

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

MORGAN SOUTHERN COMPANY,)	
Petitioner,)	
)	
v.)	PCB 06-17
)	(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, Morgan Southern Company (“Morgan”), 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. The facts, law and arguments supporting this motion are presented below.

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.

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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 (“R”). 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 reimbursement of remediation activities as early action if the activities occurred beyond the timeframe established in Board regulations for early action. Based upon the underlying facts and law, the facts in this case are

undisputed and clearly demonstrate that the Illinois EPA's June 30, 2005 decision, specifically as to Accounting Deductions Nos. 3 and 9 which were the only portions of the decision appealed by Morgan, 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 Administrative Record supporting this motion are as follows:

Morgan contracted with Professional Service Industries ("PSI") of Hillside, Illinois to remove four underground storage tanks ("USTs") at a trucking and warehouse facility located at 1579 Valencia Court, Calumet City, Illinois. Two 10,000-gallon diesel fuel tanks were located in a large pit at the site, while a 550-gallon used oil storage tank and a 550-gallon new oil storage tank were contained in a small pit. R. at 10.

Excavation and removal activities occurred on February 12 and 13, 2003. On the latter date, when the two-10,000 gallon diesel tanks were removed, a PSI employee noted a small amount of free product present in the backfill of the large pit. Based upon this, a release was reported to the Illinois Emergency Management Agency ("IEMA") on February 14, 2003. R. at 1, 11.

Removal of UST backfill and excavated soils did not occur until April 22 and 23, 2003. 1031.41 tons of soil and backfill were removed from the large pit for off-site disposal. Soil samples from the pit walls and floor did not exceed remediation objectives. R. at 11-12.

20- and 45-Day Reports, the latter containing the Professional Engineer Certification that remediation objectives were met, were received by the Illinois EPA on September 14, 2004. R. at 3, 145. The Illinois EPA 45-Day Report Form indicating that the 45-Day Report was intended to serve as a Corrective Action Completion Report was received on January 5, 2005. R. at 165-169. A No Further

Remediation Letter was issued to Morgan on January 13, 2005. R. at 173-178.

A January 5, 2005 reimbursement package submittal was returned to Morgan on March 30, 2005 for being incomplete. R. at 502, 486-491. Morgan re-submitted an application for payment of \$109,059.10 in costs that was received by the Illinois EPA on May 26, 2005. After allowing for a \$10,000.00 deductible, the Illinois EPA denied payment of Morgan's costs in a June 30, 2005 decision letter. R. at 220-221, 201-207.

B. Relevant Law

Section 57.8(f) of the Act

Until the Board adopts regulations pursuant to Section 57.14, handling charges are eligible for payment only if they are equal to or less than the amount determined by the following table:

Subcontractor or Field Purchase Cost	Eligible Handling Charges as a Percentage of Cost
\$0 - \$5,000.....	12%
\$5,001 - \$15,000.....	\$600 + 10% of amt. over \$5,000
\$15,001 - \$50,000.....	\$1600 + 8% of amt. over \$15,000
\$50,001 - \$100,000.....	\$4400 + 5% of amt. over \$50,000
\$100,001 - \$1,000,000.....	\$6900 + 2% of amt. over \$100,000

Section 732.202(g) Early Action

For purposes of reimbursement, the activities set forth in subsection (f) of the Section shall be performed within 45 days after initial notification to IEMA of a release plus 7 days, unless special circumstances, approved by the Agency in writing, warrant continuing such activities beyond 45 days plus 7 days. The owner or operator shall notify the Agency in writing of such circumstances within 45 days after initial notification to IEMA of a release plus 7 days. Costs incurred beyond 45 days plus 7 days shall be eligible if the Agency determines that they are consistent with early action.

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BOARD NOTE: Owners or operators seeking reimbursement are to first notify IEMA of a suspected release and then confirm the release within seven days to IEMA pursuant to regulations promulgated by the OSFM. See 41 Ill. Adm. Code 170.560, 170.580, 170.600. The Board is setting the beginning of the reimbursement period at subsection (g) to correspond to the notification and confirmation to IEMA.

(Amended at 26 Ill. Reg. 7119, effective April 29, 2002)

Section 732.607

Handling charges are eligible for payment only if they are equal to or less than the amount determined by the following table (Section 57.8(g) of the Act):

Subcontractor or Field Purchase Cost	Eligible Handling Charges as a Percentage of Cost
\$0 - \$5,000.....	12%
\$5,001 - \$15,000.....	\$600 + 10% of amt. over \$5,000
\$15,001 - \$50,000.....	\$1600 + 8% of amt. over \$15,000
\$50,001 - \$100,000.....	\$4400 + 5% of amt. over \$50,000
\$100,001 - \$1,000,000.....	\$6900 + 2% of amt. over \$100,000 [415 ILCS 5/57.8(f)]

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 reimbursement of remediation activities as early action if the activities occurred beyond the timeframe established in Board regulations for early action. Deduction No. 3 identifies remediation costs that Morgan sought to be reimbursed as early action activities. Pursuant to 35 Ill. Adm. Code 732.202(g), which establishes the early action timeframe as being within 45 days after initial notification to IEMA of a release plus 7 days, April 7, 2003 was the last day for early action at this site. As all of the remediation costs identified in Deduction No. 3 were incurred after April 7, 2003, the Illinois EPA could not authorize their reimbursement. The description and reference documents for

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these costs are as follows:

\$6,876.00 PSI Personnel Costs

Matthew Wollert – 31 hours from April 16 to June 25, 2003

\$3,000.00 (30 hours @ \$95.00/hour, 1 hour @ \$150.00) - R. at 261, 298.

Note – 7 other hours @ \$150.00 were cut for being incurred after the NFR date
R. at 313, 315, 318.

Gregory Smith – 39 hours from April 17, 2003 to June 19, 2003

\$3,705.00 (39 hours @ \$95.00/hour) – R. at 261, 298-299, 303.

Debra Sandrik – 3.8 hours from April 21, 2003 to January 9, 2005

\$171.00 (3.8 hours @ \$45.00/hour) – R. at 261, 298, 302, 313, 314, 315.

\$5,692.50 RW Collins Personnel Costs

From April 21, 2003 to May 2, 2003. R. at 260-261, 280-281.

\$2055.00 – George Pielat (32 hours @ \$60.00/hour, 1.5 hours @ \$90.00/hour)

\$400.00 - Mark Sirovatka (8 hours @ \$50.00/hour)

\$875.00 - Joe Digrazia (16 hours @ \$50.00/hour, 1 hour @ \$75.00/hour)

\$1150.00 - Tom McCarrin (23 hours @ \$50.00/hour)

\$912.50 - George Januska (16 hours @ \$50.00/hour, 1.5 hours @ \$75.00/hour)

\$300.00 - Joe Valenti (6 hours @ \$50.00/hour)

\$12,477.50 Equipment Usage

From April 21, 2003 to May 2, 2003. R. at 326.

\$150.00 Proctor Analysis

April 30, 2003. R. at 330.

\$31.00 IDOT Permit (Field Purchases)

From April 21, 2003 to May 2, 2003. R. at 268, 337.

\$49,070.90 Subcontractor Costs

From April 21, 2003 to May 2, 2003. R. at 270, 350.

\$448.00 – Bill's Cartage

\$94.50 – Bear-A-Cade

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\$23699.43 – CID RDF

\$3737.50 – K&D Material Haulers

\$240.22 – Material Service Corp.

\$5106.25 – RS Used Oil Services

From May 3, 2003 to July 2, 2003. R. at 271, 366.

\$892.00 – Bear-A-Cade

\$7863.00 - Chicago Asphalt

April 8, 2003 and April 24, 2003. R. at 271, 370-371.

\$1990.00 – U.S. BioSystems

Deduction No. 9 concerned handling charges that were based on ineligible costs. Handling charges of \$4,545.29 were associated with the above identified subcontractor costs. R. at 271. \$30.80 of handling charges was associated with \$257.00 of various permits obtained as Field Purchases. R. at 268, 336-337. For clarity purposes, of these permits only the aforementioned \$31.00 IDOT permit was deducted as being incurred after the early action timeframe. The other permits were deducted for occurring prior to IEMA notification. Here again, the Illinois EPA could not authorize the reimbursement of the handling charges identified in Deduction No. 9 as they were based on costs for activities that occurred beyond the early action timeframe.

In a previous case where the early action time period under 35 Ill. Adm. Code Part 732 was at issue, the Board agreed with the Illinois EPA's position that allowing reimbursement for activities performed outside the early action time period would moot the obligation to seek an extension of time. Broderick Teaming Company v. Illinois EPA, PCB 00-187 (April 5, 2001), p.3. Although the unique facts in Broderick caused the Board to change the beginning date of the early action time period, the decision still stated that "the Board today clearly states that Section 732.202(g) requires that early action activities must be performed within 45 days from the date of confirmation" unless an extension of time is

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approved by the Illinois EPA. Broderick, p. 7. When another Petitioner attempted to apply Broderick to support its early action reimbursement application for activities performed approximately six months after the release was reported, the Board noted that it “limited the applicability of Broderick to the unique facts therein.” Ozinga Transportation Services v. IEPA, PCB 00-188 (December 20, 2001), p. 9. In ruling against Ozinga, the Board held that altering the early action time period “would frustrate the intent of early action.” Ozinga, p. 10. As the early action activities were required to be performed by July 13, 1998 but were not completed until November 20, 1998, the Board ruled that “the activities are not reimbursable as early action.” Id. More recently, the Board again found Broderick “inapplicable and distinguishable” in Cancer Treatment Centers of America v. IEPA, PCB 10-33 (September 2, 2010). Cancer Treatment Centers, p. 14. Here the Board also noted that Section 732.202(g) had been amended in Regulation of Petroleum Leaking Underground Storage Tanks; Amendments to 35 Ill. Adm. Code 732, (R01-26)(April 18, 2002) to address the language at issue in Broderick. Section 732.202(g) as amended by R01-26 is the regulation applicable to the instant appeal.

As the 45-Day Report indicated that remediation objectives had been met at the site and Morgan intended the report to serve as its Corrective Action Completion Report, Morgan did not have to undertake any site investigation or corrective action measures. R. at 3, 145, 165-169. Therefore remediation activities occurring after April 7, 2003 could not be reimbursed as site investigation or corrective action costs. Section 732.202(g) does provide an owner or operator with the ability to continue early action activities beyond the early action timeframe if special circumstances arise, the Illinois EPA receives written notification of the circumstances within the early action timeframe, and the Illinois EPA approves of the extension in writing. In Paragraphs 5 and 6 of Morgan’s Petition for Review, it is asserted that cool temperatures, snow cover, and wet conditions prevented completion of

remediation activities within the early action timeframe. But neither this information nor a timely written request for an extension of the early action timeframe appear in the Administrative Record. Morgan's Petition cites no legal provisions or precedent whereby such weather circumstances identified so late in the history of this site authorize reimbursement of the disputed costs.

V. CONCLUSION

For the reasons stated herein, the Illinois EPA respectfully requests that the Board affirm the Illinois EPA's June 30, 2005 decision, specifically as to Accounting Deductions Nos. 3 and 9 which were the only portions of the decision appealed by Morgan.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,

Respondent

/s/ James G. Richardson_____

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Dated: April 5, 2011

THIS FILING IS SUBMITTED ON RECYCLED PAPER

CERTIFICATE OF SERVICE

I, the undersigned attorney at law, hereby certify that on April 5, 2011 I served true and correct copies of a MOTION FOR SUMMARY JUDGMENT upon the persons and by the methods as follows:

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