

ILLINOIS POLLUTION CONTROL BOARD
July 25, 2019

ILLICO INDEPENDENT OIL COMPANY,)	
)	
Petitioner,)	
)	
v.)	PCB 17-84
)	(UST Appeal)
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Respondent.)	

OPINION AND ORDER OF THE BOARD (by B.F. Currie):

On December 20, 2018, the Board issued an order affirming the Illinois Environmental Protection Agency's (Agency) modification of Illico Independent Oil Company's (Illico) revised corrective action plan (CAP) and budget concerning an underground storage tank (UST) site located at 3712 N. University Street in Peoria, Peoria County. On February 6, 2019, Illico filed a motion for reconsideration of the Board's order.

For the reasons stated below, the Board finds that Illico's motion does not cite newly-discovered evidence, changes in the law, or errors in the Board's application of existing law. The Board denies Illico's motion to reconsider, finding that the Board's decision affirming the Agency did not rely on matters outside of the Agency's determination letter.

PROCEDURAL BACKGROUND

On February 6, 2019, Illico timely filed a motion for reconsideration (Mot.) of the Board's December 20, 2018 order. On February 14, 2019, the Agency filed a motion to strike Illico's motion to reconsider as untimely along with its response (Resp.). On February 27, 2019, Illico filed a motion for leave to file a reply *instantly*, accompanied by its reply (Rep.). The Board grants Illico's motion for leave and accepts its reply.

Along with its reply, Illico submitted the certified mail tracking history indicating its receipt of the Board's December 20, 2018 order on January 2, 2019. Because Illico filed the motion to reconsider on February 6, 2019, which is within 35 days after the receipt of the order (35 Ill. Adm. Code 101.520(a)), Illico's motion is timely. Consequently, the Board denies the Agency's motion to strike.

LEGAL BACKGROUND

A party may file a motion to reconsider a Board order within 35 days after receiving the order. 35 Ill. Adm. Code 101.520(a). Any response to a motion to reconsider must be filed within 14 days after the filing of the motion. 35 Ill. Adm. Code 101.520(b). The purpose of a

motion to reconsider is to bring to the Board's attention newly discovered evidence that was not available at the time of the hearing, changes in the law, or errors in the Board's previous application of existing law. *See Citizens Against Reg'l Landfill v. Cty. Bd. of Whiteside*, PCB 93-156, slip op. at 2 (Mar. 11, 1993), *citing Korogluyan v. Chicago Title & Trust Co.*, 213 Ill. App. 3d 622 (1st Dist. 1992); *see* 35 Ill. Adm. Code 101.902.

DISCUSSION

The Board's December 20, 2018 order found that Illico failed to meet its burden of proving that it complied with the applicable UST laws. In its motion for reconsideration, Illico argues that the Board's order was "based upon erroneous application of existing law." Specifically, Illico maintains that the Board analyzed legal provisions not before the Board. Mot. at 1.

Illico notes that the Agency's determination letter frames the issues before the Board. Mot. at 2. Illico argues that, in upholding the Agency's denial, the Board improperly relied upon Sections 734.630(o), 734.630(tt), and 734.630(aaa) of the Board's UST rules as legal requirements that would be violated if the Agency approved the CAP. *Id.* at 3. Illico further contends that if the Agency denies or modifies a plan, the Agency must inform the owner or operator by writing, accompanied by:

- (A) an explanation of the Sections of this Act which may be violated if the plans were approved;
- (B) an explanation of the provisions of the regulations, promulgated under this Act, which may be violated if the plan were approved;
- (C) an explanation of the specific type of information, if any, which the Agency deems the applicant did not provide the Agency; and
- (D) a statement of specific reasons why the Act and the regulations might not be met if the plan were approved.

Mot. at 2, *citing* 415 ILCS 5/57(c)(4) (2016).

The Board's December 20, 2018 order upheld the Agency's determination that removal of the tanks was not necessary. Below the Board finds that the Agency's determination letter outlined which amendments to the CAP were necessary to prevent violations of the Illinois Environmental Protection Act (Act) and Board regulations. The letter also indicated the information required from Illico to support removal of the tanks as necessary, namely evidence that the contamination in the area designated as the orange zone exceeded Tier 2 remediation objectives. In upholding the Agency's determination, the Board did not rely on legal requirements outside of the Agency's determination letter. The Board therefore denies Illico's motion to reconsider.

Section 734.630 of the Board's regulations lists costs ineligible for reimbursement from the UST Fund. 35 Ill. Adm. Code 734.630. Subsection (o) excludes reimbursement costs "for corrective action activities and associated materials for services exceeding the minimum requirements necessary to comply with the Act." 35 Ill. Adm. Code 734.630(o). Subsection (tt)

excludes costs for “treatment or disposal of soil that does not exceed the applicable remediation objectives for the release, unless approved by the Agency in writing prior to the treatment or disposal.” 35 Ill. Adm. Code 734.630(tt). It is undisputed that the Tier 2 remediation objectives apply to this site. Finally, subsection (aaa) precludes reimbursement of “[c]osts associated with on-site corrective action to achieve remediation objectives that are more stringent than the Tier 2 remediation objectives developed in accordance with 35 Ill. Adm. Code 742.” 35 Ill. Adm. Code 734.630(aaa).

The Board’s decision to affirm the Agency was not based on Sections 734.630(o), 734.630(tt), and 734.630(aaa). The Board cited those rules merely to counter Illico’s unqualified claim that reimbursing the costs of removing USTs with reported releases would not violate the Board’s rules. Pet. Post Hrg. Brief at 11-12, *citing* 35 Ill. Adm. Code 734.625(a)(12). The rules merely implement a fundamental statutory principle of Section 57.7(c) of the Act (415 ILCS 5/57.7(c) (2016)), cited in the Agency’s determination letter, that costs will not be reimbursed if used for activities exceeding those required to meet the minimum requirements of the Act; and for reimbursement purposes, “minimum requirements” include “the use of Tier 2 remediation objectives.” 415 ILCS 5/57.7(c)(3) (2016).

The second paragraph of the Agency’s determination letter states that “[p]ursuant to Subsections 57.7(b)(2) and 57.7(c) of the Environmental Protection Act [(415 ILCS 5) (Act)] and 35 Illinois Administrative Code (35 Ill. Adm. Code) 734.505(b) and 734.510(a),” the Agency is modifying Illico’s CAP and cites “Attachment A” detailing modifications “necessary to demonstrate compliance.” R. 634. Modification 12 in Attachment A amends the CAP by disallowing the removal of the USTs, piping, and pump islands because “the owner/operator has not demonstrated the USTs, piping, and pump islands must be removed to access backfill/soil that contains contaminants at concentrations greater than Tier 2 remediation objectives.” *Id.* at 637. Modification 13(e) in Attachment A states that “the owner/operator shall not excavate, transport, and dispose of the backfill/soil in the orange zone because the owner/operator has not demonstrated that the backfill/soil in the orange zone contains contaminants at concentrations greater than the Tier 2 remediation objectives.” *Id.*

Modifications 12 and 13(e) explain why the Act would be violated had the Agency not modified the CAP and explain that Illico did not submit documentation showing contamination in the orange zone above Tier 2 remediation objectives.

Illico contested modification 12 in its Petition (Pet.), Motion for Summary Judgment (MSJ), and Post-Hearing Brief (Post-Hrg. Br.). For example, Illico stated, that “the issue raised in this appeal is modification number 12, and those modifications to the plan and budget premised on it.” Pet. at 3; *see also* MSJ at 5; Post-Hrg. Br. at 5.

Illico also contested modification number 13 throughout its filings. In its petition, Illico argued that it was necessary to remove the USTs to “remove soils contaminated above Tier 2 site remediation objectives.” Pet. at 3. In its motion for summary judgment, Illico quoted modification 13(e): “the owner/operator has not ‘demonstrated that the backfill/soil in the orange zone contains contaminants at concentrations greater than the Tier 2 remediation objectives.’” MSJ at 10, *citing* R. 637.

As Illico maintained throughout its filings, the primary issue in this appeal was whether Illico had demonstrated that the orange zone was contaminated at levels above Tier 2 remediation objectives, requiring the removal of the USTs. This is the issue the Board decided when ruling that Illico had not met its burden of proof. Illico Independent Oil Co. v. IEPA, PCB 17-84, slip op. at 10 (Dec. 20, 2018). The Board will not reconsider issues it has already decided without the appropriate justification. Illico fails to establish newly-discovered evidence, a change in the law, or errors in the Board's application of existing law to warrant granting its motion for reconsideration.

CONCLUSION

For the reasons stated above, the Board denies Illico's motion for reconsideration. The Board upheld the Agency modifications appealed by Illico: modification 12 and 13(e) of Attachment A to the Agency's determination letter. Illico has not persuasively argued that the Board erred in that decision. Illico failed to meet its burden of proving that its submittal to the Agency demonstrated that contamination existed above Tier 2 remediation objectives within the orange zone and thus that its CAP and budget would not have exceeded the minimum requirements necessary to comply with the Act.

ORDER


The Board denies Illico's motion to reconsider the Board's December 20, 2018 opinion and order.

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. 415 ILCS 5/41(a) (2016); *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. Filing a motion asking that the Board reconsider this final order is not a prerequisite to appealing the order. 35 Ill. Adm. Code 101.902.

Names and Addresses for Receiving Service of Any Petition for Review Filed with the Appellate Court	
Parties	Board
Illico Independent Oil Co. Attn: Patrick D. Shaw 80 Bellerive Road Springfield, IL 62704	Illinois Pollution Control Board Attn: Don A. Brown, Clerk James R. Thompson Center 100 West Randolph Street, Suite 11-500 Chicago, Illinois 60601
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I, Don A. Brown, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion and order on July 25, 2019, by a vote of 5-0.



Don A. Brown, Clerk
 Illinois Pollution Control Board