ILLINOIS POLLUTION CONTROL BOARD
April 16, 2020

PIASA MOTOR FUELS, INC.,	)	
	)	
Petitioner,	)	
	)	
v.	)	
	)	PCB 18-54
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	(UST Appeal - Land)
	)	
	)	
Respondent.	)	
	)	

ORDER OF THE BOARD (by B.K. Carter):

Piasa Motor Fuels, Inc. (Piasa) appeals to the Illinois Pollution Control Board (Board) a November 27, 2017 determination by respondent Illinois Environmental Protection Agency (Agency) partially denying Piasa's request for reimbursement of costs allegedly incurred in a leaking underground storage tank (UST) abatement action. This abatement was related to a service station known as Campus 76 Kwick Shop, in the City of Glen Carbon, County of Madison, Illinois ((LPC # 1190305016) (property). In late 2019, the Agency filed a motion to dismiss and the parties filed cross motions for summary judgment.

For the reason stated below, the Board finds that the Agency's motion to dismiss lacks merit and the motion is denied. Further, the Board finds that there are no issues of material fact and thus, summary judgment is appropriate. The Board grants in part and denies in part Piasa's motion for summary judgment; and grants in part and denies in part the Agency's cross-motion for summary judgment.

The procedural history and facts relevant to all motions are addressed below. Then the Agency's motion to dismiss is addressed, followed by the parties' motions for summary judgment.

PROCEDURAL HISTORY

On January 2, 2018, Piasa filed a petition for review of an Agency UST decision (Petition) asking the Board to review the Agency's November 27, 2017 determination denying "reimbursement for excavation, transportation and disposal cost, as well [sic] backfill costs" and related handling charges. Pet. at 3. Piasa's Petition included, as Exhibit A, the Agency's November 27, 2017 letter, which was the third response to Piasa's requests for reimbursement (Agency's Third Response). On January 11, 2018, the Board accepted the petition for hearing. On May 28, 2019, the Agency filed the record (R.).

On November 18, 2019, Piasa filed a motion for summary Judgment (MSJ). On December 9, 2019, the Agency filed its response and cross-motion for summary judgment (Cross-MSJ). On December 23, 2019, Piasa filed its response to the cross motion (Cross-MSJ Response).

On December 3, 2019, the Agency filed a motion to dismiss (MTD) Piasa's Petition. On December 17, 2019, Piasa filed its response to the motion to dismiss (MTD Response). The motion to dismiss is addressed first, followed by the motions for summary judgment.

RELEVANT FACTS

In August of 1999, a release was reported from the underground storage tanks at the property, which was assigned Incident Number 99-1940. Pet. at 1. In November of 1999, all tanks were removed in the presence of a representative of the Office of the State Fire Marshal, who observed evidence of releases on the tank floors, resulting in a second incident being reported to the Illinois Emergency Management Agency, which was assigned Incident Number 99-2577 and is a re-reporting of the former incident. *Id*. Subsequently, Piasa conducted site classification and investigation work, and the extent of the contamination plume was further delineated through multiple rounds of corrective action. *Id*.

On February 1, 2013, a corrective action plan (Plan) was submitted for the excavation and landfill disposal of on-site soils exceeding Tier 2 industrial/commercial site remediation objectives. *Id.* at 1-2. The estimated volume of the contaminated soil to be excavated was 2,870 cubic yards. *Id*. at 2. The total budget for the work was $351,175.21, including $191,400.30 for excavating, transporting and disposing of 2,870 cubic yards of contaminated soil and $67,158.00 for backfilling the excavation. *Id*. at 2. The Plan did not provide any details regarding backfill other than anticipated volume.

On March 5, 2013, the corrective action plan and budget were approved by the Agency without any modifications. *Id*. at 2. In November and December of 2013, corrective action work was performed. *Id*. at 2. On March 14, 2014, a corrective action documentation report was submitted to the Agency, indicating that the actual extent of the excavation was less than approved in the plan and budget, amounting to 2,435 cubic yards of soil using the formula required by 35 Ill. Adm. Code 734.825(a). *Id*. at 2. The report allegedly used a 1.5 multiplier from Section 734.825(a) of the Board regulations to convert cubic yards to tonnage. *Id*. at 2. The report indicated 3,652.50 tons were excavated and attached copies of landfill weight tickets and manifests showing 3,629.74 tons of contaminated soil were disposed in the Roxana Landfill. *Id*. at 2.

On February 1, 2013, Piasa submitted an application for reimbursement for corrective action activities to the Agency, seeking $300,744.45 (First Submission). *Id*. at 2. On July 10, 2014, the Agency responded (Agency's First Response), approving reimbursement for all but $57,982.12 of those requested costs, denying the remainder for an alleged lack of supporting documentation. *Id*. at 2. Specifically, the Agency's First Response stated that Piasa did not provide support for the excavation, transportation, and disposal costs for approximately 15 cubic yards of contaminated soil. The Agency's First Response also stated that it could not determine

the amount paid for backfill costs, because the majority of the backfill was excavated and hauled from the property owners' site and

> [t]he 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 consultant was unable to provide the necessary time and material breakdowns in order for the backfill costs to be paid. R. 1274.

The Agency's First Response include the statement "[t]his constitutes the Illinois EPA's final action with regard to the above application(s) for payment" and the UST "owner or operator may appeal this decision to the [Board] pursuant to Sections 40 and 57.7(c)(4) of the [Illinois Environmental Protection] Act by filing a petition for hearing within 35 days after the date of issuance of the final decision." R. 1272-73, 1276, *citing* 415 ILCS 5/40, 5/57.7(c)(4).

On August 19, 2014, Piasa submitted an additional application for reimbursement for the remaining $57,982.12 (Second Submission), offering time and materials for its backfill costs and other support. Pet. at 2-3. On December 11, 2014, the Agency responded (Agency's Second Response), approving reimbursement of $45,181.47 of backfill costs and denying reimbursement for backfill costs related to the excavation and stockpiling of soil from the owner's property, as well as the approximately 15 cubic yards of excavation, transportation and disposal costs raised in the Agency's First Response. R. 1461. The Agency's Second Response included the statement "[t]his constitutes the Illinois EPA's final action with regard to the above application(s) for payment" and the UST "owner or operator may appeal this decision to the [Board] pursuant to Sections 40 and 57.7(c)(4) of the Act by filing a petition for hearing within 35 days after the date of issuance of the final decision." R. 1459-60, 1462, *citing* 415 ILCS 5/40, 5/57.7(c)(4).

At some point not specified by the parties, Piasa's consultant submitted a Freedom of Information Act (FOIA) request for the Agency's review notes of Piasa's reimbursement requests. Pet. at 3. Based on the documents provided, Piasa alleges that the Agency misunderstood submitted documents and misapplied Board regulations. *Id*. at 3.

On July 19, 2017, Piasa submitted a third "application for payment for $20,776.86, which included additional support for reimbursement for excavation, transportation and disposal costs, as well backfill costs," and "included $7,976.22 in handling charges not previously submitted" (Third Submission). *Id*. at 3. The Third Submission offered arguments related to the FOIA documents in support of reimbursement for excavation, transportation, disposal, and backfill costs, and provided factual support for the requested handling charges. *Id*. at 3. On November 27, 2017, the Agency's Third Response approved payment of $7,720.42 in handling charges, and denied reimbursement for the remainder of the application. *Id*. at 3. The Agency's Third Response included the statement "[t]his constitutes the Illinois EPA's final action with regard to the above application(s) for payment" and the UST "owner or operator may appeal this decision to the [Board] pursuant to Sections 40 and 57.7(c)(4) of the Act by filing a petition for hearing within 35 days after the date of issuance of the final decision." R. 1579-80, 1583, *citing* 415 ILCS 5/40, 5/57.7(c)(4).

On January 2, 2018, Piasa filed a petition for review of the Agency's Third Response denying "reimbursement for excavation, transportation and disposal cost, as well [sic] backfill costs" and related handling charges under Section 58.8(i) of the Act. Pet. at 3; 415 ILCS 5/58.8(i). Specifically, Piasa alleges that the Agency incorrectly disallowed: (1) $1,003.12 for excavation, transportation, and disposal of approximately 15 cubic yards of contaminated soil, because the Agency failed to use a 1.05 "swell factor" multiplier (35 Ill. Adm. Code 734.825(a)); (2) $11,787.53 for the excavation of backfill material, because the Agency incorrectly considered this cost as not approved in a budget;[1] and (3) $255.80 in associated handling charges. Pet. at 3-6.

MOTION TO DISMISS

Standard For Granting Motion To Dismiss

The Board looks to Illinois civil practice law for guidance when considering motions to dismiss pleadings. 35 Ill. Adm. Code 101.100(b); *see also* United City of Yorkville v. Hamman Farms, PCB 08-96, slip. op. at 14-15 (Oct. 16, 2008). In ruling on a motion to dismiss, the Board takes all well-pled allegations as true and draws all reasonable inferences from them in favor of the non-movant. *See e.g.*, Beers v. Calhoun, PCB 04-204, slip op. at 2 (July 22, 2004); *see also* In re Chicago Flood Litigation, 176 Ill. 2d 179, 184, 680 N.E.2d 265, 268 (1997); Board of Education v. A, C & S, Inc., 131 Ill. 2d 428, 438, 546 N.E.2d 580, 584 (1989). "[I]t is well established that a cause of action should not be dismissed with prejudice unless it is clear that no set of facts could be proved which would entitle the plaintiff to relief." Smith v. Central Illinois Regional Airport, 207 Ill. 2d 578, 584-85, 802 N.E.2d 250, 254 (2003).

Section 105.408 of the Board's rules sets forth the requirements for a petition to appeal an Agency UST decision:

In addition to the requirements of 35 Ill. Adm. Code 101.Subpart C the petition must contain:

(a) The Agency's final decision;
(b) A statement specifying the date of service of the Agency's final decision; and
(c) A statement specifying the grounds of appeal. 35 Ill. Adm. Code 105.408.

As Piasa points out, the Board's January 11, 2018 order stated Piasa's "petition meets the content requirements of 35 Ill. Adm. Code 105.408." MTD Resp. at 2.

Agency's Motion To Dismiss

On December 3, 2019, the Agency moved to dismiss the petition, arguing lack of jurisdiction and barring the petition due to *res judicata* and collateral estoppel. Each of these

[1] Piasa also alleges that the Agency incorrectly rejected these costs as related to the removal and return of overburden. MSJ at 6-7, *citing* R. 1566.

arguments rely on a chain of factual allegations: (1) the Agency alleges that the Agency's First Response and the Agency's Second Response "encompass the final determination on the issue [Piasa] seeks to have reviewed;" (2) the Agency alleges that Piasa's July 19, 2017 Third Submission did not submit any new facts regarding the issues raised in Piasa's petition; and (3) the Agency alleges that the Agency's Third Response is "identical as to denial points one and two" of the Agency's Second Response. MTD at 7-8.

Lack Of Jurisdiction

In support of its lack of jurisdiction argument, the Agency alleges that the Third Submission constitutes a request for reconsideration of the Agency's Second Response. *Id*. at 8. The Agency argues that it "may undertake reconsideration only where authorized by statute," and had no statutory authority under these alleged facts to reconsider its earlier denial of the Second Submission. *Id*. at 8, *citing* Pearce Hospital v. Public Aid Comm'n, 15 Ill.2d 301, 154 N.E.2d 691 (1958); Reichhold Chemicals, Inc. v. Pollution Control Bd., 204 Ill.App.3d 674, 561 N.E.2d 1343 (3rd Dist. 1990), *appeal denied* 136 Ill.2d 554, 567 N.E.2d 341 (1991). In effect, the Agency asserts that the Agency's Third Response was void regarding all issues addressed in the first two submissions. The Agency then argues that because Piasa failed to timely appeal the Agency's First Response or the Agency's Second Response, the Board lacked the jurisdiction to review the Agency's Third Response, which only resubmitted the same earlier information. *Id*. at 8.

Piasa responds with several arguments. First, Piasa notes that the Agency did not raise any lack of authority issue in the Agency's Third Response. Piasa argues that "the Agency had a duty under Sections 39 and 40 of the Act to specify reasons for the denial which it intended to raise before the Board or be precluded from raising that issue." MTD Resp. at 3-4, *citing* Environmental Protection Agency v. Pollution Control Bd., 86 Ill.2d 390, 405 (1981). Specifically, Piasa argues that Section 39 of the Act requires "a detailed statement and explanation of the legal provisions that would be violated if the submittal were approved." MTD Resp. at 4. The Agency's Third Response "did not include any statement that the application for payment was an improper request for reconsideration." *Id*. at 2.

Second, Piasa claims that the Agency had authority to review the Third Submission. Piasa argues that there are no restrictions on the number of applications that can be submitted to the Agency. *Id*. at 5. Board regulations just limit applications for payment submitted to no more than one year after a No Further Remediation letter is issued, and not more frequently than once every 90 days. *Id*. at 5, *citing* 35 Ill. Adm. Code 734.605(e) and (j).

Third, Piasa asserts that the limits of Reichhold do not apply to the instant case, claiming there is "[n]othing in [Reichhold] that the Agency could not reconsider its decision." MTD Resp. at 7, *citing* Reichhold, 204 Ill.App.3d at 676. Piasa argues instead that Reichhold only states that any ongoing reconsideration by the Agency does not change the Board's duty to hear petitions filed under Section 40(a) of the Act. MTD Resp. at 7.

Fourth, Piasa asserts that the only applicable statutory obligation in Section 40 of the Act is that the Board must hear the timely filed petition for review of the Agency's Third Response.

MTD Resp. at 7, *see also* 415 ILCS 5/40(a)(1), 57.7(c)(4), and 57.8(i). Piasa further notes that "[t]he Board accepted the petition for review, finding that the 'petition meets the content requirements of 35 Ill. Adm. Code 105.408.'" (MTD Resp. at 2, *quoting* Board Order of January 11, 2018).

Board Has Jurisdiction to Hear Petition

The Underground Storage Tank (UST) Fund was created under the Illinois Environmental Protection Act (Act) and may be accessed by eligible UST owners and operators to pay for the environmental cleanup of leaking USTs. 415 ILCS 5/57. Under Title XVI of the Act, concerning the "Leaking Underground Storage Tank Program," the Agency determines whether to approve proposed cleanup plans and budgets for UST sites. 415 ILCS 5/57.7, 57.8. A UST owner or operator may appeal such Agency determinations to the Board under Section 40 of the Act, which governs Board review of Agency permit decisions. 415 ILCS 5/40(a)(1), 57.7(c)(4), 57.8(i); 35 Ill. Adm. Code 105.Subpart D.

Piasa brings this appeal under Section 57.8(i) of the Act, which provides:

> If the Agency refuses to pay or authorizes only a partial payment, the affected owner or operator may petition the Board for a hearing in the manner provided for the review of permit decisions in Section 40 of this Act. 415 ILCS 5/57.8(i).

Section 40 of the Act provides:

> 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. 415 ILCS 5/40(a)(1).

The Board consistently requires strict adherence to these statutory procedures, dismissing petitions filed after the jurisdictional 35-day appeal period of Section 40. *See, e.g.*, Illinois Ayers Oil Co. v. Illinois E.P.A., PCB 05-48, slip op. at 5 (March 17, 2005); DuPage Enterprises, Inc. v. Illinois E.P.A., PCB 93-143, slip op. at 1-2 (August 5, 1993).

Piasa seeks review of the Agency's Third Response. The Petition was filed within the 35-day filing period and, as noted above "meets the content requirements of 35 Ill. Adm. Code 105.408." MTD Resp. at 2. The Petition is therefore properly filed before the Board and the Board has jurisdiction to consider the arguments raised in the Petition.

The Board agrees it lacks jurisdiction to review the final determinations made by the Agency in letters dated July 10, 2014 and December 11, 2014. The Board previously has held that the Board does not have jurisdiction to review Agency final determinations which are not appealed to the Board within the 35-day period prescribed by Section 40 of the Act. *See* Mick's Garage, PCB 03-126, slip op. at 6-7 (Board did not have jurisdiction to review a 1992 Agency deductibility determination which was reaffirmed in a 2003 Agency determination); Panhandle Eastern Pipe Line Co. v. Illinois E.P.A., PCB 98-102, slip op. at 13, *aff'd* Panhandle Eastern Pipe

Line Co. v. Pollution Control Bd., 314 Ill. App. 3d 296, 734 N.E.2d 18 (4th Dist. 2000) (Board 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). Similarly, Piasa cannot now appeal the Agency's determination made in 2014. Further, contrary to Piasa's assertion, the Agency lacks authority to change or reconsider its final determinations. MTD Resp. at 7, *see* Reichhold, 204 Ill. App. 3d at 677-78. However, the Board finds that Piasa is not appealing those prior decisions.

The Board notes that while the Agency cannot reconsider its decision it may consider reapplications for cost reimbursement, and Board regulations contemplate multiple reapplications. *See e.g.* 35 Ill. Adm. Code 734.605(e) and (j). In fact, the Agency did so when it reviewed Piasa's Second Application, with additional support, and approved additional reimbursement amounts beyond Piasa's First Application. And even in the third submission, the Agency approved additional reimbursement. Further, while the motion to dismiss characterizes Piasa's Third Submission as a request for reconsideration of the Agency's First and Second Response, the Agency's Third Response does not characterize the Third Submission as such. Rather, like the Agency's First and Second Response, the Agency's Third Response provides the results of the Agency's review, discusses "subsequent applications," and states that "[t]his constitutes the Illinois EPA's final action with regard to the above application(s) for payment" and the UST "owner or operator may appeal this decision to the [Board] pursuant to Sections 40 and 57.7(c)(4) of the Act by filing a petition for hearing within 35 days after the date of issuance of the final decision." R. 1579-80, 1583, *citing* 415 ILCS 5/40, 5/57.7(c)(4).

Piasa's Petition alleges that:

(1) It "submitted an application for payment for $20,776.86 which included additional support for reimbursement for excavation, transportation and disposal costs, as well backfill costs."
(2) "This application also included $7,976.22 in handling charges not previously submitted."
(3) "On November 27, 2017, the Agency approved payment of $7,720.42 in handling charges, and denied reimbursement for the rest. Pet. at 3.

In considering this motion to dismiss, the Board must take all well-pled allegations by Piasa as true and draw all reasonable inferences from them in favor of Piasa. *See e.g.*, Beers, PCB 04-204 at 2; *see also* In re Chicago Flood Litigation, 176 Ill.2d at 184; Board of Education, 131 Ill.2d at 438. For purposes of considering the Agency's motion to dismiss: (1) the Board treats as true that Piasa's Third Application is a reapplication for reimbursement with additional support; (2) the Agency had authority to issue the Agency's Third Response; and (3) Piasa could petition to review it within the bounds of Section 40(a) of the Act. Therefore, the Board has jurisdiction to review Piasa's Petition and denies the Agency's motion to dismiss for lack of jurisdiction.

***Res Judicata* And Collateral Estoppel**

The Agency also argues that Piasa's Petition is barred by *res judicata* and Piasa is collaterally estopped from bringing this Petition. MTD at 9, *citing* Kean Oil v. Illinois

Environmental Protection Agency, PCB 97-146 (May 1, 1997) (finding petitioner's second reimbursement submission barred by *res judicata* and collaterally estopped by earlier dismissal by Board); Torcasso v. Standard Outdoor Sales, Inc., 193 Ill.Dec. 192, 626 N.E.2d 225 (1993) (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."); Powers v. Arachnid, Inc., 187 Ill.Dec. 407, 617 N.E.2d 864 (2nd Dist. 1993) (*res judicata* and collateral estoppel apply to administrative decisions that are adjudicatory, judicial, or quasi-judicial).

Piasa disagrees with the Agency's application of *res judicata* to the Agency's decisions regarding payment applications, because they are not adjudicatory, judicial, or quasi-judicial. MTD Resp. at 8, *citing* Illinois E.P.A v. Illinois Pollution Control Bd., 138 Ill.App.3d 550, 552 (3rd Dist. 1985) (Illinois EPA decisions do not resemble hearings where adversaries submit proofs to a neutral and detached decisionmaker). Piasa also distinguished the holding in Kean Oil, because the decision from which the *res judicata* arose in that case was a Board order, not an Agency decision. MTD Resp. at 9-10, *see also* Kean Oil, at 8 ("while the petitioner is not prohibited from submitting a new application to the Agency that provides additional information or evidence, this appears to be 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 the matter.").

Piasa argues that the record shows that Piasa was not attempting to misuse the submittal process where "[e]ach application for payment asked for a different amount, received a voucher for at least some portion requested and resulted in at least some changes to the Agency's denial letter." MTD Resp. at 10. Piasa further notes that *res judicata* is an equitable doctrine with the purpose of promoting judicial economy – requiring Piasa to submit multiple appeals for separate issues in this context would not be equitable or promote judicial economy. *Id*. at 9-11, *citing* People v. Kines, 2015 IL App (2d) 140518 ¶ 21, Vill. of Bartonville v. Lopez, 2017 IL 120643 ¶ 78.

In addition, Piasa notes that the Agency did not raise *res judicata* in the Agency's Third Response and *res judicata* is an affirmative defense that can be waived by failing to raise it in a timely manner, MTD Resp. at 8-9, *citing* Treadway v. Nations Credit Financial Servs., 383 Ill.App.3d 1124 (5th Dist. 2007).

***Res judicata* and Collateral Estoppel Are Not Applicable**

The Board agrees with Piasa on the threshold question of whether *res judicata* applies to this case. The Board finds no support for considering the Agency's payment decisions to be adjudicatory, judicial, or quasi-judicial in nature. The Agency's statement that Piasa "had a full and fair opportunity" to appeal the Agency's payment decisions to the Board does not make those decisions themselves adjudicatory, judicial or quasi-judicial. MTD at 9. Courts have found that similar Agency decisions do not resemble or reflect the due process of an adjudicatory process. Illinois E.P.A.,138 Ill.App.3d at 552. Therefore, the Board finds that *res judicata* is inapplicable to the instant case and Piasa is not collaterally estopped from petitioning the Board for review of the Agency's Third Response. Accordingly, the Board does not address any of the other *res judicata* arguments raised by the parties.

For the above reasons, the Board denies the Agency's motion to dismiss.

MOTIONS FOR SUMMARY JUDGEMENT

Standards For Considering Motions 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). 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).

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 754; Adams v. Northern Illinois Gas Co., 211 Ill. 2d 32, 43, 809 N.E.2d 1248, 1256 (2004). 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.

Arguments

On November 11, 2019, Piasa moved for summary judgment, arguing that the Agency: (1) does not have authority to re-review approved budget costs; (2) failed to use a "swell factor" 1.05 multiplier as required by the Board's regulations; and (3) incorrectly assumed that the excavating costs for backfill were related to overburden removal and return. MSJ at 8.

On December 9, 2019, the Agency responded and cross-moved for summary judgment, agreeing that there exists no issue of material fact and arguing that: (1) budgeted costs still must be supported by adequate documentation; (2) the "swell factor" 1.05 multiplier should not be used when an actual tonnage value is available; and (3) excavating backfill from Piasa's property elsewhere was not approved in the Plan or budget and cost for excavation and stockpiling of soil from Piasa's property is not reasonable. Cross-MSJ at 5-11.

Authority To Review Reimbursement Costs

Piasa argues that the Agency may not deny reimbursement of costs within a budget already approved by the Agency. MSJ at 10, *quoting* T-Town Drive Thru v. IEPA, PCB 07-85, at 24-25 (April 3, 2008) ("[T]he Agency, having approved a . . . plan and budget, cannot later reconsider the merits of the approved tasks and costs just because the reimbursement application is submitted."), *citing* 415 ILCS 5/57.7(c)(1), Evergreen FS, Inc. v. IEPA, PCB 11-51 & 12-61, at 20-21 (June 21, 2012). Rather, "[t]he Agency's review shall be limited to generally accepted

auditing and accounting practices." MSJ at 10, *quoting* 415 ILCS 5/57.8(a)(1). Piasa further argues that the Agency's Third Response improperly challenged the approved budget, because it cites Section 57.7(c)(3) of the Act, which addresses corrective action plan approval. MSJ at 10, 18.

The Agency disagrees with Piasa's premise, arguing that "[b]udgets are approved in the abstract with an upper limit set for reimbursement" and "[t]he amount from the budget is an estimate which needs to be supported by the documentation when applying for reimbursement." Cross-MSJ at 8. The Agency further states that the Subpart H rate is the maximum rate, and the Agency must still review what rates Piasa actually paid. *Id*.

The Board agrees that having total costs come in under the approved budget amount does not prevent the Agency from requiring documentation and reviewing the costs incurred. A review of Board regulations demonstrates that the approval of a budget, by itself, is insufficient to show that reimbursement is due. Rather, Piasa must provide "[a]n accounting of all costs, including but not limited to, invoices, receipts, and supporting documentation showing the dates and descriptions of the work performed." 35 Ill. Adm. Code 734.605(b)(9). The Agency's review is extensive:

> The Agency's review may include a review of any or all elements and supporting documentation relied upon by the owner or operator in developing the application for payment, including but not limited to a review of invoices or receipts supporting all claims. The review also may include the review of any plans, budgets, or reports previously submitted for the site **to ensure that the application for payment is consistent with work proposed** and actually performed in conjunction with the site." 35 Ill. Adm. Code § 734.610(c) (emphasis added).

"Following a review, the Agency has the authority to approve, deny or require modification of applications for payment or portions thereof." 35 Ill. Adm. Code § 734.610(d).

Therefore, the Board finds that the Agency may require Piasa to fully document and support the costs and corrective action activities for which it is requesting reimbursement.

Use Of "Swell Factor"

Piasa argues that the Board regulations specifically require the Agency to use a 1.05 "swell factor" multiplier to determine the volume of soil removed and disposed of to be reimbursed. MSJ at 11-12. Section 734.825(a) of the Board regulations provides 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.

> A conversion factor of 1.5 tons per cubic yard must be used to convert tons to cubic yards.

MSJ at 12, *quoting* 35 Ill. Adm. Code § 734.825(a).

Piasa used the (Excavation Length x Excavation Width x Excavation Depth) x 1.05 formula in its Agency approved budget to arrive at 2870 cubic yards. *Id*. at 13. Piasa actually excavated a smaller volume of 2,435 cubic yards, which the 1.05 "swell factor" increased to 2,556.75 cubic yards. *Id*. at 13. Of this amount, Piasa requested reimbursement for 2,435 cubic yards. *Id*. at 13. Piasa argues that the language of Section 734.825(a) requires the Agency to use the (Excavation Length x Excavation Width x Excavation Depth) x 1.05 formula and does not permit the Agency to apply the 1.5 multiplier to the 3,629.74 tons from the landfill tickets. *Id*. at 13-14. Alternatively, Piasa argues that where the Agency uses the 1.5 multiplier to convert the tonnage to 2,419.83 cubic yards, the formula still requires the Agency to apply the 1.05 "swell factor" multiplier to get a maximum payment amount based on 2,540.82 cubic yards. *Id*. at 14. In either case, Piasa argues that the rules of statutory construction apply to regulations and disfavor treating the 1.05 "swell factor" language as surplusage. *Id*. at 15, *citing* Northern Illinois Auto Wreckers and Rebuilders Ass'n v. Dixon, 75 Ill.2d 53, 58 (1979), Bethania Ass'n v. Jackson, 262 Ill.App.3d 773, 776 (1st Dist. 1994).

The Agency argues that the landfill tickets tonnage is more exact and therefore superior to the "inexact method" of using the site measurements. Cross-MSJ at 7. The Agency further argues that "the swell factor is used for estimating volume" and "would not be needed when one has an actual value such as weight of the material" to determine the maximum payment amount. *Id*.

The Board finds that there is no issue of material fact on this issue. The question is whether Section 734.825(a) requires the Agency to apply the 1.05 "swell factor" to the cubic yardage excavated from the UST site to determine the proper volume for reimbursement. The Board agrees that the rules of statutory construction apply to regulations. See Northern Illinois Auto Wreckers, 75 Ill.2d at 58. Applying those rules of construction, the Board finds that under Section 734.825(a) the Agency "must" determine the volume of soil removed and disposed by the "following equation using the dimensions of the resulting excavation." 35 Ill. Adm. Code § 734.825(a). The Agency does not explain where its novel interpretation of this Part is supported by the language. The Agency's interpretation not only treats the 1.05 "swell factor" as surplusage, but also reads out the language that the Agency "must" determine the volume of soil removed and disposed by the "following equation using the dimensions of the resulting excavation." 35 Ill. Adm. Code § 734.825(a). This interpretation is contrary to the language of Section 734.825(a). Piasa applies the Section 734.825(a) equation as written, which supports its full reimbursement request for excavation, transport, and disposal of contaminated soil.

Therefore, the Board denies the Agency's cross-motion for summary judgment in part and grants Piasa motion for summary judgment in part for $1,003.12 in excavation, transport, and disposal costs.

Excavating Costs For Backfill

Piasa's Third Submission sought reimbursement for $11,797.53 "associated with excavating and stockpiling soils on the adjacent property, prior to them being hauled to the site for use as backfill" because "the soil used had to be excavated." MSJ at 7, *quoting* R. 1532. Piasa argues that these costs are akin to purchasing backfill material from a quarry, are reimbursable under Section 734.825(b) of the Board regulations, and such cost were approved under the Plan. *Id*. at 7, 21.

Piasa's Plan stated that "the quantity of clean backfill material to be placed in the excavation is equal to the quantity of contaminated soil proposed for landfill disposal." R. 400, 549. The Plan did not indicate that Piasa would excavate the backfill from its own property or seek reimbursement for those activities. On March 5, 2013, the Agency approved the Plan and warned that "[c]osts associated with a plan or budget that have not been approved prior to the issuance of an NFR Letter will not be paid from the Fund." R. 572.

When Piasa requested reimbursement for the cost of the backfill excavated from its property, the Agency determined that Section 734.825(b) did not authorize reimbursement for this. R. 1275. So, the Agency required Piasa to submit a time and materials breakdown, because "[t]he 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." R. 1274. R. 1306.

Based upon the time and material submission, the Agency approved reimbursement for loading of backfill from the stockpile into trucks, transportation and placement of backfill into the excavation as reasonable and incurred in performance of corrective action activities. Cross-MSJ at 11. Piasa did not explain why it excavated the backfill soil from its property, and the Agency found that "the cost requested for soil taken from another part of the owner's property for some unrelated project is unreasonable as the soil was free, and therefore it exceeded the minimum requirements of the Act." *Id*.

Piasa claims that, because the Agency already approved the backfill costs in general as part of the Plan, the Agency could not now reject the reimbursement of backfill-related costs under the approved budget amount.

The Agency argues that the $11,797.53 was properly denied because: (1) the Agency never approved the excavation of soil for backfill in the Plan or budget; (2) Section 734.825(b) does not address reimbursement for excavation and stockpiling of soil; (3) Subpart H rates did not apply because those activities were in excess of those necessary to meet the minimum requirements of the Act and regulations; (4) Piasa has not demonstrated that the excavation and stockpiling activities were incurred as part of the corrective action activities; and (5) the backfill material was obtained for free. Cross-MSJ at 9-11, *citing* 35 Ill. Adm. Code 734.825(b), Subpart H, *see also* John D. Warsaw v. IEPA, PCB 2018-083 (Oct. 17, 2019) (Board upheld denial of reimbursement of cost not approved within a corrective action plan or budget). The Agency's Cross-MSJ does not reference rejection of these costs as overburden.

The Board finds that there is no issue of material fact regarding this backfill dispute. The question of what the Agency may consider in reviewing reimbursement requests may be addressed in summary judgment.

Piasa should have disclosed in its proposed Plan its intent to use backfill excavated from its property. Section 734.605(a) states that costs for which reimbursement is sought must be approved in a budget. 35 Ill. Adm. Code 734.605(a). The Plan and budget must be detailed enough to permit Agency review. Section 734.510(b) of Board regulations regarding the Agency's review of plans and budgets provides:

> 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 Subpart H of this Part. 35 Ill. Adm. Code 734.510(b) (emphasis added).

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. Piasa cannot now claim that the Agency approved general backfill actions, and is thus barred from reviewing the reasonableness of reimbursing the cost of the specific backfill 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). In the context of considering an amended plan, the Agency may properly determine whether the cost of that activity is reasonable and whether that activity is in excess of those necessary to meet the minimum requirements of the Act. *See* 35 Ill. Adm. Code 734.510(b), 630(dd).

Even if Piasa can impute the Agency's general approval of the Plan to Piasa's excavation of backfill from its property, the Agency may still review those costs for reasonableness. Under Section 734.850(b), Piasa must demonstrate to the Agency that the costs for which Piasa seeks reimbursement on a time and material basis are reasonable. *See* 35 Ill. Adm. Code 734.850(b). Thus, under either circumstance, Piasa must demonstrate the reasonableness of the backfill excavation costs for which it sought reimbursement.

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. The Agency had the authority to determine that "the cost requested for soil taken from another part of the owner's property for some unrelated project is unreasonable as the soil was free, and therefore it exceeded the minimum requirements of the Act." Cross-MSJ at 11.

Therefore, the Board denies in part Piasa's motion for summary judgment and grants in part the Agency's cross-motion for summary judgment regarding Piasa's requested reimbursement of $11,787.53 in backfill excavation costs.

This opinion constitutes the Board's findings of fact and conclusions of law.

CONCLUSION

ORDER

1. The Board denies the Agency's motion to dismiss.

2. The Board grants in part the Agency's motion for summary judgment and finds that the Agency properly denied Piasa's request to be reimbursed $11,787.53 in costs incurred excavating backfill from its property.

3. The Board grants in part Piasa's motion for summary judgment and orders the Agency to:

    a. approve reimbursement for an additional $1,003.12 for excavation, transportation, and disposal of approximately 15 cubic yards of contaminated soil; and
    b. calculate and approve reimbursement for the handling charges related to the $1,003.12 amount above.

4. The Board denies the remainder of the Agency's motion for summary judgment.

5. The Board denies the remainder of Piasa's motion for summary judgment.

IT IS SO ORDERED.

Section 41(a) of the Environmental Protection Act provides that final Board orders may be appealed directly to the Illinois Appellate Court within 35 days after the Board serves the order. 415 ILCS 5/41(a) (2018); *see also* 35 Ill. Adm. Code 101.300(d)(2), 101.906, 102.706. Illinois Supreme Court Rule 335 establishes filing requirements that apply when the Illinois Appellate Court, by statute, directly reviews administrative orders. 172 Ill. 2d R. 335. The Board's procedural rules provide that motions for the Board to reconsider or modify its final orders may be filed with the Board within 35 days after the order is received. 35 Ill. Adm. Code 101.520; *see also* 35 Ill. Adm. Code 101.902, 102.700, 102.702. Filing a motion asking that the Board reconsider this final order is not a prerequisite to appealing the order. 35 Ill. Adm. Code 101.902.

Names and Addresses for Receiving Service of Any Petition for Review Filed with the Appellate Court	
Parties	**Board**
Illinois Environmental Protection Agency Melanie Jarvis 1021 North Grand Avenue East P.O. Box 19276 Springfield, IL 62794 Melanie.Jarvis@Illinois.gov	Illinois Pollution Control Board Attn: Don A. Brown, Clerk James R. Thompson Center 100 West Randolph Street, Suite 11-500 Chicago, Illinois 60601
Piasa Motor Fuels, Inc. Attn: Patrick D. Shaw Law Office of Patrick D. Shaw 80 Bellerive Road Springfield, IL 62704 pdshaw1law@gmail.com	

I, Don A. Brown, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on April 16, 2020 by a vote of 4-0.

Don A. Brown

Don A. Brown, Clerk
Illinois Pollution Control Board