

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

VILLAGE OF WILMETTE	)	
	)	
Petitioner,	)	
v.	)	PCB 07-27
	)	
ILLINOIS ENVIRONMENTAL PROTECTION	)	(UST Appeal)
AGENCY,	)	
	)	
Respondent	)	

**PETITIONER'S RESPONSE TO IEPA'S MOTION FOR SUMMARY JUDGMENT AND CROSS-MOTION FOR SUMMARY JUDGMENT**

NOW COMES Petitioner, the Village of Wilmette ("Village"), through its undersigned attorney, and pursuant to Section 101.516 of this Board's procedural rules, 35 Ill. Adm. Code Section 101.516, hereby responds to the Motion for Summary Judgment filed by Respondent ILLINOIS ENVIRONMENTAL PROTECTION AGENCY ("IEPA"). In addition, the Village hereby files and submits this Response as its own Cross-Motion for Summary Judgment. In support thereof, the Village states as follows:

**BACKGROUND**

This appeal involves the Village's challenge to the decision of the IEPA with respect to cost reimbursement under the LUST program for corrective action completed at the Village's site located at 710 Ridge Road, Wilmette, Illinois (AR. 34). In particular, this action involves IEPA's September 14, 2006 denial of the Village's High Priority Corrective Action Plan Budget amendment. The Village also filed a related appeal (PCB 07-48) as to IEPA's subsequent denial, dated November 13, 2006, of the Village's final request for reimbursement of the costs for the remediation work associated with the budget amendment. Although the Board has denied the Village's Motion to

Consolidate the two appeals filed by the Village, a decision in this appeal, PCB-027, regarding IEPA's denial of the budget amendment, will be dispositive of the issue raised by PCB-048.

At the outset it is significant to recognize that the Village's final reimbursement request was *less* than the previously approved total budget. Nevertheless, because the amounts within the subcategories varied from the total budget amount, the Village needed to file a budget amendment. In other words, the budget amendment represented a proper accounting of the previously approved total amount as required. Nevertheless, IEPA denied the request on the grounds that, under 35 Ill. Adm. Code 732.405(d), the Village's budget amendment had been submitted subsequent to issuance of a No Further Remediation ("NFR") letter. Consequently, because the budget amendment amounts within certain categories varied, IEPA denied those amounts in the Village's final reimbursement request. Accordingly, PCB 07-27 and 07-48 raise the issue of whether IEPA correctly denied the budget amendment and final reimbursement request. This in turn raises the issue of whether, as a matter of law, all budget amendments submitted after the issuance of an NFR must be denied.

The Village recognizes that this Board has recently issued two decisions addressing the issue of budget amendments filed after the issuance of an NFR letter. In *Fed Ex Ground Packaging System, Inc. v. IEPA*, PCB 07-012 ("*Fed Ex*") and *Broadus Oil v. IEPA*, PCB 07-27 and 07-48 ("*Broadus Oil*") (interpreting 35 Ill. Adm. Code Section 734.335(d) and Section 732.405(d) respectively), the Board ruled that IEPA properly denied budget amendments on the grounds that the amendments were submitted after the issuance of an NFR letter. Notwithstanding the Board's Opinion and

Order in those two cases, because as of the time of this submittal by the Village there is a pending appeal in the *Fed Ex* case, the Village believes it is necessary to preserve its legal right to raise those arguments herein. More importantly, the Village files this Cross Motion for Summary Judgment because this instant case is distinguishable from *Broadus Oil* and *Fed Ex*.

**FACTS**

The facts before this Board are undisputed, and therefore, the Village accepts as true the statement of facts set forth in the IEPA's motion for summary judgment. The Village hereby incorporates those facts as its own, in support of both its response to the IEPA's motion for summary judgment, and of its own cross-motion for summary judgment.

The Village would emphasize, however, certain facts that are missing from IEPA's brief which demonstrate that the legal basis provided by IEPA does not support the denial of the budget amendment. Specifically, what factually distinguishes this case from *Fed Ex* and *Broadus Oil* is the fact that here, the Village's final reimbursement request was *less than the previously approved total budget*. (AR. 6-8). Nevertheless, because the amounts within the subcategories varied from the original budget amount, the Village needed to file a budget amendment. It is undisputed that the budget amendment was the proper accounting of the previously approved total budget amount.

**STANDARD**

IEPA identifies the Village's burden of proof in this case as requiring that the Village "demonstrate that the incurred costs are related to corrective action, properly accounted for, and reasonable." (IEPA Motion p.2). IEPA, however, cites no facts in the

record, nor are there any to cite, to show that the Village's request was not "related to corrective action, properly accounted for, and reasonable." In fact, the budget amendment at issue in this case only sought to reallocate costs among categories, with the result that the overall final reimbursement request was *less* than the previously approved budget. Moreover, in denying the budget amendment, the IEPA did not question that the work performed was not necessary, having previously determined that the corrective action had been done according to the approved corrective action plan (AR. 27). Thus, as a matter of law, there is no question as to whether that the Village met its burden of proof in its underlying submittal.

IEPA has recognized that "the facts in this case are undisputed" (IEPA motion, at 2). IEPA acknowledges that "the question in this case is not one of fact, but rather of law." (IEPA motion, at 6). As this Board has noted, "the law is well settled that when reviewing a question of law the reviewing court should use the *de novo* standard of review." City of Kankakee v. County of Kankakee, PCB 03-125, 03-133, 03-134, and 03-135 (cons.), 2003 Ill. ENV LEXIS 462, at \*34 (Ill. PCB, Aug. 7, 2003) (citing Panhandle Eastern Pipeline v. IEPA, 314 Ill. App. 3d 296, 734 N.E. 2d 18 (4<sup>th</sup> Dist. 2000)).

The standard of review for this Board, proceeding pursuant to Section 40 of the Illinois Environmental Protection Act, 415 ILCS 5/40, is to determine whether the application, as reviewed by the IEPA, would not violate the Act and this Board's regulations. Only information considered by the IEPA at the time it rendered its decision can be considered, and IEPA's denial letter frames the issues on appeal. Swift Food Mart v. Illinois EPA, PCB 03-185, slip op. at 11 (May 20, 2004).

The letter from the IEPA to the Village denying the budget amendment stated:

"The budget was submitted after the issuance of a No Further Remediation Letter. Pursuant to 57.6(a) 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. 1).

**IEPA'S DENIAL OF THE VILLAGE'S BUDGET AMENDMENT AND FINAL REQUEST FOR REIMBURSEMENT IS NOT SUPPORTED BY THE LANGUAGE OF 35 ILL. ADM. CODE 732.405(D) OR THE BOARD'S INTERPRETATION THEREOF.**

In the recently decided cases of *Broadus Oil* and *Fed Ex*, this Board addressed the issue of whether the regulatory provision cited by the IEPA, 35 Ill. Adm. Code 732.405(d), constitutes a basis for rejecting budget amendments and requests for reimbursement filed after the issuance of an NFR letter. In rejecting the argument that subsection (d) applies only where an owner has elected to proceed with corrective action before submitting a CAP or budget, the Board ruled that subsection (d) "*applies not only to those who proceed with no approved plan or budget, but also to those who go beyond an approved plan or budget.*" (Slip. Op. at 10, Dec. 21, 2006). Accordingly, because the Petitioners in those matters had gone beyond their respective approved budgets, they were required to have filed their budget amendments prior to the issuance of an NFR letter.

In contrast to the Petitioners in *Broadus Oil* and *Fed Ex*, the Village here did not incur costs beyond the approved budget. The total approved budget for the Village's site was \$607,703.08. The Village's final reimbursement request was \$559,583.49, which is **\$48,119.59 less than the approved budget.** (AR. 6-8). IEPA does not dispute this fact.

This Board's decisions in *Broadus Oil* and *Fed Ex* held that subsection (d)

applies to those who go *beyond* an approved budget. The language of the opinions does not apply to reallocations within subcategories of an approved budget. More importantly, the opinion should not be construed to apply to such a situation as that of the Village's. The Village's budget amendment is nothing more than what the Village was required to do in this case which is to properly account for the corrective action costs. IEPA does not dispute that the costs were not properly accounted for. Nor is there a dispute that the costs were related to the corrective action. Moreover, it is within this Board's purview to find that a final budget request that is approximately \$48,000.00 less than the previously approved IEPA budget, is reasonable as a matter of law. Hence, IEPA improperly rejected the Village's budget amendment and subsequent final reimbursement request, and therefore, summary judgment should be entered in favor of the Village and against IEPA.

**SECTION 732.405(d) IS NOT A SUFFICIENT BASIS FOR IEPA'S DENIAL BECAUSE, AS A MATTER OF LAW, IT DOES NOT APPLY TO THE VILLAGE IN THIS CASE.**

As stated at the outset, the Village recognizes that this Board has recently issued two decisions addressing the issue of budget amendments filed after the issuance of an NFR letter. However, because as of the filing of this Response and Cross Motion, an appeal is pending in the *Fed Ex* case, the Village believes it is necessary to reference the legal arguments in this brief so as to preserve its legal rights. Accordingly, for the same reasons as raised by the Petitioners in *Fed Ex* and *Broadus Oil*, the Village maintains that, at a matter law, Section 732.405(d) applies only to the right of owners/operators to proceed with remediation prior to submittal or approval of a corrective action plan or budget, a situation which is not applicable in this case.

Specifically, the sentence in 732.405(d) at issue provides: "However, any such plan and budget plan shall be submitted to the Illinois EPA for review and approval, rejection or modification in accordance with the procedures contained in Subpart F of this Part prior to payment for any related costs or the issuance of a No Further Remediation Letter." A Board Note following the subsection advises: "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."

IEPA's argument in its brief consists of a single paragraph at page 6 of its motion, in which the IEPA defines the issue presented as "whether the IEPA can consider a High Priority Corrective Action Plan Budget Amendment after the issuance of a No Further Remediation Letter." Citing Section 732.405(d) as its basis, IEPA goes on to state that "The IEPA is prohibited from reviewing the High Priority Corrective Action Plan Budget Amendment pursuant Section 732.405(d)." (IEPA motion p. 6). This interpretation of Section 732.405(d), however, does not comport with the regulatory and statutory scheme that this Board is bound to consider.

The argument that the Board should interpret the second sentence of 734.335(d) as prohibiting the IEPA from reviewing budget amendments submitted ignores the immediately preceding sentence of that subsection, ignores the entire section immediately following subsection 734.335(e), and ignores certain provisions of Section 57.8 of the Environmental Protection Act (the Act.). In particular, when interpreting a single sentence in a regulatory subsection, as IEPA has done here, the sentence must

be read as part of the whole regulation, and in light of its overall purpose. See *County of Dupage v. E & F Hauling*, PCB AC 88-76, 88-77 (Feb. 8, 1990) p. 3, citing *People v. Jordan*, 103 Ill. 2d 192, 469 N.E. 2d 569 (1984.) A reading of the entire Section 734.335 (quoted in full in IEPA's motion, pages 4-7), shows that most subsections address situations where the owner submits a CAP and Budget to IEPA for approval before conducting the corrective action, just as the Village did here. Subsection 734.335(d) is the only subsection that applies where an owner has elected to proceed with corrective action before submitting a CAP or budget. This subsection does not apply where an owner submits its plan and budget for approval before doing the work, like the Village has done here. Absent from language of subsection 734.335(d) is any reference to amended budgets at all. Instead, amended budgets are addressed in Subsection 734.335(e).

In interpreting subsection (d), this Board should do so within the entirety of that Section. The Section is entitled "Plan Submittal and Review." Subsection (a) of Section 732.405 concerns the general requirement that remediation plans be submitted for IEPA review prior to conducting any remediation activities pursuant to those plans. Subsection (b) provides that, if an owner/operator intends to seek reimbursement for remediation, the owner/operator shall also submit budget plans for the remediation work being proposed. Subsection (c) confirms that the IEPA has authority to review, approve, reject or require modification of any plans submitted to it. Subsection (e) states that whenever an owner/operator realizes after approval of any plan or budget that modifications are necessary to comply with the Illinois Environmental Protection Act or this Board's regulations, the owner/operator "shall submit, as applicable, an amended

groundwater monitoring plan, corrective action plan or associated budget plan for review by the IEPA.” Subsection (f) addresses IEPA’s authority to require revised corrective action plans in the event an approved plan is not working as anticipated.

Subsection (d), which begins: “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.” Put simply, Subsection (d) concerns those instances where an owner/operator submits no remediation plan or budget for approval prior to conducting remedial activities, and the regulation allows the owner/operator to nevertheless proceed with that remediation. The sentence in question then follows: “However, any such plan and budget plan shall be submitted to the Illinois EPA 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 to the issuance of a No Further Remediation Letter.” Hence, the work can be completed without a remediation plan, but the remediation plan must be submitted before reimbursement can be obtained for that work, and/or before an NFR is issued as a result of that work.

Nothing in this language prohibited the IEPA from considering the Village’s budget amendment proposal, and consequently denying the associated reimbursement costs. Nothing in subsections (b) or (e) requires that such amendments be requested prior to issuance of an NFR. To the contrary, only subsection (d) has such a restriction.

This interpretation of the regulatory scheme is sound legislative construction.

Clearly an NFR should not be issued for a site before the corrective action plan for that site has been reviewed and compared with finalization of remediation, nor should any reimbursement be approved for a site for which no budget whatsoever has ever been submitted. On the other hand, where as here a site has already received IEPA review and scrutiny, including both for corrective action and for budget, and in fact where the corrective action for which reimbursement is sought has been determined to have been effective, no reason exists, and none was inserted in this Board's regulations, limiting budgetary amendments only to those requested prior to issuance of the NFR.

In addition to the lack of regulatory support for its position, the IEPA also lacks any statutory basis. (Of course, if the regulation supports the IEPA, but is itself contrary to the statute, the regulation must be deemed void and the statute controls. Even if this is the type of case subject to 732.406(d), the IEPA's interpretation of the regulation will only apply if it is consistent with the Illinois Environmental Protection Act's treatment of the subject, but it is not. Section 57.7(e) of the Act, 415 ILCS 5/57.7(e), addresses the issue. That subsection allows an owner/operator to elect to proceed with any corrective action "...prior to the submittal or approval of an otherwise required plan. If the owner or operator elects to so proceed, an applicable plan shall be filed with the Agency at any time." (415 ILCS 5/57.7(e)(1) Subsection (e) continues by requiring the IEPA to "proceed to review in the same manner as required under this Title." (415 ILCS 5/57.7(e)(2)). In turn, Section 57.8 concerns the underground storage tank fund, and Section 57.9 concerns eligibility for reimbursement from that fund (415 ILCS 5/57.8 and 5/57.9). Neither addresses ineligibility based upon an amended budget being submitted to approve payment for admittedly required corrective action subsequent to the

issuance of the NFR. Simply put, there is no statutory or regulatory authority for the IEPA's action in this case.

The facts before this Board are undisputed, and it is conceded by the IEPA that the work for which the amended budget and reimbursement are sought was corrective action activities eligible for reimbursement from the fund. Therefore, no genuine issue of material fact exists, and IEPA improperly rejected the Village's budget amendment and subsequent final reimbursement request. Accordingly, summary judgment should be entered in favor of the Village and against IEPA. The Village is entitled to this Board's judgment as a matter of law.

WHEREFORE, Petitioner, the Village, requests that this Board deny the motion for summary judgment submitted by Respondent ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, and enter summary judgment in favor of the Village ordering the Illinois Environmental Protection Agency to approve the Village's proposed amended budget and final request for reimbursement and award the Village all such other and further relief as is within this Board's authority and jurisdiction,

Respectfully submitted,  
THE VILLAGE OF WILMETTE  
Petitioner,

  
By its attorney

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CERTIFICATE OF SERVICE

PLEASE TAKE NOTICE that on April 5, 2007, the Village of Wilmette has electronically filed with the office of the Clerk of the Pollution Control Board **PETITIONER'S RESPONSE TO IEPA'S MOTION FOR SUMMARY JUDGMENT AND CROSS-MOTION FOR SUMMARY JUDGMENT**, a copy of which is hereby served upon you.

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