

ILLINOIS POLLUTION CONTROL BOARD
August 11, 2022

KB SULLIVAN, INC.,)	
)	
Petitioner,)	
)	
v.)	PCB 21-78
)	(UST Appeal)
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Respondent.)	

INTERIM OPINION AND ORDER OF THE BOARD (by J. Van Wie):

KB Sullivan, Inc. (petitioner) is the owner of a service station at 111 West Jackson Street, Sullivan, Moultrie County (site or facility) at which underground storage tanks (UST) leaked petroleum. The Illinois Environmental Protection Agency (IEPA) previously approved a corrective action plan and budget. On February 5, 2020, IEPA denied in full a request for partial reimbursement of \$2,125.96, and petitioner appealed. Both parties filed motions for summary judgment.

For the reasons below, the Board finds there is no genuine issue of material fact and summary judgment is appropriate. The Board upon review of the record finds that petitioner proves that the requested reimbursement will not violate the Act or Board regulations. Therefore, the Board grants petitioner's motion for summary judgment and directs petitioner to file a statement of eligible legal fees and justify why the Board should use its discretion to reimburse those fees.

The Board denies IEPA's cross motion as a matter of law because it relies on statutory and regulatory provisions not encompassed in IEPA's denial letter.

The opinion first sets out the procedural history and then the factual background. The Board's discussion then decides the issues before the Board reaches its conclusion and issues its order.

PROCEDURAL HISTORY

On March 19, 2021, petitioner appealed IEPA's February 5, 2021 denial of reimbursement. On March 18, 2022, IEPA filed the record in this case (R.). Petitioner filed a motion for summary judgment on June 10, 2022 (Mot.). IEPA responded on June 23, 2022, with a filing titled "Cross Motion for Summary Judgment or in the Alternative Response to Petitioner's Motion for Summary Judgment" (CMot.). On July 7, 2022, Petitioner responded to the cross motion (Resp.).

FACTUAL BACKGROUND

On May 16, 2012, IEPA approved a corrective action plan and budget for this site. R. at 267. The corrective action plan calls for institutional controls to be placed on surrounding properties to allow the contamination to remain safely in place. R. at 13-14. Those institutional controls need to be negotiated with the property owner and the city of Sullivan. R. at 12-13. IEPA approved a budget of \$33,896.53. Since the approval of the corrective action plan and budget, IEPA approved partial reimbursement to petitioner in 2013, 2014, and 2015 for a total of \$18,103.01. R. at 292.

On October 20, 2020, petitioner sought an additional partial reimbursement for \$2,125.96 for numerous charges over a 5-year period. R. 294. Petitioner based the request upon ten monthly statements for consulting costs over that time-period. R. at 294-95. The statements were included in the request for reimbursement and identified the person performing the work, the person's title, the type of work, the hourly rate, and the hours worked. R. at 316- 342. The application for reimbursement was signed by the owner/operator and a licensed professional engineer. The application certified that it was prepared under the supervision of a licensed professional engineer, and all costs are correct and reasonable. R. at 301.

On February 5, 2021, IEPA denied the request for reimbursement stating:

\$2,126.96, deduction for all costs, which lack supporting documentation. Such costs are ineligible for payment from the Fund pursuant to 35 Ill. Adm. Code 734.630(cc). Since there is no supporting documentation of costs, the [IEPA] cannot determine that costs will not be used for activities in excess of those necessary to meet the minimum requirements of Title XVI of the Act. Therefore, such costs are not approved pursuant to Section 57.7(c)(3) of the Act because they may be used for site investigation or corrective action activities in excess of those required to meet the minimum requirement of Title XVI of the Act. R. at 346.

STATUTORY AND REGULATORY BACKGROUND

Section 57.7(c)(3) of the Act provides in pertinent part that, when approving any corrective action plan and budget, IEPA must determine that the costs associated with the plan will not be used for “corrective action activities in excess of those required to meet the minimum requirements of this Title.” 415 ILCS 5/57.7(c)(3) (2020).

The Board's UST regulations provide that “[c]osts ineligible for payment from the Fund include . . . [c]osts that lack supporting documentation.” 35 Ill. Adm. Code 734.630(cc).

Section 57.8 of the Act allows an owner or operator to submit a complete application for final or partial payment to the IEPA for activities taken in response to a confirmed release. 415 ILCS 57.8 (2020).

BOARD DISCUSSION

The Board begins its discussion by explaining why summary judgement is appropriate in this instance, then the Board discusses the merits of the case.

Summary Judgment

Summary judgment is appropriate when the pleadings, depositions, admissions, affidavits, and other items in the record show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Adames v. Sheahan, 233 Ill. 2d 276, 295, 909 N.E.2d 742, 753 (2009); Dowd & Dowd, Ltd. v. Gleason, 181 Ill. 2d 460, 483, 693 N.E.2d 358, 370 (1998); 35 Ill. Adm. Code 101.516(b). A genuine issue of material fact precluding summary judgment exists when “the material facts are disputed, or, if the material facts are undisputed, reasonable persons might draw different inferences from the undisputed facts.” Adames, 233 Ill. 2d at 296, 909 N.E.2d at 753; Adams v. Northern Illinois Gas Co., 211 Ill. 2d 32, 43, 809 N.E.2d 1248, 1256 (2004).

When determining whether a genuine issue of material fact exists, the record “must be construed strictly against the movant and liberally in favor of the opponent.” Adames, 233 Ill. 2d at 295-96, 909 N.E.2d at 754; Purtill v. Hess, 111 Ill. 2d 229, 240, 489 N.E.2d 867, 871 (1986). Summary judgment “is a drastic means of disposing of litigation, and therefore, should be granted only when the right of the moving party is clear and free from doubt.” Adames, 233 Ill. 2d at 296, 909 N.E.2d at 754; Purtill, 111 Ill. 2d at 240, 489 N.E.2d at 871. “Even so, while the nonmoving party in a summary judgment motion is not required to prove [its] case, [it] must nonetheless present a factual basis, which would arguably entitle [it] to a judgment.” Gauthier v. Westfall, 266 Ill. App. 3d 213, 219, 639 N.E.2d 994, 999 (2d Dist. 1994).

The Board agrees with the parties that there is no genuine issue of material fact. The issue to be decided is the legal sufficiency of IEPA’s denial reason, as stated in the denial letter. The parties pose legal arguments, but do not disagree on the facts as presented. Since there is no factual dispute, the Board will consider the merits of the motions for summary judgment.

Board Decision

The Board addresses the legal standards used in rendering its decisions on appeals of IEPA’s final decisions. Next the Board will address the arguments of the parties and explain the Board’s reasons for granting petitioner’s motion.

Standard of Review

The Board must decide whether petitioner’s submission to IEPA demonstrated compliance with the Act and the Board’s rules. Illinois Ayers Oil Co. v. IEPA, PCB 03-214, slip op. at 8 (April 1, 2004); Kathe’s Auto Service Center v. IEPA, PCB 96-102, slip op. at 13 (Aug. 1, 1996). The Board’s review is generally limited to the record before IEPA at the time of its determination. Freedom Oil Co. v. IEPA, PCB 03-54, 03-56, 03-105, 03-179, 04-04 (cons.), slip op. at 11 (Feb. 2, 2006); *see also* Illinois Ayers, PCB 03-214, slip op. at 15 (“the Board does not review [IEPA’s] decision using a deferential manifest-weight of the evidence standard,” but

“[r]ather the Board reviews the entirety of the record to determine that the [submission] as presented to [IEPA] demonstrates compliance with the Act”).

IEPA’s denial letter frames the issues on appeal. Pulitzer Cmty. Newspapers, Inc. v. IEPA, PCB 90-142 (Dec. 20, 1990).

Applicability of Section 57.7(c)(3) and 35 Ill. Adm. Code 734.630(cc).

The petitioner argues that IEPA’s denial reasons in the denial letter are inapplicable as a matter of law. Petitioner maintains that Section 57.7(c)(3), cited in the denial letter, regulates plans and budgets, not reimbursement applications. Mot. at 9. And as to the citation to Section 734.630(cc) for lack of supporting documentation, petitioner maintains that all information required by the Board’s rules were a part of the application. *Id.*

The Board finds that the denial reasons cited by IEPA are not supported. IEPA review in a request for reimbursement is governed by Section 57.8 of the Act, which provides that the review:

shall be limited to generally accepted auditing and accounting practices. In no case shall the [IEPA] conduct additional review of any plan which was completed within the budget, beyond auditing for adherence to the corrective action measures in the proposal. 415 ILCS 5/57.8 (2020).

The Board finds this case to be analogous to Pak-Ags, Inc. v IEPA, PCB 15-14 (Dec. 4, 2014) (Pak-Ags). In Pak Ags, the Board reviewed IEPA’s reimbursement denial letter in which IEPA stated:

Since there is no supporting documentation of costs, the [I]EPA cannot determine that costs will not be used for activities in excess of those necessary to meet the minimum requirements of Title XVI of the Act. Therefore, such costs are not approved pursuant to Section 57.7(c)(3) of the Act because they may be used for site investigation or corrective action activities in excess of those required to meet the minimum requirements of Title XVI of the Act. Pak-Ags, slip op. at 6.

The Board found that Pak Ags’ application was complete, noting that the IEPA’s review of reimbursement application materials is governed by Section 57.8 of the Act. Pak-Ags, slip op. at 19, *citing* 415 ILCS 5/57.8 (2012). As in this case, IEPA had approved the plan and budget. The Board found that budget review under Section 57.7 of the Act was the appropriate time to determine what supporting documentation for the actual costs budget was necessary. *Id.* The Board noted in its decision:

Section 57.8 of the Act provides that “in the case of any approved plan and budget for which payment is being sought. . . [IEPA]’s review shall be limited to generally accepted auditing and accounting practices.” 415 ILCS

57.8(a)(i)(2012). The Board has interpreted this language in the case of Evergreen FS v. IEPA, PCB 11-51, 12-61 (cons.) (June 21, 2012). In that case, the Board stated that ‘Section 57.8(a)(1) of the Act specifically limits the [IEPA]’s review when payment is sought for an approved plan or budget to ‘auditing for adherence to the corrective action measures in the proposal.’” [citations omitted]. In Evergreen, the [IEPA] reviewed a previously approved budget and determined that apportionment was required. [citations omitted]. The Board found that “[a]ny [IEPA] apportionment determination would be appropriate at the time of approval of the plan and budget, not at the payment stage.” [citations omitted]. *Id.* at 19-20.

In this instance the Board will also look to the record on the application for reimbursement. IEPA approved a budget for this site that includes \$31,443.23 in consulting fees and \$734.30 in materials. R. at 292. The corrective action plan includes seeking approval for institutional controls to allow any contamination to remain safely in the ground. Petitioner’s application specifies: 1) the work performed, and 2) that reimbursement is being sought for work on the groundwater ordinance, groundwater agreements, and preparation of the application. R. at 311-12; 316-42. The invoices detail who performed the work, the title of the person performing the work, and what work was performed. Construing the record strictly against the petitioner and liberally in favor of the IEPA, the Board finds that the record contains sufficient information and supporting documentation to allow for reimbursement. Therefore, the Board finds that reimbursing petitioner \$2,126.96 will not violate Section 57.7(c)(3) of the Act or 35 Ill. Adm. Code 734.630(cc).

The Board finds that this case is distinguishable from cases in which IEPA denied reimbursement for actual costs because of a lack of accounting documentation demonstrating that the costs were actually expended for corrective action. *See e.g. T-Town Drive Thru, Inc. v. IEPA*, PCB 07-85 (Apr. 3, 2008) (T-Town). When IEPA has approved the plan and budget, Section 57.8 of the Act limits IEPA’s review of the reimbursement application to “generally accepted auditing and accounting practices.” And IEPA cannot conduct additional review of any plan which was completed within the budget, “beyond auditing for adherence to the corrective action measures in the proposal.” 415 ILCS 5/57.8 (2020).

Seeking documentation that actual costs were expended to perform the requirements of the corrective action plan or remediation is consistent with Section 57.8 of the Act. When seeking reimbursement, the owner or operator must provide an accounting of all costs. T-Town, slip op. at 23, citing Platolene 500, Inc. v. IEPA, PCB 92-9, slip op. at 8 (May 7, 1992). However, in this case, IEPA denied reimbursement claiming there was no supporting documentation for expenditures. The record simply does not support the IEPA’s denial reasons. The petitioner provided documentation demonstrating how the costs were incurred, by whom, and that the work was a part of corrective action. Therefore, actual costs were documented, and IEPA must reimburse the requested amount.

IEPA’s Argument Regarding Section 57.7(b)(6)

Although IEPA's denial letter frames the issue as whether petitioner can be reimbursed for "costs that lack supporting documentation and exceed the minimum requirements of the Act", IEPA failed to argue or discuss the statutory and regulatory provisions cited in the denial letter as a part of its motion/response. CMot. at 3. IEPA argues that petitioner's lack of supporting documentation is the failure to submit timely status reports or "technical documents". CMot. at 4-5. IEPA relies on Section 57.7(b)(6) of the Act and Section 734.355 of the Board's rules to support its motion. *Id.*; 415 ILCS 5/57.7(b)(6) (2020); 35 Ill. Adm. Code 734.355. The denial letter does not cite to either Section 57.7(b)(6) of the Act or Section 734.355 of the Board's rules. *See R.* at 345-46. Section 57.7(b)(6) of the Act and Section 734.355 require that, if after 4 years the applicable remediation objectives in a corrective action plan have not been met, the owner or operator must submit a status report. 415 ILCS 5/57.7(b)(6); 35 Ill. Adm. Code 734.355. IEPA argues that petitioner has not submitted a "technical document" in over 10 years, and IEPA "simply cannot reimburse for costs it does not know why the work is being done now or if it is accomplishing anything". CMot. at 5.

Petitioner maintains that IEPA did not cite to either Section 57.7(b)(6) of the Act or Section 734.355 in the denial letter and as a result, IEPA cannot rely on those provisions. Resp. at 2-4, citing Pulitzer, slip op. at 7, and EPA v. PCB, 86 Ill. 2d 390, 405 (1981). Petitioner concedes that IEPA could have asked for or sought a status report on the site, but IEPA did not. Resp. at 4. Petitioner notes that IEPA's denial letter only identified a corrective action completion report and a corrective action plan, not a status report. *Id.*, R. at 346.

The Board agrees with the petitioner that IEPA cannot now argue reasons for the denial that are not cited in the denial letter. The law is well settled that the denial letter frames the issue on appeal. *See e.g. Pulitzer Cmty. Newspapers*, slip. op at 6, PCB 90-142. The Board stated in Pulitzer that:

Principles of fundamental fairness require that an applicant be given notice of the statutory and regulatory bases for denial of an application for reimbursement and that the [IEPA] be bound on review by those cited bases for denial given in its denial statement. Fundamental fairness would be violated if the [IEPA] were free to cite additional statutory and regulatory reasons for denial for the first time at the Board hearing. *Id.* at 7.

The Board concluded that IEPA cannot rely upon regulations not previously cited in the denial letter as support for denying Pulitzer's application for reimbursement. *Id.* Further, the information in the denial letter "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 reasons and regulatory and statutory bases for denial are inadequate to support permit denial." *Id.* at 6.

In this case, IEPA's failed to support the denial reasons cited in its letter to petitioner in its response/cross motion. Instead, IEPA raises a new argument in its response/cross motion. Therefore, the Board finds that IEPA's motion fails as a matter of law.

Further, a review of the record raises questions on IEPA's claim "it does not know why the work is being done now or if it is accomplishing anything" (CMot. at 5). The invoices

submitted by petitioner provide that information. For example, the January 2015 invoice notes that Engineer III, V.E. Smith, worked 45 minutes on the ELUC. R. at 317. In March of 2015, R. Haas, a Senior Account Technician did not work on reimbursement, but W.T. Sinnottt, the Senior Project Manager worked in the field on corrective action. R. at 319. IEPA's denial letter does not deny reimbursement because there has been no status report filed, instead IEPA's denial letter asserts that there is a lack of supporting documentation. The record does not support IEPA's stated denial reasons and IEPA cannot now change its reasons for denial of reimbursement. Therefore, the Board finds that IEPA's motion for summary judgment must be denied.

Reimbursement Will Not Violate the Act or Board Rules

The Board must decide whether the application as submitted will violate the Act or Board regulations. As discussed above, the Board is convinced that reimbursement of the claims as submitted will not violate the Act or Board regulations. The record includes invoices detailing the work. The request for reimbursement is within the approved budget. And the description of the work being performed is consistent with the corrective action plan. Therefore, the reimbursement will not violate the Act or Board regulations.

IEPA argues that petitioner has not submitted status reports required under the Act. However, IEPA's denial letter neither mentions a status report nor states that the lack of a status report would violate the Act. Therefore, the Board finds that the absence of a status report provides no impediment to granting petitioner's motion for summary judgment.

Legal Fees

Petitioner requests that the Board "award payment of attorney's fees." Pet. at 3; Mot. at 11. The Act gives the Board discretion to authorize payment of legal fees if the UST owner or operator prevails before the Board. 415 ILCS 5/57.8(1) (2020); *see also* 35. Ill. Adm. Code 734.630(g). The record, however, does not contain a request for a specific amount of legal fees. Petitioner also did not justify why the Board should exercise its discretion under Section 57.8(1) in this case. The Board directs petitioner to file a statement of eligible legal fees and justify why the Board should use its discretion to reimburse those fees under Section 57.8(1) of the Act. Petitioner must file its statement by September 15, 2022. IEPA may file response by September 29, 2022.

CONCLUSION

The Board finds there is no genuine issue of material fact and summary judgment is appropriate. The Board upon review of the record finds that petitioner proves that issuance of the requested reimbursement will not violate the Act or Board regulations. Therefore, the Board grants petitioner's motion for summary judgment and directs petitioner to file a statement of eligible legal fees.

The Board denies IEPA's cross motion as a matter of law, because IEPA relies on statutory and regulatory provisions not encompassed in IEPA's denial letter.

This interim opinion and order constitutes the Board's findings of fact and conclusions of law.

ORDER

The Board directs petitioner to file a statement of eligible legal fees and justify why the Board should use its discretion to reimburse those fees under Section 57.8(1) of the Act. Petitioner must file its statement by September 15, 2022. IEPA may file response by September 29, 2022.

IT IS SO ORDERED.

I, Don A. Brown, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above interim opinion and order on August 11, 2022, by a vote of 5-0.

A handwritten signature in cursive script that reads "Don A. Brown". The signature is written in black ink and is positioned above a horizontal line.

Don A. Brown, Clerk
Illinois Pollution Control Board