

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PMA & ASSOCIATES, INC.)	
Petitioner,)	
)	
v.)	PCB 07-63
)	(UST Appeal)
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
Respondent.)	

NOTICE

Dorothy Gunn
Clerk
Illinois Pollution Control Board
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Mandy L. Combs
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Carol Webb
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1021 North Grand Avenue East
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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

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

Dated: August 10, 2007
1021 North Grand Avenue East
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THIS FILING IS SUBMITTED ON RECYCLED PAPER

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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, PMA & Associates, Inc. (“PMA”), 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 ("Record" or "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 authorize payments for costs that lack supporting documentation as set forth in the Illinois EPA's final decision dated December 11, 2006 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 September 1, 2006, the Illinois EPA received an application for payment from PMA. (AR, pp. 1, 13)

In Section F Analysis Costs of the Illinois EPA forms summarizing the costs in the application, PMA indicated that 24 BTEX soil samples had been analyzed at a cost of \$87.37 per sample for a total analysis costs claim of \$2,096.88. (AR, p. 20)

On a form for Stock Items, one line item is “BETX Soil with MTBE – BETX Soil with MTBE” in a quantity of 24 at \$87.37 each for a total of \$2,096.88. (AR, p. 118) Following this form are the results for 24 samples analyzed by Prairie Analytical Systems, Inc. (AR, pp. 119-129)

On December 11, 2006, the Illinois EPA issued a determination letter concerning the application for payment that identified certain costs that would not be paid. (AR, p. 1) These were identified as \$2,096.88 for charges associated with analysis costs “that lack supporting documentation. Such costs are ineligible for payment from the Fund pursuant to 35 Ill. Adm. Code 732.606(gg). Since there is no supporting documentation of costs, the Illinois EPA cannot determine that costs will not be used for activities in excess of those necessary to meet the minimum requirements of Title XVI of the Act; therefore, such costs are not approved pursuant to Section 57.7(c)(4)(C) of the Act because they may be used for corrective action activities in excess of those required to meet the minimum requirements of Title XVI of the Act.”

B. Relevant Law

Section 57.7(c)(4)(C) of the Act

In approving any plan submitted pursuant to Part (E) of this paragraph (4), the Agency shall determine, by a procedure promulgated by the Board under item (7) of subsection (b) of Section 57.14, that the costs associated with the plan are reasonable, will be incurred in the performance of corrective action, and will not be used for corrective action activities in excess of those required to meet the minimum requirements of this title.

Section 732.606(gg) Ineligible Corrective Action Costs

Costs ineligible for payment from the Fund include but are not limited to:

gg) Costs that lack supporting documentation.

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 for costs that lack supporting documentation. United Science Industries, Inc. (“USI”), the environmental consultant performing remediation activities at PMA’s facility, sought reimbursement of \$2,096.88 for BTEX analysis of 24 soil samples. Prairie Analytical Systems, Inc. (“Prairie”) performed the analyses and provided the results that were included in the application for payment. But there was no invoice in the application indicating what Prairie had charged to perform these analyses or documenting that these costs had been billed to PMA or USI. Instead USI treated the analyses as stock items in the application for reimbursement.

Costs lacking supporting documentation were at issue in the Rezmar Corporation case already referenced in this motion. There the Board stated as follows:

“Based on Board precedent, the burden is on applicants to demonstrate that incurred costs are related to corrective action, properly accounted for, and reasonable. Beverly Malkey, as Executor of the Estate of Roger Malkey d/b/a Malkey’s Mufflers v. IEPA, PCB 92-104 (Mar. 11, 1993) at 4. When requesting reimbursement from the fund, the owner or operator must provide an accounting of all costs.” p. 9

The need for supporting documentation is not only critical for reimbursement from the UST Fund but is a cornerstone for reimbursement in any institutional accounting situation. Receipts for relatively inexpensive and mundane costs as taxicab fares and parking garage fees are routinely required to process these expenses for reimbursement. Invoices indicate what services were provided by what entity at what time and for what cost. They also document the fact that the recipient of the services was in fact billed for them.

The fact that Prairie provided BTEX analysis on 24 soil samples during July and August, 2006 can be gleaned from the results reported on pages 119 through 129 of the Record. But there is no invoice from Prairie indicating that it charged USI or PMA for these services and what the charges were. The corporations database at the Illinois Secretary of State's website indicates that USI and Prairie are two distinct corporations. It would seem routine that one company providing services to another would document and bill these services with an invoice. Treating BTEX analyses as stock items is unusual since a laboratory process is unlike the tangible items such as latex gloves or sample collection containers typically stored in a stock room.

The reimbursement sought for each BTEX soil sample, \$87.37, is the maximum reimbursement allowed for such samples. The Act and regulations clearly prescribe that only the corrective action activities necessary to meet the minimum legal requirements be performed and that only actual costs be reimbursed. Without an invoice, the Illinois EPA cannot make these determinations since it cannot confirm that \$87.37 was actually charged by Prairie for each BTEX soil sample.

Treating \$2,096.88 in analysis costs as stock items did not provide the Illinois EPA with sufficient information and documentation to authorize the reimbursement of these costs. As no invoice from Prairie for these costs was included in the application for payment, the Illinois EPA had no choice but to deny their payment in the December 11, 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 December 11, 2006 final decision.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,

Respondent

/s/ James G. Richardson

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Dated: August 10, 2007

THIS FILING IS SUBMITTED ON RECYCLED PAPER

CERTIFICATE OF SERVICE

I, the undersigned attorney at law, hereby certify that on August 10, 2007 I served true and correct copies of a MOTION FOR SUMMARY JUDGMENT upon the persons and by the methods as follows:

[Electronic Filing]

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[1st Class U.S. Mail]

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