

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

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

**POST-HEARING BRIEF OF PETITIONER**

NOW COMES WARSAW ITCO, by its attorneys, Elias, Meginness, Riffle & Seghetti, P.C., and as and for its Post-Hearing Brief of Petitioner, states as follows:

**INTRODUCTION**

The Illinois EPA denied payment of expenses incurred by Petitioner under a mistaken understanding or assumption regarding the nature of work performed by Petitioner through its consultant, and a misguided and inaccurate claim that the Illinois EPA instructed Petitioner to discontinue operation of a groundwater treatment system. 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. Illinois EPA claims that they instructed Petitioner to discontinue the originally implemented groundwater treatment system. It did no such thing. The funds sought in this appeal relate solely to the approved, original groundwater treatment system. Petitioner was never instructed, or even permitted, to discontinue that system. The work was performed and the costs were validly incurred. They should have been paid.

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. (Tr.11).

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. (Tr. 15).

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. (Tr. 14-15).

Mr. Green testified as follows:

Q. Okay. And the amounts that you're seeking in this case, what periods of time do those relate to and what system do those relate to?

A. It's basically the operation of the original ground water system.

Q. Okay. Is any part of what you're seeking related to the enhanced system that was rejected?

A. No. No enhancements were made to the unit.

Q. Were you ever told by anybody at IEPA or on behalf of IEPA to shut down the original system?

A. No.

(p. 14, lines 17-14; p. 15, lines 1-3; Transcript of Proceedings).

Mr. Green further testified as follows:

Q. Now, you heard in counsel's opening argument that you were instructed to essentially do a source removal. Did that ever occur?

A. The source removal that we could do was done during the early action and during the trench install. In order to do any further excavation on the property, we would have basically had to put the system or put the station out of operation, out of business, remove all the installed equipment, the new equipment, and taken -- you know, taken down the building.

When we did the early action activities, the tank removal installers had to drive sheet pile along the edge of the building to keep the building from coming into the hole, based upon the fact that we had water within a couple feet and it was all sloughing off into the hole, so we couldn't have excavated anything else without basically permanently putting the station out of business.

Q. And it's your testimony that you're able to close this incident without having to do this additional source removal; is that correct?

A. Yes.

(p. 15, lines 20-24; page 16, lines 1-16; Transcript of Proceedings).

With regard to the December 14, 2005 letter from the IEPA, which the IEPA claims is notice of instruction to discontinue the originally implemented groundwater treatment system, Mr. Green testified as follows:

Q. Looking at this December 14, 2005 letter, the first sentence says: It is difficult to ascertain if the recovery well system proposed in the plan is appropriate for remediation of the ground water at this time.

What did you understand that to be a reference to; the original ground water treatment system or the system proposed in the plan?

A. Well, it says the recovery well system, which is basically what we were proposing, was to enhance the recovery system.

Q. Okay. And did you interpret that in any way to impact the prior approval of the existing ground water treatment system?

A. No.

Q. And was that ground water treatment system in your view continuing to prevent off-site vibration?

A. In theory, yes, and based on the monitoring wells and that, that we had on the site, yes.

Q. So it would be unfair to characterize it as providing no benefit.

A. Right. It just wasn't optimal as to what as to what we wanted the system or had the system operating or designed to operate.

(p. 31, lines 3-24; p. 32, line 1).

On cross-examination by IEPA counsel, Mr. Green testified as follows:

Q. Did you call anyone at the Agency to ask about the status of the system, if you were confused about what the letter said?

A. I wasn't confused about what the letter said.

Q. Okay.

A. Basically we proposed enhancements. The enhancements were denied, so we said we're not -- we're not going to do that.

(p. 34, lines 8-15, Transcript of Proceedings).

Thomas Henninger of IEPA testified as follows:

Q. I'm showing you the December 14, 2005 letter that's been referred to before.

A. Okay.

Q. Is that the letter you were referring to as the denial letter?

A. This was the denial letter rejecting the plan in the budget, yes, dated December 14, 2005.

Q. Okay. And is the letter upon which you base your claim that the original system was supposed to be put out of use?

A. That was the letter that we sent as a result of a corrective action plan that Midwest sent in that asked to enhance their remediation system, and we denied it.

Q. Great. And are you aware of any written document where you told Midwest to discontinue the existing water treatment system?

A. Yes. It's the December 14, 2005 letter that was signed by me.

Q. Isn't that this?

A. Yes.

Q. And where does it say that?

A. In item number 1, the last sentence, paragraph number one.

Q. Could you read that into the record?

A. The entire paragraph?

Q. Any portion that you think --

A. I'll read it all. It is difficult to ascertain if the recovery well system proposed in the plan is appropriate for remediation of ground water at this time. Soil exceedances still exist and are the source of contamination in the ground water. You must eliminate the source of contamination in the ground water. You must eliminate the source of contamination before remediation on the ground water can be implemented.

Q. And as for the time that you sent the December 14, 2005 letter, there was an approved plan for an existing water treatment system; is that correct?

A. Yes. We approved one in 2002.

Q. And that system, as far as you knew, was up and running as of December 14 of 2005?

A. Prior to that, actually. We received an amended corrective action plan in August of 2005 from Midwest saying that it was -- it has been running and it wasn't effective, but they wanted to enhance it. We made a final decision in December.

Q. And it says: It is difficult to ascertain if the recovery well system proposed in the plan is appropriate for remediation of ground water at this time.

Were you referring to the existing system or the proposed system at that time?

A. The existing system.

Q. And does it say the existing system at any place in the December 14, 2005 letter?

A. Yes, it does, to me, in paragraph 1.

Q. And could you point out where in paragraph 1 it says existing system?

A. You must eliminate the source of contamination before remediation of ground water can be implemented, and there's already a ground water remediation system there.

Q. And so its your testimony that Midwest and Warsaw/Itco should have perceived from paragraph 1 that they were to discontinue the system.

A. Yes.

Q. Other than this December 14, 2005 letter, are you aware of any communication to either Warsaw/Itco or Midwest instructing them to discontinue the system?

A. Other than this December 14<sup>th</sup> letter, no.

(p. 45, lines 5-24; p. 46, lines 1-24; page 47, lines 1-22; Transcript of Proceedings).

With respect to the air permit fee, under questions from IEPA's counsel, Mr. Green testified as follows:

Q. I'm just trying to figure out for the Board how much it is, okay? Because we know it went up with Governor Blagojevich, and I'm not disputing that at all, okay?

A. Okay.

Q. I'm just trying to figure out what years you paid it and how much that amount would be and which budgets they were included in, so it's more of a factual –

A. I know it was also included because I just look at it today.

Q. Okay.

A. And it was also in there, and I think it was \$5,900, something like that, you know, rounded off.

Q. Okay.

A. But when I did look at the date that that was paid versus when the enhancements got rejected, it was about two months after that. So that's why we're basically –

Q. Why we're talking about this issue.

A. Right.

Q. Okay. I just wanted to clarify that so I knew if we were talking about just that one fee or if we're talking about all of them after.

A. No. It's just this one.

(p. 23, lines 14-24; p. 24, lines 1-14; Transcript of Proceedings).

The sum of \$34,790.00 was deducted for personnel costs which were reasonably and necessarily incurred. The sum of \$7,800 was deducted from air permitting and related costs. All of these expenditures were reasonably and necessarily incurred in connection with a remediation system which had been approved by the IEPA.

### ARGUMENT

As the testimony 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. Most importantly, contrary to the Illinois EPA's stated position, 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. The IEPA claims that it instructed Petitioner to discontinue the existing remediation system, relying solely upon a December 14, 2005 letter from IEPA. However, that letter stated no such thing. It

is respectfully submitted that the Illinois EPA's stated position is not even a fair inference from that December 14, 2005 letter, much less a clear instruction. The IEPA relies solely on that December 14, 2005 letter. It simply does not support their position. Moreover, Petitioner expended \$5,900 for an Air Permit to the IEPA to operate the system, which it was told would be reimbursed. (TR21). It would be a travesty to induce Petitioner and its consultant to pay a permit fee to the state under the premise that it would be reimbursed, and then disallow that expenditure.

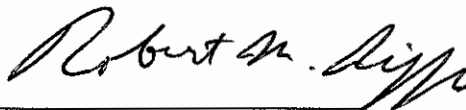
It is respectfully submitted that the costs and fees associated with permitting, installation, and ongoing operations of the originally approved groundwater treatment system were all reasonable and necessary, and should have been paid.

**CONCLUSION**

For all of the foregoing reasons, Petitioner respectfully requests that its appeal be granted, and that it be awarded the sum of \$42,590.00, consisting of \$34,790 of personnel costs, and \$7,800 in air permitting and related fees and costs.

Respectfully submitted,

WARSAW ITCO, Petitioner

By: 

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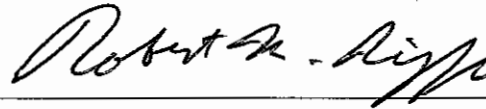
CERTIFICATE OF SERVICE

The undersigned certifies that on April 8, 2013, a copy of the foregoing document was filed electronically with the Illinois Pollution Control Board and served upon each party to this case by

X Electronic delivery and United States Mail at 5:00 p.m. on said date.

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