

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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STATE OF ILLINOIS
Pollution Control Board

BROADUS OIL,)	
)	
Petitioner,)	
)	
v.)	PCB 04-31
)	PCB 05-43
ILLINOIS ENVIRONMENTAL PROTECTION)	(UST Appeal)
AGENCY,)	(Consolidated)
)	
Respondent.)	

RESPONSE TO MOTION FOR SUMMARY JUDGMENT AND CROSS-MOTION FOR SUMMARY JUDGMENT

NOW COMES Petitioner, BROADUS OIL ("Broadus"), through its undersigned attorney, and pursuant to Section 101.516 of this Board's procedural rules, 35 Ill. Adm. Code Section 101.516, hereby responds to the Motion for Summary Judgment filed by Respondent ILLINOIS ENVIRONMENTAL PROTECTION AGENCY ("Illinois EPA"), and submits its own cross-motion for summary judgment. Broadus states as follows:

INTRODUCTION

This is a consolidation of two actions filed by Broadus challenging related decisions of the Illinois EPA with respect to a LUST remediation project at Broadus' LaSalle County facility. PCB 04-31 concerns the IEPA's August 6, 2003 denial of Broadus's High Priority Corrective Action Plan Budget amendment, and PCB 05-43 concerns the IEPA's September 8, 2003 denial of Broadus's request for reimbursement of the costs of the remediation work associated with that amendment. The sole reason for denial of reimbursement was that the budget amendment had not been approved, and the sole reason the budget amendment had not been approved was the Illinois EPA's contention that the budget amendment had been submitted subsequent to issuance of a No Further Remediation ("NFR") letter, and therefore the amended budget could not be

approved, and reimbursement could not be approved, both as a matter of law. Accordingly, both PCB 04-31 and 05-43 turn exclusively on the issue of whether the Illinois EPA correctly denied the budget amendment.

FACTS

The facts before this Board are undisputed, and Broadus accepts as accurate the statement of facts set forth in the Illinois EPA's motion for summary judgment; Broadus hereby incorporates those facts as its own, in support of both its response to the Illinois EPA's motion for summary judgment, and of its own cross-motion for summary judgment. Broadus would emphasize, however, several facts not drawn out in the Illinois EPA's motion.

Prior to the submittals at issue in this case, Broadus had submitted previous plans and budgets for Illinois EPA approval, and had conducted remedial work and obtained reimbursement for some of that work. (AR 37; AR 64). The most recent submittals prior to those at issue in this case were an amended corrective action plan and budget submitted March 12, 2002, and approved on March 27, 2002. (AR 37). A previous request for reimbursement had been submitted on August 29, 1996, to which the deductible was applied. (AR 64).

The budget amendment at issue in this case sought to add the costs of an engineered barrier which had been constructed at the site, and which was necessary to assure that no exceedances of inhalation objectives would occur at the site, as well as personnel costs associated with CACR completion. (AR 41 – AR 42). In reviewing the budget amendment, the Illinois EPA did not question that the engineered barrier was necessary to address inhalation exceedances, but instead denied only on the basis of 35 Ill. Adm. Code Section 732.405(d); the reviewer stated: "Amendments will not be reviewed following issuance of nfr letter." (AR 58).

The letter from the Illinois EPA to Broadus denying the budget amendment also only cited Section 732.405(d):

“Pursuant to 35 Ill. Adm. Code 732.405(d), plans submitted to the [Illinois EPA] for review and approval, rejection or modification in accordance with the procedures in Subpart E must be submitted prior to the issuance of a No Further Remediation Letter. This budget was received after the December 17, 2002 issuance of the No Further Remediation Letter.”

(AR 59).

Broadus separately submitted a reimbursement application, seeking a total of \$62,299.21. The Illinois EPA allowed payment of \$37,989.23, but denied \$24,289.70 that was associated with the denied budget amendment. (AR 66). (The Illinois EPA also denied \$19.02 for unreasonable costs. Broadus hereby waives argument with respect to that \$19.02 denial, and seeks no further reimbursement of that amount.)

Broadus submitted all information necessary for issuance of the NFR on November 21, 2002, and the Illinois EPA issued the NFR letter on December 17, 2002. (AR 1). The request for a budget amendment was dated May 12, 2003, and received by the Illinois EPA on July 24, 2003 (AR 59), and the request for reimbursement that included the budget amendment items was received by the Illinois EPA on August 12, 2003. (AR 64). The budget amendment was denied by letter dated August 6, 2003 (AR 59), and the reimbursement request was denied by letter dated September 8, 2003. (AR 64).

All work reflected in both the requested budget amendment and the reimbursement request was conducted prior to the issuance of the NFR letter on December 17, 2002. (AR 37 – AR 58).

STANDARD

Although the Illinois EPA accurately sets forth certain standards applicable to this Board's determinations in underground storage tank fund reimbursement cases, the Illinois EPA has failed to recognize a number of other salient factors.

First, the Illinois EPA has recognized that "the facts in this case are undisputed" (Illinois EPA motion, at 2). Indeed, the Illinois EPA even acknowledges that "[t]he question in this case is not one of fact, but rather of law." (Illinois EPA motion, at 6). As this Board has noted, "[t]he law is well settled that when reviewing a question of law the reviewing court should use the *de novo* standard of review." City of Kankakee v. County of Kankakee, PCB 03-125, 03-133, 03-134, and 03-135 (cons.), 2003 Ill. ENV LEXIS 462, at *34 (Ill. PCB, Aug. 7, 2003) (citing Panhandle Eastern Pipe Line Co. v. IEPA, 314 Ill. App. 3d 296, 734 N.E. 2d 18 (4th Dist. 2000)).

Because there is no factual issue in this case, there is no question as to whether Broadus met its burden of proof in its underlying submittal. Factually, there is no question as to what information Broadus submitted, and as to whether, other than the issue identified by the Illinois EPA, that information would have qualified Broadus for reimbursement. The only issue is whether the regulatory provision cited by the Illinois EPA, 35 Ill. Adm. Code 732.405(d), constitutes a basis for rejecting both the budget amendment and the request for reimbursement.

The standard of review for this Board, proceeding pursuant to Section 40 of the Illinois Environmental Protection Act, 415 ILCS 5/40, is to determine whether the application, as reviewed by the Illinois EPA, would not violate the Act and this Board's regulations. Only information considered by the Illinois EPA at the time its rendered its decision can be considered, and the Illinois EPA's denial letter frames the issues on appeal. Swif-T Food Mart v. Illinois EPA, PCB 03-185, slip op. at 11 (May 20, 2004).

ANALYSIS

The Illinois EPA rejected Broadus's budget amendment, and subsequently denied reimbursement, based upon the second sentence of 35 Ill. Adm. Code Section 732.405(d). That subsection concerns the right of owners/operators to proceed with remediation prior to submittal or approval of a corrective action plan or budget, and the sentence in question provides:

"However, any such plan and budget plan shall be submitted to the [Illinois EPA] for review and approval, rejection or modification in accordance with the procedures contained in Subpart E of this Part prior to payment for any related costs or the issuance of a No Further Remediation Letter." A Board Note following the subsection advises: "Owners or operators proceeding under subsection (d) of this Section are advised that they may not be entitled to full payment from the Fund. Furthermore, applications for payment must be submitted no later than one year after the date the Agency issues a No Further Remediation Letter. See Subpart F of this Part."

The sum total of the Illinois EPA's argument in this case consists of a single paragraph at page 6 of its motion, in which the Illinois EPA defines the issue presented as "whether the Illinois EPA can consider a High Priority Corrective Action Plan Budget Amendment after the issuance of a No Further Remediation Letter," and cites Section 732.405(d) as the only basis for answering that question in the negative: "The Illinois EPA is prohibited from reviewing the High Priority Corrective Action Plan Budget Amendment pursuant Section 732.405(d)." (Illinois EPA motion, at 6).

The Illinois EPA is completely misconstruing the language specifically at issue at Section 732.405(d), and in fact misconstrues the entirety of that section. The Section is entitled "Plan Submittal and Review." Subsection (a) of Section 732.405 concerns the general requirement that remediation plans be submitted for Illinois EPA review prior to conducting any remediation

activities pursuant to those plans. Subsection (b) provides that, if an owner/operator intends to seek reimbursement for remediation, the owner/operator shall also submit budget plans for the remediation work being proposed. Subsection (c) confirms that the Illinois EPA has authority to review, approve, reject or require modification of any plans submitted to it. Subsection (e) provides that whenever an owner/operator realizes after approval of any plan or budget that modifications are necessary to comply with the Illinois Environmental Protection Act or this Board's regulations, the owner/operator "shall submit, as applicable, an amended groundwater monitoring plan, corrective action plan or associated budget plan for review by the [Illinois EPA]." Subsection (f) of Section 732.405 concerns the Illinois EPA's authority to require revised corrective action plans in the event an approved plan is not working as anticipated.

It is against this backdrop that this Board included subsection (d), which begins: "Notwithstanding subsections (a), (b), (e), and (f) of this Section and except as provided at Section 732.407 of this Part [pertaining to alternative technologies, and prohibiting reimbursement for conventional technology following unsuccessful alternative technology for which no pre-approval has been received], an owner or operator may proceed to conduct Low Priority groundwater monitoring or High Priority corrective action activities in accordance with this Subpart D prior to the submittal or approval of an otherwise required groundwater monitoring plan or budget plan or corrective action plan or budget plan." In other words, Subsection (d) concerns those instances where an owner/operator submits no remediation plan or budget for approval prior to conducting remedial activities, and the regulation allows the owner/operator to nevertheless proceed with that remediation. The sentence in question then follows: "However, any such plan and budget plan shall be submitted to the [Illinois EPA] for review and approval, rejection, or modification in accordance with the procedures contained in

Subpart E of this Part prior to payment for any related costs or the issuance of a No Further Remediation Letter.” Hence, the work can be completed without a remediation plan, but the remediation plan must be submitted before reimbursement can be obtained for that work, and/or before an NFR is issued as a result of that work.

Nothing in this language prohibited the Illinois EPA from considering Broadus’s budget amendment proposal, and consequently denying the associated reimbursement costs. Simply put, Broadus was not “proceeding under subsection (d) of this Section,” as indicated in the Board Note following that subsection, but instead Broadus was proceeding under subsection (a), having submitted the appropriate High Priority corrective action plan and budget in advance of conducting the work, and Broadus also was proceeding pursuant to subsection (e), which allows amendment of any such budget. Nothing in subsections (b) or (e) requires that such amendments be requested prior to issuance of an NFR, but to the contrary the only such restriction is with respect to subsection (d), and its consideration of remediation conducted without any advance approval whatsoever.

Read correctly, the regulatory scheme makes perfect sense. Clearly an NFR should not be issued for a site before the corrective action plan for that site has been reviewed and compared with finalization of remediation, nor should any reimbursement be approved for a site for which no budget whatsoever has ever been submitted. On the other hand, where as here a site has already received Illinois EPA review and scrutiny, including both for corrective action and for budget, and in fact where the corrective action for which reimbursement is sought has been determined to have been effective, no reason exists, and none was inserted in this Board’s regulations, limiting budgetary amendments only to those requested prior to issuance of the NFR.

Again, subsection (d) simply does not apply to this site, or to Broadus's request.

It is notable that the Illinois EPA has attempted to identify the source of regulatory authority for its action in Subpart D of Part 732, concerning Corrective Action, rather than in Subpart E, concerning the review of plans, budget plans and reports, or in Subpart F, concerning payment to owners/operators from the fund. Section 732.505(c) concerns full financial reviews of submitted plans, but says nothing about rejecting budget plans that were submitted after the issuance of an NFR for work completed prior to issuance of the NFR. Similarly, Section 732.606 provides a lengthy list of costs that are ineligible to be considered corrective action and thus are not reimbursable, yet not a one of these even suggests that costs associated with an amended budget, for which the work was completed prior to issuance of the NFR but for which the budget amendment was not submitted until after issuance of the NFR, is ineligible. Notably, though, Section 732.606 does include reference to costs incurred after an owner/operator receives the NFR letter (732.606(kk)) and also includes a blanket prohibition on recovery for "[c]osts submitted more than one year after the date the [Illinois EPA] issues a No Further Remediation Letter pursuant to Subpart G of this Part." (732.606(rr)). Presumably had this Board intended to impose a blanket prohibition against reimbursement for costs incurred prior to NFR issuance but subject to a budget amendment submitted after that, this Board would clearly have so indicated in the regulatory provision most likely to include that prohibition. This Board did not do so, thereby underscoring Broadus's interpretation that no such blank prohibition was intended, but instead Section 732.405(d) was intended solely to address those situations where no prior corrective action plan and budget had been reviewed or approved by the Illinois EPA prior to the NFR issuance.

In addition to the lack of regulatory support for its position, the Illinois EPA also lacks any statutory basis. (Of course, if the regulation supports the Illinois EPA, but is itself contrary to the statute, the regulation must be deemed void and the statute controls. See 5 ILCS 100/10-55 (c)). Even if this is the type of case subject to 732.406(d), the Illinois EPA's interpretation of the regulation will only apply if it is consistent with the Illinois Environmental Protection Act's treatment of the subject, but it is not. Section 57.7(e) of the Act, 415 ILCS 5/57.7(e), addresses the issue. That subsection allows an owner/operator to elect to proceed with any corrective action "prior to the submittal or approval of an otherwise required plan. If the owner or operator elects to so proceed, an applicable plan shall be filed with the [Illinois EPA] at any time." (415 ILCS 5/57.7(e)(1) (emphasis added). That subsection continues by requiring the Illinois EPA to "proceed to review in the same manner as required under this Title." (415 ILCS 5/57.7(e)(2)). In turn, Section 57.8 concerns the underground storage tank fund, and Section 57.9 concerns eligibility for reimbursement from that fund (415 ILCS 5/57.8 and 5/57.9); neither says a thing about ineligibility based upon an amended budget being submitted to approve payment for admittedly required corrective action subsequent to issuance of the NFR.

Simply put, there is no statutory or regulatory authority for the Illinois EPA's action in this case.

The facts before this Board are undisputed, and it is conceded by the Illinois EPA that the work for which the amended budget and reimbursement are sought was corrective action activities eligible for reimbursement from the fund, no genuine issue of material fact exists, and Broadus is entitled to this Board's judgment as a matter of law requiring the Illinois EPA to approve the budget amendment, and approve reimbursement of \$24,289.70 in rejected corrective action costs.

WHEREFORE, Petitioner, BROADUS OIL, requests that this Board deny the motion for summary judgment submitted by Respondent ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, and enter a summary judgment in favor of Broadus Oil ordering the Illinois Environmental Protection Agency to approve Broad Oil's proposed amended budget and approve for reimbursement an additional \$24,289.70 in corrective action costs, and award to Broadus Oil all such other and further relief as is within this Board's authority and jurisdiction.

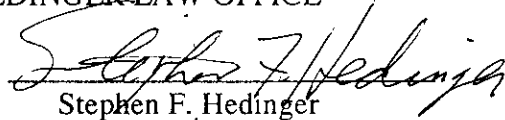
Respectfully submitted,

BROADUS OIL,
Petitioner,

By its attorney,

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Respondent.

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The undersigned certifies that an original and nine copies of Petitioner's Response to Motion for Summary Judgment and Cross-Motion for Summary Judgment were served upon the Clerk of the Illinois Pollution Control Board, and one copy was served upon the hearing officer and the above party of record in this case by enclosing same in envelopes with postage fully prepaid, and by depositing said envelopes in a U.S. Post Office Mail Box before 5:30 p.m. in Springfield, Illinois on the 13th day of September, 2006.


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