

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

KNAPP OIL COMPANY)
Petitioner,)
)
v.) PCB 2016-103
) (UST Appeal - Land)
ILLINOIS ENVIRONMENTAL)
PROTECTION AGENCY,)
Respondent.)

NOTICE

John Therriault, Acting Clerk
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PLEASE TAKE NOTICE that I have today filed with the office of the Clerk of the Pollution Control Board **RESPONDENT'S POST-HEARING BRIEF** copies of which are herewith served upon you.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,
Respondent

Melanie A. Jarvis
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217/782-9143 (TDD)
Dated: August 8, 2016

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

KNAPP OIL COMPANY)	
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v.)	PCB 2016-103
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RESPONDENT'S POST-HEARING BRIEF

NOW COMES the Respondent, the Illinois Environmental Protection Agency ("Illinois EPA" or "Agency"), by one of its attorneys, Melanie A. Jarvis, Assistant Counsel and Special Assistant Attorney General, and hereby submits its Response to the Petitioner's Post-Hearing Reply Brief to the Illinois Pollution Control Board ("Board").

INTRODUCTION

This matter is rather simple; presenting a rather ordinary fact set and nothing atypical relative to procedural considerations. Petitioner submitted a Stage 1 Site Investigation Plan & Budget ("Budget") for incident 2014-1214 for a facility ("Knapp Oil") located within Metropolis, Illinois.

BURDEN OF PROOF

Section 105.112(a) of the Board's procedural rules (35 Ill. Adm. Code 105.112(a)) provides that the burden of proof shall be on a Petitioner. In reimbursement appeals, appeals that would be under Section 105.112(a), the applicant for reimbursement has the

burden to demonstrate that costs are related to corrective action, properly accounted for, and reasonable. Rezmar Corporation v. Illinois EPA, PCB 02-91 (April 17, 2003), p. 9.

As the Board itself has noted, the primary focus of the Board must remain on the adequacy of the permit application and the information submitted by the applicant to the Illinois EPA. John Sexton Contractors Company v. Illinois EPA, PCB 88-139 (February 23, 1989), p. 5. Further, the ultimate burden of proof remains on the party initiating an appeal of an Illinois EPA final decision. John Sexton Contractors Company v. Illinois Pollution Control Board, 201 Ill. App. 3d 415, 425-426, 558 N.E.2d 1222, 1229 (1st Dist. 1990).

Thus, the Petitioner must demonstrate to the Board that it has satisfied this high burden before the Board can enter an order reversing or modifying the Illinois EPA's decision under review. In this matter, the Petitioner cannot meet this burden, for a number of reasons, but notably based upon the fact that the Illinois EPA **correctly** indicated that the costs associated with the camera would not be reimbursable as it is an indirect cost and that supporting documentation would be needed to justify the rate of the bailer, the costs associated with the survey equipment and the items associated with the sampling kit. Petitioner only submitted one document as evidence during hearing. In fact, the Petitioner presented no testimony at hearing whatsoever. The Petitioner **failed** to meet its burden of proof.

STANDARD OF REVIEW

Section 57.8(i) of the Environmental Protection Act ("Act") grants an owner or operator of a LUST a right to appeal a final determination of the Illinois EPA to the Board, pursuant to Section 40 of the Act (415 ILCS 5/57.8(i)). Section 40 of the Act (415 ILCS 5/40) is the general appeal section for permits and has been used by the legislature as the

basis for this type of appeal to the Board. When reviewing an Illinois EPA decision on a submitted corrective action plan and/or budget, the Board must decide whether or not the proposals, as submitted to the Illinois EPA, demonstrate compliance with the Act and Board regulations. Broderick Teaming Company v. Illinois EPA, PCB 00-187 (December 7, 2000).

The Board will not consider new information not before the Illinois EPA prior to its determination on appeal. Todd's Service Station v. Illinois EPA, PCB 03-2 (January 22, 2004), p.4; Pulitzer Community Newspapers, Inc. v. EPA, PCB 90-142 (Dec. 20, 1990). The Illinois EPA's final decision frames the issues on appeal. Id. The Board when rendering an opinion must look to the documents within the Administrative Record ("Record"). Normally, the Board would also look at the testimony presented at hearing. As noted above, testimony was only presented at the hearing by the Illinois EPA.¹

FACTS

Within Petitioner's January 2016 Stage 1 Site Investigation Plan and Budget, consultant Chase Environmental Group, Inc., proposed budget costs that, when presented for reimbursement, are either indirect costs or require additional information to be presented for review. The Illinois EPA approved the Stage 1 Site Investigation Plan & Budget, modifying Petitioner's requests only to the extent required by the Act and regulations to inform the Petitioner that some of the items of the budget would either not be reimbursable or would need supporting documentation when the reimbursement application is submitted. Petitioner appealed the decision to the Board.

¹ Citations to the Administrative Record will hereinafter be made as, "AR, p. ____."

ARGUMENT

The Illinois EPA due to prior decisions by the Board has been put into a Catch-22 situation. First, the Board has, due to its rulings on testimony at hearings, in effect shifted the burden of proof away from the Petitioner, upon whom the General Assembly placed the burden by statute, and onto the Agency. In this matter, as has become typical in Board LUST hearings to date, Petitioner presented no testimony at hearing and entered only one document into evidence. How can a Petitioner present so little evidence and still meet their burden of proof in a case? Normally they can't. Yet the Board has ruled that they can on many occasions. So in this case, the Agency was forced to present evidence because of the shifted burden of proof. The Illinois EPA objects to this shifting of the burden of proof and denial of its due process rights.

The Illinois EPA has the authority to put applicants on notice that requests in their budget may not be reimbursable during the Budget review period. Petitioner only presented evidence at hearing in the form of one document from the Agency's website on only one of the modification points. In regards to the other modification points, Petitioner presented no evidence at all. The Agency on the other hand, presented both testimony and documentary evidence at hearing.

The \$30 Cost for the Camera

It appears, from the Petitioner's sole document presented at hearing that the main objection that the Petitioner has is the Illinois EPA's modification of the costs associated with the camera as an indirect cost billed as a direct cost. At hearing the Agency entered into evidence as Exhibit A the Black's Law Definitions of Direct and Indirect Costs. Those definitions are as follows:

“Direct cost (1818) The amount of money for material, labor, and overhead to produce a product.

Indirect cost (1850) A cost that is not specific to the production of a particular good or service but that arises from production activity in general, such as overhead allocations for general and administrative activities.”

According to the common place definitions, and indeed common sense, it is apparent that a camera is not used directly in the remediation of a leaking underground storage tank site. Taking a picture, at best, would amount to a general or administrative activity, taking place during the remediation. A camera and film are rarely, if ever, used anymore. If they are used at all, most cameras are digital. The truth of the matter is that with the invention of cameras in our phones, those cameras are now used as a normal course of business. The provision for this cost in Agency pamphlets and on-line is outdated information. Quite simply, the Agency’s question is what exactly is this \$30 cost for? A camera is a one-time purchase, film is hardly ever used and developed, and use of a cell phone definitely is an indirect cost. Under the regulations, 35 Ill. Adm. Code 734.630(v), “indirect corrective action costs for personnel, materials, service, or equipment charged as direct costs” are ineligible for payment from the fund.

Now the Petitioner makes a big deal that the Agency never mentioned the exact words “direct” or “indirect” costs during testimony. In response, the Agency would note that it is not the Agency’s burden of proof. The Agency presented Exhibit A with the definitions of direct and indirect cost. Those definitions speak for themselves. Then, the Petitioner says that the Agency included information in its testimony that was not included in the determination letter, specifically about film development. As the Board can see from Petitioner’s Exhibit A, it was Petitioner itself that brought cameras/photo development into

the discussion. (Pet. Ex. A, p.15.) The Agency was merely explaining the Petitioner's Exhibit.

Other Modifications

The Illinois EPA also included three more modifications to the Petitioner's budget. It is important to note that these items were not excluded from the budget, but were expressly identified by modification so that the Petitioner is on notice that these items most likely would need supporting documentation at the reimbursement stage. The modifications are as follows:

- The rate proposed for the bailer will need supporting documentation as the proposed rate of \$25/bailer is deemed excessive at this time.
- Justification is being requested in regards to the cost associated with the survey equipment. What type of equipment is being used?
- A breakdown of items associated with a sampling kit will need to be submitted to determine if this exceeds the minimum requirements to meet Title XVI.

All three of these items requested that more information be submitted to the Illinois EPA so that it could determine what was included in the request and to justify an amount that was higher than normally submitted to the Agency. As the Agency showed in Exhibit B, other consultants have easily provided this documentation to justify their submittals.

Requesting justification for ambiguous items listed in a budget is reasonable and not burdensome as the Agency showed with its Exhibit B.

CONCLUSION

The Petitioner presented the Board with no basis for reversing the Illinois EPA's determination.

WHEREFORE: for the above noted reasons, the Illinois EPA respectfully requests the Board **AFFIRM** the Illinois EPA's March 8, 2016, decision.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,

Respondent

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Dated: August 8, 2016

This filing submitted on recycled paper.

CERTIFICATE OF SERVICE

I, the undersigned attorney at law, hereby certify that on **August 8, 2016**, I served true and correct copies of **RESPONDENT'S POST-HEARING BRIEF** via the Board's COOL system and email, upon the following named persons:

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