

ILLINOIS POLLUTION CONTROL BOARD
September 6, 2012

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

ORDER OF THE BOARD (by C.K. Zalewski):

For the reasons stated below, this order denies the motion for summary judgment filed by the Illinois Environmental Protection Agency (Agency). Due to insufficiencies in the record, the Board cannot determine there is no genuine issue of material fact between the parties, and cannot determine that the Agency is entitled to summary judgment as a matter of law.

On April 25, 2011, Warsaw Itco (Warsaw) timely filed a petition asking the Board to review a March 18, 2011 determination of the Illinois Environmental Protection Agency (Agency). *See* 415 ILCS 5/40(a)(1) (2008); 35 Ill. Adm. Code 101.300(b), 105.402, 105.404. The Agency’s determination concerns Warsaw’s leaking underground storage tank (UST) site located at Route 122, Miner, Tazewell County.

The Agency filed a motion for summary judgment (Mot.) on April 9, 2012. The Agency filed its administrative record (Rec.) two days later, on April 11, 2012. Petitioner timely filed a response (Resp.) in opposition on May 16, 2012, with leave of the hearing officer. The Agency filed a reply (Reply) on May 21, 2012. While there is no evidence in the record that the Agency sought and received leave to file the reply as required by 35 Ill. Adm. Code 101.500 (e), the Board has considered this filing.

STANDARD OF DECISION FOR MOTIONS FOR SUMMARY JUDGMENT

Summary judgment is appropriate when the pleadings, depositions, admissions on file, and affidavits disclose that there is 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); *see* 35 Ill. Adm. Code 101.516(b) (Motions for Summary Judgment). In ruling on a motion for summary judgment, the Board “must consider the pleadings, depositions, and affidavits strictly against the movant and in favor of the opposing party.” Dowd & Dowd, 693 N.E.2d at 370 (1998).

Summary judgment “is a drastic means of disposing of litigation,” and therefore it should be granted only when the movant’s right to relief “is clear and free from doubt.” Dowd & Dowd,

Ltd. v. Gleason, 181 Ill. 2d 460, 483, 693 N.E. 2d 358, 370 (1998), citing Purtill v. Hess, 111 Ill. 2d 299, 240, 489 N.E. 2d 867, 871 (1986). However, a party opposing a motion for summary judgment may not rest on its pleadings, but must “present a factual basis which would arguably entitle [it] to judgment.” Gauthier v. Westfall, 266 Ill. App. 3d 213, 219, 639 N.E.2d 994, 999 (2nd Dist. 1994).

THE AGENCY’S DENIAL LETTER AND MOTION FOR SUMMARY JUDGMENT

The specific Agency action appealed here is the denial of a November 8, 2010 application made by Warsaw for an amended Corrective Action Plan (CAP) for the site. In a March 18, 2011 letter, the Agency approved an amended CAP for the site. But, the Agency also modified the CAP’s budget:

\$34,790.00 deduction in Personnel Costs for costs for corrective action implementation, CAP preparation, design, and research, and permitting costs associated with enhanced bioremediation and a groundwater treatment system.

\$7,800.00 deduction in Field Purchases and Other Costs for Bureau of Water and Bureau of Air permitting and repair of equipment.

These costs are not consistent with materials, activities, and services associated with an Illinois EPA-approved technical plan. One of the overall goals of the financial review is to assure that costs associated with materials, activities, and services are consistent with the associated technical plan. Such costs are ineligible for payment from the Fund pursuant to Section 57.7(c)(3) of the Act and 35 Ill. Adm. Code 734.510(b).

The Plan at-hand, which is approved, does not propose corrective action activities involving enhanced bioremediation and/or groundwater treatment system. A Moisture Content sample and a Soil Bulk Density sample has been approved, costs are added to Analytical Costs to complete Section 734.410 (Remediation Objectives).” Pet. Exh. B Attach A.

The Agency states that the issue presented in its motion for summary judgment is “whether [] the petitioner can be reimbursed for items not received in the budget.” Mot. at 2¹. In its recitation of facts, the Agency states in 2005, Warsaw proposed an Amended High Priority CAP and associated budget for a “treatment system enhancement with horizontal recovery wells and enhanced bio-remediation study for soils and a treatment system enhancement with horizontal recovery wells for ground water.” *Id.* at 3. In 2005, the Agency disapproved the plan, and rejected the budget. Warsaw did not appeal that action, but submitted another plan and budget in January 2010. Warsaw’s January 2010 plan proposed “‘enhanced bio-remediation; soil washing’ and [] ‘groundwater treatment system’ as the proposed methods of remediation.”

¹ The Agency’s motion, filed electronically, is not paginated. For the purposes of this order, the Board has called page 1 the page with the heading “Motion for Summary Judgment”, followed by “NOW COMES”. The pages thereafter are numbered sequentially.

Id. at 4. In October 2010, the Agency rejected the January 2010 plan and budget. Warsaw did not appeal this denial, but filed a new application in November 2010 whose denial is the basis for this appeal.

The Agency contends in its arguments that, since petitioner proceeded to perform work at the site without an approved plan or budget, it did so at its own risk. Mot. at 7.

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 rejected by the Illinois EPA. The Illinois EPA was correct to modify the budget to delete these costs. *Id.*

WARSAW'S RESPONSE IN OPPOSITION

In its response, Warsaw states that operation of its groundwater remediation system was approved by the Agency, and that the costs at issue here relate to the approved system. Resp. at 1. In support thereof, Warsaw presents a May 24, 2002 letter approving its January 28, 2002 High Priority CAP, but rejecting the associated budget. Resp. Ex. B. In further support of its contention, Warsaw presented the affidavit of its environmental consultant, Al Green, President of Midwest Environmental Consulting and Remediation Services, Inc. (Midwest). Resp., Ex. B. The Green affidavit explains that, while enhancements to the system were rejected,

Petitioner was never instructed to discontinue the originally implemented groundwater remediation system which was originally installed.

The funds which Petitioner seeks in this appeal relate to the operation of the original groundwater treatment system [which Midwest began to operate on the site in October 2003], not to the disapproved enhancements to the system, which were never implemented. *Id.* at 1-2.

THE AGENCY REPLY

In its reply, the Agency concedes that it did approve operation of the remediation system in the May 24, 2002 letter². But, the Agency states,

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.

² The Agency's reply, filed electronically, is not paginated. For the purposes of this order, the Board has called page 1 the page with the heading "Illinois EPA's Reply . . .", followed by "NOW COMES". The pages thereafter are numbered sequentially.

* * *

In the December 4, 2005 letter, the Illinois EPA told 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. Reply at 2.

BOARD ANALYSIS

Among other things, the dispute between the parties involves whether and what a 2002 Agency determination did or did not authorize. The un-indexed administrative record filed by the Agency does not contain documents dated before 2005. The 2002 Agency letter submitted by the petitioner contains no details concerning what specifically was approved, beyond the statement that it was the “plan, dated January 28, 2002, . . . received by the Illinois EPA on February 8, 2002”. Resp. Ex. A at 1. Similarly, no detail is given about the contents of the proposed and rejected budget. *Id.* at 1-2.

Under these circumstances, the Board cannot presently rule on the issues presented. Due to insufficiencies in the record, the Board cannot determine there is no genuine issue of material fact between the parties, and cannot determine that the Agency is entitled to summary judgment as a matter of law.

The Board additionally notes that its review of the record reveals a troublesome document. There is a single page document at page 148 stating that a document dated June 18, 2010 is an “**EXEMPT DOCUMENT**” and that “The Agency has determined this document is exempt from public disclosure.” If this is a document on which the Agency has relied in making its decision, it must be filed with the Board. The Board’s procedural rules at Section 130.Subpart D specify the manner in which a person may file, and the Board will treat, non-disclosable information. The Agency is directed to file the missing material on or before September 21, 2012. Any requests for extension of this deadline may be made to and handled by the hearing officer.

Finally, the Board notes that the current decision deadline in this case is now less than 120 days away. Pursuant to Warsaw’s April 19, 2012 waiver, decision is due December 31, 2012; the Board meeting immediately preceding the due date is December 20, 2012. At the status conference scheduled for September 12, 2012, the parties should be prepared to discuss with the hearing officer the schedule for timely completion of the record for Board review.

IT IS SO ORDERED.

I, John T. Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on September 6, 2012 by a vote of 4-0.

A handwritten signature in black ink that reads "John T. Therriault". The signature is written in a cursive style with a long horizontal flourish at the end.

John T. Therriault, Assistant Clerk
Illinois Pollution Control Board