BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

PIASA MOTOR FUELS, INC., Petitioner,	)	
v.	)	PCB 2018-54
	)	(LUST Permit Appeal)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, Respondent.	)	

NOTICE OF FILING AND PROOF OF SERVICE

TO: Carol Webb, Hearing Officer
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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 Response to Illinois EPA's Cross Motion for Summary Judgment, copies of which are herewith served upon the above persons.

The undersigned hereby certifies that I have served this document by e-mail upon the above persons at the specified e-mail address before 5:00 p.m. on the 23rd of December, 2019. The number of pages in the e-mail transmission is 6 pages.

Respectfully submitted,
PIASA MOTOR FUELS, INC.,
Petitioner,

BY: LAW OFFICE OF PATRICK D. SHAW

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PETITIONER'S RESPONSE TO

ILLINOIS EPA'S CROSS MOTION FOR SUMMARY JUDGMENT

NOW COMES Petitioner, PIASA MOTOR FUELS, INC. (hereinafter "Piasa"), pursuant to Section 101.516 of the Pollution Control Board's procedural regulations (35 Ill. Adm. Code § 101.516), and hereby responds to the Illinois EPA's Cross Motion for Summary Judgment, stating as follows:

I. THE AGENCY ADMITS IT FAILED TO COMPLY WITH BOARD REGULATIONS BY NOT UTILIZING THE REQUIRED 'SWELL' FACTOR.

The Agency claims that it does not need to apply the swell factor when the soil is disposed at a landfill where it is weighed. (Cross-Motion, at p. 7) Board regulations unequivocally state that "the volume of soil removed and disposed must be determined by the following equation using the dimensions of the resulting excavation: (Excavation Length x Excavation Width x Excavation Depth) x 1.05." (35 Ill. Adm. Code § 734.825(a)(1)) There is no provision in the regulations for a different means of measuring volume in the event that contaminated soil is landfilled, nor in the Agency's instructions (Petitioner's Mot. S.J., Ex. A) The swell factor is utilized to adjust the volume of contaminated soils to be transported,

regardless of destination. In re Proposed Amendments to: Regulations of Petroleum Leaking Underground Storage Tanks (35 Ill. Adm. Code 732 & 734), R04-22, at p. 73 (Feb. 17, 2005) (First Notice).

The Agency is incorrect to claim that the landfill provides a more accurate measure of *volume*. The landfill weighed the loads by use of a scale and the Agency divided the total tonnage 1.5 to derive an approximate volume. The accuracy of the 1.5 conversion factor is entirely dependent upon the nature of the material weighed and site specific factors. As the Board explained in its rulemaking: "the Board recognizes that the factor ranges from one to two tons per cubic yard for different types of geologic material." (Id. at p. 74) Ultimately, the 1.5 conversion factor is an approximation at best no different than the 1.05 swell factor. There are no legal grounds for the Agency to pick and choose which regulatory provisions to comply with.

The Agency tries to develop a novel theory of regulatory interpretation based around the consultant's use of the word "contingency" to refer to the 1.05 regulatory multiplier. The undersigned has used "swell factor" because that was the term used by the Board in the rulemaking; elsewhere the 1.05 multiplier is also referred to as a "bulking factor" (Mot. S.J. Ex. A, at p. 8) or a "fluff factor" In re Proposed Amendments to: Regulations of Petroleum Leaking Underground Storage Tanks (35 Ill. Adm. Code 732 & 734), R04-22, at p. 25 (Feb. 17, 2005) (First Notice). It is clear from the context that the 1.05 contingency was the regulatory formula that the Agency pointedly disregards.

It probably should not be necessary to point out that the entire purpose of the budget is for purposes of getting paid for the work. (415 ILCS 5/57.7(a)(3) (requiring budget only if owner or operator intends to seek payment from the Fund)) The budget provides the owner / operator with

cost certainty and if the work cannot be performed within an approved budget, then it becomes the consultant's job to find another way to meet the cleanup objectives, petition for unusual or extraordinary circumstances under Section 734.860, or appeal the budget denial to the Pollution Control Board.

Petitioner objects to the Agency producing evidence regarding King's 66 Lust Incident not found in the record. (Cross-Motion, at p. 8) There also does not appear to be any relevance here since the Agency does not state that the federal criminal investigation involved use of the 1.05 swell factor, but even if it did the Agency's proper responsibility would be to initiate a new rulemaking before the Board. And even then, the Agency is still precluded by legislative act from reconsidering amounts approved and within budget. (415 ILCS 5/57.7(c)(1));415 ILCS 5/57.8(a)(1))) If there are problems with these procedures, they should be addressed to the legislature.

For these reasons, and for the reasons set forth in Petitioner's Motion for Summary Judgment, the Agency erred in refusing to utilize the swell factor required by the Board's regulations and conducting a re-review of the approved budget.

II. THE RECORD SHOWS THAT THE AGENCY ERRONEOUSLY BELIEVED THE COST OF HANDLING THE BACKFILL MATERIAL WAS THE COST OF HANDLING THE OVERBURDEN.

The Agency-approved corrective action plan required that "the soils will be replaced with clean backfill material upon removal [of the contaminated soils.]" (R.25) For budgetary purposes, the maximum amount reimbursable for backfilling the excavation is established by a formula based upon the excavation size. (35 Ill. Adm. Code 734.825(b)) There is no requirement

that the backfill material must be purchased from a quarry. (R.1306 (Agency reviewer)) A quarry is a business that excavates and stockpiles soils for sale. Here, the subcontractor excavated and stockpiled clean soils from a site owned by Petitioner. (R.1305) Because the subcontractor acted as a quarry, the Agency required a time and materials breakdown of all of 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." (R.1274 - R.1275) Petitioner did not appeal that determination but submitted the itemization of time and materials, whereupon all of the costs were approved except for those incurred from December 10 - 13, 2013 in excavating and stockpiling soils on the adjacent property. (R.1532) Only after obtaining a Freedom of Information Act response did it become clear that these costs were mistakenly believed to be cost of removing and stockpiling overburden, which had already been reimbursed. (R.1566)

The corrective action plan approved backfilling the excavation with clean soil, but did not and need not, specify means and methods. The amount approved in the budget addressed what are reasonable costs and what may or may not exceed the minimum requirements of the Act. (415 ILCS 5/57.7(c)(3) (review of budgets)) The Agency was without authority to reconsider those amounts at the payment stage. (415 ILCS 5/57.8(a)(1)) The backfill material was not “free,” anymore than it would have been free for a quarry to excavate and stockpile soils.

As explained in more detail in Petitioner’s Motion for Summary Judgment, the only issue at the payment stage is whether the costs were within the approved budget, which unquestionably they were, and whether the work performed was consistent with what was approved in the corrective action plan. The corrective action plan merely required clean soils to be used for

backfill and did not require any specific source.

For these reasons, and for the reasons set forth in Petitioner's Motion for Summary Judgment, the Agency erred in misconstruing the work excavating and stockpiling clean soils for backfill as work excavating and stockpiling overburden.

CONCLUSION

WHEREFORE, Petitioner, PIASA MOTOR FUELS, INC., prays that the Board reverse the Agency's determination in its entirety and direct the Agency to approve the payment application in total, authorize it to petition the Board for an award of its attorney's fees, and grant Petitioner such other and further relief as it deems meet and just.

PIASA MOTOR FUELS, INC.,
Petitioner

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

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