

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

VILLAGE OF WILMETTE)	
)	
Petitioner,)	
v.)	PCB 07-48
)	
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, and 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 (PCB 07-27, AR. 34). In particular, this action involves IEPA's denial, dated November 13, 2006, of the Village's final request for reimbursement of remediation costs incurred with respect to completion of the corrective action plan previously approved by the IEPA. IEPA argues that its denial of the final reimbursement request was necessitated by IEPA's September 14, 2006 denial of the Village's High Priority Corrective Action Plan Budget

amendment, which is the subject of the Village's appeal in PCB 07-27. As this Board is aware, the Village's Motion to Consolidate the two appeals was denied as stated in the Board's Order dated March 15, 2007. Nevertheless, a decision in appeal PCB-027, regarding IEPA's denial of the budget amendment, will be dispositive of the issue raised in this appeal 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 final request for reimbursement. 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. (PCB 07-27, 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, and therefore, the Village's request for final reimbursement should have been approved.

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." Moreover, in denying the final request for reimbursement, 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 (PCB 07-27, 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 (4th Dist. 2000)).

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 as a result, the

associated 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.** (PCB 07-27, 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.

IEPA denied the Village's final request for reimbursement based upon the language of 35 Ill. Adm. Code 732.601 (g) and (m). However, Section 732.601 refers to revised cost estimates and increased costs resulting from "*revised procedures.*" In this case, however, the actual amount of personnel and handling costs incurred did not arise due to any revisions in the procedures set forth in the Village's corrective action plan.

Instead, for example with respect to the personnel costs, the tasks associated with these costs simply involved matters associated with the previously planned O&M, RACR, and remediation system abandonment. (PCB 07-48, AR. 29; 36-37) More importantly, the costs denied as part of the Village's final request for reimbursement were not, as stated in subsection (m) "costs exceeding those contained in a budget plan or amended budget plan approved by the Agency." As stated previously, the total costs for which reimbursement was sought were approximately \$48,000.00 less than the total approved budget amount. 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, 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, as a matter of 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.

The facts before this Board are undisputed, and it is conceded by the IEPA that

the work for which the final request for 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 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 23, 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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