

**BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS**

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

NOTICE

Don Brown, Clerk
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph, Suite 11-500
Chicago, IL 60601
don.brown@illinois.gov

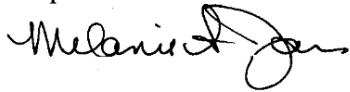
Carol Webb, Hearing Officer
Illinois Pollution Control Board
1021 North Grand Avenue East
P.O. Box 19274
Springfield, IL 62794-9274
carol.webb@illinois.gov

Patrick D. Shaw
Law Office of Patrick D. Shaw
80 Bellerive Road
Springfield, IL 62704
pdshaw1law@gmail.com

PLEASE TAKE NOTICE that I have today filed with the office of the Clerk of the Pollution Control Board **ILLINOIS EPA'S LEAVE TO FILE REPLY AND REPLY TO PETITIONER'S RESPONSE TO ILLINOIS EPA'S MOTION FOR SUMMARY JUDGMENT**, 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: June 24, 2021

**BEFORE THE POLLUTION CONTROL BOARD
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PARKER'S GAS AND MORE, INC.,)	
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ILLINOIS ENVIRONMENTAL)	
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ILLINOIS EPA'S LEAVE TO FILE REPLY

NOW COMES the Respondent, the Illinois Environmental Protection Agency ("Illinois EPA" or "Agency"), by one of its attorneys, Melanie A. Jarvis, Assistant Counsel and Special Assistant Attorney General, and pursuant to Section 101.500(e) of the Illinois Pollution Control Board's ("Board") procedural rules (35 Ill. Adm. Code 101.500(e)), hereby submits **ILLINOIS EPA'S LEAVE TO FILE REPLY** to the Illinois Pollution Control Board ("Board"). In support of this motion for leave, the Illinois EPA provides as follows.

1. The Illinois EPA filed its Cross Motion for Summary Judgment on June 3, 2021.
2. The Petitioner filed its Response on June 17, 2021 and gave notice to Respondent at 4:21 p.m. on that day. The following day, June 18th, 2021 was signed into law by President Biden as a Federal Holiday giving all State employees the day off unexpectedly.
3. The issue in this case is important and material prejudice may result if the Illinois EPA is not allowed to reply.
4. The Petitioner's arguments require a response from the Illinois EPA.

For the reasons stated herein, the Illinois EPA hereby respectfully requests that the Hearing Officer allow the Illinois EPA to file a reply to the Petitioner's response to prevent material prejudice.

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,
Respondent



Melanie A. Jarvis
Assistant Counsel
Division of Legal Counsel
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ILLINOIS EPA'S REPLY

NOW COMES the Respondent, the Illinois Environmental Protection Agency ("Illinois EPA" or "Agency"), by one of its attorneys, Melanie A. Jarvis, Assistant Counsel and Special Assistant Attorney General, and hereby, as an alternative to its Motion to Dismiss and in an effort to expedite the review of the case, submits **ILLINOIS EPA'S REPLY** to the Illinois Pollution Control Board ("Board").

ARGUMENT

To reiterate, Petitioner's consultant, Chase Environmental, requested reimbursement from the Underground Storage Tank fund for the amount of \$577,244.80 and after review of the application a voucher for \$572,925.56 was prepared for submission to the Comptroller's office. (AR 0483). This case is about \$3,755.42 of backfill material that the consultant, Chase Environmental received for **FREE**, but requests the maximum reimbursement rate for. The Illinois EPA deducted these costs due to lack of supporting documentation among other reasons. The November 27, 2017 letter, Attachment A, stated as follows:

1. "\$3,755.42, deduction for costs for Remediation and Disposal, 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.

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

2. \$563.82, deduction for costs for Consultant's Materials that 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 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 Ill. 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 Consultant's Materials were not approved in a budget and are, therefore, ineligible for payment.

In addition, the costs 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).

Finally, 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).

\$563.82 for grass seed is being cut." (AR 0486-0487).

There exists no issue of material fact. This case is a matter of the application of the law. The denial point in the reimbursement letter is lack of supporting documentation. There was no invoice for the \$3,755.42 for the purchase of the backfill material. As stated above, Illinois EPA clarified the deduction with the following statement:

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

The claim requested reimbursement of a total of 5244.1 cubic yards of backfill material at the Subpart H rate of \$24.30. The Illinois EPA reimbursed 4898.11 cubic yards of backfill material at the approved rate of \$24.30. The 4898.11 cubic yards had supporting documentation in the form of invoices for the purchase of the backfill material from Florence Quarry and Richfield Quarry and transportation of the material from Lumley Trucking, LLC. and the placement was provided by Chase Environmental Group, Inc.

Section 734.825(b) of the Board regulations states that “[p]ayment for 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 \$20 per cubic yard.” (emphasis added). Note that the Subpart H rate at the time was \$24.30 per cubic yard which over time had been adjusted for inflation.

The application failed to include an invoice for the purchase of backfill material for the 346.8 cubic yards which is a component of the 734.825(b) subpart H rate for backfill material. The Illinois EPA deducted \$10.88 per cubic yard that was used in part to justify the 4898.11 cubic yards of backfill material for the 346.8 cubic yards the consultant received for **FREE**.

The Petitioner remarks that “the Illinois EPA gave no consideration of whether the money saved from washout rock offset fuel, labor or other higher than expected costs”. This is just silliness. Why would Illinois EPA consider this out of the blue? Did Chase Environmental even put that in their submittal? Of course, the Illinois EPA did not consider these costs because if it did such costs would be in excess of the maximum payment amounts. Based on the application for payment there was no indication that there were any costs incurred in excess of the maximum payment amounts. Petitioner would have Illinois EPA be mind readers which it is not. It is a governmental agency that is a creature of statute. It follows the Act and regulations that it

was created to enforce and implement. It looks at what is presented to it by consultants like Chase Environmental and then reimburses for cleanups out of the Fund. It relies on consultants like Chase Environmental to be honest with their submittals and not ask for reimbursement at the maximum rate for items it received for **FREE**. In this case, Illinois EPA did its oversight job correctly, followed the law correctly and cut the correct amount from this reimbursement package.

Further it should be noted that the Illinois EPA did reimburse \$13.42 per cubic yard for the transportation and placement of the backfill material which is the same amount reimbursed for transportation and placement for the 4898.11 cubic yards reimbursed at the subpart H rate.

The Petitioner also remarks "Would the Illinois EPA have a problem if the backfill material cost one dollar? Washout rock is inexpensive even when not available free...". While hypotheticals are nice and we could ponder them all day, Illinois EPA would have paid the cost of the backfill material. The backfill material in this case was only provided for **FREE** because the provider's scale was broken, so the consultant had the intention of paying for the backfill material. \$24.30 per cubic yard is not **FREE** nor is it one dollar. Chase Environmental received this material for **FREE** due to an accident of circumstances and still failed to pass the savings on to the owner, their client, and Illinois EPA. Further, the Petitioner is indicating that "washout rock" is inexpensive but fails to provide any documentation as to what the actual cost of the material would have been if they were actually charged for this specific material.

Again, this case is very similar to that in Piasa Motor Fuels v. Illinois EPA, PCB 2018-054, April 16, 2020, in which the Board held in favor of the Illinois EPA on this exact argument. Unfortunately, it must once again be noted that the maximum subpart H rate is just that, a maximum rate. Illinois EPA does not pay you more than what you actually spend for the item.

When an item is **FREE**, expecting to be reimbursed for said item is a little excessive to say the least. The Illinois EPA paid for all expenses associated with backfilling the **FREE** material into the excavation. It only cut the cost for the **FREE** material.

The LUST program is a **reimbursement** program, where you are **reimbursed** for your **costs**. If you get material for **FREE**, you have no costs, therefore, you have nothing to be reimbursed for. It is a commonsense concept that the program was based upon. The Illinois EPA was acting within the Act and regulations in making these cuts.

CONCLUSION

The facts and the law are clear and in favor of the Illinois EPA. The Petitioner did not justify the costs requested by submitting adequate supporting documentation resulting in the costs being unreasonable and exceeding the minimum requirements of the Act. Requesting reimbursement for items that are received for **FREE** exceeds the minimum requirements of the Act and is de facto unreasonable.

WHEREFORE: for the above noted reasons, the Illinois EPA respectfully requests the Board (1) DENY Petitioner's Motion for Summary Judgment and (2) **GRANT** summary judgment in its favor.

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: June 24, 2021

This filing submitted on recycled paper.

CERTIFICATE OF SERVICE

I, the undersigned attorney at law, hereby certify that on **June 24, 2021**, I served true and correct copies of **ILLINOIS EPA'S LEAVE TO FILE REPLY AND REPLY TO PETITIONER'S RESPONSE TO ILLINOIS EPA'S MOTION FOR SUMMARY JUDGMENT** 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, Suite 11-500
Chicago, IL 60601
don.brown@illinois.gov

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

Patrick D. Shaw
Law Office of Patrick D. Shaw
80 Bellerive Road
Springfield, IL 62704
pdshaw1law@gmail.com

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