

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

FRIENDS OF THE ENVIRONMENT, NFP,))
)
Petitioner,))
)
v.) PCB 2016-102
) (UST Appeal)
ILLINOIS ENVIRONMENTAL))
PROTECTION AGENCY,))
))
Respondent.))

NOTICE OF FILING

To: John T. Therriault William D. Ingersoll
Clerk of the Board Brown, Hay & Stephens, LLP
Illinois Pollution Control Board 205 S. Fifth Street, Suite 700
100 West Randolph Street, Suite 11-500 P.O. Box 2459
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Hearing Officer Bradley P. Halloran
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James R. Thompson Center, Suite 11-500
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Brad.Halloran@Illinois.gov

PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Pollution Control Board ILLINOIS EPA'S RESPONSE TO PETITIONER'S MOTION FOR SUMMARY JUDGMENT, a copy of which is served upon you.

Respectfully submitted,

Dated: June 29, 2016

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY,

Scott B. Sievers
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Respondent,

BY: /s/ Scott B. Sievers
Scott B. Sievers
Special Assistant Attorney General

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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v.)	PCB 2016-102
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**ILLINOIS EPA'S RESPONSE TO
PETITIONERS' MOTION FOR SUMMARY JUDGMENT**

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

**I. THIS BOARD SHOULD DENY THE PETITIONER'S MOTION,
AS IT IS NOT ENTITLED TO JUDGMENT AS A MATTER OF LAW.**

In its summary judgment motion, the Petitioner argues that this Board's requirement of a complete application as set forth in 35 Ill. Adm. Code 734.605(b) does "not require the submittal of all paperwork from any and all downstream contractors." (Petr's Mot. for Summ. J. at ¶ 11.) The Petitioner contends it "does not necessarily challenge the IEPA's request for information and documents from downstream contractors, only that the lack of this information cannot support a denial."

In fulfilling its requirement to review payment applications, Illinois EPA must determine whether they contain all of the elements and documentation identified in Subsection 734.605(a) of the regulations. 35 Ill. Adm. Code 734.605(a), 734.610(a). One such required element is "[a]n

accounting of all costs, including, but not limited to, **invoices, receipts, and supporting documentation** showing the dates and descriptions of the **work performed.**” 35 Ill. Adm. Code 734.605(b)(9) (emphasis added). Illinois EPA is further required to determine for costs incurred in early action “whether there is sufficient documentation to demonstrate that **the work was completed**” in accordance with the applicable regulations. 35 Ill. Adm. Code 734.610(a)(2) (emphasis added).

Thus, it is not enough for a UST owner or operator to merely submit an invoice or receipt showing that, say, backfill, groundwater removal, or drum disposal costs have been incurred or even paid; the submittal must show that the costs incurred or paid were for work performed. After all, expenses are not reimbursable from the Underground Storage Tank Fund merely because they have been incurred. *Brimfield Auto & Truck v. Illinois EPA*, PCB 12-134, slip op. at 15 (Sept. 4, 2014) at 15 (citing *Beverly Powers, f/d/b/a Dick's Super Service v. Illinois EPA*, PCB 11-63, slip op. at 19 (Aug. 8, 2013).) Further, Illinois EPA’s financial review is not limited to ensure that costs are appropriate, but also that they were not “used for corrective action activities in excess of those necessary to meet the minimum requirements of the Act and regulations[.]” 35 Ill. Adm. Code 734.510(b).

The Petroleum Underground Storage Tanks regulations applicable to this case repeatedly mention contractors and subcontractors, so the drafters clearly were aware of their existence. *See, e.g.*, 734 Ill. Adm. Code 734.605(b)(9)-(10), 734.630(hh)-(ii). Nonetheless, Illinois EPA is unaware of any portion of the Environmental Protection Act or these UST regulations that draws a distinction between contractors and subcontractors based upon whether they are “downstream.” Such a distinction would impose a false analytical structure upon UST reimbursements without basis in the Act, regulations, or Board precedents.

The Petitioner wants this Board to simply take the word of a middleman contractor that the work was done and that it just happened to be performed for the Subpart H maximum rate. If this Board finds in the Petitioner's favor, environmental consultants would be foolish not to promptly form corporations or limited liability companies they would then characterize as subcontractors and then have themselves billed by those newly formed entities for nothing less than Subpart H maximum rates. Then when Illinois EPA asks for invoices and documentation from those entities that actually performed the backfilling, groundwater removal, drum disposal, etc., the consultants will be able to turn back those requests by claiming they cannot compel their strawman corporation or LLC to produce the requested documentation. Their new middleman corporations or LLCs will cloak in secrecy the details of the actual costs charged and the services performed by the entities that actually did the work, and thus undermine Illinois EPA's efforts to satisfy its mandate to conduct financial reviews.

In the instant action, the Petitioner blames contractor Orivne, Inc. for its purported inability to produce the requested documentation. (Petr's Mot. for Summ. J. at ¶ 13.) According to the Petitioner, a bundle of services was contracted from Orivne:

Here, the prime contractor chose one subcontractor, Orivne, to handle tank removal and related disposals. Orivne then chose North Branch Environmental to take care of waste water disposal and the disposal of one drum of waste solids. North Branch then chose Ortek as the water disposal facility and American Waste Industries for the drum disposal facility.

(Petr's Mot. for Summ. J. at ¶ 13.)

In *T-Town Drive Thru, Inc. v. Illinois EPA*, the UST owner/operator, T-Town Drive Thru, Inc., claimed to have been charged for a bundle of services by its contractor, USI. PCB 07-85, slip op. at 2 (April 3, 2008). When Illinois EPA requested invoices from USI backing up the costs claimed for analytical work performed by Teklab, a laboratory, and USI did not provide

them, Illinois EPA denied that portion of USI's reimbursement application and T-Town appealed.

In upholding Illinois EPA's decision, this Board wrote that "[a] subcontractor invoice stating what the subcontractor is charging, while itself not proof of payment, does help to document the actual costs incurred and work performed. Without that information, the Agency could not properly determine whether all of the claimed analytical costs were eligible." *T-Town* at 27. The Board ultimately held that, "[w]hen T-Town did not provide the requested Teklab invoices, it failed to provide adequate documentation to support the claim." *Id.* at 29.

As in *T-Town*, Illinois EPA in the instant action requested documentation of a subcontractor's work and costs, and the UST owner/operator failed to provide it. In essence, the Petitioner here has thrown up its hands and claims that the documentation is beyond its reach and control. The Petitioner, though, surely knew that if it wished to be reimbursed for costs incurred in performing work under the LUST program, it would need documentation of those costs and work and it certainly could have required that any contractor it hired provide it with whatever documentation was necessary to obtain the requested reimbursement. If the Petitioner failed to demand this of its contractors, then it did so at its own risk and not that of the Underground Storage Tank Fund.

II. CONCLUSION

This Board's procedural rules provide that, in appeals of final Agency determinations, the burden of proof rests upon the petitioner. *Chatham BP, LLC v. Illinois EPA*, PCB No. 14-1, slip op. at 7 (Sept. 4, 2014). Further, a movant for summary judgment is required to show that there is no genuine issue as to any material fact and that it is entitled to judgment as a matter of law.

Estate of Gerald S. Slightom v. Illinois EPA, PCB No. 11-25, slip op. at 15 (April 19, 2012).

In the instant matter, the Petitioner is the movant, and thus had the burden of proof. However, the Petitioner makes no argument that the documentation that Illinois EPA requested was provided, just that it should not be required to provide it in the first place. Illinois EPA, though, is charged with reviewing reimbursement applications to ensure compliance with the Act and regulations. That includes ensuring that claims are supported by sufficient documentation to show that they are eligible for reimbursement because they do not exceed either the applicable rates or the work necessary to meet the minimum requirements of the Act and regulations. While attempting to distinguish its case from this Board's precedent in *T-Town Drive Thru, Inc.*, the Petitioner fails to cite legal authority supporting the notion that it can fail to provide cost and work documentation depending upon the manner by which it contracted and subcontracted out the work. Consequently, this Board should find that the Petitioner has failed to meet its burden and that it is not entitled to summary judgment as a matter of law.

WHEREFORE, the Respondent, ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, prays that this honorable Board deny the Petitioner's Motion for Summary Judgment.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY,

Respondent,

Dated: June 29, 2016

Scott B. Sievers
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BY: /s/ Scott B. Sievers
Scott B. Sievers
Special Assistant Attorney General

Friends of the Environment, NFP v. Illinois EPA
PCB No. 2016-102

CERTIFICATE OF SERVICE

I, the undersigned, on affirmation state the following:

1. That I have served the attached ILLINOIS EPA'S RESPONSE TO PETITIONER'S MOTION FOR SUMMARY JUDGMENT upon William D. Ingersoll at the e-mail address of wingersoll@bhslaw.com and upon Hearing Officer Bradley P. Halloran at the e-mail address of Brad.Halloran@Illinois.gov.
2. That my e-mail address is Scott.Sievers@Illinois.gov.
3. That the number of pages in the e-mail transmission is 7.
4. That the e-mail transmission took place before 5:00 p.m. on the date of June 29, 2016.

Respectfully submitted,

Dated: June 29, 2016

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY,

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