

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

BEVERLY POWERS)
f/d/b/a DICK'S SUPER SERVICE,)
)
Petitioner,)
)
v.)
)
ILLINOIS ENVIRONMENTAL)
PROTECTION AGENCY,)
)
Respondent.)

PCB No. 11-63
(UST Appeal)

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Pollution Control Board

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PLEASE TAKE NOTICE that I have today caused to be filed RESPONDENT'S CLOSING BRIEF with the Illinois Pollution Control Board, a copy of which is served upon you.


Respectfully submitted,

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY,

Dated: May 8, 2013

Respondent,

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BY: 

Scott B. Sievers
Special Assistant Attorney General

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RESPONDENT'S CLOSING BRIEF

NOW COMES the Respondent, ILLINOIS ENVIRONMENTAL PROTECTION AGENCY ("Illinois EPA"), by and through its attorney, Special Assistant Attorney General Scott B. Sievers, and for Respondent's Closing Brief states the following:

I. STANDARD OF REVIEW

Section 57.3 of the Environmental Protection Act, 415 ILCS 5/1 *et seq.*, provides for the establishment of the Illinois Leaking Underground Storage Tank Program, which is to be administered by the Office of the State Fire Marshal and the Respondent, the Illinois Environmental Protection Agency. 415 ILCS 5/57.3. Section 57.7(c)(4) of the Act provides, in pertinent part, that "[a]ny action by the Agency to disapprove or modify a plan or report ... shall be subject to appeal to the [Pollution Control] Board in accordance with the procedures of Section 40." 415 ILCS 5/57.7(c)(4).

The standard of review under Section 40 of the Act is whether the application, as submitted to the Agency, would not violate the Act and Board regulations. *Freedom Oil Co. v. Illinois EPA*, PCB No. 10-46, slip op. at 13 (Aug. 9, 2012). In appeals of final Agency

determinations, the burden of proof rests upon the petitioner. *Id.* The standard of proof in LUST appeals is the preponderance of the evidence, meaning that a proposition is proved by a preponderance when it is more probably true than not. *Id.*

The Pollution Control Board' review generally is limited to the record before the Agency at the time of its determination. *Evergreen FS, Inc. v. Illinois EPA*, PCB No. 11-51, op. at 14 (June 21, 2012). The Agency's denial letter frames the issue. *Id.*

II. STATEMENT OF FACTS

A. The Administrative Record

On October 21, 2010, the Illinois Environmental Protection Agency received a proposed Corrective Action Budget Amendment. (Admin. R. at 746.) The proposed budget amendment had been submitted by Midwest Environmental Consulting & Remediation Services Inc. ("MECRS") and its president, Allan Green. (Admin. R. at 747-749.) The proposal concerned a Leaking Underground Storage Tank ("LUST") site in Delavan known as Dick's Super Service. (Admin. R. at 812.) It marked the fourth such budget amendment submitted. (Admin. R. at 812.) The proposed budget sought an additional \$26,771.55 in personnel costs to recover costs spanning a time period from at least April 2001 to September 2010. (Admin. R. at 749, 812-814.)

An Owner/Operator and Professional Engineer Budget Certification Form for Leaking Underground Storage Tanks Sites was submitted with the proposed budget amendment. (Admin. R. at 818.) The form identified Beverly Powers as the Owner/Operator of the site with the title of Owner, but the form was signed by consultant Allan Green rather than by Beverly Powers. (Admin. R. at 818.)

On February 4, 2011, Michael A. Heaton of Illinois EPA reviewed the proposed budget amendment. (Admin. R. at 821.)

On February 17, 2011, the Illinois Environmental Protection Agency rejected the proposed budget amendment. (Admin. R. at 833.) Illinois EPA denied the proposed budget for three (3) reasons: (1) the budget was signed by the consultant and did not provide the owner's or operator's full name, address, and telephone number, as required by the Environmental Protection Act and its regulations; (2) the budget included investigation or corrective action costs for consulting fees that were not reasonable, as some of the costs concerned work for which a budget with adequate hours previously had been approved and Illinois EPA had been provided with no justification why more hours were needed; and (3) the budget included costs lacking supporting documentation, as Illinois EPA received no justification as to why more hours were needed when an adequate amount had been requested and approved previously for the work. (Admin. R. at 835.)

On March 28, 2011, Petitioner Dick's Super Service filed the Petition for Review And Hearing/Appeal at issue in this action.

B. The Hearing

On February 26, 2013, Hearing Officer Carol Webb conducted a hearing in this action in Springfield, Illinois. (Tr. at 4.) MECRS President Allan Green testified on behalf of the Petitioner, and Michael Heaton of Illinois EPA testified on behalf of the Respondent. (Tr. at 3, 7.) Beverly Powers neither testified nor attended the hearing. (Tr. at 3-4.)

1. Petitioner Witness Allan Green.

Green testified that he was President of MECRS, and that Dick's Super Service had contracted with his company for environmental remediation services regarding the site. (Green, Tr. at 7, 12.) Green's initial point of contact was with Dick Powers, but he died. (Green, Tr. at 9.) At that point, Green started dealing with Dick Powers' wife, Beverly Powers. (Green, Tr. at 9-10.)

Green testified that the Owner/Operator and Professional Engineer Budget Certification Form for Leaking Underground Storage Tank Sites that was part of the budget amendment submittal identified Beverly Powers as the owner/operator, but was signed not by her but by Green as the consultant. (Green, Tr. at 17-19.) Green, though, testified that he was not the owner/operator of the Petitioner and that his sole role in this case has been as consultant. (Green, Tr. at 22.)

Green testified that he had full, written authority to sign documents on Beverly Powers' behalf. (Green, Tr. at 12-13, 19.) Green testified that he had something in writing from Beverly Powers that said he had been authorized to sign documents in connection with Illinois EPA submissions, and that he submitted that documentation to Illinois EPA. (Green, Tr. at 19-21.) However, Green testified that, without access to his file, he could not identify the date when he submitted the authorization document to Illinois EPA. (Green, Tr. at 21.) Further, Green testified that, if Heaton were to testify that he never received any documentation from Green indicating that he had written authorization from Beverly Powers to sign documents on his behalf, Green could not point to any document that refuted Heaton's statement. (Green, Tr. at 22.) However, Green admitted that he was not authorized as a power of attorney for Ms. Powers. (Green, Tr. at

19.)

As for the proposed budget amendment, Green testified that it “addresses the personnel costs that were cut from the original plans and budgets on the site in an attempt to basically get reimbursed for the personnel time that was spent on the site.” (Green, Tr. at 15.) Green testified that the proposed budget amendment included costs that had been denied previously by Illinois EPA. (Green, Tr. at 23-24.) However, Green testified that neither he nor the Petitioner appealed Illinois EPA’s previous decision denying those costs. (Green, Tr. at 24-25.)

2. Respondent Witness Michael Heaton

Michael Heaton testified that he is an environmental protection engineer in the Leaking Underground Storage Tank section of the Illinois Environmental Protection Agency. (Heaton, Tr. at 29.) Heaton has been employed by Illinois EPA since 1991, and has worked in the LUST section since 1998 or 1999. (Heaton, Tr. at 29-30.) Heaton has a geological engineering degree from the University of Missouri-Rolla. (Heaton, Tr. at 30.)

Heaton is the project manager for the Dick’s Super Service site and has been since approximately 2001. (Heaton, Tr. at 30.) In his role as project manager, Heaton has had the opportunity to review the entire file for the Dick’s Super Service site, including the plans, correspondence, and budgets. (Heaton, Tr. at 31.) Heaton testified that he assisted Illinois EPA in reaching its decision to deny the budget submittal at issue. (Heaton, Tr. at 37.)

Heaton testified that the owner/operator of the site when the first LUST budgets and documentation were submitted to Illinois EPA was Dick Powers. (Heaton, Tr. at 31.) After Dick Powers passed away, his wife, Beverly Powers, began submitting or signing the forms as owner. (Heaton, Tr. at 31.) Illinois EPA did not receive documentation of a transfer of the site, the

ownership, its operation, from Dick Powers to Beverly Powers. (Heaton, Tr. at 31-32.)

Heaton further testified that Illinois EPA never received any documentation showing that Allan Green was the owner/operator of the site, or that Beverly Powers had authorized either Allan Green or MECRS to sign documents on her behalf. (Heaton, Tr. at 31-32, 39-40, 53.) While Heaton recalled a conversation with Penny Silzer at MECRS asking where Beverly Powers was located, Heaton did not recall a conversation with Green regarding the appropriate signatories on budgets and reimbursement requests. (Heaton, Tr. at 42.) The conversation with Silzer resulted from a conversation Heaton had with his supervisor concerning Beverly Powers' whereabouts. (Heaton, Tr. at 43-44.)

The proposed budget amendment submitted in October 2010 by the Petitioner contained costs related to Tiered Approach to Corrective Action Objectives, or TACO, calculations as well as work on a Corrective Action Completion Report, or CACR. (Heaton, Tr. at 34; Resp.'s Ex. B.¹) However, the Petitioner had previously submitted a High Priority Corrective Action Plan in August 2008 that had budgeted for TACO and CACR costs. (Heaton, Tr. at 35; Resp.'s Exs. C & D.) Illinois EPA had responded with a modification letter, which Heaton testified meant that part of the plan had been approved and part denied. (Heaton, Tr. at 35; Resp.'s Ex. C.) Illinois EPA's modifications included deductions for TACO calculations and for CACR work. (Heaton, Tr. at 35-36; Resp.'s Exs. C & D.) Heaton testified that Illinois EPA's decision to approve the August 2008 High Priority Corrective Action Plan with modifications was never appealed. (Heaton, Tr. at 35.)

¹ While the Respondent introduced exhibits to aid in referring to documents during the hearing, all such exhibits were already part of the Administrative Record.

In addition, Heaton testified that the Petitioner had submitted a Corrective Action Plan Budget in July 2004. (Heaton, Tr. at 37-38; Resp.'s Exs. E & F.) That budget included TACO and CACR work, and MECRS had sought reimbursement for it. (Heaton, Tr. at 38-39; Resp.'s Ex. E.) Illinois EPA approved that budget without modification, including the TACO and CACR costs. (Heaton, Tr. at 37, 39, 48; Resp.'s Ex. F.) Heaton testified that, beyond this 2004 budget, Illinois EPA never received any justification for additional CACR or TACO costs. (Heaton, Tr. at 39.)

III. ARGUMENT

A. **The Petitioner has failed to meet her burden to prove that the submitted budget would not violate the Board regulation requiring that plans, budgets, and reports be signed by the owner or operator.**

The first reason Illinois EPA asserted for rejecting the October 2010 Corrective Action Plan Budget was that “[t]he budget was signed by the consultant and did not provide the owner’s or operator’s full name, address, and telephone number.” (Admin. R. at 835; Resp.’s Ex. A at 835.) In support, Illinois EPA cited 35 Ill. Adm. Code 734.135(c). *Id.* That Pollution Control Board provision states as follows:

734.135 Form and Delivery of Plans, Budgets, and Reports; Signatures and Certifications

...

c) All plans, budgets, and reports must be signed by the owner or operator and list the owner's or operator's full name, address, and telephone number.

35 Ill. Adm. Code 734.135(c) (2013) (emphasis added).

Administrative regulations have the force and effect of law. *Kean v. Wal-Mart Stores, Inc.*, 235 Ill. 2d 351, 368 (2009). Rules and regulations promulgated by the Pollution Control Board are presumptively valid and likewise have the force and effect of law. *Illinois EPA v.*

Jersey Sanitation Corp., 336 Ill. App. 3d 582, 588 (4th Dist. 2003) (citing *Granite City Div. of Nat'l Steel Co. v. Illinois Pollution Control Bd.*, 155 Ill. 2d 149, 162 (1993)). Board rules and regulations are to be construed by the same standards used to construe statutes. *U.S. Steel Corp. v. Illinois Pollution Control Bd. et al.*, 384 Ill. App. 3d 457, 463 (5th Dist. 2008). A board or agency must follow its own rules. *Dep't of Cent. Mgmt. Servs./Illinois Commerce Comm'n v. Illinois Labor Relations Bd.*, 406 Ill. App. 3d 766, 771 (4th Dist. 2010).

In the instant case, the Petitioner is Beverly Powers, formerly doing business as Dick's Super Service.² Consistent with this fact, Beverly Powers was identified as the Owner/Operator on a form titled "Owner/Operator and Professional Engineer Budget Certification Form for Leaking Underground Storage Tanks Sites" that was submitted as part of the October 2010 proposed budget amendment. (Admin. R. at 818.) However, despite the requirements of 35 Ill. Adm. Code 734.135(c), the form was not signed by Beverly Powers at all but by the consultant, Allan Green of MECRS. (Admin. R. at 818.) Project Manager Michael Heaton testified that Illinois EPA never received any documentation showing that Green was the owner/operator of the site. (Heaton, Tr. at 32.) Even Green himself testified that he was not the owner/operator of the site but that his sole role has been as consultant. (Green, Tr. at 22.)

While Green admitted that he was not authorized as a power of attorney for Beverly Powers, he nonetheless testified that he had full, written authority to sign documents on her behalf. (Green, Tr. at 12-13, 19.) Green even testified that he had something in writing from

² In the Petition for Review And Hearing/Appeal filed March 28, 2011, the Petitioner was Dick's Super Service. Dick's Super Service remained the Petitioner in a Waiver of Decision Deadline filed April 8, 2011 and in another filed Waiver of Decision Deadline filed May 17, 2011. It was not until a Motion to Substitute Parties was filed on June 13, 2011, and granted on July 7, 2011 that Beverly Powers became the Petitioner in the instant action.

Beverly Powers that said he had been authorized to sign documents in connection with Illinois EPA submissions, and that he submitted that documentation to Illinois EPA. (Green, Tr. at 19-21.) During his testimony, though, Green could not identify the date he submitted the documentation to Illinois EPA. (Green, Tr. at 21.) Green did not explain why Beverly Powers did not sign the submitted budget form herself in the first place and why he had to do so in her stead, and of course Beverly Powers herself did not testify and provide an answer to this question, despite being the Petitioner. (Tr. at 3, 7-28.)

Green testified that if Heaton were to testify that he never received any documentation from Green indicating that he had written authorization from Beverly Powers to sign documents on his behalf, Green could not point to any document that refuted Heaton's statement. (Green, Tr. at 22.) Heaton did so testify, stating that he reviewed the entire file for the site, including plans, budgets, and correspondence, and that Illinois EPA never received any documentation showing that Beverly Powers had authorized either Allan Green or MECRS to sign documents on her behalf. (Heaton, Tr. at 31-32, 39, 53.)

When Green was asked at hearing to show where in the Administrative Record the documentation had been submitted that he had authority to sign on behalf of Beverly Powers, the Petitioner's counsel objected: "I'm going to object. Really, I don't think it serves any purpose. It's either in there or it isn't." (Tr. at 20.) More than a month passed between the hearing in this case and the filing of the Post-Hearing Brief of Petitioner, which should have been ample time to locate within the Administrative Record the authorization documentation Green testified he had submitted. Despite this, the Petitioner's brief fails to cite any such documentation within the

Administrative Record. (Post-Hr'g Br. of Pet'r 1-5.) Green's credibility regarding the purported written authority to sign on behalf of Beverly Powers is dubious at best.

Furthermore, even if Green had been able at hearing or otherwise to point to written authorization within the Administrative Record from Beverly Powers for him to sign on her behalf, the Petitioner has come forward with no authority for the premise that an exception exists to 35 Ill. Adm. Code 734.135(c) allowing for assignment or delegation of the signature requirement to someone other than the LUST site owner or operator. (Post-Hr'g Br. of Pet'r 1-5.) Again, the requirement states that "[a]ll plans, budgets, and reports must be signed by the owner or operator." 35 Ill. Adm. Code 734.135(c). Pollution Control Board rules and regulations have the force and effect of law, *Illinois EPA v. Jersey Sanitation Corp.*, *supra*, and a board or agency must follow its own rules. *Dep't of Cent. Mgmt. Servs./Illinois Commerce Comm'n*, *supra*.

There is no debate that the October 2010 budget at issue in this action was not signed by the owner or operator, Beverly Powers. There also is no dispute that the budget was signed by Allan Green, the consultant, who claims authority to sign on Beverly Powers' behalf but cannot produce any documentation of that claim. But for Allan Green's own testimony, there is no evidence in this action that he had authority to sign the budget form on Beverly Powers' behalf or that documentation of that authority ever was presented to Illinois EPA. Finally, the Petitioner has failed to come forward with any authority that the requirement for an owner or operator to sign a budget submittal may be assigned or delegated to someone else. Therefore, the Petitioner has failed to meet her burden of proving that the submitted Correction Action Plan Budget would not violate 35 Ill. Adm. Code 734.135(c), a Board regulation.

B. The Petitioner has failed to meet her burden to prove that the submitted budget would not violate Board regulations barring costs as ineligible that lack supporting documentation and were unreasonable.

Illinois EPA rejected the October 2010 Corrective Action Plan Budget for two other reasons. First, Illinois EPA found that the budget included site investigation or corrective action costs for consulting fees that were not reasonable: “Costs associated with the CACR preparation and TACO analysis were approved in a budget on July 8, 2004. There has been [no] justification as to why more hours were needed when an adequate amount was requested and approved previously.” (Admin. R. at 835; Resp.’s Ex. A at 835.) Second, the budget included costs that lacked supporting documentation. *Id.* While Illinois EPA acknowledged that invoices were provided in the budget submittal,

what was not provided was justification with regard to the number of hours spent per task. Costs associated with the CACR preparation and TACO analysis were approved in a budget on July 8, 2004. There has been [no] justification as to why more hours were needed when an adequate amount was requested and approved previously.

Id. In support of its decision, Illinois EPA cited Section 57.7(c)(3) of the Act as well as 35 Ill.

Adm. Code 734.630(cc) and (dd). Section 57.7(c)(3) of the Act provides in pertinent part that,

[i]n approving any plan submitted ... the Agency shall determine ... that the costs associated with the plan are reasonable, will be incurred in the performance of site investigation or corrective action, and will not be used for site investigation or corrective action activities in excess of those required to meet the minimum requirements of this Title.

415 ILCS 5/57.7(c)(3) (2013). Subsections (cc) and (dd) of 35 Ill. Adm. Code 734.630, in turn, provide that “Costs ineligible for payment from the Fund include, but are not limited to: ... (cc) Costs that lack supporting documentation; (dd) Costs proposed as part of a budget that are unreasonable.”

In the instant case, Michael Heaton testified that the Petitioner had submitted a Corrective Action Plan Budget in July 2004. (Heaton, Tr. at 37-38; Resp.'s Exs. E & F.) That budget included both CACR and TACO work, and MECRS had sought reimbursement for it. (Heaton, Tr. at 38-39; Resp.'s Ex. E.) Illinois EPA approved that July 2004 budget without modification, including the CACR and TACO costs. (Heaton, Tr. at 37, 39, 48; Resp.'s Ex. F.)

In August 2008, the Petitioner submitted a High Priority Corrective Action Plan that again budgeted for CACR and TACO costs. (Heaton, Tr. at 35; Resp.'s Exs. C & D.) Illinois EPA had approved that budget with modifications, meaning part of it was approved and part denied. (Heaton, Tr. at 35; Resp.'s Ex. C.) The modifications included deductions for CACR and TACO work. (Heaton, Tr. at 35-36; Resp.'s Exs. C & D.) Illinois EPA's decision to approve the budget with modifications never was appealed. (Heaton, Tr. at 35.)

The Corrective Action Plan Budget submitted in October 2010 once again contained costs related to TACO calculations and work on a CACR. (Heaton, Tr. at 34; Resp.'s Ex. B.) Green himself testified that the proposed budget amendment included costs that had been denied previously by Illinois EPA. (Green, Tr. at 23-24.) Green testified that the proposed budget "addresses the personnel costs that were cut from the original plans and budgets on the site in an attempt to basically get reimbursed for the personnel time that was spent on the site." (Green, Tr. at 15.) Green testified that neither he nor the Petitioner ever appealed Illinois EPA's previous decisions denying those costs. (Green, Tr. at 24-25.) Further, Illinois EPA never received any justification for additional CACR or TACO costs beyond those in the approved 2004 budget. (Heaton, Tr. at 39.)

Subsection 57.7(c)(4) of the Act provides in pertinent part that “[a]ny action by the Agency to disapprove or modify a plan or report ... shall be subject to appeal to the Board in accordance with the procedures of Section 40.” 415 ILCS 5/57.7(c)(4) (2013). Further, Subsection 57.8(i) of the Act states that, “[i]f the Agency refuses to pay or authorizes only a partial payment, the affected owner or operator may petition the Board for a hearing in the manner provided for the review of permit decisions in Section 40 of the Act.” 415 ILCS 5/57.8(i) (2013). Despite these provisions, the Petitioner did not appeal the modification of its August 2008 High Priority Correction Action Plan that budgeted for CACR and TACO costs; consequently, those modifications are final and cannot be revisited. *See Evergreen FS, Inc. v. Illinois EPA*, PCB No. 11-51, op. at 14 (June 21, 2012).

To condone the Petitioner’s conduct would be to allow rolling budgets, where the same costs could be resubmitted endlessly in the hope that someday a reviewer’s oversight might result in approval of costs that had been denied previously. In the instant action, the Petitioner should not be allowed to get a second bite at the apple by including previously denied costs in its October 2010 budget and then taking the denial of that budget up on appeal for possible reversal.

IV. CONCLUSION

The Petitioner has the burden of proving that the submitted Corrective Action Plan Budget would not violate the Act and Board regulations. *Freedom Oil Co., supra*. In the case at bar, the Petitioner has failed to prove that this budget would not violate 35 Ill. Adm. Code 734.135(c), a Board regulation, when it was signed by the consultant and not by the owner or operator, as required by that provision. In addition, the Petitioner failed to prove that this budget would not violate 35 Ill. Adm. Code 734.630(cc) and (dd) by including costs that lacked

supporting documentation and are unreasonable, as the submitted budget included costs for CACR and TACO work that had already been included and approved in a 2004 budget as well as CACR and TACO costs that had been denied in a 2008 budget that was not appealed.

Consequently, the Petitioner has failed to meet her burden of proof, and the Respondent's February 17, 2011 decision to reject the Petitioner's Corrective Action Plan Budget should be affirmed.

WHEREFORE, the Respondent, ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, prays that this honorable Board DENY the Petitioner's appeal and AFFIRM the Respondent's February 17, 2011 decision.

Dated: May 8, 2013

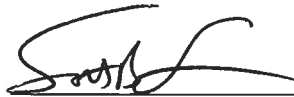
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Respectfully submitted,

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY,

Respondent,

BY:



Scott B. Sievers
Special Assistant Attorney General

**Beverly Powers f/d/b/a Dick's Super Service v. Illinois Environmental Protection Agency
Pollution Control Board No. 11-63**

CERTIFICATE OF SERVICE

Scott B. Sievers, Special Assistant Attorney General, herein certifies that he has served a copy of the foregoing **RESPONDENT'S CLOSING BRIEF** upon:

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by electronic service and by mailing true copies thereof to the addresses referred to above in envelopes duly addressed bearing proper first class postage and deposited in the United States mail at Springfield, Illinois, on May 8, 2013.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY,

Dated: May 8, 2013

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BY:



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