

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

ABEL INVESTMENTS, LLC)
Petitioner,)
)
v.) PCB 2016-108
) (UST Appeal - Land)
ILLINOIS ENVIRONMENTAL)
PROTECTION AGENCY,)
Respondent.)

NOTICE

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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

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Dated: October 17, 2016

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

ABEL INVESTMENTS, LLC)	
Petitioner,)	
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v.)	PCB 2016-108
)	(UST Appeal - Land)
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
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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 2 Site Investigation Plan & Budget ("Budget") and actual costs for Stage 1 Site Investigation for incident 2013-0781 for a facility ("Abel") located within Carbondale, 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 following Stage 1 actual costs exceeded the minimum requirements of the Act, lacked supporting documentation or were unreasonable:

- \$984.24 for costs for engineer III which exceeded the minimum requirements of the Act under 57.7(c)(3). The Illinois EPA reduced the hourly rate from \$121.49 to the \$66.81 rate for Senior Account Technician. Pursuant to Section 734.850, personnel costs must be based upon the work being performed, regardless of the title of the person performing the work.
- \$1,457.88 for costs for technical oversight/compliance/reimbursement review, which exceed the minimum requirements necessary to comply with the Act and lacked supporting

documentation pursuant to Section 57.7(c)(3) of the Act and §734.630(o) of the regulations. These costs were duplicative.

- \$54.00 for indirect corrective action costs for costs associated with a measuring wheel pursuant to §734.630(v) of the Regulations and is unreasonable.

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 following Stage 2 budget amounts exceeded the minimum requirements of the Act, lacked supporting documentation or were unreasonable:

- \$991.28 for costs for technical oversight/compliance which exceeded the minimum requirements of the Act and which lacked supporting documentation. These costs were duplicative.
- \$660.52 for costs for a Professional Geologist which exceeded the minimum requirements necessary to comply with the Act under 57.7(c)(3). The hourly rate of \$113.99 was reduced to the \$66.81 rate for Senior Account Technician. Pursuant to Section 734.850, personnel costs must be based upon the work being performed, regardless of the title of the person performing the work.
- \$456.80 for costs for Engineer III which exceeded the minimum requirements of the Act under 57.7(c)(3). The hourly rate of \$123.91 was reduced to \$66.81 rate for Senior Account Technician. Pursuant to Section 734.850, personnel costs must be based upon the work

being performed, regardless of the title of the person performing the work.

- \$797.93 for costs for travel time which exceeded the minimum requirements of the Act and lack supporting documentation. The Petitioner's consultant has an office in the area of the site and calculated travel from Springfield instead of the nearby office in Marion.
- \$743.46 for costs for SICR technical compliance/oversight which exceeded the minimum requirements of the Act pursuant to 57.7(c)(3) and lacked supporting documentation. These costs were duplicative.
- \$21.00 for indirect corrective action costs for costs associated with a measuring wheel pursuant to §734.630(v) of the Regulations and is unreasonable.

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

Petitioner submitted a Stage 1 Investigation Actual Costs and Stage 2 Investigation Plan and Budget on January 8, 2016. The Illinois EPA modified both the Stage 1 and Stage 2 submittals on May 10, 2016 because the submittal included costs that exceeded the minimum requirements of the Act, lacked supporting documentation, were duplicative or were indirect costs. The Petitioner appealed on June 2, 2016 and the parties proceeded to hearing on September 2, 2016. At hearing several witnesses testified and the parties were given a briefing schedule.

ARGUMENT

The Illinois EPA renews its objections to the Board's shifting of the burden of proof away from the Petitioner where the General Assembly placed the burden and improperly onto the Illinois EPA.

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

Indirect Cost of Measuring Wheel

The Illinois EPA modified the costs associated with the measuring wheel as an indirect cost billed as a direct cost. This modification was done at both Stage 1 and Stage 2. 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.”

A measuring wheel is a one-time cost for a piece of equipment that can be used multiple times. It is a tool and is not disposable. Nor is it available for rent. (Transcript p. 62). The measuring wheel is an item with a small cost associated with it. Testimony indicated that a measuring wheel costs around \$40 up to \$60 for a high end measuring wheel. (Transcript p. 62) In this case, Petitioner charges \$54 under Stage 1 and \$21.00 under Stage 2. That is more than enough to cover the purchase of a new measuring wheel, which as stated above is a tool that can be used multiple times. 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. Even if the Board finds that the measuring wheel is not an indirect cost, the amounts the Petitioner charged for them certainly is unreasonable.

Travel Costs

This site is in Carbondale, Illinois. The Petitioner's consultant has offices in Springfield and Marion. The lead worker, or as the Agency refers to this position, the project manager, on this site is geologist Rob Stanley who works in and lives near to

Marion. It exceeds the minimum requirements of the Act to have all travel from Springfield when the lead worker/project manager is out of the Marion office. Further, there was no supporting documentation submitted to the Illinois EPA to show that travel from Springfield was necessary instead of travel time from the Marion office. Without such documentation, the Illinois EPA could not determine if the costs would be used for activities that are not site investigation or corrective action related and would therefore not be necessary to meet the minimum requirements of the Act. See Transcript p. 41 to 42 for Rob Stanley's testimony, and Transcript p. 48 for Shirlene South's testimony.

Reduction in rate

The Illinois EPA reduced the hourly rates charged or proposed to be charged in several instances in both the Stage 1 actual costs and the Stage 2 budgeted costs. Specifically, the following was reduced:

- \$984.24 for costs for Engineer III in Stage 1 which exceeded the minimum requirements necessary to comply with the Act under 57.7(c)(3). The Illinois EPA reduced the hourly rate from \$121.49 to the \$66.81 rate for Senior Account Technician. Pursuant to Section 734.850, personnel costs must be based upon the work being performed, regardless of the title of the person performing the work.
- \$660.52 for costs for a Professional Geologist in Stage 2 which exceeded the minimum requirements necessary to comply with the Act under 57.7(c)(3). The hourly rate of \$113.99 was reduced to the \$66.81 rate for Senior Account Technician. Pursuant to Section

734.850, personnel costs must be based upon the work being performed, regardless of the title of the person performing the work.

- \$456.80 for costs for Engineer III in Stage 2 which exceeded the minimum requirements of the Act under 57.7(c)(3). The hourly rate of \$123.91 was reduced to \$66.81 rate for Senior Account Technician. Pursuant to Section 734.850, personnel costs must be based upon the work being performed, regardless of the title of the person performing the work.

Section 734.850(b) of the Board's regulations states that "Personnel costs must be based upon the work being performed, regardless of the title of the person performing the work. Owners and operators seeking payment must demonstrate to the Agency that the amounts sought are reasonable." In this case, testimony of Shirlene South, Illinois EPA project manager, stated that the Petitioner indicated in the submittal that an Engineer III or a Professional Geologist was doing the work the Illinois EPA normally sees done by the Senior Account Technician for budget calculation/development. Transcript p. 47 to 48. Without supporting documentation, the Illinois EPA is unable to determine why the higher rate individuals were performing these tasks. Therefore, the Illinois EPA reduced the rates to what it determined was reasonable for the activities described in the documentation submitted by the Petitioner. Quite frankly testimony from the Petitioner's consultant did not justify billing the higher rates even at hearing. See Transcript p. 11-12. Carol Rowe, from CW3M, never testified definitively as to the roles involved and used words like "not necessarily" and "maybe". If she is unable to determine when a person is to perform a task, it is unreasonable to ask the Illinois EPA to guess when her company lists tasks normally

performed by a Senior Account Technician under the higher paid titles of Engineer III and Professional Geologist. Simply put, at the time the Illinois EPA made its decision, it was unable to determine from the information in the record why these higher rates were listed. So the Illinois EPA reduced the rates.

For Stage 1, the Petitioner lists 29 hours of budget preparation among several people such as the Senior Project manager, the Senior Professional Engineer and the Engineer III, which Carol Rowe's testimony indicated was the same person as the Senior Professional Engineer. AR p. 55. Transcript p. 29. Interestingly, no hours were listed for the Senior Account Technician in Stage 1. The Illinois EPA only reduced the hours listed for the Engineer III.

For Stage 2, the Petitioner lists 32 hours under budget preparation among several people, Senior Project Manager, Senior Professional Engineer, Professional Geologist, and Engineer III. AR p. 66. Interestingly, 24 hours is listed in Stage 1 for the Senior Account Technician to perform Stage 2 reimbursement work (AR p.56) and then lists 30 hours for the Senior Account Technician in Stage 2 to perform Stage 2 reimbursement work (AR p.68).

The Petitioner attempted to compare their business with the Illinois EPA. That is like comparing apples to oranges. A governmental entity's personnel may be assigned different tasks due to many factors beyond its control such as the layoff of all the accountants at the Agency. (Transcript p. 27) Further, the Illinois EPA is not held to Section 734.850(b). It does not matter if you have an engineering license or a professional geologist license. If you are performing the work of a senior account technician, that is what you are paid under the Board's regulations.

In summary, no supporting documentation was submitted to the Agency to justify the higher rate individuals performing these tasks. Based upon this fact that on its face it appeared to exceed the minimum requirements of the Act, the Illinois EPA properly reduced the hourly rates under Section 734.850(b).

Technical Oversight/Compliance/Reimbursement Review

The Illinois EPA modified costs, labeled technical oversight/compliance and in one instance reimbursement review, that were duplicative, lacked supporting documentation and exceeded the minimum requirements of the Act. Specifically, the Illinois EPA cut the following:

- \$1,457.88 for costs for technical oversight/compliance/reimbursement review, which exceed the minimum requirements necessary to comply with the Act and lacked supporting documentation pursuant to Section 57.7(c)(3) of the Act and §734.630(o) of the regulations. These costs were duplicative.
- \$991.28 for costs for technical oversight/compliance which exceeded the minimum requirements of the Act and which lacked supporting documentation. These costs were duplicative.
- \$743.46 for costs for SICR technical compliance/oversight which exceeded the minimum requirements of the Act pursuant to 57.7(c)(3) and lacked supporting documentation. These costs were duplicative.

When looking at Petitioner's submittal, it is obvious, on its face, that something is wrong. The number of hours for oversight was extremely inflated. Several different

parties were performing the same task and the hours involved were excessive. For example:

- On page 54 of the Administrative Record, 16 hours is listed for the Professional Geologist to perform oversight. 3 hours is listed for the Senior Professional Engineer. Then, on page 55 of the Administrative Record, 12 hours is listed for the Senior Project Manager for technical oversight/compliance/reimbursement review.
- On page 66 of the Administrative Record, 8 hours is listed for the Senior Project Manager for Technical Compliance and Oversight while the Professional Geologist, who is the lead worker on the site is also listed as performing similar work.
- On page 69 of the Administrative Record, 6 hours is listed for the Senior Project Manager for SICR Technical Compliance/Oversight, while the Professional Geologist who is the lead worker on the site is listed for 40 hours doing similar work.

The Illinois EPA asserts that these charges are duplicative of what the lead worker, in this case the professional geologist, should be doing at the site. The lead worker is responsible for oversight. The Petitioner did not present any supporting documentation to clarify this matter. The Agency is limited to what is submitted to it and based upon the record, it could not make any other determination. The EPA properly deducted these costs when modifying the Stage 1 costs and Stage 2 budget.

Agency Response to Petitioner's Brief

The Petitioner's consultant's business is regulated. If they want reimbursement from the UST fund, they will conduct their remediations and business in a manner that complies with the Act and regulations. The Legislature and the Board, through its rulemaking has told consulting businesses what will be reimbursed when performing remediations of leaking underground storage tanks. Many businesses find themselves regulated, either by state or local governments. The Illinois EPA is not second guessing on how the consultant's business is run. It is trying to make sense of the vague information submitted by the Petitioner and fitting it into the Laws and Regulations it must enforce. The Agency is a creature of statute. It relies on Petitioner's submittals in order to perform its functions. If the submittals do not have supporting documentation, it is required to deny those costs. Petitioner is always afforded the opportunity to resubmit the information with documentation that would explain what is being performed, especially when there are several people performing the same work.

If we take the Petitioner's argument that the Agency is second guessing the business decisions of the consultant to its logical conclusion, the State and Federal government's regulatory agencies might as well close up shop. Such companies should be able to conduct business any way they see fit whether there is a threat to human health or the environment as long as the businesses make money. Of course all consulting companies would like to charge the higher rates for all of their tasks. That increases profit. But then why do we even have different rates for different activities and regulations such as Section 734.850(b), if they are all going to charge the highest rate even for the most mundane task. If the

Petitioner gets their way, there is no need for the Board or the Board's regulations. They are both meaningless.

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 May 10, 2016, decision.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,

Respondent

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Dated: October 17, 2016

This filing submitted on recycled paper.

CERTIFICATE OF SERVICE

I, the undersigned attorney at law, hereby certify that on **October 17, 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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