

ILLINOIS POLLUTION CONTROL BOARD
April 5, 2001

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

OPINION AND ORDER OF THE BOARD (by M. McFawn):

Before the Board today are two motions for reconsideration of the Board's December 7, 2000 order denying both parties' motions for summary judgment. See Broderick Teaming Company v. Illinois Environmental Protection Agency (December 7, 2000), PCB00-187. The Illinois Environmental Protection Agency (Agency) filed its motion on January 12, 2001. Broderick Teaming Company (Broderick) filed its response on January 30, 2001. Broderick filed its own motion on January 25, 2001. The Agency responded on February 13, 2001.

In each respective motion, the parties argue that the Board's decision in the December 7, 2000 order was in error. The Board will consider each party's motion, and requested relief. We will first present a brief summary of the events leading up to the parties cross-motions for summary judgment, then examine each motion for reconsideration in turn. Finally, we will issue an order consistent with our findings upon reconsideration.

BRODERICK'S APPEAL

On June 14, 2000, Broderick petitioned the Board to review the Agency's denial of Broderick's request for reimbursement from the Underground Storage Tank Fund (Fund). 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 Chicago, Illinois facility. On April 6, 2000, the Agency issued a final decision denying reimbursement of these costs.

Motions for Summary Judgment

Both parties filed motions for summary judgment. The Board denied both motions, and made several findings of law based on the uncontested facts in both motions. The Board first held that, pursuant to Section 57.5(c) of the Environmental Protection Act (Act), the owner or operator of a facility has the obligation to confirm a release from a UST in accordance with the Office of State Fire Marshal (OSFM) regulations. 415 ILCS 5/57.5(c) (1998).

Next, the Board considered by what date such confirmation must occur. The Board examined the relevant sections of the OSFM regulations, and concluded that an owner or operator has seven days after first learning of a release to further investigate and confirm such release. See 41 Ill. Adm. Code 170.580. Alternatively, the Board concluded that an owner or operator could instead initiate corrective action at the site, pursuant to Sections 170.600 and 170.610 of the OSFM regulations. See 41 Ill. Adm. Code 170.600, 170.610. The Board concluded that Broderick had until March 11, 1998, to investigate and confirm the release, or initiate corrective action. Broderick did not perform these requirements until April 30, 1998.

Finally, the Board identified the remaining issue as to whether Broderick could be reimbursed for the actions it took in conjunction with the removal of the two USTs. The Board did not decide this issue, stating that the facts in the record could not support a granting of either motion for summary judgment. In so holding, the Board relied on testimony presented by the Agency during the rulemaking hearings. See testimony of Douglas Clay; Tr. at 29-32.¹ With the support of that testimony, the Board concluded that actions taken outside the 45-day requirement found in Section 732.202(g) could be reimbursed. See 31 Ill. Adm. Code 232.202(g). However, reimbursement for such actions may only be granted if those actions may be characterized as early action under the Act or the Board's regulations.

STANDARD FOR RECONSIDERATION

Section 101.902 of the Board's procedural rules sets forth the factors the Board will consider when ruling upon a motion for reconsideration. Those factors include "new evidence, or a change in the law, to conclude that the Board's decision was in error." 35 Ill. Adm. Code 101.902 (effective January 1, 2001).

The Board has stated that "[t]he intended purpose of a motion for reconsideration is to bring to the court's attention newly-discovered evidence which was not available at the time of the hearing, changes in the law or errors in the court's previous application of the existing law." Citizens Against Regional Landfill v. County Board of Whiteside County (March 11, 1993), PCB 92-156, slip-op. at 2, citing Koroglyuan v. Chicago Title & Trust Co., 213 Ill. App. 3d 622, 572 N.E.2d 1154 (1st Dist. 1991).

Both parties mention that the Board has recently revised its procedural rules, including the rules applicable to motions for reconsideration. The previous rule articulated the factors to be considered by the Board in motions for reconsideration as including "error in the decision and facts in the record which [were] overlooked". See former 35 Ill. Adm. Code 101.246(d) prior to January 1, 2001. Both the Agency and Broderick note that this language was not carried over into the new rules.

Section 101.902 is not discussed in detail in the Board's opinions in Docket No. R00-

¹ The transcript for the November 18, 1996 hearing for Regulation of Petroleum Leaking Underground Storage Tanks (March 6, 1997), R97-10, will be referred to as "Tr. at ___."

20. Revision of the Board's Procedural Rules (December 21, 2000), R00-20. The Board's understanding of the purpose of motions for reconsideration has not changed since Citizens Against Regional Landfill was decided. The new language in Section 101.902 was not intended to materially change the scope of the Board's considerations in deliberating motions for reconsideration, but was instead intended to more effectively state the factors embodied in the Board's former regulations and prior caselaw.

The parties' motions before the Board today do not present new facts, or claim that the law has changed since December 7, 2000. Both motions do claim that the Board erred in applying the regulations relevant to Broderick's appeal.

AGENCY'S MOTION

The Agency's motion focuses on the Board's construction of Section 732.202(g). Specifically, the Agency suggests that the Board erred in reading the last sentence of Section 732.202(g) in such a way that "is inconsistent with the plain meaning of the section as a whole." Ag. Mot. at 8.² Section 732.202(g) states:

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 of 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 [Board note omitted]. 35 Ill. Adm. Code 732.202(g).

The Agency argues that Section 732.202(g) states that activities performed after 45 days are only reimbursable if the Agency approves an extension in writing. The Agency states that the last sentence of Section 732.202(g) "is necessary because the extension of time should not be taken as a blanket guarantee that any and all costs incurred within the approved extended period of time are eligible for reimbursement." Ag. Mot. at 7.

To further support its position, the Agency argues that the Board misinterpreted the testimony given by Clay during the rulemaking hearing. The Agency claims that Clay's testimony "when taken as a whole and in context with the questions asked during the LUST rulemaking, does not raise any questions of interpretation." Ag. Mot at 8.

The Board agrees with the Agency on this issue. To allow reimbursement for activities taken more than 45 days after confirmation would have the effect of rendering "moot the obligation to seek an extension of time" Ag. Mot. at 8. However, as explained below, the Agency has still not supported its case for the Board to award summary judgment to the Agency.

² The Agency's motion will be referred to as "Ag. Mot. at ___."

The Agency also suggests that the Board erred in applying Section 57.6(b) of the Act and Section 732.202(f) of the Board's regulations. Both of these provisions set forth those activities that may be characterized as early action. 415 ILCS 5/57.6(b) (1998), 35 Ill. Adm. Code 732.202(f). The Agency states that whether the actions taken by Broderick were early action is not at issue in this case, but only "whether the work described by Broderick Teaming as early action is eligible for reimbursement." Ag. Mot. at 5. The Agency further states that it "denied reimbursement of work described because the work was performed beyond the time otherwise allowed by regulation." Ag. Mot. at 6.

The Board agrees with the Agency that whether the activities for which Broderick sought reimbursement can be characterized as early action is not at issue in this case. For UST Fund appeals, the issues on appeal are limited to those raised by the Agency's denial. See Pulitzer Community Newspapers, Inc. v. IEPA (December 20, 1990), PCB 90-142, slip op. at 7. The Agency's denial letter states that the costs exceeded the minimum requirements of the Act, were conducted beyond the applicable time limits provided by the Board's regulations, and were not in an approved budget. A.R. at 3.³ Whether the activities performed by Broderick can be characterized as early action is not at issue. Today's order addresses all of the denial points raised by the Agency's letter.

BRODERICK'S MOTION

Broderick states that the Board erred in determining that Broderick did not commence corrective action on March 4, 1998. However, as the Agency points out in its response, this position is contrary to Broderick's previous statements. As the Board stated in its December 7, 2000 order, Broderick by its own admission did not begin initial response activities until April 30, 1998. See Broderick Teaming v. IEPA (December 7, 2000), PCB 00-187, slip op. at 5, Br. Mot. for Sum. Jud. at 7-8.⁴

In its motion, Broderick calls attention to the administrative record, which contains a copy of Broderick's eligibility application. Broderick cites to this document to support its claim that it began corrective action on March 4, 1998. Question 13 of the application asks "[h]as corrective action began?" with an X in front of the "yes," and March 4, 1998, filled in as the date. A.R. at 75.

This fact was before the Board on December 7, 2000, and does not introduce any new facts for the Board to consider. The record indicates that the only initial response Broderick took on March 4, 1998, was to notify the Illinois Emergency Management Agency. All other initial response activities occurred on April 30, 1998. A.R. at 15. The Board's ruling that Broderick should have complied with the requirements of Section 170.580 of the OSFM regulations was not in error.

³ The administrative record will be referred to as "A.R. at ___."

⁴ Broderick's motion for summary judgment will be referred to as "Br. Mot. for Sum. Jud. at ___."

DISCUSSION

Both motions stress that one of the keys to reimbursement is whether the activities were performed within the 45-day time period allowed under Section 732.202(g). The Agency has presented a compelling argument that to allow reimbursement for activities taken more than 45 days after confirmation would have the effect of rendering “moot the obligation to seek an extension of time” Ag. Mot. at 8. The Board agrees with the Agency on this point. However, this determination makes the matter of when the 45-day clock begins critical.

As the Board stated in our December 7, 2000 order, the owner or operator bears the statutory burden of determining “whether or not a release has occurred in conformance with the regulations adopted by the Board and the [OSFM].” 415 ILCS 5/57.5(c) (1998).

In our December 7, 2000 order, the Board held that Broderick should have investigated and confirmed the release no later than March 11, 1998, to conform to the OSFM regulations. See Broderick Teaming Company v. IEPA (December 7, 2000), PCB 00-187, slip op. at 13. The Board does not find any error in this holding. However, after applying the unique facts of this case to the Act and applicable regulations, the Board finds that it is error to start the 45-day clock using this March 11, 1998 date.

Section 732.202(g) states that early action activities “shall be performed within 45 days after confirmation of a release” 35 Ill. Adm. Code 732.202(g). Thus, the Board finds that under the following facts it is appropriate to begin the 45-day clock with the date of actual confirmation, or April 30, 1998.

The record before the Board presents the following undisputed facts: Broderick first suspected a release on March 4, 1998, after detecting an oily odor in a soil sample. That same day, Broderick placed a call to the Illinois Emergency Management Agency to provide notice of a suspected release, and was assigned a LUST incident number. Also on March 4, 1998, Broderick submitted a permit application for removal of underground storage tanks to the City of Chicago’s Department of the Environment (CDOE). CDOE issued a removal permit on March 11, 1998, which had an effective date of April 3, 1998, through October 5, 1998. CDOE, the OSFM designated agent, notified Broderick that the inspection would occur on April 30, 1998. On April 30, 1998, the CDOE inspector rendered an opinion that a release had occurred from the tanks, and Broderick removed the tanks. On May 7, 1998, Broderick removed contaminated soil and water from the site.

The Board finds that Broderick’s activities are in line with the stated intent of the regulations. As Clay stated during the November 18, 1996 hearing, the regulations attempt “to avoid the situations that [the Agency has had] come up in the past couple of years where people are trying to be reimbursed for . . . early action costs A (sic) year or two years after they have had their release and that is really not the intent of early action.” Tr. at 36.

Under these very specific facts, the Board finds on reconsideration that it is inappropriate to begin the 45-day clock on March 11, 1998. While Broderick could have confirmed the release by March 11, 1998, in accordance with OSFM regulations, the Board's regulations also authorize the Agency to "[u]ndertake investigative, preventive or corrective action whenever there is a release or a substantial threat of a release of petroleum from an underground storage tank." 35 Ill. Adm. Code 732.105(a)(2). The Agency also has the "authority to require or initiate early action activities" 35 Ill. Adm. Code 732.201. The Agency thus has a mechanism through which it may ensure that parties conform to the OSFM regulations.

Regulations are written to apply to a wide variety of fact patterns, and not every application will be readily apparent to all persons. For example, the initial response and abatement measures required by the OSFM regulations must be performed within seven days of first identifying a release. See 41 Ill. Adm. Code 170.580, 170.600, and 170.610. However, these exact same measures must be taken as part of early action under the Board's regulations within 24 hours of confirming the release. See 35 Ill. Adm. Code 732.202(a) and 732.202(b). At most, Broderick's misinterpretation of the confirmation requirements did not frustrate the intent of the LUST program. Also, it was the type of delay the Agency testified would justify an extension had a written extension been requested.

Minimum Requirements of the Act

The Agency's denial states that the costs in Broderick's application exceeded the minimum requirements of the Act. A.R. at 3. Section 57.9(b) of the Act states in part that an "owner or operator may access the [USTF] for costs associated with an Agency approved plan" 415 ILCS 57.9(b) (1998). However, 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 . . . 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 57.6(b).

Section 732.202(f) contains this exact same language, in all capital letters. See 35 Ill. Adm. Code 732.202(f). Section 732.202(g) in pertinent part states, "[f]or purposes of reimbursement, the activities set forth in subsection (f) of this Section shall be performed within 45 days after confirmation of a release" 35 Ill. Adm. Code 732.202(g).

The Board finds that Broderick's actions are not beyond the minimum requirements of the Act because they occurred within 45 days after confirmation of the release.

Approved Budget

The Agency's denial also states that the costs in Broderick's application were not in an approved budget. A.R. at 3. The Agency's motion and response do not address this issue. Section 57.7(c)(1)(B) of the Act states:

If the owner or operator intends to seek payment from the [USTF], prior to performance of any corrective action beyond that required by Section 57.6 and subsection (a) of Section 57.7, the owner or operator shall submit to the Agency for the Agency's approval or modification a corrective action plan budget which includes, but is not limited to, an accounting of all costs associated with the implementation and completion of the corrective action plan. 415 ILCS 57.7(c)(1)(B) (1998).

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 57.6(b) (1998)). The Board finds that Broderick has demonstrated that no issue of material fact remains regarding this issue. The Board further finds that Broderick's actions were taken pursuant to Section 57.6(b) of the Act, and thus Broderick was not required to submit a budget to the Agency for Broderick to be eligible for reimbursement.

ORDER

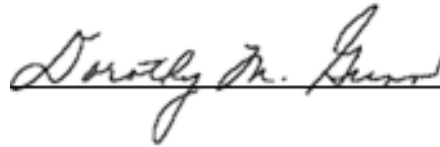
To the extent that the Board's December 7, 2000 order held that activities performed beyond 45 days after confirmation are reimbursable under Section 732.202(g), without a written extension from the Agency, the Board today clearly states that Section 732.202(g) requires that early action activities must be performed within 45 days from the date of confirmation, unless the Agency has granted a written extension to account for special circumstances, which in this case would have been the delayed availability of the designated inspector. Additionally, the Board clarifies the December 7, 2000 order concerning the actual date of confirmation. In this case the actual date, and thus the beginning of the 45-day time period, was April 30, 1998.

Aside from the 45-day time period, the facts on record indicate that the Agency's denial found the expenses claimed by Broderick reasonable. See A.R. at 1-6. Accordingly, and upon further consideration, the Board finds that summary judgment in favor of Broderick is appropriate in this case. The Board reverses the Agency's denial of Broderick's claim, and grants Broderick's motion for summary judgment.

IT IS SO ORDERED.

Section 41 of the Environmental Protection Act (415 ILCS 5/24 (1998)) provides for the appeal of final Board orders to the Illinois Appellate Court within 35 days of service of this order. Illinois Supreme Court Rule 335 establishes such filing requirements. See 172 Ill. 3d R. 335; see also 35 Ill. Adm. Code 101.520, Motions for Reconsideration.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above order was adopted on the 5th of April 2001 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