

ILLINOIS POLLUTION CONTROL BOARD
December 3, 2009

Niebrugge Oil Company,)
)
 Petitioner,)
)
 v.) PCB 10-37
) (UST Appeal)
 ILLINOIS ENVIRONMENTAL)
 PROTECTION AGENCY,)
)
 Respondent.)

ORDER OF THE BOARD (by G.T. Girard):

On November 25, 2009, Niebrugge Oil Company (Niebrugge Oil) timely filed a petition asking the Board to review both an October 22, 2009, and an October 23, 2009 determination of the Illinois Environmental Protection Agency (Agency). *See* 415 ILCS 5/40(a)(1) (2008); 35 Ill. Adm. Code 101.300(b), 105.402, 105.404. The Agency's determinations concern Niebrugge Oil's leaking underground storage tank (UST) site located in Moweaqua, Shelby County. For the reasons below, the Board accepts Niebrugge Oil's petition for hearing as timely but directs Niebrugge Oil to file an amended petition in a new docket opened today for the decision made by the Agency on October 23, 2009.

Under the Environmental Protection Act (Act) (415 ILCS 5 (2008))¹, the Agency decides whether to approve proposed cleanup plans and budgets for leaking UST sites, as well as requests for cleanup cost reimbursement from the State's UST Fund, which consists of UST fees and motor fuel taxes. If the Agency disapproves or modifies a submittal, the UST owner or operator may appeal the decision to the Board. *See* 415 ILCS 5/40(a)(1), 57-57.17 (2008); 35 Ill. Adm. Code 105.Subpart D. In this case, the Agency's October 22, 2009 determination modified and denied the "Free Product Removal Plan and Budget" and the October 23, 2009 determination conditionally approved the Stage 3 Site Investigation Plan & Budget for the UST site. Niebrugge Oil appeals on the several grounds including that the determination: (1) is in violation of the Agency's previous budget approval, (2) exceeds the Agency's authority to apportion Section 57.7 corrective action plans, as opposed to site investigation plans (415 ILCS 57.8(m) (2008)), (3) violated fundamental fairness by making such a determination without opportunity for the owner or operator to respond, (4) the costs of the site investigation plan are attributable to requirements applicable to eligible tanks and consistent with evidence of free product near eligible tanks, and (5) there appears to be no mathematical basis for the 15% deduction, either based upon volume or number of tanks.

¹ All citations to the Act will be to the 2008 compiled statutes, unless the provision at issue has been substantively amended in the 2008 compiled statutes.

Niebrugge Oil's petition meets the content requirements of 35 Ill. Adm. Code 105.408. The Board accepts the petition for hearing as timely regarding the two Agency determinations on the dates October 22, 2009 and October 23, 2009. However, since Niebrugge Oil is appealing two separate determinations made on two separate dates by the Agency these appeals should be docketed as two separate cases even though they may be related and could be considered for consolidation. Therefore, the Board directs Niebrugge Oil to file an amended petition for review severing the appeal of the Agency October 22, 2009 decision in docket PCB 10-37 from the appeal of the Agency October 23, 2009 decision that will be placed in a new docket. The Board today directs the Clerk of the Board to open a new docket to cover the appeal of the Agency determination on October 23, 2009 and to place a copy of the original petition received on November 25, 2009 in that docket so there is no question that the petition was timely filed. An amended petition and a second filing fee must be filed by January 4, 2010 to cover the filing fee required for docketing the appeal of the Agency October 23, 2009 decision.

The Board accepts the petition for hearing with regards to the October 22, 2009 determination. Niebrugge Oil has the burden of proof. *See* 35 Ill. Adm. Code 105.112(a). Hearings will be based exclusively on the record before the Agency at the time the Agency issued its determination. *See* 35 Ill. Adm. Code 105.412. Accordingly, though the Board hearing affords petitioner the opportunity to challenge the Agency's reasons for its decision, information developed after the Agency's decision typically is not admitted at hearing or considered by the Board. *See* Alton Packaging Corp. v. PCB, 162 Ill. App. 3d 731, 738, 516 N.E.2d 275, 280 (5th Dist. 1987); Community Landfill Co. & City of Morris v. IEPA, PCB 01-170 (Dec. 6, 2001), *aff'd sub nom.* Community Landfill Co. & City of Morris v. PCB & IEPA, 331 Ill. App. 3d 1056, 772 N.E.2d 231 (3rd Dist. 2002).

Hearings will be scheduled and completed in a timely manner, consistent with the decision deadline (*see* 415 ILCS 5/40(a)(2) (2008)), which only Niebrugge Oil may extend by waiver (*see* 35 Ill. Adm. Code 101.308). If the Board fails to take final action by the decision deadline, Niebrugge Oil may deem its request granted. *See* 415 ILCS 5/40(a)(2) (2008). Currently, the decision deadline is March 25, 2010, which is the 120th day after the date on which the Board received the petition, November 25, 2009. *See* 35 Ill. Adm. Code 105.114. The Board meeting immediately before the decision deadline is scheduled for March 18, 2010.

Unless the Board or the hearing officer orders otherwise, the Agency must file the entire record of its determination by December 26, 2009, which is 30 days after the Board received Niebrugge Oil's petition. *See* 35 Ill. Adm. Code 105.410(a). If the Agency wishes to seek additional time to file the record, it must file a request for extension before the date on which the record is due to be filed. *See* 35 Ill. Adm. Code 105.116. The record must comply with the content requirements of 35 Ill. Adm. Code 105.410(b).

IT IS SO ORDERED.

I, John Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on December 3, 2009, by a vote of 5-0.

A handwritten signature in black ink that reads "John T. Therriault". The signature is written in a cursive style with a long horizontal flourish at the end.

John Therriault, Assistant Clerk
Illinois Pollution Control Board