

ILLINOIS POLLUTION CONTROL BOARD
January 5, 2012

CITY OF TAYLORVILLE/TAYLORVILLE)
MUNICIPAL AIRPORT,)
)
Petitioner,)
)
v.) PCB 12-57
) (UST Appeal)
ILLINOIS ENVIRONMENTAL)
PROTECTION AGENCY,)
)
Respondent.)

ORDER OF THE BOARD (by C.K. Zalewski):

This order accepts for hearing the December 6, 2011 amended petition, and denies respondent's November 13, 2011 motion to dismiss this action.

INITIAL PETITION AND BOARD ORDER OF NOVEMBER 3, 2011

On October 21, 2011, the Mayor of the City of Taylorville (Taylorville or Petitioner) timely filed a petition asking the Board to review a September 14, 2011 determination of the Illinois Environmental Protection Agency (Agency). The petition was timely filed because it was postmarked on or before the filing deadline. See 415 ILCS 5/40(a)(1) (2010); 35 Ill. Adm. Code 101.300(b), 105.402, 105.404. The Agency's determination concerns Taylorville's leaking underground storage tank (UST) site located at the Taylorville Municipal Airport in Christian County.

The Agency September 14, 2011 determination letter, attached to the petition, recites that Taylorville requested reimbursement in the amount of \$127,383.77. After applying a \$5,000 deductible, the Agency approved payment of only \$86,840.89. The items the Agency declined to pay were:

\$19,011.69, deduction for costs for the removal, treatment, transportation, and disposal of more than four feet of fill material from the outside dimensions of the UST, as set forth in 35 Ill. Adm. Code 734.Appendix C, during early action activities conducted pursuant to 35 Ill. Adm. Code 734.210(f) . . . Such costs are ineligible for payment from the Fund pursuant to Section 57.6(b) of the Act and 35 Ill. Adm. Code 734.630(a).

The maximum amount of contaminated soil allowed by the regulations for one 5,000 gallon tank and one 10,000 gallon tank is 441 cubic yards but 734.98 cubic yards were excavated, transported and received at the landfill for disposal for a difference of 293.98 cubic yards.

\$6,583.73, deduction for costs for the removal, treatment, transportation, and disposal of more than four feet of fill material from the outside dimensions of the UST, as set forth in 35 Ill. Adm. Code 734.630(a), Appendix C, during early action activities conducted pursuant to 35 Ill. Adm. Code 734.210(f), . . . Such costs are ineligible for payment from the Fund pursuant to Section 57.6(b) of the Act and 35 Ill. Adm. Code 734.630(a).

The maximum amount of backfill allowed by the regulations for one 5,000 gallon tank and one 10,000 gallon tank is 531 cubic yards but 821.16 cubic yards were purchased for a difference of 290.16 cubic yards.

\$9,947.46, deduction for costs for above grade structures, which exceed the minimum requirements necessary to comply with the Act. Costs associated with site investigation and corrective action activities and associated materials or services exceeding the minimum requirements necessary to comply with the Act are not eligible for payment from the Fund pursuant to Section 57.7(c)(3) of the Act and 35 Ill. Adm. Code 734.630(o).

The dismantling and recycling of the chain link fence, fuel island and parking bumpers exceeds the minimum requirements necessary to comply with the Act. 9/14/11 Agency Det. Letter, Attach A at 1-2.

By order of November 3, 2011, the Board accepted Taylorville's petition for hearing as timely filed, but found that the petition was deficient. First, the Board observed that in an adjudicatory proceeding before the Board like this UST appeal, anyone other than an individual must be represented by an attorney licensed and registered to practice law. *See* 35 Ill. Adm. Code 101.400(a)(2). Taylorville's petition was signed by Greg Brotherton, Mayor. But, it was unclear whether Taylorville's petition was filed by an attorney. Additionally, the Board found that the petition failed to specify the grounds for appeal. The Board directed Taylorville, by December 2, 2011, to file an amended petition for review accompanied by the appearance of an attorney. *See* 35 Ill. Adm. Code 101.400(a)(2). The Board also noted that the timely filing of an amended petition would recommence the Board's statutory 120-day period for deciding this appeal. *See* 35 Ill. Adm. Code 105.114(b).

DECEMBER 6, 2011 AMENDED PETITION

On December 6, 2011, the Board received an amended petition from Taylorville filed by an attorney. The petition was accompanied and supplemented by nine CD ROMs containing the Amended 45 Day Report dated April 4, 2011, which is referenced in the Amended Appeal.¹ The proof of service states that the petition was mailed on December 1, 2011. The petition was timely filed because it was postmarked on or before the filing deadline. *See* 415 ILCS 5/40(a)(1) (2010); 35 Ill. Adm. Code 101.300(b), 105.402, 105.404.

¹ The Board notes that submission of this material was not necessary, as the Agency is required to file this material with the Board as part of the record in UST appeals. *See* 35 Ill. Adm. Code 105.410.

The amended petition repeats the same assertions made in the original petition, with the added procedural facts concerning the filing of the original petition. The amended petition acknowledges the regulatory limits cited by the Agency letter. But, Taylorville nonetheless requested payment of the full amount “due to the extraordinary issues of the site” outlined in the amended petition. These included approach of winter weather, slough off of sand into the pit resulting from tank excavation, infiltration of groundwater into the hole which worsened the sand sloughing, and the fact that piping leaks as well as sand leaks were involved at the site.

AGENCY MOTION TO DISMISS AND TAYLORVILLE’S RESPONSE

On November 13, 2011, the Agency filed a motion to dismiss this appeal (Mot.) because it was not filed by an attorney. The entirety of the Agency’s argument is that

Any judgment in a case initiated by a non-attorney is void, even if subsequent appearances are made by an attorney. *See, Housing Authority of Cook County v. Tonsul*, 115 Ill. App. 3d 739, 450 N.E.2d 1248 (1st Dist. 1983); *Midwest Home Savings & Loan v. Ridgewood*, 123 Ill. App. 3d 1001, 463 N.E.2d 909 (5th Dist. 1984); *Marken Real Estate & Management Corporation v. Adams*, 56 Ill. App. 3d 426, 371 N. E. 2d. 1192 (1st Dist. 1977), *Leonard v. Walsh*, 73 Ill. App. 3d 45, 220 N. E. 2d. 57 (4th Dist. 1966). Mot. at 1-2.

On December 13, 2011, Taylorville also filed a response in opposition to the Agency’s motion to dismiss (Resp.). In its response Taylorville maintained that the cases cited are inapplicable here as they involve cases filed in court going to judgment without an attorney, and the Board has yet to reach judgment in this case, in which an attorney has now appeared. Resp. at 1.

MOTION DENIED AND AMENDED PETITION ACCEPTED

The Board must first rule on the Agency’s motion to dismiss, since if the rule of nullity were found to apply, it would require dismissal of this action. The Board does not find Taylorville’s arguments persuasive. But, the Agency’s motion to dismiss this matter is denied.

In a recent UST appeal, after an extensive analysis, the Board reaffirmed its prior position that an action timely filed by a non-attorney could proceed providing that an amended petition was timely filed within the period specified by the Board. *Prime Location Properties, LLC v. IEPA*, PCB 09-67, slip op. at 4-13 (interim opinion and order *inter alia* denying motion to dismiss (August 20, 2009)); (final opinion and order denying motion to dismiss, remanding to Agency, and granting petitioner attorney fees (Nov. 5, 2009)). The Agency appealed that ruling, which has been fully briefed and argued, and awaits disposition by the Fifth District Appellate Court *sub nom. IEPA v. IPCB and Prime Location Properties, LLC*. No. 5-10-0072 (5th Dist.). ²

² The Board’s ruling in *Prime Location* was cited by the First District Appellate Court in support of its finding that the rule of nullity did not apply in *Downtown Disposal Services, Inc. v. City of Chicago, Department of Administrative Services, and Department of Transportation*, 407 Ill. App. 3d 822; 943 N.E.2d 185 (1st Dist. 2011), *appeal pending* No. 112040 (Ill. Sup. Ct.).

The Board will not repeat the lengthy Prime Location analysis here. Nothing in the Agency's one-sentence argument here persuades the Board to alter its position that the rule of nullity need not be invoked.

The Board next finds that Taylorville's amended petition meets the content requirements of 35 Ill. Adm. Code 105.408. Consequently, the Board accepts the amended petition for hearing.

Taylorville has the burden of proof. *See* 35 Ill. Adm. Code 105.112(a). Hearings will be based exclusively on the record before the Agency at the time the Agency issued its determination. *See* 35 Ill. Adm. Code 105.412. Accordingly, though the Board hearing affords petitioner the opportunity to challenge the Agency's reasons for its decision, information developed after the Agency's decision typically is not admitted at hearing or considered by the Board. *See* Alton Packaging Corp. v. PCB, 162 Ill. App. 3d 731, 738, 516 N.E.2d 275, 280 (5th Dist. 1987); Community Landfill Co. & City of Morris v. IEPA, PCB 01-170 (Dec. 6, 2001), *aff'd sub nom. Community Landfill Co. & City of Morris v. PCB & IEPA*, 331 Ill. App. 3d 1056, 772 N.E.2d 231 (3rd Dist. 2002).

The filing of an amended petition restarts the Board's decision period. *See* 35 Ill. Adm. Code 105.114(b). Hearings will be scheduled and completed in a timely manner, consistent with the decision deadline (*see* 415 ILCS 5/40(a)(2) (2010)), which only Taylorville may extend by waiver (*see* 35 Ill. Adm. Code 101.308). If the Board fails to take final action by the decision deadline, Taylorville may deem its request granted. *See* 415 ILCS 5/40(a)(2) (2010). Currently, the decision deadline is April 4, 2012, which is the 120th day after the date on which the Board received the amended petition, December 6, 2011. *See* 35 Ill. Adm. Code 105.114. The Board meeting immediately before the decision deadline is scheduled for March 15, 2012.

Unless the Board or the hearing officer orders otherwise, the Agency would ordinarily be required to file the entire record of its determination by January 5, 2012, which is 30 days after the Board received Taylorville's amended petition. *See* 35 Ill. Adm. Code 105.410(a). As today is January 5, 2012, the Board by its own motion extends the due date until January 20, 2012. If the Agency wishes to seek additional time to file the record, it must file a request for extension before the date on which the record is due to be filed. *See* 35 Ill. Adm. Code 105.116. The record must comply with the content requirements of 35 Ill. Adm. Code 105.410(b).

IT IS SO ORDERED.

I, John T. Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on January 5, 2012, by a vote of 5-0.

A handwritten signature in black ink that reads "John T. Therriault". The signature is written in a cursive style with a long horizontal flourish extending to the right.

John T. Therriault, Assistant Clerk
Illinois Pollution Control Board