

ILLINOIS POLLUTION CONTROL BOARD
August 17, 2017

CITY OF BENTON FIRE DEPARTMENT,)
)
Complainant,)
)
v.) PCB 17-01
) (UST Appeal)
ILLINOIS ENVIRONMENTAL)
PROTECTION AGENCY,)
)
Respondent.)

OPINION AND ORDER OF THE BOARD (by K. Papadimitriu):

The City of Benton Fire Department (Benton Fire) filed a petition asking the Board to review a June 10, 2016 determination of the Illinois Environmental Protection Agency (Agency). The Agency's determination concerns Benton Fire's leaking underground storage tank (UST) site located at 107 North Maple Street in Benton, Franklin County. The Agency approved Benton Fires' Site Investigation Completion Report but modified actual costs for Stage 1 site investigation, reducing consultant's material costs to zero.

On June 27, 2017, Benton Fire filed a motion for summary judgment and filed the amended proof of service on June 28, 2017. On July 12, 2017, the Agency filed a response to Benton Fire's motion with a cross-motion for summary judgment. On July 28, 2017, Benton Fire filed its response to the Agency's motion accompanied by a motion for extension of time to file a response *instanter*. The Board grants Benton Fire's motion for an extension of time to file its response and admits Benton Fire's response into the record. *See* 35 Ill. Adm. Code 101.500(d) and 101.516(a).

On August 3, 2017, the Agency filed a reply to Benton Fire's response. Because the Agency did not file a motion for permission to file a reply as required by the Board rules (35 Ill. Adm. Code 101.500(e)), the Agency's reply is not admitted into the record.

After finding that issues of material fact preclude summary judgment, this order denies both motions for summary judgment and directs the hearing officer to proceed to hearing.

GENUINE ISSUES OF MATERIAL FACT PRECLUDE SUMMARY JUDGMENT

Summary judgment is appropriate in Board adjudications when the record shows there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. 35 Ill. Adm. Code 101.516(b). This is the same standard used in trial court proceedings in Illinois. IEPA and Village of New Lenox v. PCB, 386 Ill. App. 3d 375, 391 (3rd Dist. 2008). Regardless of whether the parties agree, the "mere filing of cross-motions for summary judgment

does not establish that there is no issue of material fact, nor does it obligate the Board to render summary judgment.” Prairie Rivers Network v. Illinois Pollution Control Bd., 2016 IL App (1st) 150971 at ¶ 24, 401 Ill. Dec. 538, 542, 50 N.E.3d 680, 684, (Feb. 26, 2016). The Agency’s denial letter frames the issues on appeal. Pulitzer Cmty. Newspapers, Inc. v. IEPA, PCB 90-142 (Dec. 20, 1990).

Although both parties filed motions for summary judgment, their motions argue that genuine issue of material fact does exist. Even though the Agency states that there is no genuine issue of material fact (Agency Mot. and Resp. at 3, 4), the Agency simultaneously argues that “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” (*Id.* at 9). The Agency suggests that further examination, documentation, or testimony is needed because the reasonableness of these costs “cannot in the Illinois EPA’s opinion be determined at this point in time.” *Id.* Benton Fire’s response to the Agency’s motion also states that the Agency’s claim—that it cannot determine the reasonableness of the costs—“is not based on the record, and would require testimony from the project manager.” Benton Fire Resp. at 3.

The parties also disagree as to which facts are material, since they frame the issues differently. Benton Fire’s motion states that the appeal has two groups of issues: “(i) potential substantive objections on the basis of reasonableness or the presence of indirect costs, and (ii) a procedural objection regarding the refusal to provide a mathematical financial derivation and a discussion of indirect versus direct costs.” Benton Fire Mot. at 5. The Agency’s motion states that: “[t]he issue presented is whether, the Petitioner can be reimbursed for items not approved in the Site Investigation Actual Costs Report.” Agency Mot. at 3.

Moreover, it is not clear to the Board what was the purpose of the Agency’s review of the actual costs of Stage 1 investigation. Neither the Agency’s denial letter, nor the rest of the record, clearly indicate whether the Agency reviewed the actual costs as part of a request for payment, or just as an attachment to the Site Investigation Completion Report. The Agency’s denial letter indicates that the Agency reviewed “the February 9, 2016 Site Investigation Completion Report and Stage 1 Investigation Actual Costs.” Agency Rec. at 1. It further states that:

The Stage 1 Site Investigation Actual Costs are modified pursuant to Sections 57.7(a)(2) and 57.7(c) of the Act and 35 Illinois Administrative Code 734.505(b) and 734.510(b). Based upon the modifications ... the amounts which are summarized in attachment 3 of this letter are approved. Be aware that the amount of payment from the Fund may be limited by sections 57.8(d), 57.8(e) of the Act as well as 35 Illinois Administrative Code 734.630 and 734.655. *Id.* at 1.

The Agency refers to the denial as the “modification” of the “Stage 1 Site Investigation Actual Costs” pursuant to 35 Ill. And. Code 734.505(a) and (b). Agency Mot. at 4-5. Benton Fire’s February 9, 2016 submission states that it encloses the Site Investigation Completion Report - “Stage 1 Site Investigation Actual Costs Summary” is attached to the Report as

Appendix E. Agency Rec. at 19, 24. At the same time, Benton Fire refers to the Agency's denial as the "Agency's final decision, refusing to approve the application for payment." Pet. at 1. The petition also asks that the Board "direct the Agency to approve the application for payment." *Id.* at 3. Thus, the Board is unable to ascertain from the record what the Agency reviewed and what Benton Fire was requesting. The Board cannot effectively analyze the Agency's actions without understanding what type of review the Agency performed in the first place.

The Board thus finds that genuine issues of material fact preclude summary judgment. Therefore, the Board denies both motions for summary judgment.

HEARING

The Board directs the hearing officer to proceed to hearing. The hearing may be held by videoconference. In deciding whether to hold the hearing by videoconference, the Board or the hearing officer will consider cost-effectiveness, efficiency, facility accommodations, witness availability, public interest, the parties' preferences, and the proceeding's complexity and contentiousness. *See* 35 Ill. Adm. Code 101.600(b), 103.108.

IT IS SO ORDERED.

I, Don A. Brown, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion and order on August 17, 2017 by a vote of 5-0.

A handwritten signature in black ink that reads "Don A. Brown". The signature is written in a cursive, flowing style.

Don A. Brown, Clerk
Illinois Pollution Control Board