

ILLINOIS POLLUTION CONTROL BOARD  
March 16, 1995

KALO GASOLINE COMPANY,	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB 95-41
	)	PCB 95-74
ILLINOIS ENVIRONMENTAL	)	(Consolidated)
PROTECTION AGENCY,	)	(UST - Appeal)
	)	
Respondent.	)	

ORDER OF THE BOARD (by C.A. Manning):

This matter is before the Board on two motions for summary judgment which were both filed by the Illinois Environmental Protection Agency (Agency). The first motion, filed in PCB 95-41 on February 24, 1995, challenges only those portions of Kalo Gasoline Company's (Kalo) petition for review concerning "early action" activities conducted at Kalo's UST site. The Agency argues that PCB 95-41 was brought for the purpose of challenging the Agency's December 16, 1994 final determination rejecting Kalo's Site Classification Completion Report, and at the time the petition for review was filed on January 20, 1995, the Agency had not made a decision on the issue of early action activities. The Agency subsequently made a decision on Kalo's submission of early action costs on January 27, 1995.

In an attempt to cure the Agency's concerns regarding the timing and ripeness of the issue of "early action costs", on March 3, 1995, Kalo filed a second appeal solely challenging the Agency's January 27, 1995 decision denying early action costs in amount of \$56,000. This case is docketed as PCB 95-74 and was consolidated with PCB 95-41 on March 9, 1995. The Agency's second motion for summary judgment essentially argues that summary judgment is proper in this second appeal because the Environmental Protection Act, 415 ILCS 5/57.6(b), prohibits reimbursement for early action activities when they are conducted after the submission of site classification plans to the Agency. (3/13/95 Agency Motion at 2.)

Regarding the partial motion for summary judgment in PCB 95-41, to which Kalo has not filed a response, Kalo does state in its second petition for review, PCB 95-74, that it believes the Agency's motion for partial summary judgment to be moot. (PCB 95-74 Petition at 2.) We agree. Because Kalo timely filed a petition for review of the Agency's final determination regarding early actions costs (PCB 95-74), an appeal which was consolidated with PCB 95-41, the issue of early action costs is now properly before the Board. The Agency's motion is, therefore, moot.

Regarding the motion for summary judgment in PCB 95-74, no response has yet been filed but the response time of seven days has not yet expired. However, because this matter is scheduled for hearing on April 12, 1995, we find that undue delay or prejudice may result if the motion for summary judgment is not now addressed. (35 Ill. Adm. Code 101.241.)

The Agency argues that Section 57.6(b) is a bar to reimbursement if early action is performed after a site classification plan is submitted. We disagree. Section 57.6(b) allows an owner or operator the latitude to perform early action activities, including tank removal, without having to go through a plan-submittal process before the Agency. On its face, Section 57.6(b) is not necessarily a bar to reimbursement as the Agency contends. Instead, seeking reimbursement from the UST Fund is limited by Section 57.5(a), which provides that costs will not be reimbursed if they exceed the minimum requirements necessary to comply with this Environmental Protection Act and by the Board's regulations governing early action at 35 Ill. Adm. Code 732.200 et seq. Thus, factual issues remain for hearing such as whether the early action performed by Kalo exceeded the minimum requirements necessary to comply with the Environmental Protection Act or whether the activities performed at the site constitute "early action." Summary judgment in PCB 95-74 is therefore denied.

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 16<sup>th</sup> day of March, 1995, by a vote of 7-0.

Dorothy M. Gunn  
Dorothy M. Gunn, Clerk  
Illinois Pollution Control Board