

**BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS**

WARSAW ITCO,)	
)	
Petitioner,)	
)	
v.)	PCB 11-76
)	(UST Appeal)
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Respondent.)	

NOTICE

John Therriault, Acting Clerk
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph Street
Suite 11-500
Chicago, IL 60601

Carol Webb, Hearing Officer
Illinois Pollution Control Board
1021 North Grand Avenue East
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Robert M. Riffle
Elias, Meginness, Riffle & Seghetti, P.C.
416 Main Street, Suite 1400
Peoria, IL 61602

PLEASE TAKE NOTICE that I have today filed with the office of the Clerk of the Pollution Control Board the ILLINOIS EPA'S REPLY TO PETITIONER'S RESPONSE IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT copies of which are herewith served upon you.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,
Respondent

Melanie A. Jarvis
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217/782-5544
217/782-9143 (TDD)
Dated: May 21, 2012

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**ILLINOIS EPA'S REPLY TO PETITIONER'S RESPONSE IN OPPOSITION TO MOTION FOR
SUMMARY JUDGMENT**

NOW COMES the Respondent, the Illinois Environmental Protection Agency ("Illinois EPA"), by one of its attorneys, Melanie A. Jarvis, 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, Warsaw ITCO ("Warsaw"), 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. ARGUMENT AND ANALYSIS

The issue presented is whether, the Petitioner can be reimbursed for items not approved in the budget. Based upon the law and the facts presented, the answer is clearly that the Illinois EPA cannot reimburse the Petitioner for items not approved in the budget.

There exists no material issue of fact. It is clear from the Administrative Record that the Petitioner did not have an approved budget for the work it proceeded to do after said budget was denied, twice.

The Illinois EPA denied remediation of the groundwater in its rejection letter dated

December 14, 2005. The December 14, 2005 letter stated that the Petitioner was required to “eliminate the source of contamination before remediation of groundwater can be implemented.” This determination was based upon the Illinois EPA review of the Corrective Action Plan received on August 25, 2005. Petitioner stated in the Corrective Action Plan that, since installation of the groundwater treatment system in October 2003, no groundwater has passed through the treatment system. Therefore, there had been no groundwater remediation. As stated above, the Illinois EPA rejection letter clearly stated that the source of contamination must be eliminated before remediation of groundwater can be implemented. In addition to rejecting the plan, Illinois EPA rejected the budget in the December 14, 2005, letter. It appears that the Petitioner assumed that they would receive payment from the UST Fund even if costs were not approved in a budget. The Petitioner proceeded at its own risk in performing the work after it had been rejected by the Illinois EPA. *See*, 35 Ill. Adm. Code 734.355(d).

Petitioner is correct that the Illinois EPA did approve operation of the remediation system in the May 24, 2002, letter, however, in the December 14, 2005 letter, the Illinois EPA told the Petitioner that they had to remove the source of contamination before remediation of groundwater could be implemented. Further, the Illinois EPA did not approve the costs in the budget to continue operating the system, so, the Petitioner proceeded without an approved budget. It is unclear why the Petitioner would proceed with the groundwater remediation when the Illinois EPA told them that the source of contamination had to be removed first. The Petitioner now wants to be reimbursed for taking action it fully knew was not approved by the Illinois EPA.

The Illinois Environmental Protection Act and the corresponding regulations support the Illinois EPA’s determination. In accordance with Section 57.7(b)(3) of the Act and 35 Ill. Adm. Code 732.405(b), any owner or operator intending to seek payment from the UST Fund shall

submit to the Illinois EPA for approval a corrective action budget that includes, but is not limited to, an accounting of all costs associated with the implementation and completion of the corrective action plan. Further, pursuant to Section 57.8(a)(1) of the Act and 35 Ill. Adm. Code 732.606(m), costs exceeding those contained in a budget plan approved by the Illinois EPA are ineligible for payment from the UST Fund.

Illinois EPA wants to reiterate that since 2005, Petitioner was put on notice that the Illinois EPA would not agree to the corrective action it proposed for the site. Illinois EPA twice rejected the Plan and Budget for such work. The Petitioner never appealed these decisions. The Petitioner submitted a revised plan proposing TACO instead of the alternative technologies it had originally suggested using at the site and the Illinois EPA approved that plan. However, the Petitioner included costs for reimbursement that were outside the scope of that plan and included the work performed since 2005 on the alternative technologies that were proposed in plans and budgets rejected by the Illinois EPA. The Illinois EPA was correct to modify the budget to delete these costs.

Further, Petitioner never appealed the decisions that rejected its plans and budgets. It is late at this point to attempt to do so. The 2005 and 2010 plans and budgets were denied. Those final decisions cannot be reexamined here. Petitioner once again placed the twice denied costs within a budget for approval and once again was denied those costs. The Petitioner should not be surprised by the resulting denial. Nor is it entitled to the costs it requested three times and was denied three times. Reichhold Chemicals, Inc. v. PCB (3d Dist.1990), 204 Ill.App.3d 674, 561 N.E.2d 1343, held that the Illinois EPA has no statutory authority to reconsider a permit decision. Petitioner has asked for reconsideration of the same denied costs twice. *See also, Mick's Garage v. Illinois EPA, PCB 03-126 (December 18, 2003); Panhandle Eastern Pipe Line Co. v. IEPA, PCB 98-*

102, slip op. at 30 (Jan 21, 1999); and Kean Oil v. Illinois EPA, PCB 97-146 (May 1, 1997).

The costs that the Illinois EPA denied in the March 18, 2011, decision letter could not be approved under either the Board's regulations, nor could they be approved under the Reichhold case. It is clear from the Board's regulations and case law that the Petitioner is not entitled to the relief it seeks.

II. CONCLUSION

For the reasons stated herein, the Illinois EPA respectfully requests that the Board grant summary judgment in favor of the Illinois EPA and affirm the Illinois EPA's March 18, 2011, decision.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,

Respondent

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Dated: May 21, 2012

This filing submitted on recycled paper.

CERTIFICATE OF SERVICE

I, the undersigned attorney at law, hereby certify that on May 21, 2012, I served true and correct copies of the ILLINOIS EPA'S REPLY TO PETITIONER'S RESPONSE IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT via the Board's COOL system and by placing true and correct copies thereof in properly sealed and addressed envelopes and by depositing said sealed envelopes in a U.S. Mail drop box located within Springfield, Illinois, with sufficient First Class postage affixed thereto, upon the following named persons:

John Therriault, Acting Clerk
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