

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

KB SULLIVAN INC.,)	
Petitioner,)	
)	
v.)	PCB: 2021-078
)	(UST Appeal)
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
Respondent.)	

PETITIONER’S RESPONSE TO ILLINOS EPA’S CROSS MOTION FOR SUMMARY JUDGMENT

NOW COMES Petitioner, KB SULLIVAN INC., by its undersigned counsel, responds to Illinois EPA’s Cross Motion for Summary Judgment pursuant to Section 101.516(a) of the Board's Procedural Rules (35 Ill. Adm. Code § 101.516(a)), as follows:

INTRODUCTION

The Illinois EPA erroneously argues the lack of a status report precluded it as a matter of law from reimbursing the payment application.

I. The Legal Necessity of a Status Report Is Not Before the Board.

“The law is well settled that the Agency's denial letters frame the issues on appeal.” Evergreen FS v. Illinois EPA, PCB 11-51, slip op. at 41 (June 21, 2012).

The Board’s regulations set forth the required contents of the denial letters:

If the Agency denies payment for an application for payment or for a position thereof or requires modification, 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 the review;**
- 2) **An explanation of the Sections of the Act or regulations that may be violated if the application for payment is approved; and**
- 3) **A statement of specific reasons why the cited Sections of the Act or regulations may be violated if the application for payment is approved.**

(35 Ill. Adm. Code § 734.610(d))

This information “is necessary to satisfy principles of fundamental fairness because it is the applicant who has the burden of proof before the Board to demonstrate that the regulatory and statutory bases for denial are inadequate to support that denial.” Rossman v. Illinois EPA, PCB No. 91-80, slip op. at p. 4 (Dec. 19, 1991)

Principles of fundamental fairness require that an applicant be given notice of the statutory and regulatory bases for denial of an application of reimbursement and that the Agency be bound on review by those cited bases for denial given in its denial statement. Fundamental fairness would be violated if the Agency were free to cite additional statutory and regulatory reasons for denial for the first time at the Board hearing. The Board concludes that the Agency cannot rely upon those regulations not previously cited in the denial letter as support for its denial of [the] application for reimbursement.

Pulitzer v. IEPA, PCB 90-142, slip op. at 7, (Dec. 20, 1990).

The Illinois EPA’s cross motion for summary must be denied because it violates principles of fundamental fairness, as well as Section 734.610(d) of the Board’s regulations which codified this requirement. (35 Ill. Adm. Code §

734.610(d)) The Illinois EPA argues that its decision was based upon and supported by Section 734.355 of the Board's regulations pertaining to status reports. Since this regulation is not cited in the denial letter, the Agency cannot rely upon it. Pulitzer, PCB 90-142, slip op. at 7; see also Environmental Protection Agency v. Pollution Control Board, 86 Ill. 2d 390, 405 (1981) (holding that the Agency had a duty to raise the issue of lack of compliance with a given rule "or be precluded from raising that issue")

In addition, the decision letter failed to identify a status report as the "specific type of information" it needed. (35 Ill. Adm. Code § 734.610(d)(1)) Instead, the decision letter claims that the Agency had not received the corrective action completion report or any technical documentation since the last corrective action plan. (R.0346) Not only was a status report not identified, the only documents expressly or implicitly identified were a corrective action completion report and a corrective action plan, which are both technical documents unlike a status report which is merely a letter identifying the current situation. If the Agency actually needed to know the status of the cleanup at the time of the payment application, it had the authority to request it before making its decision. In any event, the Agency was required to identify the status report if that actually was the specific type of information it needed.

Furthermore, the Agency was required to give a "statement of specific reasons why the cited Sections of the Act or regulations may be violated if the application for payment is approved." (35 Ill. Adm. Code § 734.610(d)(3)) Whether

or not the reason given in the Agency decision letter itself is clear or specific, it is not the reason now being offered in the cross motion for summary judgment, which appears to be that the Agency wanted an additional narrative description of the costs incurred to date.

In summary, the cross motion should be denied based upon well-settled precedent that the Agency cannot rely upon those regulations and reasons not previously cited in the denial letter as support for its denial of the application for reimbursement.

II. In the Alternative, Approving the Application for Payment Would Not Violate the Act or Regulations In the Absence of a Status Report.

Assuming *in arguendo* that the Agency has properly raised the absence of a status report as an issue before the Board, the Act does not authorize rejection of payment for work performed in the absence of a status report.

The rules government applications for payment are set forth in Section 57.8 of the Act, which permit submission of “a complete application for final or partial payment . . . once every ninety days.” (415 ILCS 5/57.8) For purposes of Section 57.8 of the Act, a complete application shall consist of:

- (A) **A certification from a Licensed Professional Engineer or Licensed Professional Geologist as required under this Title and acknowledged by the owner or operator.**
[R.0301]
- (B) **A statement of the amounts approved in the budget and the amounts actually sought for payment along with a**

certified statement by the owner or operator that the amounts so sought were expended in conformance with the approved budget. [R.0301; R.0310]

- (C) A copy of the Office of the State Fire Marshal's eligibility and deductibility determination. [R.0306 - R.0307]**
- (D) Proof that approval of the payment requested will not result in the limitations set forth in subsection (g) of this Section being exceeded. [R.0300]**
- (E) A federal taxpayer identification number and legal status disclosure certification on a form prescribed and provided by the Agency. [R.0305]**
- (F) If the Agency determined . . . that corrective action must include a project labor agreement . . . [Not applicable]**

(415 ILCS 5/57.8(a)(6) (adding references to record where each item is located)

A status report is nowhere required for a payment application in the Act or the Board's regulations (35 Ill. Adm. Code § 734.605(a)). If there are alleged compliance issues, the reimbursement process is not the proper venue to pursue them. See E.P.A. v. Pollution Control Bd., 252 Ill.App.3d 828, 830 (3rd Dist. 1993) (affirming Board in holding that permit decision could not be based solely on alleged violation of the Act).

In support of the practical necessity for a status report, the Agency offers testimony not found in the record that “[t]he Illinois EPA has no idea of what, if any, remediation activities have been taken to date.” (Cross Motion, at p. 5) This testimony if it is considered is not credible. The Agency previously approved three partial payments pursuant to the same corrective action plan without any confusion. The Agency concedes somehow grudgingly the existence of short

descriptions such as “HAA” and “ELUC” and a “CACR” which the Agency can give their usual meaning. (Cross Motion, at p. 5) The descriptions in the billing forms relate back to descriptions of work approved in the budget. The Agency is not supposed to be auditing the status of the work at the reimbursement stage, but making sure the work for which reimbursement is sought is covered by the budget. (415 ILCS 5/57.8(a)(1)(“In no case shall the Agency conduct additional review of any plan which was completed within the budget, beyond auditing for adherence to the corrective action measures in the proposal.”)) The Agency does not dispute the undisputed facts set forth in Petitioner’s motion for summary judgment:

The reimbursement claim was based upon ten monthly statements of consulting costs over that period, which were summarized in the cover letter. (R.0295 - R.0296) Each statement identified the work performed, who performed the work and the number of hours worked. (R.0316 - R.0342) In addition, the submittal included an affidavit signed by the owner/operator and by a licensed professional engineer certifying that the application for payment had been prepared under the supervision of the licensed professional engineer, and the costs are correct and reasonable. (R.0301)

(Motion for Summary Judgment, at p. 4)

Furthermore, to the extent the actual justification is the absence of additional narrative discussion in the billing package, that too is not an issue that was raised in the Agency’s denial letter. Moreover, since a status report is not required to provide a narrative discussion of costs, (35 Ill Adm. Code § 734.355(a)), the purported objective is unlikely to have been met.

None of the foregoing prevents the Agency from asking questions to clarify any billing entries. Knapp v. IEPA, PCB 16-103, slip op. at p. 9 (Sept. 22, 2016)

In summary, assuming that the absence of a status report is at issue in this case, the status report as a matter of law is not required to review a billing package and as a factual matter is not relevant to the types of concerns raised for the first time in the cross motion by the Agency.

WHEREFORE, Petitioner, KB SULLIVAN, INC., prays that the Board deny the Agency's Cross Motion for Summary Judgment, grant Petitioner's Motion for Summary Judgment, allow Petitioner to submit proof of legal costs, and for such other and further relief as it deems meet and just.

KB SULLIVAN INC.,
Petitioner

By its attorneys,
LAW OFFICE OF PATRICK D. SHAW

By: /s/ Patrick D. Shaw

Patrick D. Shaw
LAW OFFICE OF PATRICK D. SHAW
80 Bellerive Road
Springfield, IL 62704
217-299-8484
pdshaw1law@gmail.com