

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

J.D. STREETT & COMPANY, INC.,)	
Petitioner,)	
)	
v.)	PCB 2022-027
)	(LUST Appeal)
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
Respondent.)	

NOTICE

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

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,
Respondent



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Dated: February 28, 2023

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Petitioner,)	
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**ILLINOIS EPA'S CROSS MOTION FOR SUMMARY JUDGMENT OR IN THE ALTERNATIVE
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 **ILLINOIS EPA'S CROSS MOTION FOR SUMMARY JUDGMENT OR IN THE ALTERNATIVE 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").

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 \$11,791.28 for actions that lack supporting documentation and exceed the minimum requirements of the Act or whether the Illinois EPA should reimburse \$3,340.34 for backfill where no supporting documentation was provided or \$8,450.94 for a tank removal where the invoice from the entity that performed the work was also not provided? Or stated another way, can the Agency require invoices, purchase tickets, and other documentation for downstream subcontractors when deciding whether to reimburse UST cleanup costs?

Based upon the express language of the Act and regulations thereunder, and the facts presented, the answer is NO. Further, as discussed below, the Board has already ruled on this question in Friends of the Environment, NFP, v. IEPA, PCB 2016-102, July 21, 2016, by deciding in

the Agency's favor.

IV. FACTS

If the Board looks solely to the Administrative Record, there exists no issue of material fact. This case is a matter of the application of the law. The Illinois EPA must make corrections to the statements in the Petitioner's statement of undisputed facts but does not consider these material issues but merely typographical or other minor mistakes in the recitation. The address at the site is listed as both, 3325 South Park Avenue, Herrin, Illinois and 3225 South Park, Herrin, Illinois in the record both in State and Petitioner prepared documents. In fact, putting the addresses in Google Earth results in the same property being found. (See, AR 0014 for an explanation). Petitioner, on page 1 of its motion has the LPC# as 1990400008. That is the number for a different site with three different releases reported. The correct LPC# is 1990405102 and the LUST Incident # is 2021-0114. (AR 0003). Again, these are just minor errors within the Administrative Record and the Petitioner's motion and are not material issues prohibiting the granting of the Agency's Cross Motion for Summary Judgement.

On February 1, 2021, the Petitioner's consultant, CSD Environmental reported a release from an underground tank system to the Illinois Emergency Management Agency ("IEMA"). (AR 0001). On February 17, 2021, CSD Environmental filed the 20-Day Certification for the site. (AR 0004). On March 16, 2021, the Office of State Fire Marshal ("OSFM") made its eligibility and Deductible Determination. (AR 0007).

On March 29, 2021, Illinois EPA received the Petitioner's 45-Day Report. (AR 0057). On April 20, 2021, Illinois EPA granted a No Further Remediation letter ("NFR"). (AR 0142). This letter was revised on June 2, 2021 due to the address conflict described above. (AR 0152). This NFR was recorded on June 21, 2021. (AR 0162).

On May 17, 2021, Petitioner submitted a billing package for the work done during early action at the site. (AR 0180). A \$5,000 dollar deductible was applied at this time. (AR 0172, AR 0184 & AR 0241). On November 5, 2021, Illinois EPA issued a determination regarding reimbursement. The application covered a period from February 1, 2021 to August 17, 2021 and the amount requested was \$21,884.08. (AR 0241). The deductible of \$5000.00 was withheld from the reimbursement payment and a voucher for \$5,092.80 was prepared for submission to the Comptroller. (AR 0241). A total of \$11,791.28 was deducted from the application due to being ineligible for payment from the fund. The deductions were as follows:

\$3,340.34, deduction for costs for backfill, 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 Illinois 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.

In addition, deduction for site investigation or corrective action costs for backfill that are not reasonable as submitted. Such costs are ineligible for payment from the Fund pursuant to Section 57.7(c)(3) of the Act and 35 Ill. Adm. Code 734.630(dd).

Documentation/invoices provided do not match the amount requested for reimbursement. Invoices for the purchase of the backfill material as well as from the contractors/subcontractors that actually performed (transported and placed the backfill material) the work needs to be provided.

\$8,450.94, deduction for costs for UST removal, 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 Illinois 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.

In addition, deduction for site investigation or corrective action costs for UST removal that are not reasonable as submitted. Such costs are ineligible for payment

from the Fund pursuant to Section 57.7(c)(3) of the Act and 35 Ill. Adm. Code 734.630(dd).

An invoice from the company that removed the USTs and was listed on the OSFM permit was not submitted to the Illinois EPA. (AR 0244-0245).

This case was appealed to the Board December 10, 2021 and Petitioner's Motion for Summary Judgement was filed on February 7, 2023.

V. LAW

Section 734.605 Applications for Payment

- a) An owner or operator seeking payment from the Fund must submit to the Agency an application for payment on forms prescribed and provided by the Agency and, if specified by the Agency by written notice, in an electronic format. The owner or operator may submit an application for partial payment or final payment. Costs for which payment is sought must be approved in a budget, provided, however, that no budget must be required for early action activities conducted pursuant to Subpart B of this Part other than free product removal activities conducted more than 45 days after confirmation of the presence of free product.
- b) A complete application for payment must consist of the following elements:
 - 1) A certification from a Licensed Professional Engineer or a Licensed Professional Geologist acknowledged by the owner or operator that the work performed has been in accordance with a technical plan approved by the Agency or, for early action activities, in accordance with Subpart B of this Part;
 - 2) A statement of the amounts approved in the corresponding budget and the amounts actually sought for payment along with a certified statement by the owner or operator that the amounts so sought have been expended in conformance with the elements of a budget approved by the Agency;
 - 3) A copy of the OSFM or Agency eligibility and deductibility determination;
 - 4) Proof that approval of the payment requested will not exceed the limitations set forth in the Act and Section 734.620 of this Part;
 - 5) A federal taxpayer identification number and legal status disclosure certification;
 - 6) Private insurance coverage form(s);

- 7) A minority/women's business form;
- 8) Designation of the address to which payment and notice of final action on the application for payment are to be sent;
- 9) **An accounting of all costs, including but not limited to, invoices, receipts, and supporting documentation showing the dates and descriptions of the work performed; and**
- 10) ***Proof of payment of subcontractor costs for which handling charges are requested. Proof of payment may include cancelled checks, lien waivers, or affidavits from the subcontractor.*** (Emphasis added).

Section 734.610 Review of Applications for Payment

- a) At a minimum, the Agency must review each application for payment submitted pursuant to this Part to determine the following:
 - 1) **Whether the application contains all of the elements and supporting documentation required by Section 734.605(b) of this Part;**
 - 2) For costs incurred pursuant to Subpart B of this Part, other than free product removal activities conducted more than 45 days after confirmation of the presence of free product, whether the amounts sought are reasonable, and whether there is sufficient documentation to demonstrate that the work was completed in accordance with the requirements of this Part;
 - 3) For costs incurred pursuant to Subpart C of this Part and free product removal activities conducted more than 45 days after confirmation of the presence of free product, whether the amounts sought exceed the amounts approved in the corresponding budget, and whether there is sufficient documentation to demonstrate that the work was completed in accordance with the requirements of this Part and a plan approved by the Agency; and
 - 4) Whether the amounts sought are eligible for payment.
- b) When conducting a review of any application for payment, the Agency may require the owner or operator to submit a full accounting supporting all claims as provided in subsection (c) of this Section.
- c) The Agency's review may include a review of any or all elements and supporting documentation relied upon by the owner or operator in developing the application for payment, **including but not limited to a review of invoices or receipts**

supporting all claims. The review also may include the review of any plans, budgets, or reports previously submitted for the site to ensure that the application for payment is consistent with work proposed and actually performed in conjunction with the site. (Emphasis added).

Section 734.630 Ineligible Corrective Action Costs

Costs ineligible for payment from the Fund include, but are not limited to:

* * *

- cc) Costs that lack supporting documentation;

VI. ARGUMENT

There exists no issue of material fact. This case is a matter of the application of the law. The Agency denied reimbursement in this case due to the lack of supporting documentation, specifically invoices documenting the work performed. The question revolves around subcontractors that performed work for whom no invoices were provided.

The Board's regulations are specific, and Section 734.605 provides, in part, as follows:

- 9) An accounting of all costs, including but not limited to, invoices, receipts, and supporting documentation showing the dates and descriptions of the work performed; and
- 10) **Proof of payment of subcontractor costs** for which handling charges are requested. Proof of payment may include cancelled checks, lien waivers, or affidavits from the subcontractor. (Emphasis added).

The issues in this case are very similar to that in T-Town Drive Thru, Inc. v. Illinois EPA, PCB 2007-085, April 3, 2008, in which the Board held in favor of the Illinois EPA on this exact argument. In T-Town, the Board held that a "subcontractor invoice stating what the subcontractor is charging, while itself not proof of payment, does help to document the actual costs incurred and work performed. Without that information here, the Agency could not properly determine whether all of the claimed analytical costs were eligible."

Like in T-Town, without the invoices from the subcontractors, the Agency cannot properly determine whether all of the claimed costs are eligible. In Clarendon Hills Bridal Center v. Illinois EPA, PCB 1993-055, February 16, 1995, the Board stated as follows:

“We find that the Agency is properly requiring applicants to the Fund to demonstrate that submitted costs are properly reimbursable. As stated above, based on Board precedent, the burden is on applicants to demonstrate that incurred costs are related to corrective action, properly accounted for, and reasonable.”

Freedom Oil Company v. Illinois EPA, PCB 2012-046, August 9, 2012, also concerned lack of supporting documentation. In that case, the Agency denied reimbursement since there was “no supporting documentation of costs, the Illinois 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”, specifically citing 415 ILCS 5/57.7(c)(3) and 35 Ill. Adm. Code 734.630(cc). In Freedom Oil, the Agency was also requesting invoices for all subcontractors performing the work and its determination was upheld by the Board in relation to excavation and backfill.

Finally, in Friends of the Environment, NFP, v. IEPA, PCB 2016-102, July 21, 2016, the Board held the “[i]n Illinois, when an underground storage tank (UST) containing petroleum leaks, the UST’s owner can seek reimbursement from the state UST fund for certain expenses incurred while cleaning up the leak. The Illinois Environmental Protection Agency reviews request for reimbursement from the fund and may decline to reimburse costs it deems unreasonable. When deciding whether certain costs are reasonable, the Agency must follow a set of Board-adopted procedures. Under those procedures, the UST owner must document all costs in its reimbursement application.” See, Friends, p.1. The facts set forth in Friends is very similar to the case at hand. In Friends, the “Agency determined that Friends’ backfill material, groundwater removal, and drum disposal costs lacked supporting documentation. They Agency also deducted handling costs. * * * The documents that Friends submitted included an invoice

from Orivne to Inland-Frycek, which listed the backfill, groundwater removal and drum disposal cost. However, Friends did not submit invoices or receipts from the downstream subcontractors specifically responsible for acquiring the backfill material, transporting and disposing of contaminated groundwater, or transporting and disposing of the drum of waste material.” In granting the Agency’s cross-motion for summary judgment, the Board discussed, on page 5 of its order, how the Board rules allow the Agency to require a full accounting supporting all claims. On page 6 of its order in Friends, the Board held that “[t]hough the definition of ‘full accounting’ does not distinguish between documents concerning work done by a general contractor versus a subcontractor (or sub-sub-contractor), the definition does not limit what the Agency may request, either. The regulation broadly grants authority, implying that the Agency can reject a reimbursement claim when certain receipts or invoices from downstream subcontractors are absent – a ‘full’ accounting must mean, at least that the Agency can request all invoices issued by contactors working on the cleanup.”

In his case, the Petitioner hired a contractor to perform a tank removal. That contractor hired a subcontractor to perform the actual work. The subcontractor was the entity that was issued a permit to perform the work. It is that subcontractor that the Agency needs invoices and supporting documentation from in order to determine if the work was done in accordance with the Act and regulations. As in Friends, without that information it is impossible for the Illinois EPA to do its statutory duty and reimburse the Petitioner for the costs requested.

It is Petitioner’s burden to show that the costs it requests are reasonable and comply with the Act and regulations. By not supplying the subcontractor invoices for the tank removal and the backfill, the Petitioner has not met its burden of proof that would allow the Agency to reimburse them for the costs.

VII. CONCLUSION

The facts, the law, and Board precedent are clear and in favor of the Illinois EPA. The Petitioner did not justify the costs requested by submitting adequate supporting documentation resulting in the costs being unreasonable and exceeding the minimum requirements of the Act.

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 favor of Illinois EPA.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,

Respondent



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Dated: February 28, 2023

This filing submitted on recycled paper.

CERTIFICATE OF SERVICE

I, the undersigned attorney at law, hereby certify that on **February 28, 2023**, I served true and correct copies of **ILLINOIS EPA'S CROSS MOTION FOR SUMMARY JUDGMENT OR IN THE ALTERNATIVE RESPONSE TO PETITIONER'S MOTION OF SUMMARY JUDGMENT** via the Board's COOL system and email, upon the following named persons:

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