

VILLAGE OF WILMETTE,)
Petitioner,)
)
v.) PCB 07-48
) (UST Appeal)
ILLINOIS ENVIRONMENTAL)
PROTECTION AGENCY,)
Respondent.)

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 instant decision is related to the Illinois EPA's decision under appeal in Village of Wilmette v. Illinois EPA, PCB 07-27, where an Illinois EPA Motion for Summary Judgment is pending. As references to documents in the Administrative Record of that appeal are necessary here, these documents will be identified as "AR07-27." The Illinois EPA asserts that the documents identified and 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 authorize payments that exceed approved budget amounts as set forth in the Illinois EPA's final decision dated November 13, 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 records supporting this motion are as follows:

On October 24, 2005, the Illinois EPA issued a NFR letter to Wilmette for this facility. (AR07-27, p.27) Revised NFR letters were issued to Wilmette on November 29, 2005 and June 16, 2006. (AR07-27, p. 47)

On July 7, 2006, Wilmette recorded the NFR letter. (AR07-27, p. 44)

On August 4, 2006, MACTEC Engineering and Consulting, Inc., on behalf of Wilmette, submitted High Priority Corrective Action Plan Budget Amendment No. 3. (AR07-27, p. 6) This budget amendment sought to increase the existing budget by \$12,109.25 for personnel costs and \$2,728.31 for handling charges. (AR07-27, p. 11)

On September 14, 2006, the Illinois EPA issued a determination letter rejecting the budget amendment 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.” (AR07-27, p. 1)

On August 2, 2006, Wilmette submitted an application for payment to the Illinois EPA. (AR, p. 21)

On November 13 2006, the Illinois EPA issued a determination letter concerning the August 2, 2006 application for payment that identified certain costs that would not be paid. (AR, p. 1) These were identified as \$12,108.50 in personnel costs and \$2,728.31 in handling charges, both deducted because “[t]he billings submitted exceed the approved budget amounts. The Illinois EPA is unable to approve billings that exceed the approved budget amounts pursuant to Section 57.8(a)(1) of the Act and 35 Ill. Adm. Code 732.601(g) and 732.606(m).”

B. Relevant Law

Section 732.405 Plan Submittal and Review

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.

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.

Section 732.601 Applications for Payment

- g) In no case shall the Agency authorize payment to an owner or operator in amounts greater than the amounts approved by the Agency in a corresponding budget plan. Revised cost estimates or increased costs resulting from revised procedures must be submitted to the Agency for review in accordance with Subpart E of this Part using amended budget plans as required under this Part.

Section 732.606 Ineligible Corrective Action Costs

- m) Costs exceeding those contained in a budget plan or amended budget plan approved by the Agency.

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 authorize payments that exceed approved budget amounts. Wilmette sought to seek reimbursement for \$12,109.25 for personnel costs and \$2,728.31 for handling charges that exceeded its approved budget amounts. To accomplish this, Wilmette submitted Budget Amendment No. 3 to the Illinois EPA. But this budget amendment was rejected by the Illinois EPA on September 14, 2006 because it had been submitted after a No Further Remediation Letter had been issued. Without an approved budget amendment for these costs, Sections 732.601(g) and 732.606(m) of the Board's regulations, 35 Ill. Adm. Code 732.601(g) and 732.606(m), prohibit payment of the costs. When Wilmette submitted an August 2, 2006 application for payment of these costs, the Illinois EPA had no choice but to deny their payment pursuant to Sections 732.601(g) and 732.606(m) in the November 13, 2006 determination letter.

V. CONCLUSION

For the reasons stated herein, the Illinois EPA respectfully requests that the Board affirm the Illinois EPA's decision to deny payment of the costs identified in the November 13, 2006 final decision.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,

Respondent

/s/ James G. Richardson

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Dated: March 29, 2007

THIS FILING IS SUBMITTED ON RECYCLED PAPER

CERTIFICATE OF SERVICE

I, the undersigned attorney at law, hereby certify that on March 29, 2007 I served true and correct copies of a MOTION FOR SUMMARY JUDGMENT upon the persons and by the methods as follows:

[Electronic Filing]

Dorothy Gunn
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