ILLINOIS POLLUTION CONTROL BOARD
November 16, 1995

KELLEY-WILLIAMSON COMPANY,	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB 95-116
	)	(UST-Fund)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
	)	
	)	
Respondent.		

JOHN W. FRANCE, WILLIAMS & MCCARTHY, APPEARED ON BEHALF OF KELLEY-WILLIAMSON COMPANY.

MELANIE A. JARVIS APPEARED ON BEHALF OF THE RESPONDENT.

OPINION AND ORDER OF THE BOARD (J. Theodore Meyer):

This matter comes before the Board on a March 29, 1995 petition for review filed by Kelley-Williamson Company (KWC) pursuant to sections 40 and 22.18(g) of the Illinois Environmental Protection Act (Act)(415 ILCS 5/40 and 57.7(c)(4)(D)(iv)(1994).) KWC seeks review of particular costs for which the Environmental Protection Agency (Agency) denied eligibility for reimbursement from the Underground Storage Tank Fund (UST Fund). Hearing was held on August 25, 1995 in Belvidere, Boone County, Illinois before Hearing Officer June Edvenson. No members of the public attended the hearing. KWC filed its post-hearing brief on September 22, 1995, requesting oral argument before the Board. The Agency filed its post-hearing brief on October 4, 1995, and KWC filed its post-hearing reply on October 23, 1995.[1]

As a preliminary matter, the Board denies KWC's request for oral argument. Although 35 Ill. Adm. Code 103.140(d) provides for oral argument on a motion, the Board believes that the issues of eligibility for reimbursement presented here can be decided based on the documents before it and that oral argument will serve no useful purpose in this instance.

BACKGROUND

[1]Hereinafter, KWC's amended petition for review shall be referred as (Pet. at __.); the record shall be referred to as (Rec. at __.); and the transcript shall be referred to as (Tr. at __.). KWC's post-hearing brief shall be referred to as (PH Br.at __.); the Agency's post-hearing brief shall be referred to as (Agency Br. at __.); and, KWC's post-hearing reply shall be referred to as (Reply at __.).

KWC owned a gas station on Logan Avenue in Belvidere, Illinois where eight underground storage tanks (USTs) were located. (PH Br. at 1.) In 1993 KWC hired Pyramid Petroleum Equipment (Pyramid) to remove all eight tanks. (Id.) Removal began on November 1, 1993, at which time a release from each of the tanks was discovered. (Id.) Jim Karplanes of Pyramid and Jim Drager of the Office of the State Fire Marshal (OSFM) were present at the removal site, observed the release and reported it to KWC, who in turn reported it to the Illinois Emergency Management Agency (IEMA). (Tr. at 25, 27, 97.) After removal of the tanks, Pyramid took soil samples from the site, placed the excavated fill material back into the holes, and added road stone to bring the soil level up to grade. (Tr. at 23, 24.)

KWC subsequently hired Environmental Technical Assistance Company (ETAC) to prepare a 45-day report which was submitted to the Agency in March, 1994, over three months late. (PH Br. at 1, R. at 253.) The report indicated that all USTs and piping had been removed to prevent further contamination. (R. at 269.) In addition, the report stated that all residual product was removed from the tanks and that the excavation completely backfilled and brought up to grade to prevent fire, explosion and vapor hazards. (Id.)

In the spring of 1994, KWC replaced ETAC with Environmental Consultants of Illinois (ECI). (R. at 55.) ECI conducted soil samples to confirm the reported release, and to prepare for the removal of the contaminated soil. (PH Br. at 1-2.) On August 31, 1994, nine months after removal of the USTs, ECI removed the fill material that had been left at the site. Jim Drager of the OSFM was present, observed the soil removal and asked ECI representative, Matt Warneke, if he was aware of the "four-foot rule". (Tr. at 94.)[2] Since both had questions about the rule, Jim Drager contacted Virginia Duffy of the Agency, who met them at the site and explained the rule. (Tr. at 117.)

In November 1994, ECI submitted an application for reimbursement on behalf of KWC. (PH Br. at 2.) The application chronicled the tank excavation, testing and soil removal activities conducted on behalf of KWC and requested reimbursement of costs totaling $60,810.02. (Id., Tr. at 90-92.) In its February 27, 1995 letter, the Agency stated that the tank removal costs of $2,947.50 were reimbursable, subject to the UST fund's $15,000 deductible. (Pet. at Attachment A.) The Agency denied KWC all costs incurred after the filing of the 45-day report, which totalled $57,862.52. (Id.) The Agency cited the following reasons for denial:

1. Early action had been completed at the time the 45-day

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[2] *See* 415 ILCS 5//57.6(a)(1)(B) as set forth infra, p.3.

report was submitted;

2. The minimum requirements had been exceeded in that native soil had been removed; and

3. Petitioner's activities constituted remediation rather than early action.

(Id.) Thereafter, KWC submitted its petition for review of the Agency's decision regarding reimbursement.

APPLICABLE LAW

In its letter to KWC denying eligibility for reimbursement, the Agency cited two reasons for denial: (1) the costs incurred after submittal of the 45-day report did not constitute early action, and (2) the costs exceeded the minimum requirements for corrective action. Following is an outline of the applicable law in this matter.

To be eligible for reimbursement from the UST Fund, costs must be reasonable and related to corrective action. (Platolene 500, Inc. v. IEPA (May 7, 1992) PCB 92-9, 133 PCB 259.) The burden of proving that challenged costs are reasonable and related to corrective action rests solely on the applicant for reimbursement. (Id. at 266.)

At the time of the release in this case, section 57.2 of the Act defined corrective action cost as "activities associated with compliance with the provisions of 57.6 [early action] and compliance with the provisions of 57.7 [investigation and remediation] of this Title." (415 ILCS 5/57.2 (1992).) In November 1993, early action was defined in Section 57.6(b) as:

> Notwithstanding any other corrective action taken, an owner or operator may, at a minimum, and prior to submission of any plans to the Agency, remove the tank system, or repair or abandon the underground storage tank in place, in accordance with the regulations promulgated by the Office of the State Fire Marshal. The owner or operator may also remove visibly contaminated fill material and any groundwater in the excavation which exhibits a sheen.

(415 ILCS 5/57.6(b).) Fill material was defined as "non-native or disturbed materials used to bed and backfill around an underground storage tank." (415 ILCS 5/57.2.) With regards to removing fill material from the site, the Act requires that:

> ...for purposes of payment for early action costs, fill material shall not be removed in an amount in excess of

4 feet from the outside dimensions of the tank.[3]

(415 ILCS 5/57.6(a)(1)(B).) In addition, the Act requires that an owner/operator comply with the provisions of Title XVI, Petroleum Underground Storage Tanks, in order to be reimbursed, and specifically states:

> [i]n no event will an owner or operator be reimbursed for any costs which exceed the minimum requirements necessary to comply with this Title.

(415 ILCS 5/57.5(a).) Finally, although the Agency relied heavily upon 35 Ill. Adm. Code 731.161-163 and 732.300(b), these regulations were not promulgated until after the events took place in this matter; therefore, they are not applicable.

ARGUMENTS

KWC asserts that the activities conducted on its behalf to remove fill material from its UST site constitute early action. Pointing to the language in the Act, KWC argues that there is no time limit for when early action can take place, as long as it is completed prior to submission of any plans to the Agency. (PH Br. at 3.) KWC contends that the 45-day report submitted in March 1994 is not a "plan", and that no rule prohibits early action activities after its submittal. (PH Br. at 3, Tr. at 145.)

The Agency argued that it denied the costs incurred after KWC filed its 45-day report because KWC exceeded the minimum requirements of early action and corrective action. First, the Agency asserts that the 45-day report is a requirement of early action intended to inform the Agency of the status of activities at a given site. (Agency PH Br. at 9.) In its 45-day report, KWC informed the Agency that it had completed all required early action measures, but failed to mention that early action activities remained. (Id. at 10-12, R. at 269.) Having received no further communication from KWC regarding the site, the Agency argues that early action ended when the 45-day report was filed because its contents indicated that all statutorily-mandated early action events had been completed, and did not state that further work at the site was necessary. (Agency PH Br. at 15.) As a result, the Agency maintains that the work completed in June and August 1994 exceeded the minimum requirements necessary to comply with early action. (Id.)

The Agency also contends that KWC should not be reimbursed for removing soil as "early action" activities because KWC did

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[3]This is known as the "four-foot rule" and is referred to as such in the record and in this opinion and order.

not meet its burden of proving that it complied with the "four foot rule" in Section 57.7(a)(1)(B) of the Act. The Agency points to the fact that KWC's consultant could not distinguish between fill material and native soil, and that Virginia Duffy of the Agency witnessed native soils being removed from the site in August 1994. (Agency PH Br. at 17, Tr. at 120, 163.)

The Agency additionally argues that KWC actually performed corrective action activities when it conducted soil sampling and testing before and after the soil removal in August 1994. (Id. at 21.) In conducting soil remediation, KWC did not do so in accordance with the minimum standards of Title XVI of the Act. (415 ILCS 5/57.7(a).) Therefore, the Agency asserts, the costs incurred are not reimbursable as "corrective action" costs.

Though it is difficult to discern, at hearing and in its post-hearing brief, KWC argues that its "corrective action" activities complied with the Act and met the minimum standards for performing remediation. They argue that remediation in the form of hauling away contaminated soil was necessary to remediate the site. (*See generally,* PH Br. at 5-6.) KWC also objected to the Agency's use of a "general rule of thumb" to determine that soil sampling and soil removal is not corrective action. (Id. at 5.)

DISCUSSION

In September 1993, the legislature enacted a new statute which substantially revised the UST program in the State of Illinois, and changed the methods by which an eligible owner or operator could obtain reimbursement. P.A. 88-496 established for the first time a "pre-approval" requirement in which an owner or operator first submits site classification and corrective action plans and receives Agency approval prior to performing corrective action. (415 ILCS 5/57.7.) Once the Agency has approved corrective action, via the corrective action plan, the owner or operator is entitled to reimbursement for the amount pre-approved by the Agency. (415 ILCS 5/57.8.)

Specifically, with regard to early action, the Act provides that early action now may be performed prior to submitting any site classification plan or corrective action plan, and the owner or operator may receive reimbursement (beyond the appropriate deductible level), as long as the early action activities are consistent with the minimum standards of the Act. (*See eg.* 415 ILCS 57.5(a).) The statute specifically states that under no circumstances will the Agency reimburse early action activities where the owner or operator removed native soil in "an amount in excess of four feet from the outside dimensions of the tank". (415 ILCS 5/57.7(a)(1)(B).)

In this case, the first issue is whether the events conducted between March and August 1994 are early action activities and therefore eligible for reimbursement under the early action provisions of the Act. Early action usually begins with the completion of the following three federally mandated requirements: reporting the release to the EMA; removing all sources of contamination, including tanks and piping; and, mitigating potential fire, explosion and vapor hazards. (415 ILCS 5/57.6(a), and 35 Ill. Adm. Code 731.161, 731.162, 731.163.) In addition, the owner or operator has the option of removing visibly contaminated fill material and any groundwater in the excavation which exhibits a sheen. (415 ILCS 5/57.6(b).) These options are considered emergency measures, like the three federally mandated requirements, and are to be conducted within the same time frame. Indeed, the Board's regulations envision that these measures would be completed before the 20-day report, and well before submittal of the 45-day report. (*See* 35 ILCS 731.162(b), 731.163(b).)

In March 1994, over 4 months after removal of its USTs, KWC submitted its 45-day report which outlined all actions taken at the site. The report indicated that in November 1993 all tanks and piping, the sources of contamination, had been removed, and that fire, explosion and vapor hazards had been mitigated. (Tr. at 162-63.) In addition, the release found at the site was immediately reported to the IEMA. (R. at 269.) These actions fulfill the federally mandated early action requirements contained in 35 Ill. Adm. Code 731.161, 731.162 and 731.163. KWC's 45-day report did not, however, state that further early action remained. (Agency PH Br. at 9-10.)

KWC claims that this omission is not pertinent to the issue because the Act does not pose a deadline for early action activities. (PH Br. at 3.) However, the 45-day report is an affirmative statement by the owner/operator that required early action activities have been completed. Based on KWC's failure to communicate that further early action activities remained, we find it reasonable for the Agency to have relied upon the 45-day report in assuming that early action activities were complete at KWC's site, and that no further action would occur unless and until a corrective action plan was submitted.

After submitting its 45-day report in March 1994, KWC hired environmental consultants who performed soil sampling and testing in June and soil removal in August. KWC claims that these activities are also early action. We disagree. These events were neither reported to nor pre-approved by the Agency. In our opinion, soil sampling and testing are actions associated with determining the levels of contamination for the purpose of assessing soil and groundwater classification and conducting corrective action. Finally, there is evidence on the record that native soil was encountered, and that the "four-foot rule" was

exceeded. Therefore, the Agency was correct in this instance in denying reimbursement for those actions which are not early action and for those activities which exceeded the "four-foot rule".

A second issue in this matter is whether the soil removal in August 1994 could be considered corrective action, and thus reimbursable under the Act. The Agency denied $57,862.52 in costs incurred at the site on the basis that, even if considered corrective action, the costs exceeded the minimum standards allowed under the Act. Specifically, the Act establishes a scheme of determining the type of site at issue and pre-approval from the Agency for a corrective action plan suitable for that site, as determined by the owner or operator's Licensed Professional Engineer. (415 ILCS 5/57.7.)[4]

In this case, it is uncontested that KWC failed to submit any of the plans required by the Act. Importantly, KWC's failure to submit a corrective action plan limits its ability to apply for and obtain reimbursement for any activities beyond the minimum requirements of the Act. Section 57.5(a) states that "[i]n no event will an owner or operator be reimbursed for any costs which exceed the minimum requirements necessary to comply with this Title." Since KWC did not adhere to the requirements of the Act by submitting the necessary plans for pre-approval of corrective action, the Agency can only reimburse those costs which are minimally required and are corrective action. (415 ILCS 57.5(a) and 57.9(a)(6).)

Determining whether costs fall under corrective action is a two-part inquiry: (1) are the costs incurred as a result of action to "stop, minimize, eliminate or clean up a release of petroleum", and (2) are the costs "the result of activities such as tank removal, soil remediation, and free product removal (Clarendon Hills Bridal Center v. IEPA (February 16, 1995) PCB 93-55; Enterprise Leasing Company v. IEPA (April 19, 1992) PCB 91-174, 134 PCB 41.)

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[4]For example, Section 57.7(a)(1)(A) requires that:

> "Prior to conducting any physical soil classification and groundwater investigation activities required by statute or regulation, the owner or operator shall prepare and submit to the Agency for the Agency's approval or modification:
>
> A. a physical soil classification and groundwater investigation plan designed to determine site classification, in accordance with subsection (b) of the Section, as High Priority, Low Priority, or No Further Action."

Additionally, if the site is a Low Priority or High Priority Site as defined in Section 57.7(b), the owner or operator must submit a corrective action plan as set forward in Section 57.7(c).

Removing contaminated soil may be an action to stop, minimize, eliminate or clean up a release, and may be an activity which falls under soil remediation, thus satisfying the two-prong test for corrective action. However, KWC conducted this activity nine months after the 45-day report was submitted, without filing a site classification, a corrective action plan or any other evidence that the costs satisfied the minimum requirements of the Act. The Agency had no information for it to accurately classify the site as "No Further Action", "Low Priority" or "High Priority", and thereby properly identify the minimum requirements for corrective action needed at the site.

Therefore, we find that KWC failed to seek and gain pre-approval of its corrective action measures, and further failed to submit sufficient information to prove that KWC did not exceed the minimum requirements of the Act for corrective action. As a result, KWC cannot be reimbursed for costs as being related to corrective action.

This opinion and order constitutes the Board's findings of fact and conclusions of law in this matter.

ORDER

The Board finds that KWC did not meet its burden of proof in arguing that the challenged costs were related to early action or did not exceed the minimum requirements for corrective action. Therefore, the Board affirms the Agency's denial of reimbursement.

IT IS SO ORDERED.

Section 41 of the Environmental Protection Act (415 ILCS 5/41 (1994)) provides for the appeal of final Board orders within 35 days of the date of service of this order. The Rule of the Supreme Court of Illinois establish filing requirements. (*See also* 35 Ill. Adm. Code 101.246, Motions for Reconsideration.)

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above opinion and order was adopted on the 16th day of November, 1995, by a vote of 7-0.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board