ILLINOIS POLLUTION CONTROL BOARD
December 21, 2006

BROADUS OIL,	)	
	)	
Petitioner,	)	
	)	
v.	)	
	)	PCB 04-31
ILLINOIS ENVIRONMENTAL	)	PCB 05-43
PROTECTION AGENCY,	)	(UST Appeals)
	)	(Consolidated)
Respondent.	)	

OPINION AND ORDER OF THE BOARD (by G.T. Girard):

In these consolidated appeals, Broadus Oil (Broadus Oil) challenges two decisions made by the Illinois Environmental Protection Agency (Agency). The Agency rejected requests for budget amendments concerning corrective actions at Broadus Oil' leaking underground storage tank (UST) site at Main and Broadway Street, Marseilles, LaSalle County. The Agency denied each request on the grounds that the previous issuance of a No Further Remediation (NFR) letter barred Agency consideration of the requests.

This matter is before the Board today on the parties' cross-motions for summary judgment. For the reasons discussed below, the Board finds that there are no genuine issues of material fact, and that the Agency is entitled to summary judgment as a matter of law.

PROCEDURAL BACKGROUND

On September 15, 2003, Broadus Oil and the Agency filed a joint request to extend the appeal period for 90 days that the Board granted on September 18, 2003. On December 15, 2003, Broadus Oil filed an appeal of the Agency's decision rejecting the amended budget. The Board accepted the petition on December 18, 2003. On September 2, 2004, the Board opened a second docket, PCB 05-43 and consolidated the two cases for hearing. *See* Broadus Oil v. IEPA, PCB 04-31, 05-43 (cons.) (Sept. 2, 2004).

On May 8, 2006, the Agency filed the administrative record (R.) along with a motion for summary judgment (Mot.). On September 22, 2006, Broadus Oil filed a response and a cross-motion for summary judgment (Resp). On September 28, 2006, the Agency filed a motion for leave to file a reply and a response to the cross-motion (Reply). The Board grants the motion for leave to file a reply.

On December 6, 2006, Broadus Oil filed a motion for leave to consolidate this proceeding with FedEx Ground Package System, Inc. v. IEPA, PCB 07-12. On December 8, 2006, the Agency filed an objection to the motion to consolidate. The Board denies the motion to consolidate for the reasons discussed below

STANDARD OF REVIEW FOR MOTIONS FOR SUMMARY JUDGMENT

Summary judgment is appropriate when the pleadings, deposition, 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). 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." *Id*. 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).

Both the parties agree that the facts in this proceeding are not in dispute and summary judgment is appropriate. Mot. at 6; Resp. at 2. The parties argue that the issues involve only questions of law, specifically the applicability and interpretation of Section 732.405(d) of the Board's rules (35 Ill. Adm. Code 732.405(d). The Board has reviewed the filings and agrees with the parties that there are no issues of material fact and summary judgment is appropriate.

FACTS

On December 17, 2002, the Agency granted a NFR letter to Broadus Oil. Mot. at 3, citing R. at 1. On December 19, 2002, Broadus Oil recorded the NFR letter. Mot. at 3, citing R. at 25. On May 13, 2003, Rapps Engineering on behalf of Broadus Oil submitted a high priority corrective action plan budget amendment for the site. Mot. at 3, citing R. at 37. The budget amendment included the cost for construction of an engineered barrier and personnel costs associated with the preparation of the corrective action completion report. R. 41-42.

On August 6, 2003, the Agency issued a determination letter rejecting the amended budget. R. at 59. The Agency's denial letter states:

> The budget is rejected for the reasons listed below (Section 57.7(c)(4) of the Act and 35 Ill. Adm. Code 732.405(c) and 732.503(b)).
>
> Pursuant to 35 Ill. Adm. Code 732.405(d), plans submitted to the Agency for review and approval, rejection or modification in accordance with the procedures in Subpart E must be submitted prior to the issuance of a No Further Remediation Letter. This budget was received after the December 17, 2002 issuance of the No Further Remediation Letter. R. at 59 (emphasis in the original).

On September 8, 2003, the Agency also issued a determination denying costs that exceeded the approved budget amounts due to the Agency's August 6, 2003 decision. R. at 64. The specific amounts denied included: (1) $24,289.70 because the costs exceeded the budget;

(2) $19.02 because the actual amounts spent on the listed receipts was different than the amount requested; and (3) $1.26 was an adjustment in the handling charges. *Id*.

Prior to the submittals at issue in this proceeding, Broadus Oil had submitted previous plans to the Agency for approval. *See* R. at 37, 64.

STATUTORY AND REGULATORY PROVISIONS

Section 57.7(c)(1)(B) and (c)(2)(B) of the Environmental Protection Act (Act), as amended by Public Acts 92-574, 92-651, and 92-735 (415 ILCS 5/57.7 (2004), require that if "the owner or operator intends to seek payment from the fund" a budget must be submitted which includes an accounting of all cost associated with the implementation of the corrective action plan.

Section 57.7(e) of the Act, as amended by Public Acts 92-574, 92-651, and 92-735, provides:

> (1) Notwithstanding the provisions of this Section, an owner or operator may proceed to conduct physical soil classification, groundwater investigation, site classification or other corrective action prior to the submittal or approval of an otherwise required plan. If the owner or operator elects to so proceed, an applicable plan shall be filed with the Agency at any time. Such plan shall detail the steps taken to determine the type of corrective action which was necessary at the site along with the corrective action taken or to be taken, in addition to costs associated with activities to date and anticipated costs.
>
> (2) Upon receipt of a plan submitted after activities have commenced at a site, the Agency shall proceed to review in the same manner as required under this Title. In the event the Agency disapproves all or part of the costs, the owner or operator may appeal such decision to the Board. The owner or operator shall not be eligible to be reimbursed for such disapproved costs unless and until the Board determines that such costs were eligible for payment. 415 ILCS 5/57.7(e) (2004).

Section 57.8 of the Act in pertinent part provides:

> If an owner or operator is eligible to access the Underground Storage Tank Fund pursuant to an Office of State Fire Marshal eligibility/deductible final determination letter issued in accordance with Section 57 .9, the owner or operator may submit a complete application for final or partial payment to the Agency for activities taken in response to a confirmed release. An owner or operator may submit a request for partial or final payment regarding a site no more frequently than once every 90 days.

(a) Payment after completion of corrective action measures. The owner or operator may submit an application for payment for activities performed at a site after completion of the requirements of Sections 57.6 and 57.7 or after completion of any other required activities at the underground storage tank site.

* * *

(5) In the event that costs are or will be incurred in addition to those approved by the Agency, or after payment, the owner or operator may submit successive plans containing amended budgets. The requirements of Section 57.7 shall apply to any amended plans. 415 ILCS 5/57.8 (2004)

Section 57.10(c)(1) of the Act provides

(c) The Agency's issuance of a no further remediation letter shall signify, based on the certification of the Licensed Professional Engineer, that:

(1) all statutory and regulatory corrective action requirements applicable to the occurrence have been complied with. 415 ILCS 57.10(c)(1) (2004).

Section 732.405(d)[1] of the Board's underground storage tank regulations, addressing releases reported between September 23, 1994 and June 23, 2002, provides:

d) Notwithstanding subsections (a), (b), (e), and (f) of this Section and except as provided at Section 732.407 of this Part, an owner or operator may proceed to conduct Low Priority groundwater monitoring or High Priority corrective action activities in accordance with this Subpart D prior to the submittal or approval of an otherwise required groundwater monitoring plan or budget plan or corrective action plan or budget plan. However, any such plan and budget plan shall be submitted to the Agency for review and approval, rejection, or modification in accordance with the procedures contained in Subpart E of this Part prior to payment for any related costs or the issuance of a No Further Remediation Letter.
BOARD NOTE: Owners or operators proceeding under subsection (d) of this Section are advised that they may not be entitled to full payment from the Fund. Furthermore, applications for payment must be submitted no later than one year after the date the Agency issues a No Further Remediation Letter. See Subpart F of this Part.

Section 732.405(e) provides:

[1] The Board notes that Section 732.405(d) was amended on February 16, 2006. *See* Proposed Amendments to Leaking Underground Storage Tanks (35 Ill. Adm. Code 732, 734), R04-22, 23 (Feb. 16, 2006). The text quoted in this opinion is the language as amended on February 16, 2006.

e) If, following approval of any groundwater monitoring plan, corrective action plan or associated budget plan, an owner or operator determines that revised procedures or cost estimates are necessary in order to comply with the minimum required activities for the site, the owner or operator shall submit, as applicable, an amended groundwater monitoring plan, corrective action plan or associated budget plan for review by the Agency. The Agency shall review and approve, reject, or require modifications of the amended plan or budget plan in accordance with the procedures contained in Subpart E of this Part.

Section 732.702 sets forth the requirements for a No Further Remediation Letter and provides:

A No Further Remediation Letter issued pursuant to this Part shall include all of the following:

a) An acknowledgment that the requirements of the applicable report were satisfied;

b) A description of the location of the affected property by adequate legal description or by reference to a plat showing its boundaries, or, for purposes of Section 732.703(d) of this Part, other means sufficient to identify site location with particularity;

c) A statement that the remediation objectives were determined in accordance with 35 Ill. Adm. Code 742, and the identification of any land use limitation, as applicable, required by 35 Ill. Adm. Code 742 as a condition of the remediation objectives;

d) A statement that the Agency's issuance of the No Further Remediation Letter signifies that:

1) *All corrective action requirements* under Title XVI of the Act and this Part *applicable to the occurrence have been complied with;*

2) *All corrective action concerning the remediation of the occurrence has been completed; and*

3) *No further corrective action concerning the occurrence is necessary for the protection of human health, safety and the environment* [415 ILCS 5/57.10(c)(1)-(3)], or, if the No Further Remediation Letter is issued pursuant to Section 732.411(e) of this Part, that the owner or operator has demonstrated to the Agency's satisfaction an inability to obtain access to an off-site property despite best efforts and

therefore is not required to perform corrective action on the off-site property in order to satisfy the corrective action requirements of this Part, but is not relieved of responsibility to clean up portions of the release that have migrated off-site;

e) The prohibition under Section 732.703(e) of this Part against the use of any site in a manner inconsistent with any applicable land use limitation, without additional appropriate remedial activities;

f) A description of any approved preventive, engineering, and institutional controls identified in the plan or report and notification that failure to manage the controls in full compliance with the terms of the plan or report may result in voidance of the No Further Remediation Letter;

g) The recording obligations pursuant to Section 732.703 of this Part;

h) The opportunity to request a change in the recorded land use pursuant to Section 732.703(e) of this Part;

i) Notification that further information regarding the site can be obtained from the Agency through a request under the Freedom of Information Act [5 ILCS 140]; and

j) Any other provisions agreed to by the Agency and the owner or operator.

AGENCY'S MOTION FOR SUMMARY JUDGMENT

The Agency asserts that there are no genuine issues of material fact and the Agency is entitled to summary judgment as a matter of law. Mot. at 1. The Agency claims that the issue in this proceeding is whether the Agency can consider a high priority corrective action plan budget amendment after the issuance of a NFR letter. Mot. at 2. The Agency asserts that the language of the rule is clear that budget plans must be submitted prior to the issuance of a NFR letter. Mot. at 6. The Agency argues that because the Agency mailed to Broadus Oil the NFR letter on December 17, 2003 and the NFR letter was recorded on December 19, 2002, the Agency could not review the submission of a budget amendment filed on May 13, 2003. *Id*. The Agency maintains that the Agency is prohibited from reviewing the amendment because of the language of Section 732.405(d). *Id*.

BROADUS OIL'S RESPONSE AND CROSS-MOTION

Broadus Oil agrees that summary judgment is appropriate as there are no issues of fact in this proceeding. Resp. at 4. According to Broadus Oil, the only issue is whether Section 732.405(d) "constitutes a basis for rejecting both the budget amendment and the request for

reimbursement." *Id*. Broadus Oil asserts that Section 732.405(d) does not constitute basis for the Agency's rejection of the budget amendment. Broadus Oil points out that Section 732.405(d) concerns the right of owner/operators to proceed with remediation prior to submittal or approval of a corrective action plan or budget. Broadus Oil notes that Section 732.405(d) provides that "any such plan and budget plan shall be submitted to the Agency for review and approval . . . prior to payment for any related costs or the issuance of a No Further Remediation Letter." Resp. at 5. Broadus Oil comments that the Board note following Section 732.405(d) provides that applications for payment must be submitted no later than one year after the date the Agency issues the NFR letter. Broadus Oil asserts that the Agency is "completely misconstruing" the language of Section 732.405(d).

Broadus Oil maintains that Section 732.405 is entitled "Plan Submittal and Review" and that subsection concerns the general requirement that remediation plans be submitted to the Agency for review prior to conducting any remediation activities pursuant to the plans. Resp. at 5-6. Broadus Oil notes that subsection (b) provides that if an owner/operator intends to seek reimbursement for remediation, a budget plan shall be submitted for the remediation proposed. Broadus Oil further notes that subsection (c) provides for the Agency's review, approval, or rejection of any plans, and subsection (e) allows for submission of amended plans and budgets. Finally, Broadus Oil points out that subsection (f) concerns the Agency's authority to require revised corrective action plans in the event that an approved plan is not working. Broadus Oil argues that against this backdrop subsection (d) is included. Resp. at 6.

Broadus Oil argues that subsection (d) applies only to instances where an owner/operator submits no remediation plan or budget for approval prior to conducting remediation and allows the owner/operator to proceed with that remediation. Resp. at 6. Broadus Oil maintains that the language requiring submission prior to issuance of a NFR letter, applies only to owner/operators that have proceeded with remediation without prior approval of plans and budgets. Broadus Oil argues that the work can be completed pursuant to subsection (d), but a plan "must be submitted before reimbursement can be obtained for that work, and/or before an NFR is issued as a result of that work." Resp. at 6-7.

Broadus Oil asserts that nothing in Section 732.405(d) prohibits the Agency from considering the budget amendment filed by Broadus Oil because Broadus Oil was not proceeding under Section 732.405(d). Resp. at 7. Rather, Broadus Oil maintains that Broadus Oil was proceeding under Section 732.405(a) and (e). *Id*. Broadus Oil argues that nothing in those two subsections requires that amendments be submitted prior to the issuance of an NFR letter and the only restriction on submission prior to issuance of a NFR letter is in subsection (d). *Id*.

Broadus Oil opines that read correctly the regulatory scheme makes "perfect sense" because clearly a NFR letter should not be issued for a site before the corrective action plan for that site has been reviewed and compared with finalization of remediation. Resp. at 7. Broadus Oil also concedes that a NFR letter should not be issued or reimbursements made before a budget has even been submitted. *Id*. However, Broadus Oil argues that when a site has already received Agency review and scrutiny, as is the case in this proceeding, then no reason exists and none is

included in the regulations limiting budgetary amendments to those requested prior to issuance of a NFR letter. *Id.*

Broadus Oil opines that "[i]t is notable that the Agency has attempted to identify the source of regulatory authority" for the Agency's action as Subpart D of Part 732 rather than Subpart E (review of plans and budgets) or Subpart F (payment to owner/operators). Resp. at 8. Broadus Oil asserts that Section 732.505(c) concerns full financial reviews of submitted plans, but says nothing about rejecting a plan that was submitted after issuance of the NFR letter. *Id.* Broadus Oil also argues that the language of Section 732.606, which is a list of ineligible costs, does not have language which "suggests" that costs associated with an amended budget for work completed prior to issuance of a NFR letter is ineligible. *Id.* Broadus Oil maintains that "[n]otably though Section 732.606" includes a reference to costs incurred after the NFR letter is receives (subsection kk) and to costs "submitted more than one year after the date" the NFR letter is issued (subsection rr). *Id.* Broadus Oil argues that had the Board intended to impose a blanket prohibition against reimbursement for costs incurred prior to the NFR letter's issuance, but not submitted as a budget amendment until after the NFR letter was issued, the Board would have included such language. *Id.*

Broadus Oil maintains that the Agency lacks statutory support for refusing to review the amended budget. Resp. at 9. Broadus Oil asserts that Section 57.7(e) of the Act (415ILCS 5/57.7(e) (2004)) allows an owner/operator to elect to proceed with any corrective action prior to submission or approval of plans and if an owner/operator elects to proceed, an applicable plan may be filed at any time. Resp. at 9. Broadus Oil further argues that Section 57.8 of the Act (415ILCS 5/57.8) (2004)) dealing with the fund and Section 57.9 of the Act (415ILCS 5/57.9 (2004)) concerning eligibility for reimbursement are silent about ineligibility based upon an amended budget submitted to approve payment for required corrective action subsequent to issuance of the NFR letter. *Id.*

Broadus Oil argues that the facts are undisputed and Broadus Oil is entitled to judgment as a matter of law.

AGENCY'S REPLY

The Agency disagrees with the assertions of Broadus Oil and argues that the Agency's rejection of the amended budget is supported by the Act and the regulations. Reply at 4-5. The Agency maintains that Section 732.702(d) quotes statutory language and indicates that the issuance of the NFR letter signifies that all statutory and regulatory corrective action requirements applicable to the occurrence have been complied with. Reply at 4. The Agency opines that the language means that the provisions of Section 57.7 of the Act (415ILCS 5/57 (2004)) have to be finished and complied with prior to the issuance of the NFR letter. *Id.* The Agency asserts that if the corrective action requirements are not finished, the NFR letter cannot be issued. *Id.*

The Agency maintains that Section 57.7 of the Act (415ILCS 5/57 (2004)) includes all the provisions relating to the approval of budgets and includes requirements that the budget should include an accounting of all costs associated with the implementation of the corrective

action plan. Reply at 5. The Agency asserts that therefore when reading the Act and the regulations as a whole, the Act clearly requires the budget to be submitted prior to the issuance of the NFR letter. *Id*. The Agency argues that Section 732.405(d) merely reiterates what the Act requires, that all plans and budgets be submitted prior to the issuance of the NFR letter. Because the NFR letter was issued prior to the submission of the amended budget, the Agency asserts that the Agency properly rejected the amended budget and the Agency is entitled to judgment as a matter of law. *Id*.

DISCUSSION

The following discussion will address a preliminary matter, the motion to consolidate and then address the arguments made by the parties.

Preliminary Matter

Before discussing the merits of this case, the Board first notes that both Broadus Oil and the Agency cite to and discuss rule language amended by the Board in Proposed Amendments to Leaking Underground Storage Tanks (35 Ill. Adm. Code 732, 734), R04-22, 23 (Feb. 16, 2006). The adoption of this rule language occurred over two years after the Agency issued the denial letters at issue in this proceeding. Since the inception of the leaking underground storage tank program, there have been numerous changes to the provisions of the law. As a result, the Board and the courts have addressed the issue of what law applies when. *See* Vogue Tyre & Rubber Company v. IEPA, PCB 96-10 (Oct. 21, 2004). However, a review of the regulatory language relied upon by both parties establishes that the amendments from 2006 do not impact the outcome of the proceedings. Therefore, the Board will discuss the regulatory language as amended in 2006.

Motion to Consolidate

Section 101.406 of the Board's procedural rules provides that, on the motion of any party, "[t]he Board will consolidate the proceedings if consolidation is in the interest of convenient, expeditious, and complete determination of claims, and if consolidation would not cause material prejudice to any party." 35 Ill. Adm. Code 101.406.

The Board recognizes that the FedEx case appears to raise the same legal issue as this proceeding and also notes a third case appearing to raise the same legal issue in which the Agency on November 22, 2006, filed a motion for summary judgment. *See* Village of Wilmette v. IEPA, PCB 07-27.

Because this proceeding and PCB 07-12 as well as PCB 07-27 involve different parties, different facts, and different UST sites, the Board is not persuaded that consolidation furthers "the interest of convenient, expeditious, and compete determination of claims." *See* 35 Ill. Adm. Code 101.406. Accordingly, Broadus Oil's motion to consolidate is denied.

Discussion on the Merits

The Board finds the parties have shown that there are no genuine issues of material fact and that summary judgment is appropriate. Broadus Oil argues that subsection (d) applies only in "those instances where an owner/operator submits no remediation plan or budget for approval prior to conducting remedial activities." Mot. at 6 (emphasis added). However, after careful reading of subsection (d) within the full context of the UST rules, the Board disagrees. The Board finds that the applicability of subsection (d) is not limited to sites where corrective action is performed before any corrective action plan or budget is submitted or approved. Instead, subsection (d) applies to the extent any corrective action activities are performed or costs are incurred for which there is no Agency pre-approval, *i.e.*, to the extent the activities or costs go beyond the approved corrective action plan or budget.

If subsection (d) applied only where there was no approved plan or budget, as Broadus Oil maintains, then there would have been no need to begin subsection (d) with "[n]otwithstanding subsection[] . . . (e)." Subsection (e) requires amendments to plans or budgets. So, an already-existing and approved plan or budget, such as this Broadus Oil case, is contemplated by subsection (d). Applying the Board's reading of subsection (d) in this case, Broadus Oil proceeded under subsection (d) by incurring costs beyond the approved budget without first getting the amended budget approved by the Agency. Thus, the budget amendment must be submitted prior to the Agency's issuance of an NFR Letter for that budget amendment to be reviewed by the Agency. Further, the caution in the Board Note under subsection (d) that owners or operators proceeding under subsection (d) may not be entitled to full payment from the UST Fund applies not only to those who proceed with no approved plan or budget, but also to those who go beyond an approved plan or budget.

In relation to the UST rules, subsection (d) is an exception to the general rule that plans and budgets must be submitted to the Agency prior to performing the work. Subsection (e) clearly requires amendments to remediation plans or budgets. That is why it is necessary for subsection (d) to specify that any such "after-the-fact" plan or budget or amended plan or budget, must be submitted before the NFR letter issues. The second sentence of subsection (d) is not a "stand-alone" ban on all post-NFR plan/budget submittals. There is no need for such a broad ban because normally (*i.e.*, those sites not proceeding under subsection (d)), the remediation plans or budgets are submitted before corrective action commences. In the consolidated cases at hand, the Board finds that the Agency properly rejected requests for budget amendments concerning corrective action at Broadus Oil's site because the budget amendment was received after an NFR letter was issued for the site. The Board grants the Agency's motion for summary judgment.

CONCLUSION

The Board finds that summary judgment is appropriate in this proceeding as the parties agree there are no issues of material fact. Based on the arguments and a reading of the Act and the Board regulations, the Board finds that the Agency is entitled to judgment as a matter of law and grants the Agency's motion for summary judgment. The Board finds that the Agency properly rejected an amended budget pursuant to Section 732.405(d) of the Board's regulations and the subsequent reimbursement request based on that amended budget.

ORDER

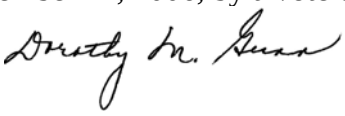
The Board grants the Agency's motion for summary judgment and denies the petitioner's motion for summary judgment.

IT IS SO ORDERED.

Board Member Thomas E. Johnson dissents.

Section 41(a) of the Environmental Protection Act provides that final Board orders may be appealed directly to the Illinois Appellate Court within 35 days after the Board serves the order. 415 ILCS 5/41(a) (2004); *see also* 35 Ill. Adm. Code 101.300(d)(2), 101.906, 102.706. Illinois Supreme Court Rule 335 establishes filing requirements that apply when the Illinois Appellate Court, by statute, directly reviews administrative orders. 172 Ill. 2d R. 335. The Board's procedural rules provide that motions for the Board to reconsider or modify its final orders may be filed with the Board within 35 days after the order is received. 35 Ill. Adm. Code 101.520; *see also* 35 Ill. Adm. Code 101.902, 102.700, 102.702.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion and order on December 21, 2006, by a vote of 3-1.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board