

ILLINOIS POLLUTION CONTROL BOARD  
January 7, 2010

NIEBRUGGE OIL COMPANY, )  
)  
Petitioner, )  
)  
v. ) PCB 10-40  
) (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. On December 3, 2009, the Board accepted Niebrugge Oil's petition for hearing as timely but directed Niebrugge Oil to file an amended petition in a this new docket for the decision made by the Agency on October 23, 2009. On December 17, 2009, Neibrugge Oil filed an amended petition which refers to both the October 22 and October 23 decisions by the Agency. The Board will accept the appeal, but clarifies that this docket will be for the purpose of addressing the October 23, 2009 decision by the Agency.

Under the Environmental Protection Act (Act) (415 ILCS 5 (2008))<sup>1</sup>, 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 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.

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<sup>1</sup> 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 with regards to the October 23, 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). The filing of an amended petition recommences the decision period. *See* 35 Ill. Adm. Code 105.114(b). Currently, the decision deadline is April 20, 2010, which is the 120th day after the date on which the Board received the amended petition, December 17, 2009. *See* 35 Ill. Adm. Code 105.114. The Board meeting immediately before the decision deadline is scheduled for April 15, 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).

On December 24, 2009, Niebrugge Oil filed a motion for leave to file the exhibits to the amended petition. The Board grants that motion.

IT IS SO ORDERED.

I, John Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on January 7, 2010, by a vote of 5-0.



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John Therriault, Assistant Clerk  
Illinois Pollution Control Board