

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

ABP PROPERTIES, LLC	)	
Petitioner,	)	
	)	
v.	)	PCB No. 2025-001
	)	(UST Permit Appeal)
ILLINOIS ENVIRONMENTAL	)	
PROTECTION AGENCY,	)	
Respondent.	)	

**NOTICE OF FILING AND PROOF OF SERVICE**

TO: Carol Webb, Hearing Officer	Richard Kim
Illinois Pollution Control Board	Division of Legal Counsel
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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, pursuant to Board Procedural Rule 101.302 (d), PETITIONER'S MOTION FOR SUMMARY JUDGMENT, a copy of which is herewith served upon the attorneys of record in this cause.

The undersigned hereby certifies that a true and correct copy of this Notice of Filing, together with a copy of the document described above, was today served upon the Hearing Officer and Division of Legal Counsel by electronic-mail, this 29<sup>th</sup> day of August, 2024. The number of pages of this filing, other than exhibits, is 14 pages.

Respectfully submitted,  
ABP PROPERTIES, LLC  
Petitioner,

BY: LAW OFFICE OF PATRICK D. SHAW

BY: /s/ Patrick D. Shaw

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**PETITIONER’S MOTION FOR SUMMARY JUDGMENT**

NOW COMES Petitioner, ABP PROPERTIES, LLC, by its undersigned counsel, moves for summary judgment pursuant to Section 101.516(b) of the Board’s Procedural Rules (35 Ill. Adm. Code § 101.516(b)), stating as follows:

**ISSUE PRESENTED**

Whether an owner/operator is precluded by 35 Ill. Adm. Code 734.870 from utilizing bidding as an alternative method for determining the maximum payments after the Illinois EPA has previously approved costs using the presumed, listed amounts.

**STATEMENT OF UNDISPUTED FACTS**

ABP Properties, LLC (ABP), of Gurnee, Illinois, operated a self service fueling station at 120 West First Street, Gibson City, Ford County, Illinois. (A.R.007, A.R.025) The site was assigned LPC #0530100002. (A.R.003) On October 5, 2016, a leak or spill was reported from three gasoline underground storage tanks at the site to the Illinois Emergency Management Agency, which was assigned Incident Number 2016-0917. (A.R.001)

Subsequently, the gasoline tanks were removed as a part of early action, along with a heating oil tank discovered during excavation. (A.R.007-A.R.008) Thereafter, site investigation activities were conducted (A.R.009-011), and the Site Investigation Completion Report was approved on June 13, 2019 (A.R.253)

On October 7, 2021, a corrective action plan and budget was submitted for the site, which proposed, in relevant part, to excavate soil contaminated in excess of the applicable site remediation objectives to a depth of ten feet for a total of 697.66 cubic yards. (A.R.016) The area to be excavated is illustrated in a drawing in the record, and extends through a majority of the areas surrounding the pump islands and beneath the canopy. (A.R.042) In the accompanying budget, the number of cubic yards to be excavated was originally given as 967.66 cubic yards, a transposition error. (A.R.060) The cost estimated for the work were based on the maximum payment amounts listed in the Board's regulations, adjusted by the inflation factor.

On February 9, 2022, the Illinois EPA approved the corrective action plan and modified the budget. (A.R.230) In relevant part, the volume of soil to be excavated and backfilled was modified to 698 cubic yards with the agreement of ABP's consultant. (A.R.232-A.R.233) As such, the amounts approved for excavation and backfilling were as follows:

**Excavation, Transportation, and Disposal of contaminated soil . . .**

Number of Cubic Yards	Cost per Cubic Yard (\$)	Total Cost
698.00	77.23	\$53,906.54

**Backfilling the Excavation**

Number of Cubic Yards	Cost per Cubic Yard (\$)	Total Cost
698.00	27.10	\$18,915.80

(A.R.060 as modified by A.R.232-A.R.233)

Thereafter, Petitioner's consultant was unable to find a licensed contractor willing to perform the excavation and backfilling work within the adjusted maximum payment amounts, and so the work was put out for public bid. (A.R.238)

On November 22, 2023, Petitioner submitted a Corrective Action Budget Amendment based upon the lowest bid received, which was \$55,539.86 above the previously approved budget for excavation and backfilling work. (A.R.240) The budget amendment requested approval of \$62,890.94, which is the sum of the increase in costs from the lowest bid as well as the consultant's costs in preparing and conducting the bid. (A.R.239)

On May 21, 2024, the Illinois EPA rejected the budget amendment entirely. (A.R.256)

The decision letter claimed that bidding could be not used to increase previously approved costs:

**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.259)

In the Agency reviewer's notes on this decision, he stated:

**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.254-A.R.255)

On July 5, 2024, Petitioner filed a timely petition for review with the Illinois Pollution Control Board, which was accepted by Order of July 11, 2024.

### **LEGAL STANDARDS AND SCOPE OF REVIEW**

The Agency's denial or modification of a corrective action plan budget may be appealed to the Board. See 415 ILCS 5/57.7(c)(4). Such Agency action must be accompanied by an explanation of the legal provisions that may be violated if the plan is approved, a statement of specific reasons why the legal provisions might be violated, and an explanation of the specific type of information the Agency deems the applicant did not provide. (415 ILCS 5/57.7(c)(4))

On appeal to the Board, the Agency statements and explanation frame the issues. Abel Investments v. IEPA, PCB 16-108, slip op. at 3 (Dec. 15, 2016) The Board must decide whether ABP's submittal to the Agency demonstrated compliance with the Act and the Board's rules. Id.

Petitioner has the burden of proof in these proceedings. Abel Investments v. IEPA, PCB 16-108, slip op. at 3 (Dec. 15, 2016). The standard of proof in UST appeals is a "preponderance of the evidence." Id. ("A proposition is proved by a preponderance of the evidence when it is more probably true than not."). "The Board's review is generally limited to the record before IEPA at the time of its determination." Id.

The Board has promulgated rules for summary judgments: "If the record, including pleadings, depositions and admissions on file, together with any affidavits, shows that there is no genuine issue of material fact, and that the moving party is entitled to judgment as a matter of law, the Board will enter summary judgment." (35 Ill. Adm. Code § 101.516(b)) This motion

for summary judgment is based upon the record filed by the Agency and the explanation given in the Agency decision letter. A party opposing a motion for summary judgment may not rest on its pleadings, but must "present a factual basis which would arguably entitle [it] to a judgment."

Gauthier v. Westfall, 266 Ill. App. 3d 213, 219 (2d Dist. 1994).

### **ARGUMENT**

As in a recent bidding case, Singh v. IEPA, PCB 23-90 (Sept. 21, 2023) (bidding for engineered barrier), the consultant initially obtained an approved plan by utilizing the presumptive, listed rates in Subpart H of the Underground Storage Tank ("UST") regulations. (35 Ill. Adm. Code 734.800 *et seq.*) After failing to find any contractors willing to perform the excavation and backfilling work for those amounts, the consultants solicited bids from the public. The Agency's denial letter does not dispute that the excavation work cannot be performed for the approved rates. Instead, the Agency's position is that this sequencing of successive budget amendments waived availability of any alternative methods of determining maximum payment amounts due to the operation of Section 734.870 of the UST regulations. This creative reading of Section 734.870 is not supported by the text of Subpart H nor the function of the Underground Storage Tank Program.

**I. THE TEXT OF THE UST REGULATIONS DOES NOT PRECLUDE AN AMENDED BUDGET BASED UPON BIDDING.**

The UST regulations provide “three methods for determining the maximum amounts that can be paid from the Fund.” (35 Ill. Adm. Code § 734.800(a)) These are (1) presumptive amounts listed for each task, adjusted by an annual inflation factor, (2) amounts determined by competitive bidding for one or more tasks, and (3) amounts for unusual or extraordinary circumstances. (Id.) Each method is governed by different provisions, and it is in failing to recognize these differences that the Illinois EPA has erred.

**A. Presumptive, Listed Rates.<sup>1</sup>**

The first method assigns presumptive amounts to tasks identified in Sections 734.810 through 734.850, subject to further adjustment for inflation pursuant to Section 734.870:

**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.**

(35 Ill. Adm. Code § 734.500(a)(1) (emphasis added))

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<sup>1</sup> The first method is traditionally referred to simply as the Subpart H amounts or rate as they are found entirely in Subpart H of the UST regulations. However, all three methods are provided for in Subpart H. To avoid confusion, this motion refers to them as “listed” amounts or rates because the costs are contained in Subpart H, whereas the other two methods involve costs derived from extrinsic sources, such as the lowest bid. The motion also refers to the first method as presumptive amounts as they exist as a matter of law without any need for demonstration.

Using this method simply requires identifying a task and applying the amount assigned to that task. For example, Section 734.825 states that all costs associated with the removal transportation and disposal of contaminated soil cannot exceed a total of \$57 per cubic yard. (35 Ill. Adm. Code.825(a), effective Mar. 1, 2006)) Given that these amounts are dated from 2006, there is an additional adjustment is required by Section 734.870 for inflation. “The Board’s UST rules require IEPA to annually adjust the Subpart H maximum payment amounts by a specified inflation factor.” Singh v. IEPA, PCB 23-90, slip op. at 7 n.4 (Sept. 21, 2023) (emphasis added) The calculation of this inflation factor is a ministerial task governed by Section 734.870, titled “Increase in Maximum Payment Amounts.” (35 Ill. Adm. Code § 734.870) The language used in Section 734.870 is consistently one of “adjustment;” the listed amounts are “adjusted,” resulting in an “[a]djusted maximum payment amount.” (Id.)<sup>2</sup> Thus, the listed or presumptive maximum payment amount for soil removal and disposal is \$57 per cubic yards, but the adjusted maximum payment amount in effect in October of 2021 was \$77.23 per cubic yard. (A.R.060 (Petitioner’s corrective action plan))

Given that maximum payment amounts are adjusted every year, provision is made for determining which adjusted maximum payment amounts apply to a given project

**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**

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<sup>2</sup> The term “adjusted” and its variants appear eight times in Section 734.870 of the Board’s regulations, and nowhere else in Part 734. Adjustment is entirely a concept relevant to the annual inflation factor.



**amount for the cost must not be increased (e.g, by proposing the cost in a subsequent budget).**

(35 Ill. Adm. § 734.870(d)(1)(emphasis added))

As will be discussed in detail in the next part, Section 734.870 is only incorporated into the regulations governing the first method. All Section 734.870(d)(1) does is establish the effective date for “adjusted maximum payment amounts” created by annual application of the inflation factor to listed amounts. Every year the amounts created through the First Method are adjusted, and Section 734.870(d)(1) controls which year’s adjusted maximum payment amount applies to a given budget. The owner/operator cannot obtain a different year’s adjusted maximum payment amount through successive budget resubmittals. Petitioner did not submit an amended budget seeking to apply the October 2023 adjusted maximum payment amounts. Instead, Petitioner utilized an alternative method provided by the Illinois Environmental Protection Act and the Board’s regulations for when the adjusted maximum payment amount is below market.

**B. Competitive Bidding.**

In outlining the regulatory framework of the three methods for determining maximum payment amounts, UST regulations do not make Section 734.870 applicable to any method, other than the first:

- 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.**

(35 Ill. Adm. Code § 734.500(a)(1)&(a)(2) (emphasis added))

The provision detailing the first method has been repeated to illustrate that Section 734.870 is only referenced as applying to the first method, and excluded from all other methods. “Where a statute lists the things to which it refers, there is an inference that all omissions should be understood as exclusions.” Bridgestone/Firestone, Inc. v. Aldridge, 179 Ill.2d 141, 151-52 (1997). “This rule of statutory construction, *expressio unius est exclusio alterius*, is based on logic and common sense. It expresses the learning of common experience that when people say one thing they do not mean something else. The maxim is closely related to the plain language rule in that it emphasizes the statutory language as it is written.” Id. at 152. By referring to Section 734.870 in the first method, but not in the other listed methods, the regulation excludes Section 734.870 from competitive bidding by operation of this maxim.

While there was certainly an opportunity to add the phrase “and Section 734.870” in subparagraphs (2) and (3) of Section 734.500(a) had the Board wanted to so, this would have made the other two methods eligible for annual adjustment by the inflation factor contained in Section 734.870. There is not a compelling reason to do so. Bidding utilizes better and contemporaneous information of market costs in a given time and place, so there would be little, if any, need to utilize an annual inflation factor. The provisions of Subpart H of the UST regulations “should be evaluated as a whole, with each provision construed in connection with

every other section.” Roselle Police Pension Board v. Village of Roselle, 232 Ill. 2d 546, 552 (2009) Section 734.870(d)(1) is just one part of the inflation factor adjustments contained in Section 734.870, which applies to tasks originally from 2006 found throughout Subpart H. Excluding inflation factors for competitive bidding is not only reasonable, Section 734.500 excludes their application.

In summary, competitive bidding is available for tasks listed in Sections 734.810 through 734.850, but bidding is not subject to adjustment by an inflation factor in Section 734.870, or otherwise governed by that Section.

**C. Unique or Extraordinary Circumstances**

While this method is not at issue here, the implication of the Agency’s interpretation of Subpart H would similarly limit the third method for determining maximum payment amounts:

- 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 § 734.500(a)(3) (emphasis added))

Similar to bidding, the text excludes the applicability of Section 734.870 to the third method by not listing it in the same location as it was included for the first method.

**II. OBTAINING AN APPROVED PLAN FIRST IS IMPORTANT TO SUCCESSFUL COMPETITIVE BIDDING.**

Traditionally, competitive bidding requires final plans and specifications, which allow for contractors to independently respond to the bid solicitation on a firm basis. The approach that

the Agency would mandate under its interpretation of Section 734.870 would appear to require work to be bid without an approved plan, or risk the opportunity to bid being waived.

While UST regulations require a budget to be submitted for approval along the plan (35 Ill. Adm. Code 734.335(b)), the Act allows successive budget amendments when the approved budget is insufficient. (415 ILCS 5/57.8(a)(5) (“In the event that costs are or will be incurred in addition to those approved by the Agency, . . . the owner or operator may submit successive plans containing amended budgets.”) “Each bid must cover all costs included in the maximum payment amount that the bid is replacing.” (35 Ill. Adm. Code § 734.855) It is entirely consistent with these provisions for a consultant to submit a plan with a budget based upon presumptive amounts listed in the UST regulations and then submitted an amended budget upon finding that those amounts will be insufficient to hire someone to perform the work.

The utility of this approach can be illustrated by the factual background in Singh v. IEPA, PCB 23-90 (Sept. 21, 2023). The consultant there submitted multiple plans for an engineered barrier that were denied or modified to change its size and shape. (Id. at 2-3) At each step the budget and successive budgets utilized the presumptive rates in Subpart H until the consultant started to perform the approved work and discovered that no contractor would perform the work for the rates listed in Subpart H. Had the consultant in Singh submitted plans for the engineered barrier based upon a budget arrived at through competitive bidding from the outset, the bids would have repeatedly been for plans rejected or modified by the Agency. The administrative costs of planning and overseeing the bidding process in Singh was \$9,356.90. Singh v. IEPA, PCB 23-90, slip op. at 4-5 (Nov. 16, 2023) While successive bids may not be quite as expensive as the original, the more bid acceptance is withdrawn because the plan was not ultimately

approved by the Agency, the fewer bidders will likely be interested in being involved in such a process in the future and ignore subsequent bid invitations.

The bottom line though is that bidding is authorized by the Act for situations as here where corrective action “cannot be performed for amounts less than or equal to maximum payment amounts adopted by the Board.” (415 ILCS 5/57.7(c)(4)(C)(ii)) There is no statutory limitation defining when performance must be unavailable, or restrict the frequency of budget amendments as it limits the frequency of payment applications. (415 ILCS 5/57.8) Between the time a plan is being designed and a plan is approved -- costs can change significantly due to such things as rising fuel costs, suppliers leaving a market or increases in landfill tipping fees. The Board’s regulations should not be interpreted to qualify an option that the legislature deemed an important method of determining “the reasonableness of costs of corrective action.” (415 ILCS 5/57.7(c)(4)(B))

### **CONCLUSION**

By a preponderance of the evidence, this motion demonstrates that as a matter of law Section 734.870(d)(1) does not bar a subsequent budget amendment utilizing competitive bidding, so long as there is a demonstration that corrective action “cannot be performed for amounts less than or equal to maximum payment amounts adopted by the Board.” (415 ILCS 5/57.7(c)(4)(C)(ii))

WHEREFORE, Petitioner, ABP PROPERTIES, LLC, prays that the Board find the Agency erred in its decision, direct the Agency to approve the budget amendment as submitted, allow Petitioner to submit proof of legal costs, and for such other and further relief as it deems meet and just.

ABP PROPERTIES, LLC,  
Petitioner

By its attorneys,  
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By: /s/ Patrick D. Shaw

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