BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

WEEKE OIL COMPANY, Petitioner, v. ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, Respondent.	)))))))))	PCB 10-01 (UST Appeal)

NOTICE

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PLEASE TAKE NOTICE that I have today caused to be filed a RESPONSE TO PETITIONER'S BRIEF with the Illinois Pollution Control Board, copies of which are served upon you.

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY

/s/ James G. Richardson
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THIS FILING SUBMITTED ON RECYCLED PAPER

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

WEEKE OIL COMPANY, Petitioner,	)	
v.	)	PCB 10-01 (UST Appeal)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, Respondent.	)	

RESPONSE TO PETITIONER'S BRIEF

NOW COMES the Respondent, the Illinois Environmental Protection Agency ("Illinois EPA"), by one of its attorneys, James G. Richardson, Assistant Counsel and Special Assistant Attorney General, and hereby submits to the Illinois Pollution Control Board ("Board") its Response to Petitioner's Brief.

I. STANDARD OF REVIEW

Sections 57.7(c) and 57.8(i) of the Illinois Environmental Protection Act ("Act"), 415 ILCS 5/57.7(c),57.8(i), grants an individual the right to appeal a determination of the Illinois EPA to the Board pursuant to Section 40 of the Act, 415 ILCS 5/40. Section 40 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 Illinois EPA determination of ineligibility for reimbursement from the Underground Storage Tank Fund ("UST Fund"), the Board must decide whether or not the application, as submitted to the Illinois EPA, demonstrates compliance with the Act and Board regulations. Broderick Teaming Company v. Illinois EPA, PCB 00-187 (December 7, 2000).

Pursuant to 35 Ill. Adm. Code 105.112(a), the Petitioner, Weeke Oil Company ("Weeke"),

has the burden of proof in this case. In reimbursement appeals, the burden is on the applicant for reimbursement to demonstrate that incurred costs are related to corrective action, properly accounted for, and reasonable. Rezmar Corporation v. Illinois EPA, PCB 02-91 (April 17, 2003). New information that was not before the Illinois EPA prior to its final determination regarding the issues on appeal will not be considered by the Board. Kathe's Auto Service, Inc. v. Illinois EPA, PCB 95-43 (May 18, 1995). Thus Weeke must demonstrate to the Board with appropriate information that it has satisfied its burden before the Board can enter an order reversing or modifying the Illinois EPA's decision under review.

II. RELEVANT FACTS

The Illinois EPA received a 45-Day Report concerning this site on November 17, 2008. Administrative Record ("AR") p. 83. It indicated that during a subsurface site investigation on October 29, 2008, odorous and discolored greenish-gray silty clay was encountered in a soil boring advanced five feet into the UST pit and speculated that the release was the result of fill and overfill. AR pp. 91-92. The Report further stated that the site's UST system was taken out of service in September 2008. AR p. 94. On the 45-Day Report Form, the "No" boxes were checked in response to questions asking if free product or groundwater was encountered.

A 45-Day Report Addendum was received on January 14, 2009 and reviewed by Illinois EPA Project Manager Trent Benanti. AR pp. 109-111. The Addendum indicated that two 4,000 gallon tanks and a 6,000 gallon tank were pulled on December 8 and 9, 2008 and that no holes were observed in the tanks. AR p. 120. Benanti was also the project manager for Incident No. 982004 that involved these same tanks and culminated with the issuance of a No Further Remediation ("NFR") Letter on September 13, 2006. AR p. 109, Transcript ("TR") p. 65, Respondent's Exhibit

1. The Addendum again reported that no free product or groundwater was encountered. AR pp. 116-117, 124. From his review of the analytical results for the soil samples from the floor and walls of the excavation, Benanti concluded that there were no concentrations of BTEX, MTBE or PNAs in excess of the most stringent Tier I TACO remediation objectives. AR pp. 109-110.

The Illinois EPA issued a non-LUST determination letter on May 26, 2009. AR p. 78. In light of the fact that the tanks associated with Incident No. 20081597 were the same tanks that were the subject of Incident No. 982004 for which a NFR Letter was issued on September 13, 2006, it found that Weeke had not presented evidence of a new release. Specifically, no analytical results from the October 29, 2008 soil boring were provided and the analytical results for the soil samples from the excavation floor and walls did not exhibit concentrations of BTEX, MTBE or PNAs in excess of the most stringent Tier I TACO remediation objectives. On June 4, 2009, Weeke's application for payment was denied due to the non-LUST determination. AR pp. 1-3.

III. ARGUMENT

A. Site Information and Conditions

In addition to his aforementioned findings, Benanti noted during his testimony that the Tier I TACO remediation objectives are listed to two decimal points. TR p. 64. For Benzene, the objective is .03 mg/kg, not .030 mg/kg. By mathematically rounding the analytical results to two decimal points for the soil samples from the excavation, such as the Number 8 wall sample with a result of 0.034 mg/kg for Benzene, the analytical result Weeke claims exceeds the Benzene objective in reality does not. AR p. 135. Benanti further testified that he was the project manager for Incident No. 982004 that was concluded with the issuance of the September 13, 2006 No Further Remediation Letter. He advised that Weeke obtained that NFR Letter by use of Tier II calculations

and institutional controls. TR p. 65. Although the existence of a previous NFR Letter would normally prompt him to examine contaminant concentrations found at the site during the previous investigation, he did not have to do that here since neither free product nor groundwater were encountered and the current contaminant concentrations did not even exceed the most stringent Tier I remediation objectives. TR p. 68.

The Illinois EPA's non-LUST determination was driven, if not dictated, by the facts in the Illinois EPA's possession prior to the May 26, 2009 decision letter. Only visual and olfactory observations were produced by the lone soil boring taken on October 29, 2008. It is not that surprising that petroleum odors and discolored soil would be found at the typical gas station. But the instant site is not just another gas station since Weeke chose to obtain a 2006 NFR Letter for it by leaving contamination in place at the site. Even Weeke's consultant, Bryan Williams, testified that it "really didn't surprise" him that discolored and odorous soil was encountered due to the previous release and the fact that contamination was left in place. TR p. 14. Therefore visual and olfactory observations have little, if any, probative value as to whether a new release occurred here. Then consider that Weeke reported that neither free product nor groundwater was encountered, and Benanti determined that there were no concentrations above the most stringent Tier I TACO remediation objectives in the analytical results for the soil samples from the floor and walls of the excavation. Based upon this information, it would be more difficult, if not impossible, to justify a finding that a new release had occurred here instead of the non-LUST determination the Illinois EPA actually made.

Weeke claims that the Illinois EPA's position on the 1998 Incident is "ambiguous," meant to only raise "doubts" that a new release occurred in 2008. BR p. 18. But Weeke does not understand

Project Manager Benanti's testimony here. Benanti was the project manager for the 1998 Incident, and only learned of the 2008 Incident when a reviewer in the claims unit brought the early action billing package for the 2008 Incident to his attention. TR pp. 62-63. The billing package is what led to his review of the 45-Day Report and 45-Day Report Addendum concerning the 2008 Incident, not the fact that there had been an incident at the site in 1998. Benanti did not have to perform the customary review and comparison of the contaminant levels from the prior incident to the ones in the 2008 Incident as no free product or groundwater was encountered for the 2008 Incident and the analytical results for the tank pit soil samples did not exceed the most stringent Tier I TACO remediation objectives. TR p. 68. This explains why there are no documents from the 1998 Incident in the Administrative Record, not some effort by the Illinois EPA to be ambiguous and merely raise doubts Weeke also believes that operation of the site as a service station until September 2008 bolsters its position that the 2008 Incident was a new release. BR p. 19. But no evidence consistent with this assumption, such as product leakage logs or failed tank tightness tests, was presented and the tanks had no holes in them when they were removed. AR p. 120.

What other points does Weeke argue in favor of its position? Weeke's Points 1 and 7 arise from the 45-Day Report that reported visual and olfactory observations produced by the soil boring taken on October 29, 2008. Petitioner's Brief ("BR") pp. 16-17. The minimal significance these factors should be accorded, in light of the site's remediation history since 1998, has already been discussed in this brief. Its Point 4 suggests that two confirmation samples exceed the most stringent TACO Tier I objective for benzene. BR p. 17. The Illinois EPA has already stated its position regarding the .034 mg/kg reading. Weeke argues that no rule authorizes rounding in the LUST Program, but fails to cite any LUST Program rule that prohibits it. It then references the Number 3

wall sample where the laboratory detection limit, <.25 mg/kg, was above the acceptable detection limit ("ADL") for benzene, which in the instant case is the most stringent Tier I TACO remediation objective of .03 mg/kg. But this sample could fall anywhere in a range of 0 mg/kg to .249 mg/kg., leaving this analytical result with little, if any, probative value. Weeke should have collected another soil sample from this area and obtained a useful analytical result from it. As the certification Weeke cites in Point 3 is undoubtedly based on these two analytical results, Points 3 and 4 also do not help Weeke satisfy its burden in this case.

Points 5, 6, 8 and 9 concern conditions at the site when the tanks were pulled on December 8 and 9, 2009. BR p. 17. First, the Hearing Officer was correct in not admitting Petitioner's Exhibit 11, the Office of the State Fire Marshal UST Removal Log for the December 8 and 9, 2009 tank pull, and Petitioner's Exhibit 12, the June 10, 2009 letter with photographs sent to Hernando Albarracin by Williams, as they were not in the Illinois EPA's possession prior to the issuance of the May 26, 2009 decision letter. The Hearing Officer's rulings should be upheld. Weeke could have submitted the UST Removal Log and the Exhibit 12 photographs to the Illinois EPA prior to the decision date but did not do so. Second, conditions at the tank pull were a focal point of testimony by Weeke witnesses at the hearing. Consultant Williams described the scene as a "very nasty tank pit that was saturated with free product petroleum." TR p. 22. His colleague Don Grammer testified that "It stunk to high heaven" and "There was free products floating on the water in the hole, and it was a royal mess." TR pp. 57-58. But the drama and urgency portrayed by these remarks fades when Williams, in his next two sentences, acknowledges that "It was cleaned up. The product did not come back." TR p. 22. Project Manager Benanti was not surprised by this fact, since he considered such water to be merely perched water based upon his experience with the earlier incidents at this

site and Weeke's report that no groundwater was encountered at the site. TR p. 69. And regardless of how nasty the site looked and smelled, the only scientific and objective evidence of contaminant levels at the site, namely the analytical results for soil samples from the excavation floor and walls, indicated that the most stringent Tier I TACO remediation objectives had not been genuinely exceeded. Therefore site conditions at the time of the tank pull also fail to challenge the non-LUST determination in this case.

Weeke apparently believes that only the LUST program regulations required it to remove the perched water, and that by taking this action this incident should be in the LUST Program. Weeke argues that non-LUST determinations defeat "everything that the Illinois Environmental Protection Act was created to address." BR p. 20. In addition to Project Manager Benanti's reference to the September 13, 2006 NFR Letter as being a requirement outside of the LUST program to address the perched water, it would also be imprudent for a property owner to allow such conditions to exist. Of course such conditions could also be the basis for alleging open dumping violations pursuant to Section 21(a) of the Act and water pollution violations under Section 12 of the Act. So there are many sound reasons outside of the LUST Program to remove the perched water.

Weeke concludes its discussion of conditions at the site by saying that it should be allowed to perform confirmation sampling of the site's piping runs and dispenser islands, as this activity was postponed based on the Illinois EPA's December 8, 2008 letter. BR p. 20. But if confirmation samples from the tank pit did not exceed the most stringent Tier I TACO remediation objectives, and Weeke's consultant believed that the 2008 Incident was "the result of fill and overfill based on the depth that the odorous and discolored soil was encountered," it is unlikely that additional confirmation samples would exceed the tank pit analytical results. AR p. 91. And anyway, Weeke

can do this sampling at anytime regardless of the ultimate decision in this case. Of course at the present time, Weeke would not be reimbursed for these activities. If Weeke is truly concerned about environmental conditions at and the marketability of its site, it could explore obtaining an NFR Letter from the Illinois EPA's Site Remediation Program. But here again, this would be at Weeke's own expense.

B. Procedural Matters

The purpose of the LUST Program is to prescribe procedures for the remediation of LUST sites and establish requirements to seek payment for remediation activities from the UST Fund. 415 ILCS 5/57. If an owner or operator wants to be reimbursed for its eligible costs from the UST Fund, it must comply with the required remediation procedures. No one remediation activity guarantees entry into the LUST Program and access to the UST Fund. All tank pulls simply do not qualify for the Program and Fund.

Weeke's Point 2 and other sections of its brief focus on the Illinois EPA's December 8, 2008 letter to Weeke that was admitted into evidence as Petitioner's Exhibit 10 without objection from the Illinois EPA. BR p. 16, TR p. 25. But many of Weeke's references to the letter are misleading. First, Weeke states that "The Agency herein reviewed the 45 day report, approving the plan and budget for stage 1 site investigation." BR. p. 11. But the letter clearly states that "At a later time, the Illinois EPA will conduct a full technical review of the 45-Day Report and any other report submitted pursuant to Section 57.6 of the Act and 35 Ill. Adm. Code 734, Subpart B, in conjunction with any other plan or report selected for review (35 Ill. Adm. Code 734.505)." Clearly no full review was performed, and in reality there was a minimum of information to review in the 45-Day Report concerning whether a new release had occurred. It basically identified the October 29, 2008

soil boring, and stated that analytical results from samples would be provided in a 45-Day Report Addendum. AR pp. 91, 94-95. With the certification that the 45-Day Report did not demonstrate compliance with the most stringent Tier I TACO remediation objectives, the Illinois EPA issued the December 8, 2008 letter. AR p. 87. The letter acknowledges the 45-Day Report but does not make any determinations concerning it. TR. pp 66-67. Second Weeke states that the Illinois EPA relied upon the 45-Day Report and 45-Day Report Addendum in "approving" the stage 1 site investigation with the December 8, 2008 letter. BR p. 15. But the 45-Day Report Addendum, that contained the analytical results for the confirmation samples from the tank pit that were critical to the non-LUST determination here, was not received by the Illinois EPA until January 14, 2009. AR p. 111. Third, Weeke states "In reliance upon the Agency's [December 8, 2008] approval, Weeke continued early action work, with the expectation of reimbursement from the LUST Fund, . . ." BR p. 12-13. But the Illinois EPA's December 8, 2008 letter was issued on the same day that the tank pull commenced. The tank pull occurred, but it could not have been done solely in reliance on a letter that Weeke had not yet received.

The fact that the December 8, 2008 letter was not an "approval" letter as argued by Weeke moots many of its arguments concerning administrative procedures. Weeke cites no authorities to suggest that its situation here is akin to that of a license or permit holder governed by the Administrative Procedure Act. Even though Weeke acknowledges the "sequential nature of the LUST program" and that remediation measures intensify as the investigation continues, it apparently does not grasp the idea that scientific and objective information like analytical results for the tank pit confirmation samples can contradict earlier site observations. BR p. 12. Weeke's attempt to analogize its situation to the one in States Land Improvement Corp. v. Illinois EPA, 173 Ill. Dec.

285, 596 N.E.2d 1164 (4th Dist. 1992), is also misplaced. Sections 57.7(c), 57.8(i) and 40 of the Act provide for the review of Illinois EPA LUST decisions by the Board. No such review provisions accompanied the program under review in States Land. States Land, pp. 288-289. Weeke is getting "its day in court" with the instant appeal.

To sum up, this site was issued a NFR Letter in 2006 that left contamination in place. Not surprisingly, petroleum odors and discolored soil were noted in an October 29, 2008 lone soil boring. Neither free product nor groundwater was ever encountered. The only scientific and objective evidence of contamination at the site, soil samples from the floor and walls of the tank pit, did not exceed the most stringent Tier I TACO remediation objectives. The Illinois EPA issued a non-LUST determination letter for this site, finding that Weeke had not presented evidence of a new release. Ironically, one group of Weeke's arguments is captioned "The IEPA cannot establish that the 2008 release is a re-reporting of the release from ten years earlier." BR p. 18. But the Illinois EPA does not have to do this because Weeke has the burden of proof here. What has been established is that Weeke has not proven that the 2008 release was a new release.

IV. CONCLUSION

For all of the reasons and arguments presented herein, the Illinois EPA respectfully requests that the Board affirm its May 26, 2009 and June 4, 2009 decisions.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY

/s/ James G. Richardson
James G. Richardson
Special Assistant Attorney General

CERTIFICATE OF SERVICE

I, the undersigned attorney at law, hereby certify that on March 15, 2010 I served true and correct copies of a RESPONSE TO PETITIONER'S POST-HEARING BRIEF upon the persons and by the methods as follows:

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