

ILLINOIS POLLUTION CONTROL BOARD
April 3, 2003

HOME OIL COMPANY,)
)
 Petitioner,)
)
 v.) PCB 02-205
) PCB02-206
 ILLINOIS ENVIRONMENTAL) (UST Appeal)
 PROTECTION AGENCY,) (Consolidated)
)
 Respondent.)

ORDER OF THE BOARD (N.J. Melas):

In these two consolidated appeals of underground storage tank (UST) decisions, Home Oil Company (Home Oil) filed a motion for summary judgment and supporting brief on February 14, 2003.¹ Home Oil asks the Board to grant summary judgment in its favor, finding that Home Oil has demonstrated to the Environmental Protection Agency (Agency) that the costs submitted for reimbursement from the State's UST Fund are reasonable and that Home Oil is entitled to be reimbursed \$127,077.54 in corrective action costs.

The Agency responded to the motion on March 17, 2003. On March 27, 2003, Home Oil filed a motion for leave to reply and a reply brief. The Board grants Home Oil's motion for leave and accepts Home Oil's reply brief. For reasons explained more fully in this order, the Board denies Home Oil's motion for summary judgment and directs the parties to proceed to hearing.

BACKGROUND

Home Oil currently owns land located at 2700 W. Main Street, Belleville, St. Clair County. Home Oil previously operated a gasoline service station on this site that had USTs. Pet. 205, 206 at 1. The USTs were removed in 1991 and Home Oil obtained a Leaking Underground Storage Tank (LUST) incident number (910367). *Id.* Home Oil, through United Science Services, its environmental consultant, submitted to the Agency a corrective action plan (CAP) dated November 5, 1996, that included groundwater treatment and soil vapor extraction systems. Pet. 206 at 1. The Agency approved the CAP on February 21, 1997. Pet. 206 Exh. A.

The First Reimbursement Request

On January 12, 2001, Home Oil submitted a request for reimbursement for the period of October 1, 1999 to July 31, 2000 in the amount of \$83,896.74. Pet. 206 at 2. The Agency

¹ The petition for review docketed as PCB 02-205 will be referred to as "Pet. 205 at ___." The petition docketed as PCB 02-206 will be referred to as "Pet. 206 at ___."

denied the entire amount of the request in a letter dated August 22, 2001. Pet. 206 at 2. The letter stated that \$81,548.90 of the costs lacked supporting technical documentation because Home Oil failed to show that the costs were for corrective action done in accordance with plans approved by the Agency. Pet. 206 Exh. B. The letter further stated that \$2,347.84 were costs that Home Oil failed to show were reasonable because they exceeded recommended Agency rates. Pet. 206, Exh. B.

Home Oil resubmitted the \$83,896.74 reimbursement request in a letter dated October 17, 2001, referring to a report that provided an update on the previous request. Pet. 206 Exh. C. On April 20, 2002, the Agency denied the request again. Pet. 206, Exh. D. The Agency's April 20, 2002 denial letter is the subject of Home Oil's petition for review docketed as PCB 02-206.

The Second Reimbursement Request

Home Oil submitted another request on January 22, 2002, in the amount of \$43,180.80 for the period of August 1, 2000 through March 31, 2001. Pet. 205 at 2. The Agency denied this amount in a letter dated May 3, 2002. *Id.* The Agency letter stated that Home Oil failed to show that \$1,738.50 of the costs were reasonable because the rates exceeded the Agency recommended rates. Pet. 205 Exh. B. Costs in the amount of \$25.50 were ineligible subcontractor charges. *Id.* The letter also indicated that \$38,277.68 in costs were not reimbursable because the activities were not performed in accordance with an Agency approved plan. The Agency determined that costs incurred on September 27 and 28 in the amount of \$2,389.12 were not considered costs for corrective action activities. Finally, according to the Agency, \$750 of the costs lacked supporting documentation and were deductions that Home Oil failed to show were reasonable. *Id.* The Agency's May 3, 2002 denial letter is the subject of Home Oil's petition for review docketed as PCB 02-205.

STATUTORY AUTHORITY

Both parties agree that the Board's authority to review the Agency's decision in this UST reimbursement proceeding arises under Section 22.18b of the Environmental Protection Act (Act) as it existed in 1991. Mot. at 8; Resp. at 2. Prior to 1993, Section 22.18b of the Act governed eligibility for reimbursement from the UST Fund. Ill. Rev. Stat. Ch. 111 1/2 Section 1022.18b (1991).

In 1993, the General Assembly repealed Section 22.18b and enacted a new Title XVI regarding UST Fund reimbursement applications and determinations. 415 ILCS 5/57 (2002). The new law provided that releases reported to the State on or after the effective date of the amendments, September 13, 1993, would proceed under the new Title XVI. 415 ILCS 5/57.13(a) (2002). Owners or operators who reported releases prior to the effective date could choose to proceed under the new Title XVI by submitting a written statement of election to the Agency. 415 ILCS 5.57.13(b) (2002). Without a written statement of election, Section 22.18b would apply. Riverview F.S. v. Illinois Environmental Protection Agency, PCB 97-227 (May 3, 2001).

In this proceeding, Home Oil reported the release in 1991. Neither party contends that Home Oil elected to proceed under the new Title XVI. Therefore, Section 22.18b applies here.

PRELIMINARY MATTERS

Home Oil refers to an affidavit that it alleges was attached to a document entitled “Petitioner’s response to first set of interrogatories.” Br. at 12, 13, 21, 22, 23. Neither the response to interrogatories nor the affidavit has been filed with the Board. Throughout its brief, Home Oil also cites to deposition testimony. However, the testimony has not been filed with the Board. Therefore, at this time, the Board cannot consider the alleged facts that Home Oil has presented from the affidavit or deposition testimony.

DISCUSSION

Standard of Review

Summary judgment is appropriate when the pleadings and depositions, together with any affidavits and other items in the record, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *See Dowd & Dowd, Ltd. v. Gleason*, 181 Ill. 2d 460, 693 N.E.2d 358 (1998). 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*, 181 Ill. 2d at 483, 693 N.E.2d at 370.

Summary judgment “is a drastic means of disposing of litigation,” and therefore it should only be granted when the movant’s right to the relief “is clear and free from doubt.” *Dowd*, 181 Ill. 2d at 483, 693 N.E.2d at 370, *citing Purtil v. Hess*, 111 Ill. 2d 229, 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 a judgment.” *Gauthier v. Westfall*, 266 Ill. App. 3d 213, 219, 639 N.E.2d 994, 999 (2nd Dist. 1994).

Both parties agree that the burden of proof in this appeal is on Home Oil. Br. at 8-9; Resp. at 5. Home Oil must demonstrate that the costs incurred to perform the corrective action were reasonable. *See Clarendon Hills Bridal v. IEPA*, PCB 93-55 (Feb. 16, 1995).

Motion for Summary Judgment

Home Oil seeks review of \$127,077.54 in costs. The Agency denied reimbursement on the following grounds: (1) that Home Oil failed to demonstrate certain costs exceeding Agency recommended rates were reasonable; (2) that Home Oil failed to show that certain costs were incurred in accordance with an Agency approved corrective action plan; (3) that Home Oil requested costs for certain activities that were not corrective actions; and (4) that certain costs lacked supporting technical documentation.

Home Oil argues that the submitted costs were reasonable, and the Agency’s reimbursement denial was insufficient and improper. Br. at 38. The determination of whether the costs were reasonable was improper because it was based on undisclosed guidance

documents, according to Home Oil. *Id.* Home Oil further contends that keeping the guidance documents confidential is insufficient because it prevents claimants from knowing whether their request for reimbursement is reasonable. *Id.* at 38-39.

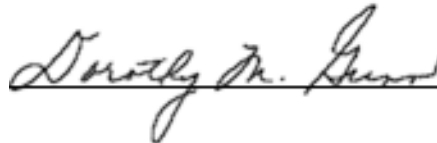
The Agency contends that there are disputed material facts requiring a hearing. Reply at 2. For example, the Agency claims that Mr. William Richards, an agency employee who helped compile an internal reimbursement guidance document, can testify about how the Agency applied its rates to Home Oil's reimbursement request. *Id.* at 3.

The Agency refers to Mr. Doug Oakley's deposition testimony as another example of a factual dispute that may be resolved at hearing. Reply at 4. Mr. Oakley, an Agency employee, apparently testified that the fixed rate for mobilization found in Agency internal guidance has no relationship to the amount of equipment moved. The Agency states that at hearing Mr. Oakley would explain that the fixed rate does in fact take into account these variables. *Id.* at 4-5. The Agency contends that while Home Oil has taken depositions of Agency employees, the employees have not been examined by Agency counsel. *Id.* at 3-4.

The Board finds that the examples of factual disputes between the parties that the Agency provides are persuasive. A hearing will also afford the parties an opportunity to present testimony challenging or supporting the Agency's reimbursement denials based on the nature of the work performed, the cost documentation, and the scope of the Agency approved corrective action plan, all of which the parties dispute. Additionally, the Board notes that Home Oil relies on deposition testimony and an affidavit that have not been filed with the Board to support its arguments. For these reasons, the Board finds that Home Oil has not demonstrated that its right to relief is clear and free from doubt. Construing the documents contained in the record in favor of the nonmoving party, the Board finds that genuine issues of material fact remain. Accordingly, the Board denies Home Oil's motion for summary judgment and directs the parties to proceed to hearing.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on April 3, 2003, by a vote of 7-0.

A handwritten signature in cursive script, reading "Dorothy M. Gunn", written over a horizontal line.

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board