

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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NOV 22 2006

STATE OF ILLINOIS
Pollution Control Board

VILLAGE OF WILMETTE)
Petitioner,)
)
v.)
)
ILLINOIS ENVIRONMENTAL PROTECTION)
AGENCY,)
Respondent.)
)

PCB 07-27
(UST Appeal)

NOTICE

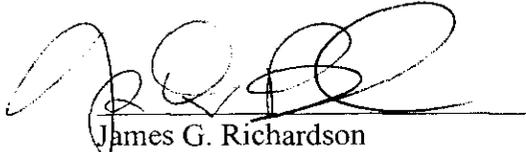
Dorothy Gunn
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Mary Beth Cyze
Village of Wilmette
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Wilmette, Illinois 60091

PLEASE TAKE NOTICE that I have today caused to be filed a MOTION FOR SUMMARY JUDGMENT with the Illinois Pollution Control Board, copies of which are served upon you.

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY


James G. Richardson
Special Assistant Attorney General

Dated: November 20, 2006
1021 North Grand Avenue East
P.O. Box 19276
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217/782-5544

THIS FILING IS SUBMITTED ON RECYCLED PAPER

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

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PROTECTION AGENCY,)	
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MOTION FOR SUMMARY JUDGMENT

NOW COMES the Respondent, the Illinois Environmental Protection Agency ("Illinois EPA"), by one of its attorneys, James G. Richardson, Assistant Counsel and Special Assistant Attorney General, and, pursuant to 35 Ill. Adm. Code 101.500, 101.508 and 101.516, hereby respectfully moves the Illinois Pollution Control Board ("Board") to enter summary judgment in favor of the Illinois EPA and against the Petitioner, Village of Wilmette ("Wilmette"), in that there exist herein no genuine issues of material fact and that the Illinois EPA is entitled to judgment as a matter of law with respect to the following grounds. In support of said motion, the Illinois EPA states as follows:

I. STANDARD FOR ISSUANCE AND REVIEW

A motion for summary judgment should be granted where the pleadings, depositions, admissions on file, and affidavits disclose no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Dowd & Dowd, Ltd. v. Gleason, 181 Ill.2d 460, 483, 693 N.E.2d 358, 370 (1998); McDonald's Corporation v. Illinois Environmental Protection Agency, PCB 04-14 (January 22, 2004), p. 2.

Section 57.8(i) of the Illinois Environmental Protection Act ("Act"), 415 ILCS 5/57.8(i), grants

an individual the right to appeal a determination of the Illinois EPA to the Board pursuant to Section 40 of the Act, 415 ILCS 5/40. Section 40 of the Act, the general appeal section for permits, has been used by the legislature as the basis for this type of appeal to the Board. Thus, when reviewing an Illinois EPA determination of ineligibility for reimbursement from the Underground Storage Tank Fund, the Board must decide whether or not the application as submitted demonstrates compliance with the Act and Board regulations. Rantoul Township High School District No. 193 v. Illinois EPA, PCB 03-42 (April 17, 2003), p. 3.

In deciding whether the Illinois EPA's decision under appeal here was appropriate, the Board must look to the documents within the Administrative Record ("AR"). The Illinois EPA asserts that the Record and the arguments presented in this motion are sufficient for the Board to enter a dispositive order in favor of the Illinois EPA on all relevant issues. Accordingly, the Illinois EPA respectfully requests that the Board enter an order affirming the Illinois EPA's decision.

II. BURDEN OF PROOF

Pursuant to Section 105.112(a) of the Board's procedural rules, 35 Ill. Adm. Code 105.112(a), the burden of proof shall be on the petitioner. In reimbursement appeals, the burden is on the applicant for reimbursement to demonstrate that incurred costs are related to corrective action, properly accounted for, and reasonable. Rezmar Corporation v. Illinois EPA, PCB 02-91 (April 17, 2003), p. 9.

III. ISSUE

The issue before the Board is whether the Illinois EPA can consider a High Priority Corrective Action Plan Budget amendment after the issuance of a No Further Remediation ("NFR") letter as set forth in the Illinois EPA's final decision dated September 14, 2006 (AR, p. 1) taking into account the underlying facts and law. As will be argued below, the facts in this case are undisputed and clearly

demonstrate that the decision was appropriate and should be affirmed.

IV. THE ILLINOIS EPA IS ENTITLED TO SUMMARY JUDGMENT BASED ON THE FACTS AND LAW

A. Relevant Facts

The facts in the Illinois EPA record supporting this motion are as follows:

On October 24, 2005, the Illinois EPA issued a NFR letter to Wilmette. (AR, p.27) Revised NFR letters were issued to Wilmette on November 29, 2005 and June 16, 2006. (AR, p. 47)

On July 7, 2006, Wilmette recorded the NFR letter. (AR, p. 44)

On August 4, 2006, MACTEC Engineering and Consulting, Inc., on behalf of Wilmette, submitted a High Priority Corrective Action Plan Budget amendment. (AR, p. 6)

On September 14, 2006, the Illinois EPA issued a determination letter rejecting the budget because “[t]he budget was submitted after the issuance of a No Further Remediation Letter. Pursuant to Section 57.6(a) of the Act and 35 Ill. Adm. Code 732.405(d), any corrective action plan or budget must be submitted to the Illinois EPA for review and approval, rejection, or modification in accordance with the procedures contained in Subpart E of 35 Ill. Adm. Code 732 prior to the issuance of a No Further Remediation Letter.” (AR, p. 1)

B. Relevant Law

Section 732.405 Plan Submittal and Review

- a) Prior to conducting any corrective action activities pursuant to this Subpart D, the owner or operator shall submit to the Agency a Low Priority groundwater monitoring plan or a High Priority corrective action plan satisfying the minimum requirements for such activities as set forth in Section 732.403 or 732.404 of this Part, as applicable.
- b) In addition to the plans required in subsections (a), (e), and (f) of this Section and prior to

conducting any groundwater monitoring or corrective action activities, any owner or operator intending to seek payment from the Fund shall submit to the Agency a groundwater monitoring or corrective action budget plan with the corresponding groundwater monitoring or corrective action plan. Such budget plans shall include, but is not limited to, a copy of the eligibility and deductibility determination of the OSFM and an estimate of all costs associated with the development, implementation and completion of the applicable activities, excluding handling charges. Formulation of budget plans should be consistent with the eligible and ineligible costs listed at Sections 732.605 and 732.606 of this Part and the maximum payment amounts set forth in Subpart H of this Part. As part of the budget plan the Agency may require a comparison between the costs of the proposed method of remediation and other methods of remediation.

- c) The Agency shall have the authority to review and approve, reject or require modification of any plan or budget plan submitted pursuant to this Section in accordance with the procedures contained in Subpart E of this Part.
- d) Notwithstanding subsections (a), (b), (e), and (f) of this Section and except as provided at Section 732.407 of this Part, an owner or operator may proceed to conduct Low Priority groundwater monitoring or High Priority corrective action activities in accordance with this Subpart D prior to the submittal or approval of an otherwise required groundwater monitoring plan or budget plan or corrective action plan or budget plan. However, any such plan and budget plan shall be submitted to the Agency for review and approval, rejection, or modification in accordance with the procedures contained in Subpart E of this Part *prior to* payment for any related costs or *the issuance of a No Further Remediation Letter*. (Emphasis added)

BOARD NOTE: Owners or operators proceeding under subsection (d) of this Section are advised that they may not be entitled to full payment from the Fund. Furthermore, applications for payment must be submitted no later than one year after the date the Agency issues a No Further Remediation Letter. See Subpart F of this Part.

- e) If, following approval of any groundwater monitoring plan, corrective action plan or associated budget plan, an owner or operator determines that revised procedures or cost estimates are necessary in order to comply with the minimum required activities for the site, the owner or operator shall submit, as applicable, an amended groundwater monitoring plan, corrective action plan or associated budget plan for review by the Agency. The Agency shall review and approve, reject, or require modifications of the amended plan or budget plan in accordance with the procedures contained in Subpart E of this Part.
- f) If the Agency determines any approved corrective action plan has not achieved applicable remediation objectives within a reasonable time, based upon the method of remediation and site specific circumstances, the Agency may require the owner or operator to submit a revised corrective action plan. If the owner or operator intends to seek payment from the Fund, the owner or operator must also submit a revised budget plan. Any action by the Agency to require a revised corrective action plan pursuant to this subsection (f) shall be subject to appeal to the Board within 35 days after the Agency's final action in the manner provided for the review of permit decisions in Section 40 of the Act.

BOARD NOTE: Owners and operators are advised that the total payment from the Fund for all groundwater monitoring plans and associated budget plans, and for all corrective action plans

and associated budget plans, submitted by an owner or operator must not exceed the amounts set forth in Subpart H of this Part.

C. No Genuine Issues Of Material Fact Exist

The question in this case is not one of fact but rather of law. Specifically, the question is whether the Illinois EPA can consider a High Priority Corrective Action Plan Budget amendment after the issuance of a No Further Remediation letter. Section 732.405(d) of the Board's regulations, 35 Ill. Adm. Code 732.405(d), clearly states: "However, any such plan and budget plan shall be submitted to the Agency for review and approval, rejection, or modification in accordance with the procedures contained in Subpart E of this Part *prior to* payment for any related costs or *the issuance of a No Further Remediation Letter.*" (Emphasis added). It is clear from the record that the Illinois EPA issued Wilmette a NFR letter on October 24, 2005 and revised NFR letters on November 29, 2005 and June 16, 2006. Wilmette recorded its NFR letter on July 7, 2006. MACTEC Engineering and Consulting, Inc., on behalf of Wilmette, submitted a High Priority Corrective Action Plan Budget amendment on August 4, 2006. The record clearly shows that Wilmette submitted this High Priority Corrective Action Plan Budget amendment after the issuance of a NFR letter. The Illinois EPA is prohibited from reviewing the High Priority Corrective Action Plan Budget amendment pursuant to Section 732.405(d).

V. CONCLUSION

For the reasons stated herein, the Illinois EPA respectfully requests that the Board affirm the Illinois EPA's decision to reject the High Priority Corrective Action Plan Budget amendment in the September 14, 2006 final decision.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,

Respondent



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Special Assistant Attorney General
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Dated: November 20, 2006

This filing submitted on recycled paper.

CERTIFICATE OF SERVICE

I, the undersigned attorney at law, hereby certify that on November 20, 2006 I served true and correct copies of a MOTION FOR SUMMARY JUDGMENT by first class mail of the United States Postal Service upon the persons as follows:

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Chicago, Illinois 60601-3218

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Board
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