

ILLINOIS POLLUTION CONTROL BOARD
March 3, 2011

EVERGREEN FS, INC.,)
)
Petitioner,)
)
v.) PCB 11-51
) (UST Appeal)
ILLINOIS ENVIRONMENTAL)
PROTECTION AGENCY,)
)
Respondent.)

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

On February 23, 2011, Evergreen FS, Inc. (Evergreen) timely filed a petition asking the Board to review a January 20, 2011 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 determination concerns Evergreen's leaking underground storage tank (UST) site located at 808 North Union Street in Dwight, Livingston County. For the reasons below, the Board accepts Evergreen's petition for hearing.

Under the Environmental Protection Act (Act) (415 ILCS 5 (2008)), 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 deducted 50% of the amount that Evergreen sought in an application for payment of \$26,500.40 from the UST Fund. In support, the Agency refers to apportionment under Section 57.8(m) of the Act (415 ILCS 5/57.8(m) (2008)) and states that the release for leaking UST incident number 910580 was deemed ineligible. Evergreen appeals on numerous grounds, including the absence of any determination that the referenced prior release was deemed ineligible, and the Agency's failure to either limit its review to the application or provide a pre-denial opportunity to respond. Evergreen's petition meets the content requirements of 35 Ill. Adm. Code 105.408.

The Board accepts the petition for hearing. Evergreen 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 Evergreen may extend by waiver (*see* 35 Ill. Adm. Code 101.308). If the Board fails to take final action by the decision deadline, Evergreen may deem its request granted. *See* 415 ILCS 5/40(a)(2) (2008). Currently, the decision deadline is June 23, 2011, which is the 120th day after the date on which the Board received the petition, February 23, 2011. *See* 35 Ill. Adm. Code 105.114. The Board meeting immediately before the decision deadline is scheduled for June 16, 2011.

Unless the Board or the hearing officer orders otherwise, the Agency must file the entire record of its determination by March 25, 2011, which is 30 days after the Board received Evergreen'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 March 3, 2011, by a vote of 5-0.



John Therriault, Assistant Clerk
Illinois Pollution Control Board