BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

PARKER'S GAS & MORE, INC. Petitioner,	)	
v.	)	PCB 2019-079
	)	(LUST Permit Appeal)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, Respondent.	)	

NOTICE OF FILING AND PROOF OF SERVICE

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PLEASE TAKE NOTICE that I have today electronically filed with the Office of the Clerk of the Illinois Pollution Control Board, Petitioner's Post-Hearing Reply Brief, copies of which are herewith served upon the above persons.

The undersigned hereby certifies that a true and correct copy of this Notice of Filing, together with a copy of the documents described above, were today served upon the Hearing Officer and Division of Legal Counsel by electronic-mail, this 27th day of December, 2022. The number of pages of this filing, other than exhibits, is 12.

Respectfully submitted,

PARKER'S GAS & MORE, INC.
Petitioner,

BY: LAW OFFICE OF PATRICK D. SHAW

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PETITIONER'S POST-HEARING REPLY BRIEF

NOW COMES Petitioner, PARKER'S GAS & MORE, INC., by its undersigned counsel, pursuant to the briefing schedule entered by the Hearing Officer at hearing, states as follows:

I. BURDEN OF PROOF AND STANDARD OF REVIEW.

Without restating the legal standards and scope of review in Petitioner's Brief (Brief, at pp. 6-7), a few points of particular disagreement should be noted.

While the ultimate burden of persuasion rests with Petitioner, the standard of proof is not "high" as claimed by the Agency, but merely that of a preponderance of the evidence. Evergreen FS v. IEPA, PCB 11-51, slip op. at 16 (June 21, 2012). The Agency cannot merely sit on a purported high burden of proof as it does here, particularly as the Board has already denied summary judgment herein. The denial of summary judgment necessarily indicates that Petitioner's arguments had support in the administrative record, which is tantamount to the Petitioner having presented a *prima facie* case. See John Sexton Contractors Co. v. Pollution Control Board, 201 Ill. App.3d 415, 425-426 (1st Dist. 1990); cf. Ambrose v. Thornton Township School Trustees, 274 Ill. App. 3d 676, 680 (1st Dist. 1995) (explaining the difference between burdens of production and of persuasion). Petitioner has the burden of persuasion that the

statutory and regulatory provisions identified in the Agency determination letter would not be violated if payment was made. Evergreen FS v. IEPA, PCB 11-51, slip op. at 16 (June 21, 2012)

II. MOTION TO STRIKE TESTIMONY OF MIKE DUDAS MUST BE DENIED.

After direct examination and cross examination of Mike Dudas, the Agency objected to his testimony and asked that it be struck "for lack of foundation and knowledge as to this site in that he is not the P.E. that was present at this site at the time, nor did he sign any of the documents at the time, and it seems like his experience is more with IDOT than it is with LUST sites." (Hrg. Trans. at p. 33) The Hearing Officer overruled the objection. (Id. at p. 34)

Pursuant to Section 101.502(b) of the Board's procedural rules this objection has been waived:

> **At hearing, objections and hearing officer rulings must be made on the record. A party's objection to a hearing officer ruling made at hearing is waived if the party fails to file the objection within 14 days after the Board receives the hearing transcript.**

(35. Ill. Adm. Code § 101.502(b))

The transcript was filed with the Board on November 22, 2022, and any objection to the Hearing Officer's ruling was waived on December 6, 2022, which was the same day that Petitioner's brief was filed herein. Therefore, the motion is waived for lateness. Furthermore, no objection to relevance was made at hearing and therefore was waived for this additional reason.

Moreover, objecting to lack of foundation of testimony after the witness has been examined materially prejudices the Hearing Officer's ability to carefully examine what, if any, testimony may have been beyond the scope of the witness's personal knowledge. That said, Dudas did not testify to matters solely in the personal knowledge of any other individual. If there

had been any legitimate objection in that regard, the Agency should have raised it during questioning. Furthermore, the objection that Dudas' experience is more with IDOT than IEPA is not a proper objection, it is a loose characterization of his experience, not to his testimony. Most environmental consultants have experience outside the LUST Program; it is only those employed in the LUST Section that tend to be limited in their experience to the LUST Program, though even Agency employees lack experience planning or conducting a remediation. Dudas expanded on his broad experience after the objection was made at hearing. (Hrg. Trans. at pp. 34-36)

Furthermore, Petitioner disputes that Dudas is not an expert witness, i.e., "a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." (Ill. R. Evid. 702) Dudas is a professional engineer with experience, training and education relevant to all aspects of backfilling an excavation. However, the relevant standard in these proceedings is that the testimony merely "be relied upon by prudent persons in the conduct of serious affairs." (35 Ill. Adm. Code § 101.626(b)) As a technically qualified body (415 ILCS 5/5(a), the Board is quite capable of comprehending scientific and technical issues in a way a general court or jury may not. Sierra Club v. Midwest Generation, LLC, PCB 13-15, slip op. at p. 3 (May 10, 2018) (finding that the Board is not required to follow Illinois Evidence Rule 702)

III. THE LEGAL ISSUES RAISED IN THIS CASE WERE NOT PRESENT IN PIASA MOTOR FUELS.

In Piasa Motor Fuels v. IEPA, PCB 2018-054 (April 16, 2020), the Board sustained cuts made for backfilling activities not approved in the budget pursuant to 35 Ill. Adm. Code

734.605(a) ("Costs for which payment is sought must be approved in a budget"). The applicant in Piasa Motor Fuels requested payment for backfill excavated from the owner's property, i.e. the material would be excavated, transported and placed in the hole solely by the consultant or contractors under the consultant's oversight. Initially, the Agency denied the request because such activities do not fall under established Subpart H rates and therefore the costs incurred as a result of providing the equipment, labor and transportation of the backfill from the other property to the site, as well as placing the backfill into the excavation needed to be submitted on a time and materials basis. Id. at pp. 3 & 13; see also 35 Ill. Adm. Code § 734.850(b)(costs associated with activities that do not have a maximum payment amount must be determined on a on a time and materials basis). When the applicant resubmitted a payment request with the requested time and materials support, the Agency rejected the request for such activities because "the costs were not approved in the budget." (Brief, Ex. A)

The various underlining and highlighting in the Response Brief indicates that the Agency misses the point of the case. The applicant engaged in an activity deemed so different from those covered by the Subpart H rates for backfilling (35 Ill. Adm. Code 734.825), that the work had to be established on a time and materials basis. That the work was different enough to be governed by time and materials basis meant it needed to be reviewed in an amended corrective action plan:

> **In this case, the Agency could not determine whether costs associated with excavating backfill from Piasa's property were reasonable or incurred in the performance of corrective activities, because the Plan did not disclose to the Agency that Piasa would take these actions. . . .**
>
> **Where Piasa requests reimbursement for an activity that was not approved as part of its corrective action plan, Piasa must first submit an amended corrective action plan. See 35 Ill. Adm. Code 734.605(a). . . .**
>
> **Piasa did not disclose to the Agency its intent to excavate backfill from its**

> **property. The Agency did not approve a plan including the cost of excavating backfill from Piasa's property.**

Id. at 13.

The Board opinion in Piasa Motor Fuels did not authorize the Agency to re-evaluate costs at the payment stage that were approved at the planning stage. Instead, the backfilling activity utilized in that case needed to be disclosed and examined as part of an amended corrective action plan, at which point in time the Agency could determine whether the costs of the plan are unreasonable or exceeded the minimum requirements of the Act.

The Agency did not reject the application for payment herein due to any deviation from the corrective action plan and therefore the holding in Piasa Motor Fuels is inapplicable. Nor did the Petitioner submit costs on a time and materials breakdown, which evidenced an acquiescence that the activity was different than traditional backfilling. Most importantly, the Agency determination letter herein did not raise the issues presented in Piasa Motor Fuels and it is the Agency determination letter that frames the issues before the Board.

The reason the Agency did not reject costs as inconsistent with the corrective action plan herein is that backfilling with wash-out rock involves no different activities than using any other backfill material. At hearing, Brian Bauer testified that there was no issue with using the wash out rock, LUST sites can use clean construction debris material, but not if it is free. (Hrg. Trans. at pp. 49-50) Thus an amended corrective action plan would serve no useful function since it's solely the cost of the materials that concerns the Agency, there are no standards for materials and no rates set for materials outside the total unit rate encompassing all components of backfilling. Moreover, it would be impossible to determine at the planning stage what backfill materials would be available, including price and quantity, a year or so in advance. (Hrg. Trans. at p. 19)

There are no material requirements in the Board regulations, so the LUST Program allows consultants to select any backfill material so long as it is clean. A ruling by the Board that any material that is free or relatively inexpensive in the judgment of the Agency needs to be approved in a corrective action plan would simply be tantamount to a ruling that such material cannot be used at all.

Petitioner nowhere disputes the Agency's statutory right to review payment applications by "auditing for adherence to the corrective action measures in the proposal." (415 ILCS 5/57.8(a)(1)) However, the Agency has not claimed that the use of the washout rock failed to adhere to corrective action measures in the proposal.

IV. UNLIKE IN T-TOWN DRIVE THRU, PETITIONER DOCUMENTED ITS COSTS.

In T-Town Drive Thru v. IEPA, PCB 07-85 (April 3, 2018), the Board upheld the Agency's denial of a payment application for lack of supporting documentation, specifically the laboratory invoices. The Agency decision letter, in compliance with the Board's regulations (35 Ill. Adm. Code § 734.610(d)(1), explained that it needed the laboratory invoices to complete its review of the application. T-Town Drive Thru, slip op. at 7. The consultant declined to supply the invoices from an outside lab, claiming that the outside laboratory work was merely part of a bundle of services provided to the customer. While the Board did agree that how these costs "might be allocated between contractor and subcontractor is irrelevant under the regulations," the payment application must still provide an "accounting of all costs, including but not limited to, invoices, receipts, and supporting documentation showing the dates and descriptions of the work

performed." Id. at pp. 22-23 (citing 35 Ill. Adm. Code 732.601(b)(9)) The Board did not prejudge what laboratory costs may or may not be reimbursable as that issue was not before it, only the issue of the Agency's right to request the invoices. See T-Town Drive Thru v. IEPA, PCB 07-85, slip op. at p. 2 (June 19, 2018) (denying motion for reconsideration).

Unlikely in the present case, there is no missing documentation that the Agency needed to review in order to do its job. A comparison of the denial explanations is revealing:

T-Town Drive Thru:

Analysis costs do not have any backup invoices listing the costs for lab costs.

T-Town Drive Thru, PCB 07-85, slip op. at p. 21 (April 3, 2018)

Parker's Gas & More:

520.195 tons at $6.70 per ton plus 7.75% sales tax are being cut from the Backfill line item because they were provided free of charge.

(R.0486)

The former denial raised a procedural issue as to the necessity of laboratory invoices to complete the Agency review of the application. Unlike in T-Town, Petitioner submitted the documentation, but the Agency contends that the documentation necessitated the reductions. See IEPA Brief, at p. 11. As explained by the Board in T-Town in its June 19, 2018 opinion, what documentation is required for a complete application is entirely different from what legal significance that documentation might have. The Agency has not identified any missing supporting information, just that the documentation given compels a reduction without identifying any statutory or regulatory support.

V. REPLY TO AGENCY'S RESPONSE TO PETITIONER'S ARGUMENT

The vindictives from the Agency's attorney against the consultant or consultants in general shows the paucity of the Agency's legal arguments. Consultants are essential to the achieving the purposes of the LUST Program, as they are the ones planning and performing all of the corrective action. It is also not surprising that once again the Board is faced with a LUST appeal from a 1990s release at a former gasoline service station which is currently unused. Consultants are essential to developing and executing a cleanup that can pay for the costs associated with corrective action from the Underground Storage Tank Fund, particularly for properties without commercial value. When it works this is one of the best environmental programs in the State, and when it doesn't the site becomes orphaned, ignored and a burden on its communities.

The program doesn't work when the site is remote from landfills and materials. There is no provision in the Subpart H rates to adjust for the doubling of gasoline prices. Backfill is paid on a total unit rate, if one component skyrockets, then savings must be found through other components. There is no basis for adjusting reimbursement rates for increases in gasoline prices any more than decreases in the cost of backfill material.

The excavation was backfilled pursuant to the approved plan and the Agency has never identified any inconsistency between the application for payment and the work approved in the plan. The purpose of plan and budget approval prior to performing the work is to protect against the Agency second-guessing itself at the payment stage:

> **Clearly the statute envisions that once a corrective action plan and budget are in place, no further substantive review is taken. If IEPA is allowed to perform "a full review" at the reimbursement stage, owners and operators performing clean up are at risk, and what happened in this case could**

> **happen again. That is, an owner or operator could follow an approved plan and budget, only to be told that IEPA has found a reason not to reimburse them for those actions, which IEPA already approved and agreed to reimburse. The legislature did not intend such result and the plain language of the statute does not allow such a result.**

Estate of Gerald D. Slightom v. IEPA, PCB 2011-025 (Glosser, Dissenting), *rev'd* 2015 IL App (4th) 140593.

The Agency appears to believe that fidelity to the approved plan is insufficient because "what is 'planned' does not always end up as what was 'completed or done' at a site." (Agency Brief, at p. 12) If the plan was not followed, then the plan's approval is not binding at the payment stage, but the Agency is without statutory authority to conduct additional review beyond auditing for "adherence to the corrective action measures in the proposal." (415 ILCS 5/57.8(a)(1)) Adding new requirements at the payment stage is also a good way to orphan a site.

The rates set for the washout rock developed by Brian Bauer were not reasonable as previously discussed in Petitioner's Brief. (Brief, at pp. 14-15) Nor is it true that he followed the Act and regulations in making this decision, or at least no such legal framework has been disclosed. (IEPA Brief, at p. 13) He made it up, and his testimony indicated that he had not given any thought to the differences in the materials or prices at the different quarries; they just grabbed an invoice and assumed that the materials were similar. (Hrg. Trans. at p. 76)

One difference in backfill materials appears to be beyond the Agency's comprehension is that the conversion factor in the Board rules governs reimbursements, but does not reflect real world conditions. (Hrg. Trans. at pp. 67-68) The real world conditions still matter. To perform the corrective action plan, enough material must be acquired to fill the excavation, but different materials (sand, gravel, aggregate, rock) have different densities, moisture levels and compaction.

If the consultant simply relied on the 1.5 conversion factor in acquiring backfill, the backfill might not be enough to fill the hole or might overfill it. The Board rules use the 1.5 conversion factor to cap reimbursements, but it remains true in the real world that the tonnage of backfill material needed to fill a hole will not be based upon the conversion factor but on the nature of the specific materials used. Brian Bauer was simply wrong to assume that all backfill material is similar in assuming that the same tonnage of aggregate would fill the hole as the washout rock. (Hrg. Trans. at pp. 52-53)

Of all the various problems with the rate developed for washout rock, however, the largest is that the Agency is without ratemaking authority to begin with. See 5 ILCS 100/5-25 (ratemaking must be authorized by law and executed through rulemaking).

CONCLUSION

Petitioner has met its burden of proving by a preponderance of the evidence that no legal provision cited in the Agency's decision letter would be violated if the payment application was approved. Accordingly, Petitioner prays that judgment be entered in its favor, the Agency be directed to approve the payment application in full, the Board award payment of legal costs herein, and the Board grant Petitioner such other and further relief as it deems meet and just.

PARKER'S GAS & MORE, INC.,
Petitioner

By its attorneys,
LAW OFFICE OF PATRICK D. SHAW

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