

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

BENTON FIRE DEPARTMENT)	
Petitioner,)	
)	
v.)	PCB 2017-001
)	(UST Appeal - Land)
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
Respondent.)	

NOTICE

Don Brown, Clerk
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph Street
Suite 11-500
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Carol Webb, Hearing Officer
Illinois Pollution Control Board
1021 North Grand Avenue East
P. O. Box 19274
Springfield, IL 62794-9274

Patrick D. Shaw
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80 Bellerive Road
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PLEASE TAKE NOTICE that I have today filed with the office of the Clerk of the Pollution Control Board **ILLINOIS EPA'S REPLY TO PETITIONER'S RESPONSE 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: August 3, 2017

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ILLINOIS EPA'S REPLY TO PETITIONER'S RESPONSE TO MOTION FOR SUMMARY

JUDGMENT

NOW COMES the Respondent, the Illinois Environmental Protection Agency ("Illinois EPA" or "Agency"), by one of its attorneys, Melanie A. Jarvis, Assistant Counsel and Special Assistant Attorney General, and hereby submits its **ILLINOIS EPA'S REPLY TO PETITIONER'S RESPONSE TO MOTION FOR SUMMARY JUDGMENT** to the Illinois Pollution Control Board ("Board").

INTRODUCTION

In regards to Petitioner's Response to Motion for Summary Judgment, there exists a material issue of fact and therefore, Petitioner's Motion for Summary Judgment cannot be granted. Petitioner's response is an attempt to distract and obscure the real issue in this case which is simply, was supporting documentation asked for by the Illinois EPA? Yes, it was. Can Illinois EPA ask for supporting documentation under the Board regulations? Yes, it can. Was supporting documentation submitted by Petitioner? No, it was not. That is the end of the story. Because the Petitioner failed to provide the requested documentation, the

Petitioner's actual costs and budget were correctly amended to exclude the items for which supporting documentation was requested and not submitted.

Let's be clear, Petitioner has no absolute right to what it asserts are costs. The Agency is charged with the duty to review, approve or disapprove requests. The Petitioner is "**eligible**" for reimbursement **not entitled** to whatever it claims.

Petitioner attempts to blame everyone but the party responsible, itself. Petitioner lays out a magical history tour of supposed Illinois EPA wrongs that were purportedly perpetrated long ago, under a different administration and a different director, under a different set of regulations. What is at issue in this case is not any sordid history that the Petitioner can call up from a time far removed, but what is happening now, in the present. And in the present, a reasonable legal request was made of the Petitioner. Petitioner failed to submit anything in response to this request. We could ask the question why the Petitioner did not submit the underlying basis for the figures, but it is not for the Illinois EPA to speculate, it is for the Illinois EPA to just rely on the facts and information submitted by the Petitioner.

ARGUMENT

For the sake of clarity, Illinois EPA will address Petitioner's claims in the order they appear in the Petitioner's response. Petitioner includes a whole bunch of unsubstantiated facts that the Illinois EPA does not agree to. Therefore, whereas the Illinois EPA's Motion for Summary Judgment is based on facts solely in the record and upon law and should be granted, the Petitioner's Motion for Summary Judgment should be **DENIED** because there are material issues of fact surrounding its claims within its Motion for Summary Judgment and its Response.

1. STANDARD FOR ISSUANCE AND REVIEW

Petitioner has an issue with the Illinois EPA's standard of review. Petitioner claims that the Agency cannot reconcile the standard of review because it asked for supporting documentation instead of a denial based upon "the application as submitted". Petitioner's Response, p.1. This is one of the Petitioner's attempts to distract and obscure the real issue with ridiculous claims. The Illinois EPA did not have enough information from "the application as submitted" to make a decision, so it requested additional documentation; documentation **directly related to supporting** "the application as submitted".

2. "RELIED UPON" AS USED IN SECTION 734.505(a)

In a very short argument, the Petitioner laments that the Agency did not explain the law in question to the Petitioner and the Board and therefore, the Illinois EPA's Motion for Summary Judgment should be denied. The Agency believes that the wording in question is self-explanatory and that the Board is more than capable of discerning the meaning behind its own regulations. However, in the interest of being helpful, the meaning of the words "relied upon" means supporting documentation that was used in figuring out the cost numbers used when filling out the application. Such documentation that was used (i.e., relied upon) in filling out the forms should be readily available. Illinois EPA will not speculate as to why such documentation was not submitted.

3. MATHEMATICAL FINANCIAL DERIVATION TO REVIEW REASONABLENESS OF COSTS.

The argument the Petitioner makes in this section of his motion is a tour through history. A history that simply doesn't exist anymore. There is no attempt to establish a rate sheet here. That is an absurd allegation. What was asked for, clearly from the wording

of the decision letter, was a justification as to the unit rates that were being used. Perhaps the term, “mathematical financial derivation” was not the best way to phrase the request, but the statement indicating what type of information was requested included examples of what was being looked at: “Include such variables (as applicable) as purchase costs (including receipts), operation & maintenance costs, estimated product usage, and estimated product life”.

This is a request for the Petitioner to “show your work”, not the Agency establishing rates. In fact, nowhere does the Illinois EPA state that a certain outcome is acceptable and another would be denied. The Agency merely asked for the Petitioner to justify and explain the costs that were given on the sheet. Where the Petitioner ties that to the rate setting caselaw is baffling and an obvious attempt at obscuring the actual issue at hand.

The Petitioner then states that a rulemaking is in order. The Agency disagrees with this statement. The Agency followed the regulations which give it the authority to ask for supporting documentation. The Petitioner refused to submit anything in reply to that request except to tell the Agency that it was not going to send in anything. The rules are clear, and the Illinois EPA followed those rules. Any attempt to state that it did not, is simply untrue.

It appears from its response that what the Petitioner would like is for the regulations to state that the Illinois EPA is a rubber stamp approving everything submitted by the applicants without any review whatsoever. This is simply not the way the LUST program was meant to operate. There are checks and balances that are necessary whenever dealing with State funds.

The Petitioner continues to assume and present facts that are not in the record nor could they reasonably be derived from a reading of the record. The Illinois EPA does not accept the facts that Petitioner states in this section of its argument. Since these facts are key to the Petitioner's arguments they are indeed material and would thus require a denial of its Motion for Summary Judgment.

4. CONSULTANT DID NOT REFUSE OR FAIL TO RESPOND

The consultant did respond to the request for supporting documentation -- by refusing to submit such documentation after several requests that it do so. Nowhere in its motion did the Illinois EPA state that the consultant did not respond to the emails sent to it by the Illinois EPA's project manager. Its response was not sufficient¹ and was a flat-out refusal to comply with the request being made under regulatory authority clearly granted to the Agency.

The record clearly shows that the Illinois EPA's project manager noted to the Petitioner that it could elect to waive the decision deadline to allow for more time for the parties to discuss what was being requested. Now the Petitioner complains that it was not given enough time, when an extension of time is solely within the Petitioner's ability and exclusive control. If it had not taken such a firm stance in its replies, we may not be here today and this could have been worked out. To claim that it did not have time is disingenuous at best, a complete fabrication at worst. Time was always in the Petitioner's control. The Illinois EPA does not accept the facts that Petitioner states in this section of its argument. This results in a material issue of fact that would benefit from testimony at hearing. Petitioner's Motion for Summary Judgment should be denied. Certainly, any

¹ To the contrary of Petitioner's claim now, the Agency noted within a footnote of its original pleading that the email exchange was even terse or derisive in tone on the part of Petitioner.

'equitable' argument regarding time, which the Petitioner holds exclusively, should be construed against them – not the Agency as suggested – as would be required by any application of a request for summary judgment.

CONCLUSION

The law is clear; the Illinois EPA has the right to seek supporting documentation. (See 35 Illinois Administrative Code 734.505(a)). And, the facts are clear; the Petitioner did not submit supporting documentation. As such, the Illinois EPA is entitled to Summary Judgment.

WHEREFORE, for the above noted reasons, the Illinois EPA respectfully requests the Board (1) **DENY** Petitioner's Motion for Summary Judgment and (2) **GRANT** summary judgment in its favor.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,

Respondent

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Dated: August 3, 2017

This filing submitted on recycled paper.

CERTIFICATE OF SERVICE

I, the undersigned attorney at law, hereby certify that on **August 3, 2017**, I served true and correct copies of **ILLINOIS EPA'S REPLY TO PETITIONER'S RESPONSE TO MOTION FOR SUMMARY JUDGMENT** via the Board's COOL system and email, upon the following named persons:

John Therriault, Acting Clerk
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