

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

WARSAW ITCO,)
)
Petitioner,)
)
vs.)
)
ILLINOIS ENVIRONMENTAL)
PROTECTION AGENCY,)
)
Respondent.)

PCB No. 11-76
(UST Appeal – Petition for Review and
Hearing/Appeal)

**RECEIVED
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STATE OF ILLINOIS
Pollution Control Board**

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RESPONSE IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

NOW COMES WARSAW ITCO, by its attorneys, Elias, Meginnes, Riffle & Seghetti, P.C., and as and for its Response in Opposition to Motion for Summary Judgment, states as follows:

INTRODUCTION

The Illinois EPA is operating under a mistaken understanding or assumption regarding the work performed by Petitioner through its consultant. Petitioner installed a groundwater treatment system which was approved by the Illinois EPA. The costs at issue in this appeal relate to the approved system. Subsequently, Petitioner proposed enhancements to the approved groundwater treatment system. Those enhancements were denied. Contrary to the Illinois EPA's understanding, Petitioner and its consultant never implemented those enhancements, and did not seek recovery of costs for those enhancements. The funds sought in this appeal relate solely to the approved, original groundwater treatment system.

FACTS

1. Petitioner, through its consultant, Midwest Environmental Consulting & Remediation Services, Inc. (Midwest) began to operate a groundwater remediation system at the subject property in October, 2003. This system was approved by the Illinois Environmental Protection Agency. (See Exhibit A).

2. Petitioner proposed certain enhancements to the groundwater remediation system, including enhanced bio-remediation and horizontal recovery wells for groundwater.
3. The enhancements to the groundwater remediation system were rejected.
4. Petitioner was never instructed to discontinue the originally implemented groundwater remediation system which was originally installed.
5. The funds which Petitioner seeks in this appeal relate to the operation of the original groundwater treatment system, not to the disapproved enhancements to the system, which were never implemented.

STANDARD OF LAW

The standard for determining a motion for summary judgment is set forth in the Illinois Code of Civil Procedure, Section 2-1005(c), which states, in pertinent part, as follows:

The judgment sought shall be rendered without delay if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

735 ILCS §5/2-1005(c) (West 2012). Summary judgment “is a drastic means of disposing of litigation and, therefore, should be allowed only when the right of the moving party is clear and free from doubt.” Adams v. Northern Illinois Gas Co., 211 Ill.2d 32, 43, 809 N.E.2d 1248, 1256, 284 Ill.Dec. 302, 310 (2004), *rehearing denied* (2004) (emphasis added). Summary judgment should only be entered if there is no genuine issue as to any material fact and the moving party is entitled to judgment *as a matter of law*:

Summary judgment is proper where, when viewed in the light most favorable to the nonmoving party, the pleadings, depositions, admissions, and affidavits on file reveal that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2002); *Hall v. Henn*, 208 Ill.2d 325, 328, 280 Ill.Dec. 546, 802 N.E.2d 797 (2003); *Ragan v. Columbia Mutual Insurance Co.*, 183 Ill.2d 342, 349, 233 Ill.Dec. 643, 701 N.E.2d 493 (1998).

Home Ins. Co. v. Cincinnati Ins. Co., 213 Ill.2d 307, 315, 821 N.E.2d 269, 275, 290 Ill.Dec. 218, 224 (2004).

ARGUMENT

As the Affidavit of Al Green, President of Midwest, attests, all costs and fees for which Petitioner seeks recovery in this appeal relate solely to the installation, permitting and operation of the originally approved groundwater remediation system. Petitioner was never instructed to discontinue the originally implemented groundwater remediation system which was originally installed, and had no right to discontinue that system until its amended Corrective Action Plan was ultimately approved. Petitioner does not disagree with the legal analysis set forth in the Illinois EPA's Motion. However, the entirety of the Illinois EPA's argument is based on the faulty premise that Petitioner is seeking payment for operating a system which was not approved by the Illinois EPA. That argument is simply wrong. Summary judgment should only be granted when the right to judgment is free from doubt. Adams, supra. It is a drastic remedy which deprives a litigant of the right to proceed to trial. Home Ins. Co., supra. In this case, summary judgment is simply not warranted.

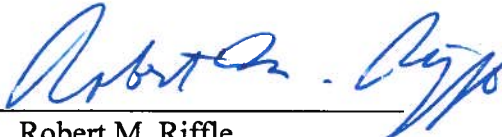
It is respectfully submitted that the costs and fees associated with permitting, installation, and ongoing operations of the originally approved groundwater treatment system were all reasonable and necessary, and should have been paid.

CONCLUSION

For all of the foregoing reasons, Petitioner respectfully requests that the Illinois EPA's Motion for Summary Judgment be denied, and that this matter be set for hearing.

Respectfully submitted,

WARSAW ITCO, Petitioner

By: 
Robert M. Riffle
Its Attorney

ROBERT M. RIFFLE

Elias, Meginnes, Riffle & Seghetti, P.C.

416 Main Street, Suite 1400

Peoria, IL 61602

(309) 637-6000

612-441

CERTIFICATE OF SERVICE


The undersigned certifies that on May 14, 2012, a copy of the foregoing document was served upon each party to this case by

- Enclosing a true copy of same in an envelope addressed to the attorney of record of each party as listed below, with first class postage fully prepaid, and depositing each of said envelopes in the United States Mail at 5:00 p.m. on said date.
- Personal delivery to the attorney of record of each party at the address(es) listed below
- Facsimile transmission with confirmation by United States Mail
- Via Federal Express - Express Package Service - Priority Overnight

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MAY 16 2012
STATE OF ILLINOIS
Pollution Control Board

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board
James R. Thompson Center
100 W. Randolph Street
Suite 11-500
Chicago, IL 60601

Greg Richardson
Illinois Environmental Protection Agency
Division of Legal Counsel
1021 North Grand Ave. East
Post Office Box 19276
Springfield, IL 62794-9276



Robert M. Riffle
Elias, Meginnes, Riffle & Seghetti, P.C.
416 Main Street, Suite 1400
Peoria, IL 61602
(309) 637-6000
612-441



ILLINOIS ENVIRONMENTAL PROTECTION AGENCY

1021 NORTH GRAND AVENUE EAST, P.O. BOX 19276, SPRINGFIELD, ILLINOIS 62794-9276

RENEE CIPRIANO, DIRECTOR

217/782-6762

MAY 24 2002

CERTIFIED MAIL

7001-2510-0002-3280-0403

Howard Warsaw
Route 122
Minier, Illinois 61759

Re: LPC #1790455007 -- Tazewell County
Minier/Warsaw, Howard
Route 122
LUST Incident No. 981987 and 991610
LUST Technical File

Dear Mr. Warsaw:

The Illinois Environmental Protection Agency (Illinois EPA) has reviewed the High Priority Corrective Action Plan (plan) submitted for the above-referenced incident. This plan, dated January 28, 2002, was received by the Illinois EPA on February 8, 2002. Citations in this letter are from the Environmental Protection Act (Act) and 35 Illinois Administrative Code (35 IAC).

Pursuant to 35 IAC Section 732.405(c) and Section 57.7(c)(4) of the Act, the plan is approved. The activities proposed in the plan are appropriate to demonstrate compliance with 35 IAC Part 732 and Title XVI of the Act. Please note that all activities associated with the remediation of this release proposed in the plan must be executed in accordance with all applicable regulatory and statutory requirements, including compliance with the proper permits.

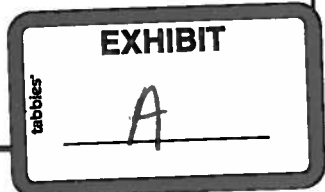
In addition, the proposed budget for the High Priority Corrective Action Plan is rejected for the reason(s) listed in Attachment A (Section 57.7(c)(4) of the Act and 35 IAC Sections 732.405(c) and 732.503(b)).

All future correspondence must be submitted to:

Illinois Environmental Protection Agency
Bureau of Land - #24
LUST Section
1021 North Grand Avenue East
Post Office Box 19276
Springfield, IL 62794-9276

Please submit all correspondence in duplicate and include the "Re:" block shown at the beginning of this letter.

GEORGE H. RYAN, GOVERNOR



Page 2

An underground storage tank owner or operator may appeal this final decision to the Illinois Pollution Control Board (Board) pursuant to Section 57.7(c)(4)(D) and Section 40 of the Act by filing a petition for a hearing within 35 days after the date of issuance of the final decision. However, the 35-day period may be extended for a period of time not to exceed 90 days by written notice from the owner or operator and the Illinois EPA within the initial 35-day appeal period. If the owner or operator wishes to receive a 90-day extension, a written request that includes a statement of the date the final decision was received, along with a copy of this decision, must be sent to the Illinois EPA as soon as possible.

For information regarding the filing of an appeal, please contact:

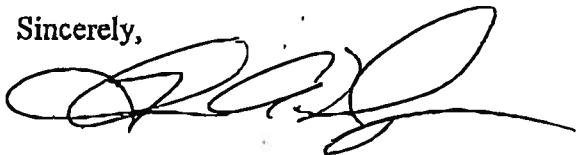
Dorothy Gunn, Clerk
Illinois Pollution Control Board
State of Illinois Center
100 West Randolph, Suite 11-500
Chicago, IL 60601
312/814-3620

For information regarding the filing of an extension, please contact:

Illinois Environmental Protection Agency
Division of Legal Counsel
1021 North Grand Avenue East
Springfield, IL 62794-9276
217/782-5544

If you have any questions or need further assistance, please contact Jim Ransdell at 217/557-6938.

Sincerely,



Thomas A. Henninger
Unit Manager
Leaking Underground Storage Tank Section
Division of Remediation Management
Bureau of Land

TAH:JSR;jk\022244.doc

Attachment: Attachment A

cc: Midwest Environmental Consulting & Remediation
Division File

Attachment A

**Re: LPC #1790455007 -- Tazewell County
Minier/Warsaw, Howard
Route 122
LUST Incident No. 981987 and 991610
LUST Technical File**

NOTE: Citations in this attachment are from 35 Illinois Administrative Code (35 IAC) and the Environmental Protection Act.

- 1. One of the overall goals of the financial review is to assure that costs associated with materials, activities and services are reasonable (35 IAC Section 732.505(c)).**

The budget includes costs that are not reasonable as submitted (Section 57.7(c)(4)(C) of the Act and 35 IAC Section 732.606(hh)). Please note that additional information and/or supporting documentation may be provided to demonstrate the costs submitted are reasonable.

The Agency is requesting further breakdown of the groundwater treatment system and the operation and maintenance for the groundwater system supporting costs, i.e., invoices and receipts for activities, materials, design, time spent, sub-contracting, operation failure and repair rates, life expectancy, salvage value, and any other costs associated with the system.

TAH:JSR:jk\022244.doc

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

WARSAW ITCO,)	
)	
Petitioner,)	
)	
vs.)	
)	PCB No. 11-76
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Respondent.)	

**AFFIDAVIT OF AL GREEN IN SUPPORT OF
RESPONSE IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT**

STATE OF ILLINOIS)
)
COUNTY OF TAZEWELL)

Al Green, having been first duly sworn upon his oath, deposes and states as follows:

1. I am the President of Midwest Environmental Consulting & Remediation Services, Inc. ("Midwest"). I submit this Affidavit based on my own personal knowledge and as consultant for Petitioner, Warsaw Itco, in support of the Response in Opposition to Motion for Summary Judgment.

2. Petitioner, through Midwest, began to operate a groundwater remediation system at the subject property in October, 2003. This system was approved by the Illinois Environmental Protection Agency.

3. Petitioner, through Midwest, proposed certain enhancements to the groundwater remediation system, including enhanced bio-remediation and horizontal recovery wells for groundwater.

4. The enhancements to the groundwater remediation system were rejected.



5. Petitioner was never instructed to discontinue the originally implemented groundwater remediation system which was originally installed.

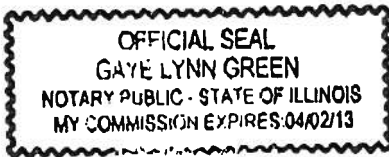
6. The funds which Petitioner seeks in this appeal relate to the operation of the original groundwater treatment system, not to the disapproved enhancements to the system, which were never implemented.

FURTHER YOUR AFFIANT SAITH NOT.

Al Green
AL GREEN

Subscribed and sworn to before me
this 14 day of May, 2012.

Gaye Lynn Green
Notary Public
612-443



ELIAS, MEGINNES, RIFFLE & SEGHETTI, P.C.
ATTORNEYS AT LAW

JOHN S. ELIAS
BRIAN J. MEGINNES
ROBERT M. RIFFLE
MICHAEL R. SEGHETTI
TROY N. PUDIK

416 MAIN STREET, SUITE 1400
PEORIA, ILLINOIS 61602-1611
TELEPHONE: (309) 637-6000
FACSIMILE: (309) 637-8514
www.emrslaw.com

DAVID N. SCHELLENBERG
JANAKI NAIR
LANE G. ALSTER
CYNTHIA L. ELIAS, OF COUNSEL

File No. 30927-009

May 14, 2012

Ms. Dorothy M. Gunn
State of Illinois
Pollution Control Board
James R. Thompson Center
100 W. Randolph Street, Suite 11-500
Chicago, IL 60601

Re: Warsaw Itco v. IEPA
PCB No. 11-76

Dear Clerk:

Enclosed please find the original and eleven (11) copies of Petitioner's Response to Motion for Summary Judgment with respect to the above-referenced matter. Please return a file-stamped copy of Response to the undersigned in the return envelope enclosed.

Thank you for your anticipated cooperation.

Very truly yours,



Robert M. Riffle

RMR:tj
Enclosures
cc: Mr. Al Green
612-442

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Pollution Control Board

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