

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

BENTON FIRE DEPARTMENT)	
Petitioner,)	
)	
v.)	PCB 2017-001
)	(UST Appeal - Land)
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
Respondent.)	

NOTICE

Don Brown, Clerk
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph Street
Suite 11-500
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Carol Webb, Hearing Officer
Illinois Pollution Control Board
1021 North Grand Avenue East
P. O. Box 19274
Springfield, IL 62794-9274

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Law Office of Patrick D. Shaw
80 Bellerive Road
Springfield, IL 62704

PLEASE TAKE NOTICE that I have today filed with the office of the Clerk of the Pollution Control Board **ILLINOIS EPA'S MOTION FOR SUMMARY JUDGMENT AND RESPONSE TO PETITIONER'S MOTION FOR SUMMARY JUDGMENT**, copies of which are herewith served upon you.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,
Respondent

Melanie A. Jarvis
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217/782-5544
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Dated: July 12, 2017

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

BENTON FIRE DEPARTMENT)	
Petitioner,)	
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v.)	PCB 2017-001
)	(UST Appeal - Land)
ILLINOIS ENVIRONMENTAL)	
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ILLINOIS EPA'S MOTION FOR SUMMARY JUDGMENT AND RESPONSE TO PETITIONER'S

MOTION OF SUMMARY JUDGMENT

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 submits its **ILLINOIS EPA'S MOTION FOR SUMMARY JUDGMENT AND RESPONSE TO PETITIONER'S MOTION OF SUMMARY JUDGMENT** to the Illinois Pollution Control Board ("Board").

I. STANDARD FOR ISSUANCE AND REVIEW

A motion for summary judgment should be granted where the pleadings, depositions, admissions on file, and affidavits disclose no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Dowd & Dowd, Ltd. v. Gleason, 181 Ill.2d 460, 483, 693 N.E.2d 358, 370 (1998); McDonald's Corporation v. Illinois Environmental Protection Agency, PCB 04-14 (January 22, 2004), p. 2.

Section 57.8(i) of the Illinois Environmental Protection Act ("Act") (415 ILCS 5/57.8(i)) grants an individual the right to appeal a determination of the Illinois EPA to the Board pursuant to Section 40 of the Act (415 ILCS 5/40). Section 40 of the Act, the general appeal section for

permits, has been used by the legislature as the basis for this type of appeal to the Board. Thus, when reviewing an Illinois EPA determination of ineligibility for reimbursement from the Underground Storage Tank Fund, the Board must decide whether the application, as submitted, demonstrates compliance with the Act and Board regulations. Rantoul Township High School District No. 193 v. Illinois EPA, PCB 03-42 (April 17, 2003), p. 3.

In deciding whether the Illinois EPA's decision under appeal here was appropriate, the Board must look to the documents within the Administrative Record ("Record" or "AR"). The Illinois EPA asserts that the Record and the arguments presented in this motion are sufficient for the Board to enter a dispositive order in favor of the Illinois EPA on all relevant issues. Accordingly, the Illinois EPA respectfully requests that the Board enter an order granting the Illinois EPA summary judgement.

II. BURDEN OF PROOF

Pursuant to Section 105.112(a) of the Board's procedural rules (35 Ill. Adm. Code 105.112(a)), the burden of proof shall be on the petitioner. In reimbursement appeals, the burden is on the applicant for reimbursement to demonstrate that incurred costs are related to corrective action, properly accounted for, and reasonable. Rezmar Corporation v. Illinois EPA, PCB 02-91 (April 17, 2003), p. 9.

III. ISSUE

The issue presented is whether, the Petitioner can be reimbursed for items not approved in the Site Investigation Actual Costs Report. Based upon the express language of this Section and the facts presented, the answer is NO.

IV. FACTS

There exists no issue of material fact. This case is a matter of the application of the law. On February 9, 2016, the Petitioner submitted a Site Investigation Completion Report and Stage 1 Site Investigation Actual Costs that were prepared by Chase Environmental Group and received by the Illinois EPA on February 11, 2016. The Site Investigation Completion Report was approved by the Illinois EPA on June 10, 2016. The Stage 1 Site Investigation Actual Costs were modified in the decision letter issued to Petitioners on June 10, 2017. Full facts as set forth in Petitioner's Report are set forth on Pages 003 and 004 of the Record and are incorporated herein.

The Actual Costs were approved subject to modification (See AR005 and AR006) as follows:

"The total amount of costs from Consulting Materials Cost Form (\$960.01) (See AR075 and AR076) is reduced to \$0.00.

- a) These costs lack supporting documentation. Such costs are ineligible for payment from the Fund pursuant to 35 Illinois Administrative Code 734.630(cc).
- b) These costs may not be reasonable. Such costs are ineligible for payment from the Fund pursuant to Section 57.7(c)(3) of the Act and 35 Illinois Administrative Code 734.630(dd).
- c) These costs may include indirect corrective action costs for personnel, materials, services, or equipment charged as direct costs. Such costs are ineligible for payment from the Fund pursuant to 35 Illinois Administrative Code 734.603(v).

In accordance with 35 Illinois Administrative Code 734.505(a), the Illinois EPA may review any or all technical or financial information, or both, relied upon by the owner or operator or the Licensed Professional Engineer or Licensed Professional Geologist in developing any plan, budget, or report selected for review. The Illinois EPA may also review any other plans, budgets, or reports submitted in conjunction with the site.

The Illinois EPA has requested the following information directly from Chase Environmental Group. (See AR010 and AR011). However, the information was not provided. The Illinois EPA may be willing to reconsider these costs if this information can be provided.

For each of the items which are listed on the Consulting Materials Costs Form, please provide the following information:

1. Please provide a mathematical financial derivation for how the unit rate for the item was determined. Include such variables (as applicable) as purchase costs (including receipts), operation & maintenance costs, estimated product usage, and estimated product life.
2. Please discuss if it is appropriate for the item to be charged as a direct project cost (versus as an indirect cost of doing business)."

A Stage 1 Site Investigation Actual Costs Summary can be found at AR007. This table shows that the amount of Actual Costs requested was \$20,119.05 and the Actual Costs granted was \$19,159.04. The Petitioner filed this appeal on July 18, 2016.

ILLINOIS EPA'S ARGUMENT IN FAVOR OF SUMMARY JUDGMENT

There exists no issue of material fact. This case is a matter of the application of the law.

35 Illinois Administrative Code 734.505(a) states as follows:

- a) The Agency may review any or all technical or financial information, or both, relied upon by the owner or operator or the Licensed Professional Engineer or Licensed Professional Geologist in developing any plan, budget, or report selected for review. The Agency may also review any other plans, budgets, or reports submitted in conjunction with the site.

Section 734.505(b) specifically gives the Illinois EPA authority to modify budgets and reports it reviews.

- b) The Agency has the authority to approve, reject, or require modification of any plan, budget, or report it reviews. The Agency must notify the owner or operator in writing of its final action on any such plan, budget, or report, except in the case of 20 day, 45 day, or free product removal reports, in which case no notification is necessary. Except as provided in subsections (c) and (d) of this

Section, if the Agency fails to notify the owner or operator of its final action on a plan, budget, or report within 120 days after the receipt of a plan, budget, or report, the owner or operator may deem the plan, budget, or report rejected by operation of law. If the Agency rejects a plan, budget, or report or requires modifications, the written notification must contain the following information, as applicable:

- 1) An explanation of the specific type of information, if any, that the Agency needs to complete its review;
- 2) An explanation of the Sections of the Act or regulations that may be violated if the plan, budget, or report is approved; and
- 3) A statement of specific reasons why the cited Sections of the Act or regulations may be violated if the plan, budget, or report is approved.

In this case, the Illinois EPA followed the letter of the law. It reviewed the Petitioner's Site Investigation Completion Report and Actual Costs. As stated in the above sections of the Board's regulations:

"[t]he Agency may review any or all technical or financial information, or both, **relied upon** by the owner or operator or the Licensed Professional Engineer or Licensed Professional Geologist in developing any plan, budget, or report selected for review."
(Emphasis added).

The Illinois EPA project manager informed the Petitioner, via email, that Illinois EPA needed additional supporting documentation to issue a final decision. Chase Environmental refused to submit that supporting documentation and cooperate with the Illinois EPA project manager. (See AR010 to AR011). So, the Actual Costs were modified under Section 734.505(b) to zero because no supporting documentation was provided.

The request made by the Illinois EPA project manager was a reasonable one. How can the Illinois EPA determine if the items listed and their costs are reasonable within the definitions of the Law and Regulations if the supporting documentation is not provided? Simply it cannot. To

do the job given to it by the Illinois Legislature and the Board's regulations, the Illinois EPA must be able to ask for supporting documentation and owners/operators and their consultants must be cooperative in giving such information to the Illinois EPA if they want reimbursement from the Fund.

Illinois EPA followed the law and regulations, the consultant for Petitioner was not cooperative in responding. The email exchange clearly shows that the response from the Petitioner's consultant had a sarcastic and rude tone, while the questions asked from the Illinois EPA project manager were professional in nature¹.

The law is clear; the Illinois EPA has the right to seek supporting documentation. (See 35 Illinois Administrative Code 734.505(a)). And, the facts are clear; the Petitioner did not submit supporting documentation. As such, the Illinois EPA is entitled to Summary Judgment.

¹ The email exchange clearly shows that the response from the Petitioner's consultant had a sarcastic and rude tone, while the questions asked from the Illinois EPA project manager were professional in nature

RESPONSE TO PETITIONER'S MOTION FOR SUMMARY JUDGMENT

The Petitioner's arguments in its Motion for Summary Judgment are not persuasive under current law and are unsubstantiated as to facts necessary to rule in its favor. What the Petitioner is trying to do is rewrite the law and regulations through Summary Judgment. At best what Petitioner requests is for the Board to take applicable law and distinguish the facts of his case as to how that law should apply. Put very simply, the Illinois EPA has not reviewed nor approved a budget in this matter and is reviewing actual costs. It is at this point where the Illinois EPA must request additional information, if necessary, to determine eligibility for payment from the Fund. Section 734.505 provides the Illinois EPA expressly with such authority. Petitioner's application of the law is not consistent with the law as written (allowing for review) nor the intent of the process on-going before the Illinois EPA. As such, Petitioner's Motion must be denied as it is not founded on law.

On Page 3 of its Motion, the Petitioner quotes responses from its consultant, Chase Environmental. Of note, in response to the request for supporting documentation, Chase Environmental responded as follows:

"Chase has included all information required and in accordance with the Illinois EPA forms and instructions existing at the time of submittal. The rates proposed within the Consulting Materials Form are rates that have consistently been approved in our clients (sic) Budgets and Reimbursement requests."

This response shows that the Petitioner's argument is anchored only upon its Consultant's contention. However, the contention has absolutely no regard for the Board's regulations or the procedures allowed thereunder. Chase Environmental seeks to explain away any review based upon a contention that the Illinois EPA's forms did not require anything other than a submission of information. The Fund is not self-policing. No duty to protect the Fund is

placed upon the applicant, to the contrary, such function and responsibility is vested in the Illinois EPA and ultimately this Board. The Act and Regulations do not allow an applicant to avoid review of its costs.

The Petitioner in its motion highlights the fact that the decision letter says “may not be reasonable” and “may include indirect corrective action costs”. What Petitioner fails to understand is that when it refuses to give the Illinois EPA supporting documentation that the Illinois EPA can lawfully request under the Board’s regulations, it prevents the Illinois EPA from determining if the costs are reasonable or indirect. The Illinois EPA has clearly determined that it is unable to determine reasonableness or whether a cost is indirect without additional supporting documentation. As such, again contrary to Petitioner’s contention that Summary Judgment is available, facts must be in dispute since the reasonableness of the submitted documents is inevitably in question in this matter. These costs may turn out to be reasonable and direct costs. But, without further examination, documentation or testimony, such cannot in the Illinois EPA’s opinion be determined at this point in time. Moreover, as long as the Petitioner refuses to provide the supporting documentation, it is the Illinois EPA’s conclusion, consistent with its request which is the subject of this proceeding, that a determination can never be definitively made. Without testimony at hearing, neither the Board nor the Illinois EPA can determine if the facts given by the Petitioner are correct.

Illinois EPA under its legal authority reduced the unsupported amounts to zero, but did not foreclose the ultimate payment, if appropriate, by allowing Petitioner to submit additional documents/information. The Petitioner can always submit the requested information and seek reimbursement from the Fund

Finally, Illinois EPA does not adopt Petitioner's portrayal of the facts. Petitioner has made no effort to point to any law or fact in the record to support its claim that summary judgment is appropriate. Petitioner blindly suggests that the Board rule that the Illinois EPA must accept only what is submitted and approve any such costs in full without any review. Unfortunately for Petitioner, that is simply not how the Act and regulations are written. There are checks and balances in the regulations for a reason.

With regard to Petitioner's next two arguments, regarding what Illinois EPA can request as supporting documentation and limiting EPA's review to Subpart H numbers, once again, these are matters which can only be resolved through hearing and admission of argument, documentation and/or testimony. Petitioner in offering that the Illinois EPA look only at whether the amounts exceed Subpart H ignores the law, (Section 734.505(b)) which it seems this Petitioner and its consultant have a habit of doing. While this is one factor, it is not dispositive of the Illinois EPA's duties.

Petitioner's attempt to add information to the argument within a Summary Judgment motion simply makes the Illinois EPA's point. For example, Petitioner includes an exhibit that is not located within the record in this matter. The Instructions for the Budget and Billing Forms is a document that could further be explained at a hearing on the matter. The Board should note that it is inconsistent to allow the Petitioner to bolster an argument with facts which are not within the record, while holding the Illinois EPA to the application alone. And, for that matter, it is far more consistent with the regulations to allow for submission of information that can be reviewed under testimony or objection than to simply add such to argument within a Motion to dispose of the entire matter of record. Petitioner has attempted to both place words in the Illinois EPA's mouth that it cannot respond to or submits testimony in the pleading that the

Illinois EPA cannot explain or know the answers to. Perhaps what Petitioner contends cannot be done is routinely done by other applicants. Or, perhaps what it claims that it is unable to do, under further investigation, is indeed doable. Such a contention should only be allowed carefully, and at very least be subject to be presented by witnesses or documented information. And, finally, at very least, this assertion is challenged by the Illinois EPA and as such, if it is a material fact, is disputed and should moot the Petitioner's motion. A Motion for Summary Judgment is not the place for such speculation or uncontested material speculation. A Motion for Summary Judgment must be based on the material facts in the record and the applicable law. However, Petitioner in its motion expands on these principals unreasonably.

Paired down to its essence, Petitioner arguments seek the Board to rubber stamp its contention that what an owner/operator submits is definitive as to what is sufficient documentation for purposes of review of its costs and because of the above, any request by the Agency for additional or supporting documentation or information is against the law and facts and should be found unreasonable and subject the fund to reimbursement of the costs and payment of fees. This is very plainly contrary to existing regulations (upon which the Agency relies) and could not possibly be consistent with the Illinois EPA's function to review and likewise is inapposite to the Board's purpose within the regulations, i.e., to ensure that claims against the fund are justifiable for reimbursement.

Petitioner's motion, far from meeting the burden and requirements for issuance of Summary Judgment in its favor, must be rejected. To grant Petitioner's Motion for Summary Judgment, the Board would need to accept a material fact upon which the Illinois EPA does not agree and contort law which allows for the review beyond recognition.

CONCLUSION

The facts and the law are clear and in favor of the Illinois EPA. The Petitioner did not submit supporting documentation when asked to do so.

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

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Dated: July 12, 2017

This filing submitted on recycled paper.

CERTIFICATE OF SERVICE

I, the undersigned attorney at law, hereby certify that on **July 12, 2017**, I served true and correct copies of **ILLINOIS EPA'S MOTION FOR SUMMARY JUDGMENT AND RESPONSE TO PETITIONER'S MOTION OF SUMMARY JUDGMENT** via the Board's COOL system and email, upon the following named persons:

John Therriault, Acting Clerk
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