

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

WEBB & SONS, INC.,)	
Petitioner,)	
)	
v.)	PCB 07-24
)	(UST Appeal)
ILLINOIS ENVIRONMENTAL PROTECTION)	
AGENCY,)	
Respondent.)	
)	

NOTICE

Dorothy Gunn
Clerk
Illinois Pollution Control Board
100 West Randolph Street, Suite 11-500
Chicago, Illinois 60601-3218

Jeffrey W. Tock
Harrington & Tock
P.O. Box 1550
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PLEASE TAKE NOTICE that I have today caused to be filed a RESPONSE TO PETITIONER'S BRIEF with the Illinois Pollution Control Board, copies of which are served upon you.

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY

/s/ James G. Richardson
James G. Richardson
Special Assistant Attorney General

Dated: January 12, 2007
1021 North Grand Avenue East
P.O. Box 19276
Springfield, Illinois 62794-9276
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**THIS FILING IS SUBMITTED ON RECYCLED PAPER
BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**

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Petitioner,)	
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v.)	PCB 07-24
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ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
Respondent.)	

RESPONSE TO PETITIONER’S BRIEF

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 hereby submits to the Illinois Pollution Control Board (“Board”) its Response to Petitioner’s Brief.

I. BURDEN OF PROOF

Pursuant to 35 Ill. Adm. Code 105.112(a), the Petitioner, Webb & Sons, Inc. (“Webb”), has the burden of proof in this case. 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). Thus Webb must demonstrate to the Board that it has satisfied its burden before the Board can enter an order reversing or modifying the Illinois EPA’s decision under review.

II. STANDARD OF REVIEW

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 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. Therefore when

reviewing an Illinois EPA determination of ineligibility for reimbursement from the Underground Storage Tank Fund (“UST Fund”), the Board must decide whether or not the application, as submitted to the Illinois EPA, demonstrates compliance with the Act and Board regulations. Broderick Teaming Company v. Illinois EPA, PCB 00-187 (December 7, 2000).

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”), along with the testimony provided at the hearing held on December 11, 2006 in this matter (“TR”). Based on the information within the Record and the Transcript, along with the relevant law, the Illinois EPA respectfully requests that the Board enter an order affirming the Illinois EPA’s decision.

III. FACTS

Webb submitted an August 18, 2006 proposed Corrective Action Plan and Budget to the Illinois EPA. Section G of the submittal’s Appendix B contained information regarding personnel costs that totaled \$104,637.00, although the figure for personnel costs presented in Section B of Appendix B was \$103,360.00. Pet. Exhibit 1, AR at 49, 54-56. On September 12, 2006 the Illinois EPA acted on the submittal and, among other things and employing the number contained in Section B, deemed all of the personnel costs unreasonable pursuant to 35 Ill. Adm. Code 732.606 (hh). Pet. Exhibit 3, AR at 1-7. The Illinois EPA requested “an hourly breakdown of each task performed by each job title in order to make a more thorough review of the proposed personnel costs.” In its October 13, 2006 Petition for Review concerning the Illinois EPA’s action regarding the personnel costs, Webb asked the Board to “find that the Agency’s September 12, 2006 rejection of the Personnel Costs section of the Petitioner’s Budget proposal was arbitrary and capricious and without statutory authority” and “remand this matter to the Agency with instructions to approve the

Petitioner's Budget proposal as submitted . . .”

IV. ARGUMENT

Illinois EPA Project Manager James Malcom testified that he reviewed Webb's August 18, 2006 proposed Corrective Action Plan and Budget. Based upon his training and experience he determined that the overall hours were excessively high, specifically for the job titles of Senior Project Manager, Professional Engineer, and Engineer III for High Priority Investigation and Preliminary Costs, and Scientist III for CACR Report/HAA's/Reimbursements. TR at 44-45, 47, 49. Malcom also noted that two LUST project appeals were included within the tasks performed by the first three job titles, something that prior to this case he had never seen requested nor approved for reimbursement. TR at 45, 61. He stated that the hourly breakdown request contained in the Illinois EPA's September 12, 2006 letter was not unusual for a budget with excessive hours, both under his current supervisor and previous supervisors. TR at 48, 52. Aside from the fact that all of his work is reviewed by his supervisor, the excessive hours prompted Malcom to obtain input from his supervisor on the appropriate action to take. TR at 41, 61.

Webb is critical of the Illinois EPA's decision but several flaws exist in Webb's position. In its Petition for Review, Webb claimed that the Illinois EPA's decision was arbitrary, capricious and without statutory authority and asked that the Illinois EPA be required to approve the personnel costs as submitted. But at the briefing stage of this proceeding Webb retreats from this stance, now conceding that the Illinois EPA needed additional information to review the hours of the Senior Project Manager, Professional Engineer, and Engineer III for High Priority Investigation and Preliminary Costs.

Webb references these three job titles as "limited" personnel in its brief, apparently

suggesting that these positions and the costs associated with them are not that significant to the budget as a whole. This is simply not the case. These three job titles account for almost 48% of the total hours and 54% of the total personnel costs presented in the budget. It would not have been prudent for the Illinois EPA to approve the other personnel costs sought by Webb when the Illinois EPA could not determine the reasonableness or reimbursement eligibility of over 50% of the total budget. The situation is analogous to that of an unfinished jigsaw puzzle. One cannot fully grasp or evaluate the image of the puzzle if more than 50% of the pieces are missing. Webb goes on to suggest that once the appeal hours are isolated, the hours allocated to the Corrective Action Plan can be identified and easily approved by the Illinois EPA. But for the hours sought for the Senior Project Manager, Malcom testified “And I’ve never seen 453. I mean, that just seemed really excessive.” TR at 44-45. Even when the appeal hours are identified, the remaining hours will still have to be scrutinized to determine if they satisfy the statutory and regulatory requirements for reimbursement.

Webb touts the expertise and experience of Illinois EPA personnel in reviewing plans and budgets, including Malcom’s supervisor Harry Chappel, then chastises Chappel for not approving the personnel costs sought by Webb aside from those for Senior Project Manager, Professional Engineer, and Engineer III for High Priority Investigation and Preliminary Costs. This argument should not be given much weight because it is a double-edged sword. If Webb has true regard for Illinois EPA expertise and experience, it should have submitted the hourly breakdown sought by the September 12, 2006 decision letter. This argument is further weakened by Webb’s concession that additional information was appropriate for three job titles.

The reduction of personnel hours by the Illinois EPA was an issue in Todd’s Service Station

v. Illinois EPA, PCB 03-2 (January 22, 2004). Todd's had also been provided an opportunity by the Illinois EPA to submit additional information concerning the reasonableness of costs. In its decision affirming the Illinois EPA's action, the Board stated as follows:

“Line item descriptions of the work performed by each professional do not provide enough information for the Agency to determine whether the number of hours and rates charged are appropriate and reasonable. A more specific breakdown of the tasks performed and how many hours were spent on each task is necessary for the Agency to make this determination. Also, Todd's did not present any testimony at hearing explaining how the Agency record demonstrates that the costs are reasonable.” p.7

At the hearing in the instant appeal, Webb took time to discuss other reimbursement appeals and introduce the testimony of Illinois EPA employees provided in regulatory proceedings. But as was the case in Todd's Service Station, there was little, if any, testimony explaining how the Illinois EPA's Administrative Record demonstrated that the costs of the Senior Project Manager, Professional Engineer, and Engineer III for High Priority Investigation and Preliminary Costs were reasonable.

To sum up, Webb submitted a Corrective Action Plan and Budget to the Illinois EPA wherein over 50% of the personnel costs sought raised questions as to whether the costs were excessive and eligible for reimbursement. The Illinois EPA decided to deem all of the personnel costs as unreasonable but provided Webb an opportunity to submit additional information so that a more thorough review of the personnel costs could be performed. Webb instead elected to pursue this appeal. At the hearing, Webb testimony provided little insight as to how the costs of the Senior Project Manager, Professional Engineer, and Engineer III for High Priority Investigation and Preliminary Costs were reasonable based upon the Illinois EPA's Administrative Record. Since then, Webb has conceded that additional information was needed by the Illinois EPA to review these

costs. Webb has failed to meet its burden of proof in this matter.

V. CONCLUSION

For all of the reasons and arguments presented herein, the Illinois EPA respectfully requests that the Board affirm its September 12, 2006 decision.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY

/s/ James G. Richardson
James G. Richardson
Special Assistant Attorney General

Dated: January 12, 2007
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CERTIFICATE OF SERVICE

I, the undersigned attorney at law, hereby certify that on January 12, 2007 I served true and correct copies of a RESPONSE TO PETITIONER'S BRIEF upon the persons and by the methods as follows:

[*Electronic Filing*]

Dorothy Gunn
Clerk
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100 West Randolph Street, Suite 11-500
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[*1st Class U.S. Mail*]

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