

ILLINOIS POLLUTION CONTROL BOARD
January 19, 2006

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| MCLEAN COUNTY ASPHALT, |) | |
| |) | |
| Petitioner, |) | |
| |) | |
| v. |) | PCB 05-154 |
| |) | (UST Appeal) |
| ILLINOIS ENVIRONMENTAL |) | |
| PROTECTION AGENCY, |) | |
| |) | |
| Respondent. |) | |

ORDER OF THE BOARD (by G.T. Girard):

On February 14, 2005, McLean County Asphalt (petitioner) filed a petition for review of an Illinois Environmental Protection Agency (Agency) decision rejecting an amended budget for the remediation of a site in Bloomington, McLean County. Petitioner filed the petition pursuant to Section 57.7(c)(4)(D) of the Environmental Protection Act (Act) (415 ILCS 5/57.7(c)(4)(D) (2004)). The Board accepted the petition for hearing on March 16, 2005. On November 14, 2005, petitioner filed a motion for summary judgment and on December 5, 2005, the Agency responded in opposition to the motion. For the reasons discussed below the Board denies the motion for summary judgment.

FACTS

On September 9, 2004, petitioner submitted a “Second Amended Corrective Action Plan and Budget” (Amended Plan) to the Agency. Mot. at 1. On January 6, 2005, the Agency refused to review the Amended Plan. *Id.* In the denial letter the Agency asserts that the Agency had already taken final action on the Amended Plan and petitioner had failed to appeal that final action. *Id.*; Resp. at 1-2.

STANDARD OF REVIEW FOR MOTIONS FOR SUMMARY JUDGMENT

Summary judgment is appropriate when the pleadings, depositions, admissions on file, and affidavits disclose that there is 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). In ruling on a motion for summary judgment, the Board “must consider the pleadings, depositions, and affidavits strictly against the movant and in favor of the opposing party.” *Id.* Summary judgment “is a drastic means of disposing of litigation,” and therefore it should be granted only when the movant’s right to the relief “is clear and free from doubt.” *Id.*, citing Purtill v. Hess, 111 Ill. 2d 299, 240, 489 N.E.2d 867, 871 (1986). However, a party opposing a motion for summary judgment may not rest on its pleadings, but must “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 (2nd Dist. 1994).

ARGUMENTS

Petitioner argues that there are no genuine issues of material fact and that the Board may grant summary judgment as a matter of law. The Agency disagrees and argues that the record does not include sufficient facts to determine the outcome of the appeal. The following paragraphs summarize the parties' positions.

Petitioner's Arguments

Petitioner asserts that there are no genuine issues of material facts. Specifically, petitioner asserts that the cost associated with the completion of the amended plan were in excess of the amounts approved in the budget. Mot. at 2. Petitioner argues that pursuant to Section 57.8(a)(5) of the Act (415 ILCS 5/57.8(a)(5) (2004)), petitioner sought Agency approval of the additional costs. *Id.* Petitioner argues that the Agency's failure to review, approve, reject, or require modification of the Amended Plan is a violation of the Act. Mot. at 2-3. Petitioner argues that the Agency's prior action was not a final action as defined by Section 57.7(c)(1) of the Act (415 ILCS 5/57.7(c)(1) (2004)). *Id.* Petitioner asks the Board to grant summary judgment and direct the Agency to review the Amended Plan. *Id.*

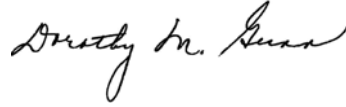
Agency's Arguments

The Agency asserts that a final decision on the Amended Plan had been made previously and petitioner failed to appeal that decision. Resp. at 2. The Agency points out that in Kean Oil Company v. IEPA, PCB 97-146 (May 1, 1997) the Board determined that a petitioner cannot restore or resurrect an appeal right by resubmitting a request. Resp. at 2. The Agency argues that summary judgment cannot be granted in this case because the record is unclear as to whether the original budget and the Amended Plan are identical or similar enough to support the Agency's January 6, 2005 decision. *Id.* The Agency argues that the decision cannot be reached without reviewing both documents and the original budget is not in the record. *Id.* Therefore, the Agency argues issues of fact exist and summary judgment should be denied. Resp. at 3.

DISCUSSION

Summary judgment is appropriate only if there are no genuine issues of material fact. The issue in this appeal is whether or not the Agency's decision is correct. The Agency determined that the Agency would not to review the Amended Plan because the Agency had previously made a final decision on the Amended Plan or a plan identical to the Amended Plan. For the Board to decide the validity of the Agency's denial reasons, the Board must review both plans or at a minimum testimony on the content of the plans. The record does not contain this information at this time. The substance of the plans is an issue of fact. Therefore, the Board finds that there are genuine issues of material fact and summary judgment is not appropriate. The Board denies the motion for summary judgment and directs that this matter proceed to hearing.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on January 19, 2006, by a vote of 4-0.

A handwritten signature in cursive script that reads "Dorothy M. Gunn".

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board