

ILLINOIS POLLUTION CONTROL BOARD
December 7, 2000

BRODERICK TEAMING COMPANY,)
)
 Petitioner,)
)
 v.) PCB 00-187
) (UST – Petition for Review)
 ILLINOIS ENVIRONMENTAL)
 PROTECTION AGENCY,)
)
 Respondent.)

ORDER OF THE BOARD (by M. McFawn):

On June 14, 2000, Broderick Teaming Company (Broderick) petitioned the Board to review the Illinois Environmental Protection Agency (Agency) denial of Broderick's request for reimbursement from the Underground Storage Tank Fund (USTF). Broderick had filed with the Agency an application for reimbursement of \$56,296.98 that Broderick had paid in conjunction with the removal of two registered petroleum underground storage tanks (UST) from its facility in Chicago, Illinois (facility). On April 6, 2000, the Agency issued a final decision denying reimbursement of these costs. Presently this matter is before the Board on cross motions for summary judgment. Petitioner Broderick filed its motion for summary judgment on October 20, 2000,¹ to which the Agency filed its response on November 2, 2000. The Agency filed its motion for summary judgment on October 25, 2000, to which Broderick filed its response on October 31, 2000.

Broderick seeks summary judgment on the claim that it conducted early action within 45 days of the release being confirmed. The Agency seeks summary judgment on the grounds that Broderick failed to conduct the early action within the 45 days required. Both parties frame the central issue on summary judgment to be when the release from the UST system was confirmed, thereby triggering the 45-day timeframe for conducting early action activities. Broderick argues that the release was confirmed on April 30, 1998, when the Office of State Fire Marshal (OSFM), or its designated agent, provided an opinion as to whether a release had occurred at the facility. The Agency argues that the release was confirmed on March 4, 1998, when Broderick notified the Illinois Emergency Management Agency (IEMA) of a suspected release at the facility.

The Board denies both motions for summary judgment for the reasons explained below. In reaching this conclusion, the Board resolves the question of law concerning the release confirmation date. First, however, the Board must determine who is legally obligated to confirm

¹ Broderick filed a corrected motion for summary judgement and brief in support on November 2, 2000. These documents corrected format errors in Broderick's October 20, 2000 motion. The Board considered the November 2, 2000 motion and brief.

the release. Finally, the Board questions whether Broderick is barred from reimbursement if it did not perform early action within the 45-day timeframe. This last question cannot be resolved on the record before the Board. Therefore, both motions for summary judgment are denied.

STANDARDS FOR REVIEW

Section 57.8(i) of the Environmental Protection Act (Act) grants an individual the right to appeal an Agency determination to the Board pursuant to Section 40 of the Act. 415 ILCS 5/57.8(i) (1998). Section 40 of the Act is the general appeal section for permits and has been used by the legislature as the basis for this type of appeal to the Board. Therefore, when reviewing an Agency determination of ineligibility for reimbursement from the USTF, the Board must decide whether or not the application, as submitted to the Agency, demonstrates compliance with the Act and Board regulations. Kathe's Auto Service Center v. IEPA (August 1, 1996), PCB 96-102, slip op. at 27.

In this case, both parties have asked the Board to make that determination in the context of their cross motions for summary judgment. Summary judgment is appropriate when the pleadings and depositions, together with any affidavits and other items in the record, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. See Dowd & Dowd, Ltd. v. Gleason, 181 Ill. 2d 460, 693 N.E.2d 358 (1998). In ruling on a motion for summary judgment, the Board "must consider the pleadings, depositions, and affidavits strictly against the movant and in favor of the opposing party." Dowd, 181 Ill. 2d at 483, 693 N.E.2d at 370.

Summary judgment "is a drastic means of disposing of litigation," and therefore it should only be granted when the movant's right to the relief "is clear and free from doubt." Dowd, 181 Ill. 2d at 483, 693 N.E.2d at 370, citing Purtill v. Hess, 111 Ill. 2d 229, 240, 489 N.E.2d 867, 871 (1986). However, a party opposing a motion for summary judgment may not rest on its pleadings, but must "present a factual basis, which would arguably entitle [it] to a judgment." Gauthier v. Westfall, 266 Ill. App. 3d 213, 219, 639 N.E.2d 994, 999 (2nd Dist. 1994).

Again, both parties have made motions for summary judgment. Both have argued that no material issue of fact exists. Both have framed the same question of law and argued that its outcome determines whether Broderick is entitled to reimbursement from the USTF.

FACTS

The following are the facts in the record before the Board as summarized in Broderick's corrected motion for summary judgment at pages 2-3. The Agency does not dispute these facts on the record. Broderick contracted for the removal of two USTs located at its facility located in Chicago, Illinois. On March 4, 1998, Broderick cored the floor and took a soil sample in preparation for the work to occur at the facility. The soil sample had an oily odor. On that day, Broderick placed a telephone notice of a suspected release to IEMA. Also on that day, Broderick applied to the City of Chicago for a UST removal permit. The City of Chicago issued the permit on March 11, 1998.

On April 30, 1998, Broderick opened the floor of the facility, revealing three USTs.² Inspectors from the Department of Environment and Fire Department visually confirmed that a significant release of product had occurred from each UST. Broderick informed the inspectors that Broderick had previously informed IEMA of the suspected release. Broderick removed the tanks on April 30, 1998, and began an initial response to mitigate the source of the release, and any safety hazards or immediate threats to the environment. Broderick stockpiled the soils on site, and removed 1,475 gallons of product/water. On May 7, 1998, Broderick removed an additional 6,650 gallons of product/water and 600 cubic yards of contaminated soil.

On April 6, 2000, the Agency denied Broderick's application for reimbursement for all costs claimed for the following three reasons. None of the costs were eligible for reimbursement because they: (1) exceeded the minimum requirements of the Act (415 ILCS 5/1 *et seq.* (1998)); (2) were conducted after the 20 and 45-day reporting requirements of 35 Ill. Adm. Code 732.202(c), 732.202(e), 731.162(b) and 731.163(b); and (3) were not in an approved budget. Stipulated Administrative Record at 3.

CONFIRMATION OF RELEASE

Both parties' motions address the Agency's second denial point. Broderick and the Agency disagree about whether the activities performed by Broderick occurred within the timeframe established in the Board's regulations governing reimbursement. Section 732.202(g) provides in pertinent part:

For purposes of reimbursement, the activities set forth in subsection (f) of this Section shall be performed within 45 days after confirmation of a release, unless special circumstances, approved by the Agency in writing, warrant continuing such activities beyond 45 days. The owner or operator shall notify the Agency in writing within 45 days after confirmation of a release of such circumstances. Costs incurred beyond 45 days shall be eligible if the Agency determines that they are consistent with early action. 35 Ill. Adm. Code 732.202(g). (Emphasis added.)

According to the parties the critical question of law is when was the release confirmed. Each of the parties believes that once the confirmation date is determined, it will prevail. Broderick claims that confirmation must be done by the City of Chicago inspectors and so the confirmation date is the day they observed the tank removal, *i.e.*, April 30, 1998. In its motion, Broderick claims that a "release is confirmed based upon the visual observation of the independent third party inspection . . . coupled with reporting to IEMA . . . Brod. mot. at 11."³

Broderick premises its argument on that portion of Section 57.5(c) of the Act which provides that the inspector from the OSFM or its designated agent, in this case the City of

² The OSFM determined that the third UST was not eligible for reimbursement. Broderick's application does not include costs associated with the third UST.

³ Broderick's motion will be referred to as "Brod. mot. at ___."

Chicago, must be on site during tank removal, at which time, “the inspector shall, upon preliminary excavation of the tank site, render an opinion as to whether a release of petroleum has occurred” 45 ILCS 5/57.5(c). Brod. mot. at 5. If Broderick is correct, it will have performed its activities within 45 days of the confirmation date.

The Agency claims that the date Broderick first notified IEMA should be used as the date confirmation of the release occurred, thus starting the clock for the 45-day requirement of the Board’s rules. The Agency claims that this March 4, 1998 notification was when Broderick confirmed the release, and began corrective action. Ag. mot. at 5.⁴ The Agency expands on this argument in its response to Broderick’s motion. The Agency claims that the Act places the burden of confirming a release on the owner or operator of the UST system, and that this requirement is triggered as early as when a suspected release is discovered. Ag. resp. at 4.⁵ Like Broderick, the Agency cites to Section 57.5(c) of the Act, but focuses on the remainder of that Section, which provides:

The owner or operator shall determine whether or not a release has occurred in conformance with the regulations adopted by the Board and the [OSFM] In the event the owner or operator confirms the presence of a release of petroleum, the owner or operator shall comply with Section 57.6 [Early Action]. 415 ILCS 5/57.5(c) (1998). (Emphasis added.)

Thus, the first question is who must confirm the suspected release. The Board agrees with the Agency that pursuant to Section 57.5(c) of the Act, the owner or operator has the obligation to confirm the release in accordance with OSFM regulations. That entire section describes the procedure that must be followed during a removal or abandonment of a UST system, or other actions deemed appropriate by the OSFM. Relevant to the question of who must confirm a release, the pertinent sentence in Section 57.5(c) is the sentence emphasized above. Clearly this language is controlling. Broderick, as the owner or operator, has the burden of confirming the release. Furthermore, according to Section 57.5(c) that confirmation is to be done in accordance with the OSFM and Board regulations.

The next question of law (and that identified by the parties) is: what is the correct confirmation date. Since confirmation must be done in conformance with the OSFM regulations, we will examine the pertinent regulations of the OSFM, specifically Sections 170.560 and 170.580. Section 170.560 governs when an owner or operator must report to IEMA, and in part states:

Owners or operators of UST systems shall report to [IEMA] within 24 hours and follow the procedures in Section 170.580 for any of the following conditions:

- a) The discovery by owners, operators or others of released regulated substances at the UST site or in the surrounding area (such as the

⁴ The Agency’s motion will be referred to as “Ag. mot. at ___.”

⁵ The Agency’s response will be referred to as “Ag. resp. at. ___.”

presence of free product or vapors in soils, basements, sewer or utility lines or nearby surface water). 41 Ill. Adm. Code 170.560. (Emphasis added.)

On March 4, 1998, Broderick discovered such a release and reported the same to IEMA. Section 170.580 establishes the procedures an owner or operator must utilize following a report of such a release to IEMA as required by Section 170.560. Section 170.580 in pertinent part states:

Unless corrective action is initiated in accordance with Sections 170.600 and 170.610, owners or operators shall investigate and confirm all suspected releases of regulated substances requiring reporting under Section 170.560 within seven days 41 Ill. Adm. Code 170.580. (Emphasis added.)

Together these two OSFM regulations require that the owner or operator confirm the suspected, reportable release no later than seven days after reporting it to IEMA. Broderick claims that it “did not have the legal authority to remove the tank until it obtained a City of Chicago permit and have the City of Chicago inspectors on site.” Brod. mot. at 8. While accurate, this argument has no impact on Broderick’s ability to meet the release investigation and confirmation requirements found at 41 Ill. Adm. Code 170.580. Nothing in those sections requires that the tanks must be removed prior to the OSFM inspection, or even that additional excavation activities must take place.

The Agency argues that the release confirmation date should be March 4, 1998. The Board does not agree with the Agency that March 4, 1998, is the correct confirmation date. Nothing in the Act or the Board regulations indicates that the date the release is suspected and reported is the confirmation date. The OSFM regulation specifically states that confirmation must occur within seven days after a reportable release is identified. This makes sense, since confirming a suspect release is not necessarily instantaneous, but may take some minimal amount of time. In fact, 24 hours is provided before a suspected release must be reported to IEMA. 41 Ill. Adm. Code 170.560.

In sum, both the Agency and Broderick overlooked the very specific OSFM requirement that the suspected release be confirmed by the owner or operator within seven days of finding the reportable release. Broderick first learned of the suspected release on March 4, 1998. Pursuant to Section 170.560 of the OSFM’s regulations, Broderick was required to, and did, notify IEMA within 24 hours of the suspected release. 41 Ill. Adm. Code 170.560. Broderick then had seven days to investigate and confirm the release. 41 Ill. Adm. Code 170.580. According to OSFM regulation, Broderick had until March 11, 1998, to confirm the release. Broderick failed to do this. Alternately, Broderick could have initiated corrective action pursuant to Sections 170.600 and 170.610 of the OSFM’s regulations. Broderick did not take such initial response and abatement measures until April 30, 1998. Brod. mot. at 8. Sections 732.202(f) and (g) of the Board’s regulations provide that, for purposes of reimbursement, early action activities shall be performed within 45 days after confirmation of a release. Forty-five (45) days after March 11, 1998, was April 25, 1998. Therefore, Broderick did not perform the activities described at

Section 732.220(f) within 45 days after March, 11, 1998, the last day Broderick had to confirm the reportable release.

MINIMUM REQUIREMENTS OF THE ACT

Finally, the last question of law is whether Broderick can be reimbursed for the actions taken April 30, 1998, and over the next month even though Broderick did not act within the 45-day timeframe. Broderick touches upon this issue when it addresses the Agency's first denial point, arguing that its actions did satisfy the minimum requirements of the Act. The Agency did not address this issue in either its motion or its response to Broderick's motion for summary judgment. The Agency relied upon the argument that the actions were not performed in the 45-day timeframe, and therefore were not reimbursable.

The Agency's denial stated that the costs in Broderick's application exceeded the minimum requirements of the Act. Broderick argues that the actions it took at the site following the inspection on April 30, 1998, were authorized by Section 57.6 of the Act, which states that such actions may be taken "prior to submission of any plans to the Agency." 415 ILCS 5/57.6(b) (1998). Section 57.6(b) of the Act states:

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 abandon the [UST] system in place, in accordance with the regulations promulgated by the [OSFM]. 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) (1998).

This language is also set out verbatim at the Early Action rule at Section 732.202(f) of the Board's regulations. In addition to this statutory language, the final sentence of Section 732.202(f) states:

Early action may also include disposal in accordance with applicable regulations or ex-situ treatment of contaminated fill material in accordance with Section 57.7(a)(1)(B) of the Act. 35 Ill. Adm. Code 732.202(f)

This sentence was added in: *In re* Regulation of Petroleum Leaking Underground Storage Tanks (March 6, 1997), R97-10, as was all of Section 732.202(g), which is discussed below.

The Agency does not address specifically the impact of this statutory provision on this case. Again, the Agency focuses on the timeframe for conducting early action found in Section 732.202(g). The Agency claims that reimbursement for Broderick's actions is barred because those actions were not taken within the 45-day timeframe after the release was confirmed. Neither party focused on the final sentence of Section 732.202(g) that provides: "Costs incurred beyond 45 days shall be eligible if the Agency determines that they are consistent with early action." 35 Ill. Adm. Code 732.202(g). This language was added in R97-10, to clarify how reimbursement worked. During that rulemaking, an inquiry was made at that time whether this

language meant that early action costs were not reimbursable even if the 45-day reports were not submitted on time, and the actions not take during that timeframe.

At hearing, Douglas Clay of the Agency was questioned about the consequences if an owner/operator fails to perform the required actions within the 20 or 45-day timeframe. In particular, the Agency was asked if there could be no reimbursement for actions outside that timeframe. The Agency responded that the fact that the owner or operator did not perform those actions within those timeframes would threaten the ability for reimbursement. However, the Agency added that even if the reports were submitted late (a violation of the regulations), the actions could still be reimbursed under “early action,” but the Agency would need to look at that issue on a case by case basis. R97-10 Tr. at 28-29.⁶

A little later, the Agency was specifically asked whether there could be “tasks appropriately characterized as early action performed 20 days after the release reported and there is no agency approval of a time extension where the Agency would approve for reimbursement for those tasks as early action.” The Agency answered “yes.” When asked what factors would be involved in that decision, several examples were given. One justification acceptable to the Agency was a problem scheduling contractors, and another was “fire marshal approval or having the fire marshal coming out.” R97-10 Tr. at 30-31. When asked, the Agency agreed that its decision to approve reimbursement under these various scenarios could be “characterized to depend on whether the owner/operator is making a good faith attempt to remove the tank within that timeframe, but has specific reasons where it could not be done.” R97-10 Tr. at 32.

This discussion about the meaning of Section 732.202(g) was very lengthy and detailed. The Agency witness testified that actions taken outside of the 20 and 45-day timeframe could be reimbursed as early action, and the Agency would do so on a case by case basis. This testimony explains the impact of adding Section 732.202(g), and in particular the last sentence in that Section. Some factors relevant to the Agency considering reimbursement for early action activity performed outside the 45-day timeframe were identified, and appear to be on point in this case. The Agency never qualified this testimony, and the Board did not address it or the specific meaning of Section 732.202(g) in its adopting opinion. Therefore, the Board concludes that this testimony supports the relevant language at Section 732.202(g) adopted in R97-10.

CONCLUSION

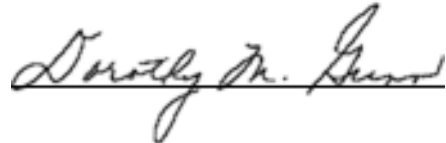
At this time, the Board will deny the parties’ motions for summary judgment. Summary judgment is only to be granted if the movant’s right is clear and free from doubt. Neither party’s right to summary judgment is free from doubt based upon the record before the Board. While the parties have stipulated to the Administrative Record, facts remain outside of the record that are necessary for the Board to determine whether Broderick intended its activities to be early actions, and had justifiable reasons for not performing them in the 45-day timeframe. Furthermore, neither party specifically addressed this question of law in its brief. Therefore, the Board denies

⁶ The November 18, 1996 transcript for In re Regulation of Petroleum Leaking Underground Storage Tanks (March 6, 1997), R97-10, will be referred to as “R97-10 Tr. at ____.”

both motions for summary judgment and instructs the hearing officer to schedule this matter for hearing and briefing.

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 7th of December 2000 by a vote of 7-0.

A handwritten signature in cursive script, reading "Dorothy M. Gunn", written over a horizontal line.

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board