

ILLINOIS POLLUTION CONTROL BOARD
July 21, 2016

FRIENDS OF THE ENVIRONMENT, NFP,)
)
 Petitioner,)
)
 v.) PCB 16-102
) (UST Appeal)
 ILLINOIS ENVIRONMENTAL)
 PROTECTION AGENCY,)
)
 Respondent.)

ORDER OF THE BOARD (by G.M. Keenan):

In Illinois, when an underground storage tank (UST) containing petroleum leaks, the UST's owner can seek reimbursement from the state UST fund for certain expenses incurred while cleaning up the leak. The Illinois Environmental Protection Agency reviews requests for reimbursement from the fund and may decline to reimburse costs it deems unreasonable. When deciding whether certain costs are reasonable, the Agency must follow a set of Board-adopted procedures. Under those procedures, the UST owner must document all costs in its reimbursement application.

Friends of the Environment, NFP (Friends) owned two USTs that leaked. After Friends removed the tanks, it applied for reimbursement from the UST fund. The Agency only approved part of the reimbursement request; it found that Friends did not document all of its cleanup costs. The Agency approved reimbursement for costs it deemed appropriately documented, and it denied reimbursement for costs that it deemed unsupported. Friends appealed the decision to the Board, arguing that it sufficiently documented its costs and that the Agency violated the Board's rules on reimbursement from the UST fund.

Both parties moved for summary judgment. This order finds Friends did not show that the Agency violated Board rules when partially denying a reimbursement request due to lack of supporting documentation. Therefore, the Board will grant the Agency its cross-motion for summary judgment.

BACKGROUND

Procedural History

The Board's involvement with this matter began when Friends petitioned the Board for review of the Agency's decision to only partially reimburse Friends' claimed cleanup costs.¹

¹ Friends of the Environment, NFP v. Illinois Environmental Protection Agency, PCB 16-102 (Apr. 5, 2016) (Friends' petition) (Pet.).

The Board accepted the petition for hearing.² After the Agency filed the administrative record of its decision,³ each party filed a motion for summary judgment,⁴ followed by a response from each party.⁵ This order resolves these motions.

Undisputed Facts

Friends owned two USTs located at 3609-23 West Harrison Street in Chicago that leaked petroleum products.⁶ To manage the cleanup, Friends hired a consultant named Inland-Frycek, Inc. The consultant reported the leak on September 1, 2015.⁷ To assist with the cleanup, Inland-Frycek, hired a contractor named Orivne, Inc.⁸ Orivne, in turn, hired a number of ‘downstream’ subcontractors to complete individual tasks related to the cleanup. These parties worked together to perform the cleanup work in October 2015.⁹

After the Office of the Illinois State Fire Marshal determined that Friends could seek reimbursement for its costs (minus a deductible),¹⁰ Friends requested that the Agency approve payment of \$43,964.55 from the UST fund.¹¹ The Agency deemed certain costs ineligible for reimbursement and approved only part of Friends’ request (\$19,146.98).¹²

The Agency determined that Friends’ backfill material, groundwater removal, and drum disposal costs lacked supporting documentation. The Agency also deducted handling costs. (Handling costs are, in general, a percentage of other costs.) The documents that Friends submitted included an invoice from Orivne to Inland-Frycek, which listed the backfill, groundwater removal, and drum disposal costs.¹³ However, Friends did not submit invoices or receipts from the downstream subcontractors specifically responsible for acquiring the backfill material, transporting and disposing of contaminated groundwater, or transporting and disposing of the drum of waste material. The following bullet points specify what Friends submitted and what the Agency found lacking:

² Friends, PCB 16-102 (Apr. 21, 2016) (Board order).

³ Friends, PCB 16-102 (May 18, 2016) (Administrative record).

⁴ Friends, PCB 16-102 (June 17, 2016) (Friends Mot. for S.J.); Friends, PCB 16-102 (June 17, 2016) (Agency Mot. for S.J.).

⁵ Friends, PCB 16-102 (June 29, 2016) (Friends Response); Friends, PCB 16-102 (June 29, 2016) (Agency Response).

⁶ Administrative Record (R.) at 5 (Friends’ election to proceed as owner).

⁷ R. at 1 (Hazardous materials incident report). The Agency insinuates that Friends and Inland-Frycek are functionally indistinguishable. Agency Mot. for S.J. at 1-2. The Agency notes, for instance, that Friends and Inland-Frycek have the same street address. *Id.*, citing R. at 8 (signature page from Friends’ 20-day certification). However, the Agency does not argue that this fact is legally relevant, so the Board will not incorporate it into its analysis.

⁸ R. at 88 (Orivne’s invoice to Inland-Frycek from Friends’ reimbursement claim).

⁹ R. at 14 (Executive summary to Friends’ 45-day report to the Agency).

¹⁰ R. at 39 (Office of the Illinois State Fire Marshal’s deductible letter).

¹¹ R. at 57-94 (Friends’ reimbursement claim). Friends later amended the claim. R. at 180-200 (Friends’ amended reimbursement claim).

¹² R. at 220 (Agency’s decision letter to Friends).

¹³ *Supra* at n. 8 (Orivne’s invoice).

- **Backfill costs:** Friends requested \$1,982.40 for the cost of replacing material removed from the cleanup site with clean backfill.¹⁴ Orivne's invoice charged Inland-Frycek \$1,982.40 for the backfill.¹⁵ Another subcontractor helped procure backfill: Friends also submitted an invoice from a company named Lindahl Bros. Lindahl's invoice charged Orivne \$800 for transporting an unspecified quantity of sand.¹⁶ No document lists the cost for purchasing the backfill material. The Agency found the backfill costs ineligible for reimbursement because Friends did not clearly show how much was paid for the backfill material or what quantity of material Lindahl transported.¹⁷
- **Groundwater removal costs:** Friends requested \$12,982.20 for the cost of removing contaminated groundwater.¹⁸ Orivne's invoice to Inland-Frycek also lists this cost.¹⁹ However, other subcontractors' costs are not specifically documented. A waste manifest in the application shows that a subcontractor, North Branch Environmental, transported contaminated water to another subcontractor, Ortek, Inc., for disposal.²⁰ No invoice from either North Branch or Ortek is in the reimbursement application, so the Agency deducted these costs.²¹
- **Drum disposal costs:** Friends requested \$619.57 for the cost of disposing one drum of solid waste.²² This value is also listed in the invoice from Orivne to Inland-Frycek.²³ According to a waste manifest, North Branch transported a drum of solid waste to another subcontractor, American Waste Industries, for disposal.²⁴ Again, no invoice from either contractor is in the reimbursement application, so the Agency deducted the cost of transporting and disposing the waste.²⁵
- **Adjusted handling costs:** Handling costs are generally a percentage of the other costs incurred. For example, handling costs are 12% of cleanup costs up to \$5,000.²⁶ Due to reimbursement deductions, the Agency also adjusted the handling costs.²⁷

¹⁴ R. at 66 (Remediation and disposal costs form from Friends' reimbursement claim).

¹⁵ *Supra* at n. 8 (Orivne's invoice).

¹⁶ R. at 197 (Invoice from Lindahl Bros. to Orivne from Friends' amended reimbursement claim).

¹⁷ R. at 204 (Agency's fiscal review notes).

¹⁸ R. at 67 (Remediation and disposal costs form from Friends' reimbursement claim).

¹⁹ *Supra* at n. 8 (Orivne's invoice).

²⁰ R. at 137 (North Branch Environmental's waste manifest for groundwater removal from Friends' amended 45-day report).

²¹ R. at 222 (Agency's decision letter).

²² *Supra* at n. 18 (Remediation and disposal costs form).

²³ *Supra* at n. 8 (Orivne's invoice).

²⁴ R. at 198 (North Branch Environmental's waste manifest for drum disposal from Friends' amended reimbursement claim).

²⁵ *Supra* at n. 21 (Agency's decision letter).

²⁶ R. at 217 (Agency's fiscal review notes).

²⁷ *Supra* at n. 21 (Agency's decision letter).

Statutes and Regulations

The Illinois Environmental Protection Act established the Illinois Leaking Underground Storage Tank Program, authorizing the Office of the Illinois State Fire Marshal and the Agency to administer reimbursements from the UST fund.²⁸ The Act requires the Agency to determine, under Board-adopted procedures, that reimbursed cleanup costs are reasonable.²⁹ Under those procedures (Part 734 of the Board's rules), costs that lack "supporting documentation" are ineligible for reimbursement.³⁰

When the Agency decides not to approve reimbursement and the applicant appeals to the Board, the applicant bears the burden of proof.³¹ The Board must base its review on the record before the Agency at the time it declined reimbursement.³²

Both parties filed motions for summary judgment. Under the Board's procedural rules, if the record shows that there is no genuine issue of material fact, and that the moving party is entitled to judgment as a matter of law, the Board will enter summary judgment.³³

ANALYSIS

To resolve the motions for summary judgment, the Board must decide several legal questions. First, if there is any genuine issue of material fact, then the Board will reject both motions. If not, if Friends can show that documentation that it presented to the Agency supported its backfill costs, groundwater removal costs, and drum disposal costs as required under Board rules, then it is entitled to judgment and the Board will grant its motion. If Friends cannot, then the Board will grant the Agency's motion.

There Is No Genuine Issue of Material Fact

The Board may only grant summary judgment in an appeal of an Agency determination when there is no genuine issue of material fact.³⁴ Both parties alleged in their motions for summary judgment that no genuine issue of material fact exists.³⁵ But agreement of the parties alone "does not establish that there is no issue of material fact, nor does it obligate the Board to render summary judgment."³⁶ In this instance, however, the Board has not identified any genuine issue of material fact in the administrative record.

²⁸ 415 ILCS 5/57.3 (2014).

²⁹ 415 ILCS 5/57.7(c)(3) (2014).

³⁰ 35 Ill. Adm. Code 734.630(cc).

³¹ 35 Ill. Adm. Code 105.112(a).

³² 415 ILCS 5/40(e)(3)(ii) (2014).

³³ 35 Ill. Adm. Code 101.516(b).

³⁴ *Id.*

³⁵ Friends' Mot. for S.J. at 1; Agency's Mot. for S.J. at 13.

³⁶ Prairie Rivers Network v. Illinois Pollution Control Bd., 2016 IL App (1st) 150971 at ¶ 24, 401 Ill. Dec. 538, 542, 50 N.E.3d 680, 684, (Feb. 26, 2016).

The Agency Is Entitled to Judgment as a Matter of Law

The dispute ultimately turns on one question: can the Agency require invoices, purchase tickets, and other documentation from downstream subcontractors when deciding whether to reimburse UST cleanup costs? Or is an invoice from a general contractor to an owner's consultant sufficient supporting documentation? When it denied reimbursement, the Agency claimed that Friends did not submit "supplemental documentation" under Part 734 of the Board's rules.³⁷ In a narrow sense, Friends did supply some kind of supporting documentation—Friends submitted the invoice from Inland-Frycek³⁸ and the invoice from Orivne to Inland-Frycek for backfill, groundwater removal, and drum disposal (and other ancillary documents).³⁹ Friends argues that these documents (and several other ancillary documents) satisfy requirements for "supplemental documentation" under Board rules.⁴⁰

To determine whether the documents in Friends' application meet these requirements, the Board will examine the regulation's text and past Board orders that applied the regulation. This order will explain that while the Board's rules do not directly address downstream subcontractors, past Board adjudications rightly determined that the Board's rules allow the Agency to require documents detailing a downstream subcontractor's transactions. Under these legal authorities, Friends did not show that it provided the "supplemental documentation" that the Agency may request under Board regulations.

Board Rules Allow the Agency to Require a Full Accounting Supporting All Claims

Part 734 does not define "supporting documentation."⁴¹ It does, however, use the term when setting requirements for the reimbursement application and Agency review of that application. Applications for reimbursement from the UST fund must include an "accounting of all costs, including but not limited to, invoices, receipts, and supporting documentation showing the dates and descriptions of the work performed"⁴²

When the Agency reviews applications, it *must* determine whether there is "sufficient documentation" to show the work was completed according to regulatory requirements.⁴³ This requires the applicant to submit more than the bare minimum; the documentation must sufficiently show (in the Agency's discretion) that the applicant properly completed the work.

To aid its decision-making, the Agency *may* require the owner to submit "a full accounting supporting all claims . . . including but not limited to a review of invoices or receipts

³⁷ R. at 222 (Agency's decision letter).

³⁸ R. at 186 (Invoice from Inland-Frycek to Friends from Friends' amended reimbursement claim).

³⁹ *Supra* at n. 8 (Orivne's invoice).

⁴⁰ Friends Mot. for S.J. at 6-7.

⁴¹ See 35 Ill. Adm. Code 734.115.

⁴² 35 Ill. Adm. Code 734.605(b)(9).

⁴³ 35 Ill. Adm. Code 734.610(a)(2).

supporting all claims.”⁴⁴ Part 734 defines “Full Accounting” as a compilation of documentation to establish, substantiate, and justify the nature and extent of the corrective action costs incurred by an operator or owner.⁴⁵

Though the definition of “full accounting” does not distinguish between documents concerning work done by a general contractor versus a subcontractor (or sub-sub-contractor), the definition does not limit what the Agency may request, either. The regulation broadly grants authority, implying that the Agency can reject a reimbursement claim when certain receipts or invoices from downstream subcontractors are absent—a “full” accounting must mean, at least, that the Agency can request all invoices issued by contractors working on the cleanup.

A prior Board adjudication supports this interpretation.

T-Town Establishes That the Agency May Require Subcontractor Invoices

In T-Town Drive Thru v. IEPA,⁴⁶ the Board reviewed the Agency’s decision to partially deny a request to reimburse UST cleanup costs. The Agency denied part of the claim because the tanks’ owner did not submit invoices that the general contractor received from a laboratory that tested soil samples.⁴⁷ The applicant argued that it appropriately submitted the general contractor’s invoice and should not be required to submit the laboratory’s invoices.⁴⁸ The Board ruled that the Agency could request subcontractor invoices and deny reimbursement when those invoices were not provided.⁴⁹

Friends argues that T-Town involves a “very different set of facts”: the Agency seeks invoices from Friends for transactions that are several degrees more remote than the transactions at issue in T-Town.⁵⁰ In T-Town, the applicant hired a general contractor, who then hired the laboratory (two degrees of separation). In this case, Friends hired Inland-Frycek, who hired Orivne, who then hired other downstream subcontractors (three degrees of separation).

Despite these factual differences, Friends did not identify an aspect of the Board’s rules or the Board’s reasoning in T-Town that makes this a *meaningful* difference. The Board ruled that the Agency could require an applicant to provide invoices from subcontractors that worked on the cleanup—it didn’t limit this authority to only require invoices from direct subordinates to the prime contractor.

⁴⁴ 35 Ill. Adm. Code 734.610(b), (c).

⁴⁵ 35 Ill. Adm. Code 734.115.

⁴⁶ T-Town Drive Thru v. IEPA, PCB 07-85 (Apr. 3, 2008) (Board order). T-Town interpreted Part 732 of the Board’s rules, which only applies to releases reported between September 23, 1994 and June 23, 2002. For the purposes of this order, the relevant sections of Part 732 and Part 734 are identical.

⁴⁷ T-Town, PCB 07-85 at 7.

⁴⁸ T-Town, PCB 07-85 at 16-17.

⁴⁹ T-Town, PCB 07-85 at 29.

⁵⁰ Friends’ Mot. for S.J. at 8.

Therefore, the Board's interpretation of UST reimbursement rules in T-Town applies to Friends' petition and the Agency may require an applicant submit invoices and other documentation from downstream subcontractors.

CONCLUSION

The Agency is entitled to judgment because Friends did not show that the Agency violated Board regulations when denying requested reimbursement from the UST fund for lack of invoices from downstream subcontractors. Though the Board's regulations do not explicitly allow the Agency to require all downstream subcontractor invoices, they do not explicitly limit the Agency's authority either. The Agency's authority to seek documentation cannot be unlimited, but Part 734 does not prohibit the Agency from requesting invoices from downstream subcontractors.

For these reasons, the Board will grant the Agency's motion for summary judgment.

ORDER

1. The Board denies the motion for summary judgment by Friends of the Environment, NFP.
2. The Board grants the Illinois Environmental Protection Agency's cross-motion for summary judgment.
3. The Board closes the docket.

IT IS SO ORDERED.

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.⁵¹ Illinois Supreme Court Rule 335 establishes filing requirements that apply when the Illinois Appellate Court, by statute, directly reviews administrative orders.⁵² 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.⁵³

I, John T. Therriault, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on July 21, 2016 by a vote of 5-0.



John T. Therriault, Clerk
Illinois Pollution Control Board

⁵¹ 415 ILCS 5/41(a) (2014); *see also* 35 Ill. Adm. Code 101.300(d)(2), 101.906, 102.706.

⁵² 172 Ill. 2d R. 335.

⁵³ 35 Ill. Adm. Code 101.520; *see also* 35 Ill. Adm. Code 101.902, 102.700, 102.702.