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SEP 15 2003

BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

STATE OF ILLINOIS
Pollution Control Board

TODD'S SERVICE STATION,)	
Petitioner,)	
v.)	PCB No. 03-2
ILLINOIS ENVIRONMENTAL)	(UST Fund Appeal)
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 a RESPONSE TO PETITIONER'S POST-HEARING BRIEF, copies of which are herewith served upon you.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,
Respondent



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Dated: September 11, 2003

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RESPONSE TO PETITIONER'S POST-HEARING BRIEF

NOW COMES the Respondent, the Illinois Environmental Protection Agency ("Illinois EPA"), by one of its attorneys, John J. Kim, Assistant Counsel and Special Assistant Attorney General, and, pursuant to an order entered by the Hearing Officer dated July 28, 2003, hereby submits its Response to the Petitioner's Post-Hearing Brief to the Illinois Pollution Control Board ("Board").

I. 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. 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. Thus Todd's Service Station ("Todd's" or "the Petitioner") must demonstrate to the Board that it has satisfied its burden before the Board can enter an order reversing or modifying the Illinois EPA's decision under review.

II. STANDARD OF REVIEW

Section 57.8(i) of the Environmental Protection Act ("Act") 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 5/57.8(i)). Section 40 of the Act (415 ILCS 5/40) is the general appeal section for permits

and has been used by the legislature as the basis for this type of appeal to the Board. Therefore, when reviewing an Illinois EPA determination of ineligibility for reimbursement from the Underground Storage Tank Fund (“UST Fund”), the Board must decide whether or not the application, as submitted to the Illinois EPA, demonstrates compliance with the Act and Board regulations. Broderick Teaming Company v. Illinois EPA, PCB 00-187 (December 7, 2000).

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”), along with testimony provided at the hearing held on July 15, 2003, in this matter.¹ Based on the information within the Record and the testimony, along with the relevant law, the Illinois EPA respectfully requests that the Board enter an order affirming the Illinois EPA’s decision.

III. THE PETITIONER MISREPRESENTED THAT THE HOURS FOR WORK IN THE AMENDED BUDGET WERE APPROVED BY THE ILLINOIS EPA

In its Post-Hearing Brief (“Brief”), the Petitioner made statements that certain “facts” are uncontested. However, the statements are misleading at best. For example, the Petitioner stated that the Illinois EPA “orally authorized” Todd’s consultant (Midwest Environmental Consulting & Remediation Services, Inc., or “Midwest”) to perform additional work related to site remediation. Petitioner’s Brief, p. 2. Presumably, this is supported by reference to conversations that took place between James Malcolm of the Illinois EPA and Todd Birky of Midwest. Petitioner’s Brief, p. 3. The Petitioner notes that Mr. Birky testified that Mr. Malcolm made the suggestion that off-site sampling be conducted. Id.

Relying on this testimony, the Petitioner argues that it is “undisputed” that the hours of work that are the subject of the amended budget (AR, pp. 114-126) were reasonably necessary, and were expended either at the direction of the Illinois EPA or with the full approval of the

¹ Citations to the Administrative Record will hereinafter be made as, “AR, p. ____.” References to the transcript of the hearing will be made as, “TR, p. ____.”

Illinois EPA. Petitioner's Brief, p. 7. That is a false and, at best, misleading statement. First, there is no question but that the hours set forth in the amended budget are in dispute, as that forms the very basis for the appeal. What may be undisputed, at least from the Petitioner's perspective, is that Midwest billed the Petitioner for those hours and that Midwest claims it provided work for all those hours. However, that does not mean that the Illinois EPA did not, and does not now, find that those hours were excessive for the work described. Also, there is clearly a question as to whether those hours were reasonably necessary. The Illinois EPA has taken the position, as memorialized in its decision of June 7, 2002 (AR, pp. 136-139), that not all of the hours included in the amended budget were reasonably necessary. Rather, the Illinois EPA in the final decision and in testimony elicited at the hearing described what hours it did believe to be reasonable.

The Petitioner also argues that the work related to the hours in the amended budget was performed at the direction of the Illinois EPA or with its full approval. Again, that is a misleading statement. The Illinois EPA did not approve any of the hours of work as listed in the amended budget, since that is the purpose of such an amendment itself, i.e., to seek approval for the hours of work listed. In this case, the amended budget was submitted after the work itself was performed, so the request for approval of a budget for the hours of that work post-dated the performance of the work. The Petitioner seems to be claiming that conversations between representatives of Midwest and the Illinois EPA formed the basis for the claim that the work was approved.

Pursuant to the Illinois Environmental Protection Act ("Act")² and Section 732.503 of the Board's regulations (35 Ill. Adm. Code 732.503), the Illinois EPA must issue approvals of plans

² Because of an unusual Spring 2003 legislative session, there are four Public Acts that amend the relevant provision of the Act. Section 57.7(c)(4) of the Act (415 ILCS 5/57.7(c)(4)) as was effective on July 25, 2002, provides that

or budgets submitted for approval in writing within a specified time period. In the present case, the most recent final decision issued in response to the budget amendment is the decision under appeal. That decision did not approve the hours of the work in question, and therefore the Illinois EPA did not approve the hours of the work in question. It is erroneous to state otherwise, as the Petitioner has sought to do.

Also, even if the assertion that a member of the Illinois EPA made a suggestion as to how the consultant for Todd's should proceed, in the end the Board must recognize that it is the role of the consultant, not the Illinois EPA staff, to determine proposals for how corrective action should be done at any given site requiring corrective action. If the Illinois EPA staff were imputed to have that responsibility, then the burden of preparing adequate documents for approval could also be transferred to the Illinois EPA staff. The defined roles for addressing corrective action at a site that has experienced a release from an underground storage tank ("UST") are that the owner or operator of the UST retains a consultant, and it is the responsibility of the owner or operator and its consultant to formulate what they believe to be an adequate and reasonable proposal to address the contamination. It is the responsibility of the Illinois EPA to then review and either approve, disapprove or modify those proposals.

The Petitioner is arguing here that the suggestion of the Illinois EPA, while certainly noteworthy, is tantamount to a pre-approval of the underlying work. That is not the case, since it is unclear from the Record in this situation exactly what was said or understood by both parties. Further, it is the responsibility of the Petitioner to present a reasonable and approvable plan or budget, even one that may incorporate a suggestion from a staffer of the Illinois EPA. If the Petitioner fails to meet that burden, then the alternate response that "the Illinois EPA told me to

the Illinois EPA shall issue approvals, disapprovals or modifications of plans (including budgets) in writing. That same requirement that approvals be issued in written form is also found in each of the four recent Public Acts that amend Section 57.7 (P.A. 92-554, P.A. 92-573, P.A. 92-651 and P.A. 92-735), though the specific citation varies.

do so” is not sufficient. The burden is solely on the Petitioner to submit approvable plans, since the Illinois EPA does not act as the consultant for the Petitioner.

The Illinois EPA strongly argues that the false and misleading assertions of the Petitioner not be given credence and should not weigh in the Board’s consideration of the decision under review.

II. THERE IS A CLEARLY DEFINED STANDARD OF REVIEW FOR REVIEWING BUDGETS

The Petitioner argues that the Illinois EPA has no defined standard of review for reviewing budgets, and that if there were standard, and if that standard were followed, then the Illinois EPA would be entitled to some deference. That statement is only partially correct, as there is a very clear standard set forth in the Act and Board regulations that is applicable and was properly applied.

Section 57.7(c)(4)(C) of the Act (415 ILCS 5/57.7(c)(4)(C))³ provides that the Illinois EPA shall determine, by a procedure promulgated by the Board, that the costs associated with the plan (or budget) are reasonable, will be incurred in the performance of corrective action, and will not be used for corrective action activities in excess of those required to meet the minimum requirements of Title XVI of the Act. The procedure and standard promulgated by the Board in conjunction with that statutory provision is found at Section 732.505 of the Board’s regulations (35 Ill. Adm. Code 732.505). Section 732.505 details the standards for review of plans or reports, included among which are budgets. Even more guidance is found in Section 732.606 of the Board’s regulations (35 Ill. Adm. Code 732.606), which lists costs that are ineligible for payment from the UST Fund.

³ This is the citation found in the final decision (AR, p. 138) and refers to the version of the Act in effect at the time of issuance of the decision.

The Illinois EPA's final decision included citations to these statutory and regulatory provisions. The standards were thus set forth, as defined by the Act and Board's regulations. The Illinois EPA in turn made its decision consistent with, and through application of, the applicable standards. The Illinois EPA's final decision to reduce the hour rate and number of hours of certain workers and work was done based on a determination that the figures proposed were unreasonable.

II. THE ILLINOIS EPA PROPERLY REDUCED THE HOURLY RATES AT ISSUE

The Illinois EPA's final decision under appeal consisted of two deductions that have been challenged by the Petitioner; namely, reduction in the hourly rates for certain titles and a reduction in the number of hours sought for a job title.

In the case of the hourly rate deductions, Harry Chappel of the Illinois EPA testified that the hourly rate for an Environmental Hydrogeologist sought for approval in the amended budget was \$98.00/hour, and that the rate was reduced to \$85.00/hour in the final decision. AR, pp. 55-57, 119, 138. In addition, the requested hourly rate for a Senior Environmental Manager was reduced from \$110.00/hour to \$100.00/hour (TR, pp. 77; AR, pp. 119, 138), and the requested rate of \$110.00/hour for a Professional Geologist was reduced to \$100.00/hour. AR, pp. 119, 138; Respondent's Exhibit 1. Mr. Chappel testified that the decision to reduce the hourly rates was not his, but that he left that portion of the amended budget's review to Mr. Malcolm. TR, p. 77. However, Mr. Chappel also noted that the decision to reduce the hourly rate for an Environmental Hydrogeologist from the \$98.00/hour requested to \$85.00/hour was also made in an earlier decision by the Illinois EPA. TR, pp. 54-57. In a decision dated November 1, 2000, the Illinois EPA decided that the requested rate of \$98.00/hour for an Environmental Hydrogeologist (AR, p. 80) should be reduced to \$85.00/hour. AR, p. 100.

The burden for establishing that an hourly rate in the amended budget is reasonable is upon the Petitioner. Here, the Petitioner provided no information within the amended budget that defined how the hourly rates sought for approval were arrived at. In testimony at hearing, Al Green of Midwest testified that it was his opinion that the requested rates were reasonable and customary, but he did not provide any details as to how those particular rates were calculated and submitted by Midwest in the amended budget. TR, pp. 23-24. Therefore, there was absolutely no information provided in the amended budget documents that described how the rates in question were determined by Midwest. The only information offered by the Petitioner in support of those rates was provided at hearing, and then again no details on the manner in which the rates were calculated were provided. It cannot be enough for an applicant to simply offer a figure or rate with no corresponding explanation and expect that the figure or rate will be approved with no further scrutiny. Given this dearth of supporting information, the Board should find that the Petitioner has failed to meet its burden of demonstrating how the rates in question were reasonable and why they should have been approved.

Mr. Chappel testified that the decision to reduce that hourly rate was arrived at through usage of a standard internal rate that was developed through taking a medium [sic] and adding a standard deviation to a summary of costs over several years. TR, p. 75. The use of such a rate is not inconsistent with earlier Illinois EPA usage of a fixed figure for handling charges, prior to those particular charges being more specifically defined in statute and regulation.⁴ The use of such a rate as a guideline is not impermissible and, in the face of no other documentation or information from the applicant, should not be deemed inappropriate. Rather, it is an effective

⁴ For example, in the case of Chuck and Dan's Auto Service v. Illinois EPA, PCB 92-203 (August 26, 1993), the Illinois EPA described how it applied a figure to assist in determinations of what costs or dollar amounts are reasonable. The Board agreed that the development and use of the rate, in a manner not inconsistent with the internal rate described in Mr. Chappel's testimony, was acceptable.

tool by which the Illinois EPA can conduct reviews, especially when the applicant provides no other related information.

Given that the Petitioner did not provide any accounting, explanation or other information as to how it calculated the hourly rates sought for approval, the Illinois EPA's decision to reduce those rates to figures it believed to be reasonable based upon averaging of related costs over several years was appropriate. The Illinois EPA respectfully requests that the Board affirm the Illinois EPA's decision to reduce the hourly rates in question.

III. THE ILLINOIS EPA PROPERLY REDUCED THE HOURS OF WORK AT ISSUE

In its June 7, 2002 final decision, the Illinois EPA also approved a reduced number of hours of work compared to that sought by the Petitioner. These reductions are for work performed by a Senior Project Manager, Environmental Hydrogeologist, Senior Environmental Manager, Professional Engineer, Principal and Project Manager. AR, pp. 119, 138; Respondent's Exhibit 1.

The hours requested for those job titles were provided in line items in the amended budget proposal. AR, p.119. Included in the line items were short descriptions of the tasks to be performed related to the requested hours. Similarly, in the earlier budget submitted by the Petitioner, short descriptions of the tasks to be performed were included in the line items along with the number of hours sought for approval. AR, p. 80.

Todd Birky, an employee of Midwest, confirmed in the task descriptions for the job title line items, there was no breakdown of how many hours were attributable for each of the listed tasks. TR, p. 47. Indeed, except for the information found on those line items, there is no further description in the proposed budget amendment that gives any insight as to how those figures were calculated or what types of specific actions were included within the tasks. For example,

six of the eight listed personnel titles have "CACR" listed as a task. AR, p. 119. The acronym "CACR" likely refers to a Corrective Action Completion Report, but except for the line for the Professional Engineer ("CACR review and certification"), there is no way to know how many hours were spent on the CACR by each personnel, nor what they did relative to the CACR. Similarly, for those positions that have an entry of "highway authority agreement," there is no information as to what was done relative to the highway authority agreement, or how many hours were spent in so doing.

Mr. Chappel testified that the decision to reduce the number of hours in question was his. TR, p. 77. He testified that there were no standard tasks or standard hours for tasks used by staff at the Illinois EPA, so that there is some subjectivity involved in reviewing a budget proposal. He explained that since there are no set hours for any given task, he would review the hours proposed for a given task by taking into account three factors: 1) Experience that the reviewer had reviewing submittals for similar tasks; 2) Experience gleaned by having personally done those tasks; and 3) The specific information provided in the application given by the applicant. TR, p. 79.

As to the specific reasons for imposing the reductions, he testified that, in comparing the proposed budget amendment with the original budget (approved on November 1, 2000) (AR, pp. 98-101), he found certain tasks to have been already approved or referenced in part. TR, pp. 67-68; AR, pp. 80, 119. Since there was no explanation or description provided by the Petitioner when submitting the amended budget proposal, and there were clearly duplicative acts between the original budget and the amended budget. Therefore, Mr. Chappel relied on his experience in having reviewed submittals for similar tasks and his experience at having personally been involved in such work. He testified that such experience was in the hundreds of sites, and could

be close to a thousand. TR, pp. 50-51. Further, as described above, there was no specific information within the proposed amended budget other than the short task descriptions.

The Petitioner and its consultant had the clear burden of providing an adequate package for the amended budget. The information contained therein was lacking though, and did not have sufficient information by which a reviewer could determine who did what and for how long. In this context, Mr. Chappel's decision, based on his lengthy experience and the lack of information supplied by the Petitioner, was appropriate and resulted in a reasonable decision.

In its brief, the Petitioner argued that Mr. Chappel stated he had no evidence that the hours were not actually expended, and that he did not know how many hours were expended by Midwest on the project. Petitioner's Brief, p. 8. The Petitioner also noted Mr. Chappel's testimony regarding other site-specific elements of the corrective action. *Id.* This testimony, argued the Petitioner, is indicative of the Illinois EPA's failure to articulate a valid reason for the rejection of certain hours.

Unfortunately for the Petitioner, the testimony cited to has no bearing on whether the hours sought for approval were reasonable as submitted. Whether the hours were actually expended, or how many hours were actually expended, is not relevant to the decision of whether the hours presented in the budget were themselves reasonable. If Midwest had spent three times the number of hours as were presented, and provided every scintilla of evidence documenting that they had been expended, would that proof or knowledge thus result in a conclusion that the hours were reasonable? The answer is no. Even if Mr. Chappel had complete knowledge that the hours in the amended budget were actually expended, or that a greater number of hours was spent than was requested for approval, that still would not affect the decision here of whether the hours actually presented in the budget are reasonable for the tasks described.

The Petitioner also claims that there were difficulties inherent in obtaining the highway authority agreements for the site, and that Mr. Chappel's testimony as to his personal experience with such documents should weigh in favor of the Petitioner. Petitioner's Brief, p. 8. The Petitioner conveniently overlooks Mr. Chappel's other testimony that there was no information or documentation within the proposed amended budget that described any of the difficulties claimed by Midwest at the hearing. TR, p. 78. As seen by the Record, the only time that the Petitioner or its consultant provided any documentation as to difficulties in obtaining the highway authority agreements was in testimony at hearing, not in the submission to the Illinois EPA that formed the basis for the final decision under appeal.

The lack of information provided by the Petitioner regarding the tasks and hours sought for approval for those tasks were the ultimate cause for the final decision here. The actions taken by the Illinois EPA were correct given that lack of information, and the decision was consistent with the standards set forth in the Act and Board's regulations. The Illinois EPA therefore respectfully requests that the Board affirm the decision to reduce the number of hours as done in the June 7, 2002 final decision.

V. CONCLUSION

For all the reasons and arguments included herein, the Illinois EPA respectfully requests that the Board affirm its June 7, 2002 decision. The Illinois EPA acted appropriately and in conformity with its statutory and regulatory obligations and guidelines, while the Petitioner did not provide near the information in the amended budget needed to support a finding to the contrary. Based on the facts and legal arguments contained herein, the Illinois EPA asks that the Board affirm the Illinois EPA's decision dated June 7, 2002.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,
Respondent



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217/782-5544, 217/782-9143 (TDD)

Dated: September 11, 2003

This filing submitted on recycled paper.

CERTIFICATE OF SERVICE


I, the undersigned attorney at law, hereby certify that on September 11, 2003, I served true and correct copies of a RESPONSE TO PETITIONER'S POST-HEARING BRIEF, by placing true and correct copies in properly sealed and addressed envelopes and by depositing said sealed envelopes in a U.S. mail drop box located within Springfield, Illinois, with sufficient First Class Mail postage affixed thereto, upon the following named persons:

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