

ILLINOIS POLLUTION CONTROL BOARD

July 25, 2013

BROADUS OIL COMPANY,	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB 10-48
	)	(UST Appeal)
ILLINOIS ENVIRONMENTAL	)	
PROTECTION AGENCY,	)	
	)	
Respondent.	)	

ROBERT M. RIFFLE, ELIAS, MEGINNES, RIFFLE & SEGHETTI, P.C., APPEARED ON BEHALF OF THE PETITIONER; and

SCOTT B. SIEVERS, SPECIAL ASSISTANT ATTORNEY GENERAL, AND JAMES G. RICHARDSON, ASSISTANT COUNSEL, ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, APPEARED ON BEHALF OF THE RESPONDENT.

OPINION AND ORDER OF THE BOARD (by J.A. Burke):

Broadus Oil Company (Broadus) appeals a December 8, 2009 determination of the Illinois Environmental Protection Agency (Agency) rejecting Broadus' budget to implement a corrective action plan at an underground storage tank (UST) site located at 1006 West Main Street in Streator, LaSalle County. In its petition for review, Broadus argues that the budgeted amount was "reasonably [sic], customary, and necessary for the proper completion of the project and site closure." Pet. at 2. During the course of this proceeding, Broadus narrowed its request for review to the sole issue of appropriateness of the Agency denial of \$3,959.86 in personnel costs.

For the reasons set forth below, the Board finds the Agency denial was appropriate, and affirms the Agency's determination as it relates to the rejected personnel costs.

**PROCEDURAL BACKGROUND**

On April 12, 2010, Broadus filed a petition for review of a December 8, 2009 Agency determination. The Board accepted the petition for hearing on April 15, 2010. The Agency filed its record (Rec.) on August 31, 2012.

The Board commenced holding a hearing in this matter on November 7, 2012, in Springfield, Sangamon County. Due to a medical emergency, Broadus' key witness was unable to attend. Consequently, the hearing was continued without objection until February 26, 2013.

At the February 26, 2013 hearing, Allan Green, President of Midwest Environmental Consulting and Remediation Services, testified on behalf of Broadus. At that same hearing, Brian Bauer, a project manager in the Leaking UST program at the Agency, testified on behalf of the Agency. No members of the public attended the hearing on either November 7, 2012 or February 26, 2013.

Broadus filed its post-hearing brief (Br.) on April 8, 2013. The Agency filed its post-hearing brief (Resp.) on May 10, 2013, accompanied by a motion for leave to file, which the Board rules upon below. Broadus filed its reply (Reply) on May 21, 2013.

### **AGENCY'S MOTION**

On May 10, 2013, the Agency filed a motion for leave to file its closing brief (Mot.). The Agency's post-hearing brief was originally due on May 8, 2013, but this date was unattainable "due to unforeseen interruptions and a workload that was greater than anticipated." Mot. at 1. The Agency states that it conferred with counsel for Broadus and that Broadus' counsel "has no objection to the instant motion." *Id.* For these reasons and to avoid any material prejudice to the Agency, the Board grants the Agency's motion and accepts the Agency's post-hearing brief.

### **FACTS**

On November 18, 2009, the Agency received a corrective action budget amendment (Budget) from Broadus. Rec. at 1630. The Budget related to Broadus' UST site at 1006 West Main Street in Streator, LaSalle County. *Id.* at 1616. The Budget sought \$3,959.86 in personnel costs, \$5,847.39 in handling costs, and \$78,947.73 in field purchases and other costs. *Id.* at 1619.

The Agency rejected the Budget on December 8, 2009. Rec. at 1630-1633. Agency employee Sam Hale was the project manager assigned to Broadus' request at the time of the Agency determination and Clifford Wheeler, who signed the December 8, 2009 determination, was a unit manager in the Agency Leaking UST Section. Rec. at 1631; Tr. at 22-23. Since December 8, 2009, both men have passed away. Tr. at 23. At hearing, Brian Bauer, a project manager who oversees the reimbursement portion of the UST program, testified on behalf of the Agency. *Id.* at 21. The December 8, 2009 Agency determination listed two reasons for its rejection of the Budget:

1. The budget includes soil disposal and backfill costs that exceed the maximum payment amounts set forth in Subpart H, Appendix D, and/or Appendix E of 35 Ill. Adm. Code 734. Such costs are ineligible for payment from the [UST] Fund pursuant to 35 Ill. Adm. Code 734.630(zz). In addition, such costs are not approved pursuant to Section 57.7(c)(3) of the [Environmental Protection Act (Act) (415 ILCS 5/57.7(c)(3) (2010)] because they are not reasonable.
2. The budget includes costs for corrective action that are inconsistent with the associated technical plan. One of the overall goals of the financial

review is to assure that costs associated with materials, activities, and services shall be consistent with the associated technical plan. Such costs are ineligible for payment from the [UST] Fund pursuant to Section 57.7(c)(3) of the Act and 35 Ill. Adm. Code 734.510(b). Rec. at 1633.

On April 12, 2010, Broadus filed its petition for review of this Agency determination.

### **BROADUS' PETITION**

Broadus' petition sought review of the Agency's rejection of the Budget seeking approval for \$88,754.98 "which was the amount reasonably and necessarily expended to complete work on the project." Pet. at 2. Broadus argues that the budgeted amount was "reasonably [sic], customary, and necessary for the proper completion of the project and site closure." *Id.*

### **HEARING**

Mr. Allan Green, President of Midwest Environmental Consulting and Remediation Services (MECRS), testified on behalf of Broadus. Tr. at 8. Broadus retained MECRS to oversee investigation and remediation of the site. *Id.* Green submitted the Budget to the Agency. *Id.* at 10-11. Green acknowledged that a later budget addendum addressed field purchases and other costs, and that it was only personnel and handling costs remaining at issue. *Id.* at 11. With regards to the personnel costs, Green testified that work included

the time that was spent between the city, their attorneys, the off-site property owner, and their attorneys, and then the [Illinois Department of Transportation] for their highway authority agreement, and then reimbursement time and certification on that issue. *Id.* at 12.

Green also testified that, because of the nature of the project and the neighboring property owner, MECRS was in contact with Sam Hale and Cliff Wheeler "if not every other day, then close to that." *Id.* Green stated that, under instruction from Hale and Wheeler, he was to "do what you need to do to get this site closed and get [the neighbor] out of [the Agency's] hair." *Id.* at 13.

Green testified that the handling charges entailed "handling charges put on the subcontractor invoices, once proof of payment has been shown. It's . . . the money markup . . . to the individuals for basically paying subcontractors." Tr. at 14.

On cross-examination, Green was presented a number of questions relating to the subsequent March 28, 2010 budget amendment, which the Board does not summarize here. Tr. at 14-19.

Brian Bauer, a project manager who oversees the reimbursement portion of the UST program, testified on behalf of the Agency. Tr. at 19-21. Bauer testified that both Sam Hale and Clifford Wheeler had passed away since the December 8, 2009 Agency determination. *Id.* at 22-23.

Bauer stated that the Agency does not approve handling charges in a budget request, but rather, such charges are approved “based upon what you submit in your reimbursement at the time you submit the bills.” Tr. at 24-25. Bauer testified that the Agency approves budgets seeking reimbursement for excavation, disposal and backfill. *Id.* at 27. However, the Agency does not approve budgets that include “restoration of water or restoration of electric compactors or pre-create cost figures.” *Id.* Bauer further stated that the Agency could deny a budget in whole, even if part of the budget may be acceptable. *Id.* at 28.

Bauer testified that the Agency provided forms for submittal of various Leaking UST documentations, including budgets. Tr. at 31. However, the form submitted with the Budget was not the most current form used by the Agency at the time. *Id.* at 30. Bauer stated that the current form, in contrast to the form submitted by Broadus, did not include handling charges as a line item. *Id.* at 31. This is because the Agency does not “approve a dollar amount in the budget for handling charges.” *Id.*

On cross-examination, Bauer noted that he did not have any involvement in the process of denying the Budget, and that his only knowledge of how the determination was made came from reviewing the file after-the-fact. Tr. at 32-33. Bauer noted that there was no mention of personnel costs in the two reasons for denial provided in the Agency determination letter. *Id.* at 34. Bauer also stated that he did not have any reason to believe that the hours or the hourly rates listed on personnel costs were not reasonable. *Id.* Bauer also stated that, while he was unable to remember a specific regulation off-hand, the regulations and his “experience of denying budgets over the years” caused him to believe that the Agency could deny an entire budget based on one particular deficiency. *Id.*

On redirect examination, Bauer acknowledged that, when a budget is denied in whole or in part, the explanation set forth for its rejection may not be necessarily detailed to every particular line of that budget. Tr. at 36. Bauer noted that a generalized statement as to the basis for the rejection, such as costs for corrective action, would encompass a number of costs, including personnel and handling costs. *Id.* at 36-37.

On recross examination, Bauer testified that all of the personnel costs were referenced as costs for corrective action in the Agency determination letter. *Id.* at 37. According to Bauer, “[if the Agency is] denying a budget for excavation, transportation, disposal, the cost to prepare that budget and everything else would be all-inclusive of what [the Agency] was denying.” *Id.* Bauer also acknowledges that the personnel costs included hours for off-site excavation. *Id.* at 38.

### **BROADUS’ ARGUMENTS**

In its post-hearing brief, Broadus limits its argument to personnel costs and does not request approval for handling or other costs. Broadus argues that its budget should be approved because it “reasonably and necessarily incurred the personnel costs which are at issue in the amount of \$3,959.86 in remediating the subject property.” Br. at 3. Broadus contends that this position is “undisputed” and that “[n]o valid ground has been articulated by the [Agency] for denial of the personnel charges at issue in this case.” *Id.*

Broadus also contends that “[i]t appears that [the Agency] is taking the position that because one entry on the proposed budget (i.e., handling charges [sic]) should not have been included, it had the right to deny that budget in its entirety.” Br. at 3. Broadus notes that the Agency “could not point to any rule that allowed such a blanket denial.” *Id.* at 4. Broadus concludes that the personnel costs “were reasonable and necessarily expended, and should be paid.” *Id.*

In its reply, Broadus argues that, since there is “absolutely no dispute regarding the propriety of [the personnel] expenses,” additional resources should not be used to resubmit the personnel costs to the Agency for approval. Reply at 2. Broadus contends that partial approval of budgets “occurs routinely” and that the Agency decision to deny the budget in its entirety “appears to be selective application of the applicable rules.” *Id.* Broadus does not believe that it should incur “further delay or expenditure” to obtain “what rightfully should have been reimbursed long ago.” *Id.*

### **AGENCY’S RESPONSE**

The Agency states that the Budget sought costs for excavation, transportation, and disposal of 1,660.93 cubic yards of contaminated soil (at a rate of \$60.35 per cubic yard) as well as costs for the same volume of backfill (at a rate of \$21.17 per cubic yard). Resp. at 8. The Agency notes that a letter submitted by Broadus on March 28, 2010 states that those rates should have been \$58.59 per cubic yard for the excavation, transportation and disposal costs and \$20.56 per cubic yard for backfilling. *Id.* The Agency therefore argues that it correctly rejected the Budget “for including excessive soil disposal and backfill costs which were ineligible for payment and were not approved because they were unreasonable.” *Id.* at 9.

The Agency also references the Budget’s cost request “to ‘restore water,’ ‘restore electric,’ and ‘compactor.’” Resp. at 9, citing Rec. at 1622. The Agency argues that it “does not approve budgets that include restoration of water, restoration of electric, compactors, and the like.” Resp. at 9, citing 35 Ill. Adm. Code 734.630.

The Agency states that the Budget sought \$5,847.39 in handling charges. Resp. at 9. While the Agency approves handling charges when bills are submitted for reimbursement, the Agency does not approve handling charges as part of a corrective action plan budget. *Id.* at 10, citing 35 Ill. Adm. Code 734.335(b). The Agency also notes that the Board’s regulations provide for the payment of handling charges on a sliding scale based upon the subcontractor or field purchase cost. *Id.*, citing 35 Ill. Adm. Code 734.865 and 35 Ill. Adm. Code 734.635. The Agency argues that it acted correctly in not approving the handling charges because “the regulations exclude handling charges from corrective action plan budgets.” *Id.*

The Agency also notes that the Budget included \$3,959.86 in personnel costs. Resp. at 10. Agency employee Brian Bauer testified at hearing that a corrective action plan budget can include personnel costs. *Id.*, citing Tr. at 36-37. Bauer testified that the Agency’s second basis for rejecting the Budget (inclusion of corrective action costs inconsistent with the associated technical plan) included personnel costs. *Id.* at 11, citing Tr. at 37-38.

The Agency cites Section 57.7(c)(3) of the Act, which states in part that, in approving a corrective action plan, the Agency will 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. Resp. at 11, citing 415 ILCS 5/57.7(c)(3) (2010).

The Agency also cites Section 734.510(b) of the Board's regulations, which provides in part that the Agency's financial review of a corrective action plan "must include . . . costs associated with any materials, activities, or services that are included in the budget." Resp. at 11, citing 35 Ill. Adm. Code 734.510(b).

The Agency states that,

after it reviewed the [Budget] containing excluded handling charges; personnel costs related to erroneously high excavation, transportation, disposal, and backfill costs; and ineligible costs for a compactor and for restoring electric and water, [the Agency] properly rejected the budget pursuant to Section 57.7(c)(3) of the Act and Subsection 734.510(b) of the Board's regulations. Resp. at 11.

The Agency contends that no provision of the Act or the Board's regulations requires the Agency to modify or approve in part a plan, budget, or report that contains a portion that would violate the Act or Board regulations if it were approved. Resp. at 12, citing 35 Ill. Adm. Code 734.505(b).

The Agency notes that the vast majority of Broadus' original \$88,574.98 claim has been satisfied in a subsequent submittal. Resp. at 12. Further, the Agency "will approve [Broadus'] handling charges consistent with Board regulations when [the Agency] receives a submittal for reimbursement." *Id.* The Agency also notes that "the possibility remains that [the Agency] would approve [the personnel costs] if submitted as part of a budget amendment that does not violate the Act or Board regulations." *Id.*

### **BURDEN OF PROOF**

The burden of proof in an appeal of the Agency's rejection of a corrective action budget is on the petitioner. 415 ILCS 5/57.7(c)(4); 415 ILCS 5/40(a)(1); 35 Ill. Adm. Code 105.112(a).

### **STATUTORY BACKGROUND AND STANDARD OF REVIEW**

The Act provides that to seek reimbursement from the UST Fund, an owner or operator must submit to the Agency for approval a corrective action budget. 415 ILCS 5/57.7(b)(3) (2010). The standard of review is whether the application, as submitted to the Agency, would not violate the Act and Board regulations. Ted Harrison Oil Co. v. IEPA, PCB 99-127, slip op.

at 5 (July 24, 2003), citing Browning Ferris Industries of Illinois v. PCB, 179 Ill. App. 3d 598, 534 N.E.2d 616 (2nd Dist. 1989). In reviewing a corrective action plan budget, the Agency must 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 Title XVI of the Act. 415 ILCS 5/57.7(c)(3) (2010).

### **BOARD DISCUSSION**

In its petition, Broadus requested that the Board reverse or modify the Agency's rejection of the Budget and accept the requested Budget amount of \$88,754.98. Pet. at 2. At hearing, Broadus limited its appeal to personnel and hearing costs. Tr. at 5. In its post-hearing brief and reply, Broadus only seeks reimbursement of \$3,959.86 in personnel costs. Br. at 4, Reply at 2. The Agency acknowledges such in its response, stating that Broadus is "apparently abandoning its claim for handling charges." Resp. at 3. The Board has previously found that arguments raised in a petition but not argued by a petitioner are waived. American Bottom Conservancy and Sierra Club v. City of Madison, Illinois, and Waste Management of Illinois, Inc., PCB 07-84, slip op. at 4 (Feb. 21, 2008) Because Broadus now only seeks personnel costs, the Board only addresses the Agency's determination as it pertains to the rejected \$3,959.86 in personnel costs. The Board therefore does not address the \$5,847.39 in handling costs, or \$78,947.73 in field purchases and other costs.

The sole issue before the Board is whether the Agency properly rejected Broadus' budgeted personnel costs. The Agency's determination must provide "an explanation of the provisions of the regulations . . . which may be violated if the plan were approved" and "a statement of specific reasons why . . . the regulations might not be met if the plan were approved." Prime Location Properties, LLC v. IEPA, PCB 09-67, slip op. at 29 (Aug. 20, 2009), citing 415 ILCS 5/57.7(c)(4)(B), (D) (2010), *aff'd sub nom.* IEPA v. PCB, 2012 IL App (5th) 100072-U.

At hearing, Brian Bauer, a project manager who oversees the reimbursement portion of the UST program, testified on behalf of the Agency. Tr. at 21. The December 8, 2009 Agency determination rejected the Budget in part because it "includes soil disposal and backfill costs that exceed the maximum payment amounts set forth in Subpart H, Appendix D, and/or Appendix E of 35 Ill. Adm. Code 734," and because the Budget "includes costs for corrective action that are inconsistent with the associated technical plan." Rec. at 1633. Bauer testified at hearing that personnel costs would have been denied for the second reason. Tr. at 37.

At hearing, Bauer testified that he had no reason to believe that the personnel costs are not reasonable. Tr. at 34. However, the Agency contends that the personnel costs were denied because, if the Agency is "denying a budget for excavation, transportation, [and] disposal, the cost to prepare that budget and everything else would be all-inclusive of what [the Agency] was denying." *Id.* at 37. Broadus is not challenging the Agency's denial of the budget for excavation, transportation, and disposal. Rather, Broadus requests approval of only personnel costs and contends that "partial approval of budgets occurs routinely." Reply at 2. As the Agency notes, however, Section 734.505(b) of the Board's rules provide that the Agency "has

the authority to approve, reject, or require modification of any plan, budget, or report it reviews.” Br. at 11-12, citing 35 Ill. Adm. Code 734.505(b).

The Board agrees with the Agency that the Agency is not required to modify or approve in part a plan, budget, or report that contains a portion that would violate the Act or Board rules. Broadus offers no argument that handling, excavation, transportation, and disposal costs were incorrectly denied. Accordingly, the Board cannot find that the Agency erred in rejecting personnel costs together with the entire Budget. For these reasons, the Board affirms the Agency’s rejection of personnel costs.

The Agency argues that the majority of Broadus’ appeal has been resolved in a subsequent submittal. Resp. at 12. Further, the Agency states that it may approve the handling and personnel costs consistent with Board regulations if Broadus were to resubmit a budget amendment. *Id.* The standard of review in the instant appeal is whether the application, as submitted to the Agency on November 18, 2009, would not violate the Act and Board regulations. The Board does not consider information “not before the Agency prior to its final determination regarding the issues on appeal.” Kathe's Auto Service Center v. IEPA, PCB 95-43, slip op. at 14 (May 18, 1995). Therefore, any actions taken following the Agency’s determination are irrelevant, and the Board did not consider these Agency arguments when making its decision.

Because Broadus, following hearing, only requests personnel costs, the Board does not address whether the Agency acted appropriately in denying the Budget in its entirety, or whether the Agency appropriately denied Broadus’ request for handling costs.

### **CONCLUSION**

For the reasons above, the Board affirms the Agency’s December 8, 2009 determination denying Broadus \$3,959.86 in personnel costs.

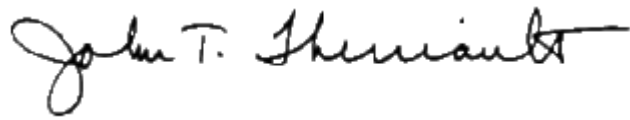
This opinion constitutes the Board’s findings of fact and conclusions of law.

IT IS SO ORDERED.



Section 41(a) of the Environmental Protection Act provides that final Board orders may be appealed directly to the Illinois Appellate Court within 35 days after the Board serves the order. 415 ILCS 5/41(a) (2010); *see also* 35 Ill. Adm. Code 101.300(d)(2), 101.906, 102.706. Illinois Supreme Court Rule 335 establishes filing requirements that apply when the Illinois Appellate Court, by statute, directly reviews administrative orders. 172 Ill. 2d R. 335. The Board's procedural rules provide that motions for the Board to reconsider or modify its final orders may be filed with the Board within 35 days after the order is received. 35 Ill. Adm. Code 101.520; *see also* 35 Ill. Adm. Code 101.902, 102.700, 102.702.

I, John Therriault, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion and order on July 25, 2013, by a vote of 4-0.

A handwritten signature in black ink, reading "John T. Therriault", is enclosed within a rectangular box. The signature is fluid and cursive, with a long horizontal stroke at the end.

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John Therriault, Clerk  
Illinois Pollution Control Board