill. Adm. Code 734.870(d); *see also* 35 Ill. Adm. Code 734.800(a)(1)-(3). ABP clarifies that the first method, using presumptive, listed rates, is referred to as "Subpart H" rates or amounts because these amounts are listed in Subpart H of the Board's UST regulations. Mot. at 7; *see* 35 Ill. Adm. Code 734.

ABP also argues that there is no statutory limitation on the frequency of bidding, and the Act authorizes bidding where corrective action cannot be performed for amounts equal to or less than the Subpart H limits. Mot. at 13, *citing* 415 ILCS 5/57/7(c)(4)(C)(ii), and 57.8 (2022).

ABP points out that the Agency's denial letter does not dispute that the excavation work cannot be performed for the rates approved in the February 9, 2022 plan and budget. Mot. at 6; *see* A.R. at 256.

The Agency disagrees with ABP's reading and argues that the express language of the Act and Board UST regulations precludes ABP from using competitive bidding as an alternative method for determining maximum payment amounts after the Agency previously approved costs under Section 734.800(a)(1). Resp. at 3. The original October 7, 2021 corrective action plan and budget, which was approved on February 9, 2022, relied on the applicable Subpart H rates. *Id.* at 7. The Agency claims that the approval of those rates is subject to the Section 734.870(d)(1) prohibition on future increases to the maximum payment amount set for costs approved by the Agency. The Agency argues that this means the budget that ABP submitted on November 27, 2023, which requested rates for excavation, transportation, and disposal of contaminated soil and backfilling that were higher than previously approved on February 9, 2022, is prohibited.

The Agency argues that the budget at issue here and submitted on November 27, 2023, did not request cost recovery for additional excavation, transportation, and disposal of contaminated soil and backfilling. Resp. at 7. Rather, the Agency argues ABP seeks cost increases due to inflation resulting from ABP not pursuing the required abatement in a timely manner. *Id.* at 8.

Both parties cite to Section 57.7(c)(3)(C) of the Act and Section 734.855, which state that, "[b]idding is allowed only if the owner or operator demonstrates that corrective action cannot be performed for amounts less than or equal to maximum payment amounts adopted by the Board." Resp. at 8; Reply at 2. There is no dispute that ABP could not find a licensed contractor to perform the job for the approved Subpart H Maximum Payment amounts. Mot. at 4; Resp. at 6; Reply at 2. There is nothing in the text of Section 57.7(c)(3)(C) that requires a petitioner to do anything beyond demonstrating that corrective action cannot be performed for the maximum payment amounts in Subpart H.

ABP refutes the Agency's claims regarding inflation, and asserts that there is nothing in the Act or Board's regulations that excludes bidding under conditions of inflation. Reply at 2. ABP claims that bidding in the case of inflation is not excluded by the plain language of Section 57.7(c)(3)(C), which only requires the owner or operator to demonstrate that corrective action cannot be performed for amounts less than or equal to maximum payment amounts adopted by the Board. *Id.* at 2; 415 ILCS 5/57.7(c)(3)(C)(ii) (2022). ABP asserts that the only limitation on bidding is a demonstration that corrective action cannot be performed. ABP argues that the Agency's response proves that IEPA does not dispute that ABP's consultant "could not find a licensed contractor to perform the job for the approved Subpart H Maximum Payment Amounts." Reply at 2 (*citing* Resp. at 6).

ABP argues that Section 734.875 supports its argument for the availability of competitive bidding. Section 734.875 requires the Agency to review the rates set in Subpart H and submit a report to the Board on whether the rates were consistent with market rates as well as suggest any changes needed to make the Subpart H amounts consistent with prevailing market rates. Reply at 3; *see* 35 Ill. Adm. Code 734.875. ABP asserts this imposes a responsibility on IEPA to monitor prevailing market costs and recommend updates to Subpart H, and that bidding was intended to provide IEPA with information to comply with this obligation. Reply at 3; *see also* Proposed Amendments To: Regulation of Petroleum Leaking Underground Storage Tanks (35 Ill. Adm. Code 732), R04-22(a), slip op. at 68 (Feb. 17, 2005). ABP asserts that IEPA has never complied with its obligation to review and report suggested rate changes under Section 734.875, and argues that IEPA rejecting competitive bidding that reflects market rates only makes this obligation harder to perform. Reply at 3.

Finally, ABP disagrees with the Agency's claim that it did not act in a timely manner, but argues that timeliness is "irrelevant under IEPA's interpretation of Section 734.800," because imposing a timeliness requirement would cause the Agency's interpretation on the prohibition against bidding to apply at any stage in the process once a budget had previously been approved. Reply at 4. ABP claims that this would create circumstances in which the Fund would not reimburse corrective action costs, which it argues is a discretionary authority that would have to have been explicitly granted to IEPA under Part 734. *Id.* Because Part 734 does not specify that subsequent budgets may be rejected for untimeliness, ABP asserts that IEPA does not have the discretionary authority to reject subsequent budgets based on timeliness. *Id.*

The Board disagrees with the Agency's assertion that the approval of maximum amounts using the applicable Subpart H rates under Section 734.800(d)(1) prohibits a subsequent budget amendment using the competitive bidding process under Section 734.800(a)(2). The Board notes that Section 734.870(d)(1) specifically addresses adjustment of the Subpart H maximum payment amounts determined under Section 734.800(a)(1). ABP is not trying to adjust the approved maximum Subpart H amounts, but it is amending the budget using a different method of determining the maximum amount, i.e., by a bidding process under Section 734.800(a)(2).

The Agency first challenges ABP's basis for the cost increase – inflation – stating that, "[t]he cost increase due to inflation are [sic] not a result of any action taken by the IEPA but are [sic] a factor of the owner/operator not pursuing the required abatement measure in a timely manner." Resp. at 8. The Agency argues that the establishment of Subpart H rates in Section

734.870 is “an incentive to the owner/operator to conduct their work in a timely manner so that their remediation is reimbursed.” *Id.* However, the Agency does not provide factual support for its suggestion that ABP did not pursue remediation in a timely manner, nor does the record reflect that failure. Further, the Agency does not provide a statutory or regulatory citation for its suggestion that inflation is not a cause of rate increases for remediation work that could be opened for bidding.

The Board also notes that the Agency does not explain how an owner’s or operator’s decision to use competitive bidding in this instance is precluded by Section 57.7(c)(3)(C). Even if the work was previously approved in a budget, the Act clearly anticipates that multiple budgets may be filed, and that bidding is available for the costs. *See* 415 ILCS 5/57.8 (2022). Section 734.855 implements bidding as an alternative to Subpart H and provides that, “[o]nce a maximum payment amount is determined via bidding, the Agency may approve the maximum payment amount in amended budget and other subsequent budgets submitted for the same incident.” 35 Ill. Adm. Code 734.855.

Further, the Board disagrees with the Agency’s assertion that ABP’s Corrective Action Plan Budget Amendment, which used the lowest bid received under Section 734.800(a)(2) competitive bidding to determine the proposed amended budget, is a request that the Agency “change or modify its February 9, 2022, final decision, when [the Agency] does not have the authority to do so.” *Resp.* at 8-9, *citing* Reichhold Chemicals, Inc. v. Pollution Control Board, 204111.App. 3d 674,561 N.E.2d 1343 (3d Dist.1990). The Board agrees with ABP that Section 734.800 specifies three methods for determining maximum amounts, each governed by different provisions of the Board’s UST provisions (35 Ill. Adm. Code 734), and Section 734.870(d)(1) does not prohibit the amendment of corrective action plan budgets using the bidding process under Section 734.800(a)(2).

Both parties also cite to Singh v. IEPA. The Board’s determination in Singh hinged on the issue of whether the installation of a six-inch concrete barrier was a “replacement” versus a “placement” under Section 734.840, and therefore whether the Act or the Board’s regulations prohibited bidding for the installation of the barrier. Singh v. IEPA, PCB 23-90 (Sep. 21, 2023). The Agency rejected Singh’s corrective action budget amendment for the cost of installation of the barrier. *Id.* at 3. The Board ultimately found that the installation was a “replacement” falling under Section 734.840(b) of the Board’s regulations and that the Act and Board regulations therefore did not prohibit bidding for its installation. *Id.* at 10. Accordingly, the Board reversed the Agency’s decision to deny the amended corrective action plan and directed the Agency to approve the budget as submitted. *Id.* In this instance the Board does not find either party’s reliance on Singh persuasive, as the facts of that case are distinguishable.

Board Ruling

The Board finds that there is no genuine issue of material fact and summary judgment is appropriate. The Board finds that Section 734.800 establishes three alternative methods for determining a corrective action plan budget, and that Section 734.870(d)(1) does not bar a subsequent budget amendment using competitive bidding under Section 734.800(a)(2) when it is demonstrated that the corrective action cannot be performed for amounts less than or equal to

the maximum amounts in a previously approved corrective action plan budget. Therefore, the Board grants ABP's motion for summary judgment.

Reimbursement of Legal Fees

ABP seeks reimbursement of its legal fees. *See* Pet. at 4; Mot. at 14. The record does not now include the amount of these fees or ABP'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 ABP 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 there is no genuine issue of material fact, and ABP is entitled to judgment as a matter of law. The Board further finds that ABP's budget amendment would not violate the Act or Board rules. Therefore, the Board reverses the Agency's decision and orders the Agency to approve the budget amendment as submitted. The Board sets deadlines for ABP to file a statement of legal fees and the Agency to respond.

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

ORDER

1. The Board grants Petitioner's motion for summary judgment.
2. The Board reverses the Agency's May 21, 2024 decision to deny reimbursement and orders the Agency to approve the budget.
3. The Board directs ABP 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. ABP must file the request by Monday, March 10, 2025, which is the first business day following the 30th day after the date of this order. The Agency may file a response within 14 days after being served with ABP's statement.

I, Don A. Brown, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above interim opinion and order on February 6, 2025, by a vote of 5-0.



Don A. Brown, Clerk
Illinois Pollution Control Board