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
James R. Thompson Center
100 West Randolph Street
Suite 11-500
Chicago, IL 60601

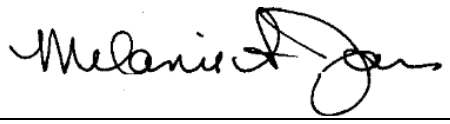
Carol Webb, Hearing Officer
Illinois Pollution Control Board
1021 North Grand Avenue East
P. O. Box 19274
Springfield, IL 62794-9274

Patrick D. Shaw
Law Office of Patrick D. Shaw
80 Bellerive Road
Springfield, IL 62704

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

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,
Respondent



Melanie A. Jarvis
Assistant Counsel
Division of Legal Counsel
1021 North Grand Avenue, East
P.O. Box 19276
Springfield, Illinois 62794-9276
217/782-5544
217/782-9143 (TDD)
Dated: December 3, 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.	)	

MOTION TO DISMISS

NOW COMES the Respondent, the Illinois Environmental Protection Agency ("Illinois EPA"), by one of its attorneys, Melanie A. Jarvis, Assistant Counsel and Special Assistant Attorney General, and, pursuant to 35 Ill. Adm. Code 101.500, 101.506 and 101.508, hereby respectfully moves the Illinois Pollution Control Board ("Board") to **DISMISS** the above case and in support of said motion, the Illinois EPA states as follows:

I. STANDARD FOR ISSUANCE AND REVIEW

The Board, as well as most courts of original jurisdiction, have consistently ruled that a motion to dismiss a pleading should be granted where the well-pleaded allegations, considered in the light most favorable to the non-movant, indicate that no set of facts could be proven upon which the petitioner would be entitled to the relief requested. (See Uptown Federal Savings & Loan Assoc. v.Kotsiopoulos (1982), 105 Ill. App. 3d 444, 434 N.E.2d 476; People v. Stein Steel Mills Services, Inc., PCB 02-1 (Nov. 15, 2001).) The Board has further reasoned that "[a] motion to dismiss, like a motion for summary judgment, can succeed where the facts, taken in a light most favorable to the party opposing the motion, prove that the movant is entitled to dismissal as a matter of law." (BTL Specialty Resins v. Illinois Environmental Protection Agency, (April 20, 1995), PCB 95-98.) Where the Board

finds it lacks jurisdiction to hear a case, it must dismiss the matter. WEI Enterprises v. Illinois EPA, PCB 04-22 (February 19, 2004); Mick's Garage v. Illinois EPA, PCB 03-126 (December 18, 2003); Panhandle Eastern Pipe Line Co. v. IEPA, PCB 98-102, slip op. at 30 (January 21, 1999); Kean Oil v. Illinois EPA, PCB 97-146 (May 1, 1997). Challenges to a tribunal's jurisdiction can be raised at any point in the proceeding. Concerned Boone Citizens, Inc. v. M.I.G. Investments, Inc. (2d Dist.1986), 144, Ill.App.3d 334, 494 N.E.2d 180; Ogle County Board v. PCB, 272 Ill. App. 3d 184, 191, 649 N.E.2d 545, 551 (2d Dist. 1995). This motion will demonstrate that the facts taken in favor of Petitioner would not allow the Petitioner to the relief plead and further will demonstrate that no litigable matter is presented for the Board to hear. As such, the Board must dismiss the present action.

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. FACTS

The following facts are indisputable and straight from the Administrative Record ("AR") filed in this matter. Should this matter proceed further, the Illinois EPA does reserve its right to challenge Petitioner's facts, characterizations of the facts and the ability to offer facts within its own right.

On March 12, 2014, the Petitioner submitted a request for reimbursement. ("Reimbursement Request 1" or "RR1"). (AR 1273). After discussions with the Petitioner, (AR 1283-1355), the Agency issued its final determination letter on July 10, 2014. (AR 1273). The amount requested was $300,744.45 and the amount approved was $242,762.33. This final determination letter was not

appealed to the Board. The deductions included as follows:

1. $1,003.12, deduction 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 2419.83 cubic yards but reimbursement was requested for 2,435 cubic yards.

2. $56,979.00, deduction for backfill costs, 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.

Invoices with the amounts paid for backfill were not submitted to the Agency. The only documentation received for backfill was an invoice from Bluff City Minerals but the prices and total was blacked out so the Agency is unable to determine the amount paid for the backfill. It is the Agency's understanding that the majority of the backfill was clean soil excavated and hauled by Heartland Drilling & Remediation from the property owner's site and was not purchased. The costs were 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 but the R.1275 consultant was unable to provide the necessary time and material breakdowns in order for the backfill costs to be paid.

Pursuant to 35 Ill. Adm. Code 734.825(b) payment of 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$23.40 per cubic yard. Since the majority of the backfill was not purchased this rate is not applicable and a time and materials breakdown of these costs must be submitted pursuant to 35 Ill. Adm. Code 734.850.

In addition, the Agency is deducting $1,799.23 of the above deduction for backfill costs, which Jack 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.

The documentation provided only indicated that 2358.11 cubic yards of backfill material was used therefore 76.89 cubic yards lack documentation.

On August 19, 2014, the Petitioner submitted a request for reimbursement. ("Reimbursement Request 2" or "RR2"). (AR 1473). The Agency issued its final determination letter on December 11, 2014. (AR 1459). The amount requested was $57.982.12 and the amount approved was $45,181.47. This final determination letter was not appealed to the Board. The deductions included as follows:

1. $1,003.12, deduction 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 2419.83 cubic yards but reimbursement was requested for 2,435 cubic yards.

2. $11,797.53, deduction for backfill costs, 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.

The time and material breakdown for backfill only provided documentation for $45,181.47. In addition, the documentation provided documents 2,191.39 cubic yards were used for backfill.

On July 19, 2017, the Petitioner submitted a request for reimbursement. ("Reimbursement Request 3" or "RR3"). (AR 1528). The Agency issued its final determination letter on November 27,

2017. (AR 1579). The amount requested was $20.776.86 and the amount approved was $7,720.42.

This final determination letter was appealed to the Board. The deductions included 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 R.1582 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).

As stated above, this final determination letter is the subject of this appeal.

VII. APPLICABLE LAW

A. ENVIRONMENTAL PROTECTION ACT:

415 ILCS 5/40(a)(1). Appeal of permit denial

a)(1) If the Agency refuses to grant or grants with conditions a permit under Section 39 of this Act, the applicant may, within 35 days after the date on which the Agency served its decision on the applicant, petition for a hearing before the Board to contest the decision of the Agency. However, the 35-day period for petitioning for a hearing may be extended for an additional period of time not to exceed 90 days by written notice provided to the Board from the applicant and the Agency within the initial appeal period. The Board shall give 21-day notice to any person in the county where is located the facility in issue who has requested notice of enforcement proceedings and to each member of the General Assembly in whose legislative district that installation or property is located; and shall publish that 21 day notice in a newspaper of general circulation in that county. The Agency shall appear as respondent in such hearing. At such hearing the rules prescribed in Section 32 and subsection (a) of Section 33 of this Act shall apply, and the burden of proof shall be on the petitioner. If, however, the Agency issues an NPDES permit that imposes limits which are based upon a criterion or denies a permit based upon application of a criterion, then the Agency shall have the burden of going forward with the basis for the derivation of those limits or criterion which were derived under the Board's rules.

B: POLLUTION CONTROL BOARD REGULATIONS:

35 Ill. Adm. Code 105.108 Dismissal of Petition

A petition is subject to dismissal if the Board determines that:

a) The petition does not contain the informational requirements set forth in Section 105.210, 105.304, 105.408 or 105.506 of this Part;

b) The petition is untimely pursuant to Section 105.206, 105.302, 105.404 or 105.504 of this Part;

c) The petitioner fails to timely comply with any order issued by the Board or the hearing officer, including an order requiring additional information;

d) The petitioner does not have standing under applicable law to petition the Board for review of the State agency's final decision; or

e) Other grounds exist that bar the petitioner from proceeding.

VIII. ARGUMENT AND ANALYSIS

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, was enacted by the legislature; and defines the basis and structure of this type of appeal to the Board. Thus, the Act expressly provides that when reviewing an Illinois EPA determination regarding eligibility for reimbursement from the Underground Storage Tank Fund, the Board must first determine whether or not the application 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. Motions challenging jurisdiction can be filed at any time during a proceeding. *See* Ogle County Board v. PCB, 272 Ill. App. 3d 184, 191, 649 N.E.2d 545, 551 (2d Dist. 1995) (challenges to jurisdiction may be raised at any time during the proceeding); People v. Michael Grain Co., Inc., et al., PCB 96-143, slip op. at 4 (Oct. 2, 2003) (motion to dismiss filed ten months after being served with third amended complaint allowed because motion challenged the Board's authority to issue a final decision).

In short, in this matter, Petitioner claims to be aggrieved by the November 27, 2017 letter issued by the Illinois EPA. However, as is evident from the facts, this letter postdates prior letters, issued on July 10, 2014 and December 11, 2014, which encompass the final determination on the issue the Petitioner seeks to have reviewed. In short, the Illinois EPA has issued the same determination letter to the Petitioner three times, with two of the determination letters being identical as to denial points one and two. In Reimbursement Request 3, the petitioner does not submit any new facts for

the Agency to review that are different from Reimbursement Request 2 where identical amounts were denied reimbursement from the Fund. The Petitioner includes legal arguments within RR3, but those arguments should have been brought before the Board during an appeal of RR2 and not within an identical submittal to the Agency, which the Agency is barred from considering due to Reichold and other caselaw. The board in reviewing its jurisdiction to hear a matter must consider whether the Petitioner can appeal from a letter that merely reiterates a final decision issued by the Illinois EPA that the Petitioner failed to appeal at the time. It is clear that the answer is NO.

The law is very clear on this issue. Reichhold Chemicals, Inc. v. PCB (3d Dist.1990), 204 Ill.App.3d 674, 561 N.E.2d 1343, held that the Illinois EPA has no statutory authority to reconsider a permit decision. Further, it is well established that an administrative agency has no inherent authority to amend or change its decision and may undertake reconsideration only where authorized by statute. (Pearce Hospital v. Public Aid Commission (1958), 15 Ill.2d 301, 154 N.E.2d 691; Reichhold Chemicals Inc. v. PCB (3d Dist.1991), 204 Ill.App.3d 674, 561 N.E.2d 1343.) Although the Board possesses such power, the appellate court has held that the Illinois EPA has no such reconsideration powers. (Reichhold, 561 N.E.2d 1343.) In general, finality, as it pertains to administrative agency decisions, is a decision which "fully terminates proceedings before an administrative body." Taylor v. State Universities Retirement, 111 Ill. Dec. 283;512 N.E.2d 399 (Ill.App. 4 Dist.1987) The Board found in Mick's Garage v. Illinois EPA, PCB 03-126 (December 18, 2003) that it lacked jurisdiction to review the Illinois EPA's February 7, 1992 deductibility determination. The Board stated that it "has held that a condition imposed in a permit, not appealed to the Board under Section 40(a)(1), may not be appealed in a subsequent permit. Panhandle Eastern Pipe Line Co. v. IEPA, PCB 98-102, slip op. at 30 (Jan 21, 1999)". It is clear that the Board does not have jurisdiction to hear a case where the Petitioner has not appealed a denial from the fund, but has instead resubmitted, several years later,

the same information for review by the Illinois EPA. See, Mick's Garage.

Further, even if the Board finds that it does have jurisdiction to hear the case, the Plaintiff's cause of action is barred by *res judicata* and is collaterally estopped from bringing this case. In Kean Oil v. Illinois EPA, PCB 97-146 (May 1, 1997), the Board held that it was concerned that there was "an attempt by petitioner to misuse the submittal process in order to remedy its failure to properly appeal the first decision by the Agency concerning this matter. Pursuant to the "doctrine of *res judicata,* a final judgement rendered by a court of competent jurisdiction on the merits is conclusive as to the rights of the parties and their privies, and the claim, demand or cause of action." Torcasso v. Standard Outdoor Sales, Inc., 193 Ill. Dec. 192, 626 N.E.2d 225 (1993). *Res judicata* "bars all matters that were actually raised or could have been raised in the prior proceeding." Id. *Res judicata* bars a Cause of action or re-litigation of issued based upon a previous determination rendered in an administrative proceeding. *Res judicata* and collateral estoppel apply to administrative decisions that are adjudicatory, judicial, or quasi-judicial in nature. Powers v. Arachnid, Inc., 187 Ill. Dec. 407, 617 N.E.2d 864, 248 App.3d 134 (2nd Dist. 1993)

There are three elements required in order for the doctrine of *res judicata* to apply:

(1) there was an identity of parties or their privies;
(2) there was an identity of cause of action; and
(3) there was a final decision by an administrative body that was either adjudicated or was not appealed in a timely manner.

The Petitioner's cause of action in this case is barred under the doctrine of *res judicata* based upon the identical decision letter being issued by the Illinois EPA that was never appealed by the Petitioner. Based upon the evidence in the Administrative Record, this appeal is based upon the same exact decision as the prior Agency decision letter issued on December 11, 2014, which was never appealed by the Petitioner. The costs which are the basis of this appeal are derived from the same

costs incurred on the same dates and times, arising from the same activities at LUST Incident No. 99-1940. The Petitioner had a full and fair opportunity to address all of the same issues before the Board it now seeks to address by attempting to cure its failure to exercise the right of appeal of the December 11, 2014 letter. The Petitioner is attempting to reconfer subject matter jurisdiction upon the Board after failing to file a timely petitioner for review of Illinois EPA's December 11, 2014 letter. How many times should an applicant be allowed to submit the exact same material resulting in the exact same results? The caselaw clearly states that such material should be submitted once unless there is more factual information to be submitted to demonstrate that the claim can be paid.

The Petitioner is trying to subvert the appeal process. The Agency requests the Board to not allow the potential misuse of the reimbursement system and as the Agency has properly identified, the Agency does not have the authority to reconsider a final determination under the above caselaw, especially the Reichold and Kean decisions.

The Illinois EPA issued final, appealable, decisions on July 10, 2014 and December 11, 2014. The Petitioner failed to appeal either decision. The December 11, 2014 decision being identical to the November 27, 2017 determination. The Illinois EPA does not have statutory authority to reconsider its final decisions. See, Reichhold Chemicals. The letter sent on November 27, 2017 merely reiterated the two prior decisions previously made by the Agency and not appealed by the Petitioner. The November 27, 2017 letter in and of itself was NOT an appealable final decision of the Illinois EPA. The Board does not have jurisdiction to hear this case. See, Mick's Garage.

X. CONCLUSION

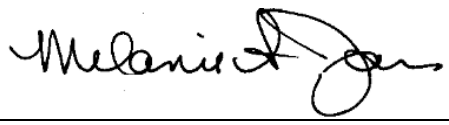
For the reasons stated herein, the Illinois EPA respectfully requests that the Board dismiss this action against the Illinois EPA due to lack of jurisdiction and that the cause of action is barred due to *res judicata* and collateral estoppel. If the Board finds that it does have jurisdiction to hear the above

case, the Agency respectfully asks the hearing officer to grant an extension for the filing of the Agency's response and cross motion for summary judgement.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,

Respondent



Melanie A. Jarvis
Assistant Counsel
Special Assistant Attorney General
Division of Legal Counsel
1021 North Grand Avenue, East
P.O. Box 19276
Springfield, Illinois 62794-9276
217/782-5544
217/782-9143 (TDD)
Dated: December 3, 2019

CERTIFICATE OF SERVICE

I, the undersigned attorney at law, hereby certify that on December 3, 2019, I served true and correct copies of a **MOTION TO DISMISS** via the Board's COOL system and email, upon the following named persons:

Don Brown, Clerk
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph Street
Suite 11-500
Chicago, IL 60601

Carol Webb, Hearing Officer
Illinois Pollution Control Board
1021 North Grand Avenue East
P. O. Box 19274
Springfield, IL 62794-9274

Patrick D. Shaw
Law Office of Patrick D. Shaw
80 Bellerive Road
Springfield, IL 62704

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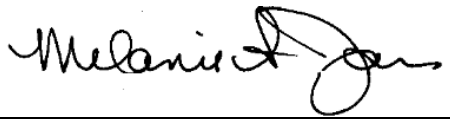

Melanie A. Jarvis
Assistant Counsel
Division of Legal Counsel
1021 North Grand Avenue, East
P.O. Box 19276
Springfield, Illinois 62794-9276
217/782-5544
217/782-9143 (TDD)