

ILLINOIS POLLUTION CONTROL BOARD
March 16, 1995

MONTGOMERY WARD & CO.,)	
INCORPORATED,)	
)	
Petitioner,)	
)	
v.)	PCB 94-289
)	(UST FRD)
ILLINOIS ENVIRONMENTAL,)	
PROTECTION AGENCY,)	
)	
Respondent.)	

ORDER OF THE BOARD (by J. Yi):

On October 11, 1994, Montgomery Ward & Co., Incorporated (Montgomery Ward) filed by personal delivery a petition for review of an Illinois Environmental Protection Agency (Agency) final reimbursement determination from the Underground Storage Tank Fund (UST). On January 11, 1995 the Board accepted this matter for hearing.

On February 6, 1995, the Agency filed a motion to dismiss the appeal for lack of subject matter jurisdiction. The Agency states that Montgomery Ward, in February 1994, elected to seek reimbursement for corrective action that was performed at its site from October 23, 1991 through March 30, 1992 under Title XVI of the Environmental Protection Act (Act). (415 ILCS 5/57 et. seq. (1992).)¹ (Mot. at 1.) The Agency argues that "[r]elief under Title XVI is not available where there has been no corrective action performed after the effective date of Title XVI." (Mot. at 2.) The effective date of the amendatory language to the Act which created Title XVI was September 13, 1993. The Agency cites to two Board orders, Twomey Company v. IEPA, (February 3, 1994), PCB 92-199 and Tolles Realty Company v. IEPA, (March 17, 1994), PCB 93-124, to support its proposition that the relief requested by Montgomery Ward is not available under Title XVI. (Mot. at 2.) The Agency argues, that since the corrective action was completed prior to the effective date of Title XVI, the relief and remedy requested by Montgomery Ward is not available under Title XVI and the Board lacks subject matter jurisdiction to consider the matter. (Mot. at 3.)

Montgomery Ward filed a response to the motion to dismiss on

¹The Agency motion to dismiss will be referenced as "Mot. at".

February 14, 1995.² Montgomery Ward states that the Agency has inaccurately interpreted the Board's holdings, and that Title XVI allows for recovery of corrective action costs that have been performed prior to its effective date. (Resp. at 1-2.) Montgomery Ward states that the Board's holding in Twomey and Tolles is that "...attorney's fees are not recoverable under Title XVI for releases reported prior to the effective date of Title XVI **where the tank operator has not elected to proceed under Title XVI**". (Resp. at 1.) Montgomery Ward also states "...when an owner/operator elects to proceed under Title XVI, 'all costs incurred in connection with the incident prior to notification shall be reimbursable in the same manner as was allowable under the then existing law'". (415 ILCS 5/57.13(b) (1992).) (Resp. at 2.) Therefore, Montgomery Ward concludes that Title XVI allows for recovery of corrective action costs by the law as it existed at the time the petitioner incurred those costs. (Resp. at 3.)

DISCUSSION

A grant of a motion to dismiss for lack of subject matter jurisdiction is appropriate when the body does not have lawful authority to deal with the particular subject. (Echo Lake Concerned Citizens Homeowners Association, Inc. v. Village of Lake Zurich (1979), 68 Ill.App.3d 219, 386 N.E.2d 117.) Therefore, the issue before the Board is whether it has the authority to hear Montgomery Ward's appeal of the Agency's reimbursement determination pursuant to Title XVI of the Act. For the reasons stated below, we deny the Agency's motion to dismiss.

Title XVI of the Act was adopted by the legislature in P.A. 88-496, which the Governor signed into law on September 13, 1993.³ The particular section of the law that is in question here is set forth at Section 57.13 of the Act. Section 57.13 states as follows:

- a) If a release is reported to the proper State authority on or after the effective date of this amendatory Act of 1993, the owner and operator shall comply with the requirements of this Title.
- b) If a release is reported to the proper State authority

²Montgomery Ward's response to the Agency's motion to dismiss will be referenced as "Resp. at ".

³See the Board's August 1, 1994 opinion in R94-2 for a general discussion of new law and its impacts to the existing underground storage tank program.

prior to the effective date of this amendatory Act of 1993, the owner and operator of an underground storage tank may elect to proceed in accordance with the requirements of this Title by submitting a written statement to the Agency of such election. If the owner or operator elects to proceed under the requirements of this Title all costs incurred in connection with the incident prior to notification shall be reimbursable in the same manner as was allowable under the then existing law. Completion of corrective action shall then follow the provisions of this Title.

Section 57.13 of the Act allows for reimbursement of corrective action costs in connection with the incident, prior to notification of seeking reimbursement under Title XVI, in the same manner as was allowable under the law when the corrective action was completed. Montgomery Ward notified the Illinois Emergency Services and Disaster Agency on October 10, 1991 and submitted an eligibility and reimbursement application on March 30, 1992. Montgomery Ward elected to opt into Title XVI on February 11, 1994. The Agency granted some of the corrective action costs for which Montgomery Ward sought reimbursement in September, 1994, and denied others that are the basis for this appeal. The Agency has partially granted reimbursement for some of the corrective action costs and does not argue that the election to proceed is improper.


Election to proceed under Title XVI of the Act does not prohibit an owner or operator from seeking reimbursement for corrective actions that took place prior to the notification, but specifies instead which law would apply to those actions. Corrective action is not the sole activity governed by Title XVI. Petitioners who have completed corrective action, for instance, may desire to proceed under Title XVI for closure purposes at the site and pursue relief such as a "No Further Remediation" letter pursuant to Section 57.10 of the Act. (415 ILCS 5/57.10 (1992).) Thus, the fact that corrective action has been completed is not the only factor to determine whether relief is appropriate or desirable under Title XVI.

Finally the Agency cites to the Board's decisions in Tolles and Twomey for the proposition that, if corrective action did not occur after the effective date, a petitioner may not proceed under Title XVI. The Board's decisions in both Tolles and Twomey concerned petitioners who did not opt into Title XVI pursuant to Section 57.13 of the Act and did not perform corrective action after the effective date of Title XVI, but who nonetheless were requesting attorney fees pursuant to Section 57.8(1) of the Act. (415 ILCS 5/57.8(1) (1992).) Here, the record indicates Montgomery Ward elected to proceed under Title XVI in February, 1994; it is currently not requesting attorney fees.

The Board denies the Agency motion to dismiss this matter. The assigned hearing officer is directed to proceed to hearing in this matter.

IT IS SO ORDERED.

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



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board