ILLINOIS POLLUTION CONTROL BOARD
January 21, 1999

RICHARD and WILMA SALYER,	)	
	)	
Petitioners,	)	
	)	
v.	)	PCB 98-156
	)	(UST - FRD)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
	)	
Respondent.	)	

RICHARD AND WILMA SALYER APPEARED *PRO SE*; and

JOHN J. KIM, ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, APPEARED ON BEHALF OF RESPONDENT.

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

On July 8, 1998, the petitioners, Richard and Wilma Salyer (Salyers), filed a petition for review of the Illinois Environmental Protection Agency's (Agency) reimbursement determination. The Salyers are seeking review of an April 10, 1998 Agency decision that denied them reimbursement from the Underground Storage Tank (UST) Fund for certain remedial activities determined not to be corrective action. Specifically, the Agency determined that the costs involving landscaping and the replacement of concrete and asphalt were not reimbursable. On appeal, the Salyers contend that both of these items constitute reimbursable corrective action, and that the Agency's denial of reimbursement was in error.

On November 19, 1998, the Board issued an order partially granting the Agency's motion for summary judgment. In that order, the Board granted the Agency's motion for summary judgment as to the landscaping and associated handling costs, and denied the Agency's motion for summary judgment as to the paving and associated handling cost. A hearing on the remaining issues was held on November 24, 1998. Both parties submitted posthearing briefs: the petitioners on December 17, 1998, and the respondent on December 22, 1998. On December 28, 1998, the petitioners filed a motion to strike portions of respondent's posthearing brief. On December 30, 1998, the Agency filed a response to the motion to strike.

For the reasons that follow, the Board affirms the Agency's decision to deny reimbursement for costs involving the concrete and asphalt.

INTRODUCTION

The Salyers own and operate a retail gasoline station and automobile repair facility located at 551 South York Road, Elmhurst, Illinois.[1] Rec. at 6, 9. A release of gasoline from the Salyers' facility was reported to the Illinois Emergency Services and Disaster Agency on March 23, 1990. On April 30, 1997, the Salyers submitted a corrective action plan (CAP) to the Agency for review. The CAP describes remedial activities to be performed at the facility. One of the key elements of the CAP was the utilization of a soil vapor extraction (SVE) system at the site. The CAP describes how a pilot test of the SVE system was performed at the site, and includes results of that test. Rec. at 24-28. Based on those results, the CAP contains a proposal that the SVE system be utilized at the site, describes how the SVE system would be installed, and how the SVE system would work. Rec. at 29-38. The CAP contains cost estimates for the SVE system and related items, but does not contain provisions for the use of a surface seal. Rec. at 40.

On August 15, 1997, the Agency approved the CAP with seven conditions. Mot. at 2; Rec. at 60-62. On November 4, 1997, the Salyers sent a request for reimbursement of costs to the Agency. Rec. at 65. In the cover letter to the reimbursement request, the Salyers' engineer, Robert A. Mehrens, P.E., of RAM Engineering, Ltd., stated that included in the costs sought for reimbursement was the cost of placing pavement over the SVE system. Rec. at 65. On April 10, 1998, the Agency issued a final determination on the reimbursement request. Rec. at 113-115. The Agency's final determination denied costs for asphalt and concrete replacement, as well as costs for landscaping. Rec. at 115.

A hearing was held in this matter on December 24, 1998, before Board Hearing Officer Kathleen Crowley. Mehrens was called by each party as a witness. The Agency called Mehrens as an adverse witness. The hearing officer found no question of credibility with Mehrens' testimony. Two exhibits were offered into evidence at the hearing. Exhibit 1 is an article entitled, A Practical Approach to the Design, Operation, and Monitoring of In Situ Soil-Venting Systems. Exhibit 2 is a book titled Modeling of In Situ Techniques for Treatment of Contaminated Soils. Both exhibits were accepted into the record by Hearing Officer Crowley.

REGULATORY BACKGROUND

For the purpose of this case, Section 22.18b(g) 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. Ill. Rev. Stat. 1989, ch. 111 1/2, par. 1022.18b(g); 415 ILCS 5/40 (1996). Section 40 of the Act is the general appeal section for permits and has been used by the legislature as the basis for this and other types of appeal to the Board. In reviewing an Agency determination of ineligibility for reimbursement from the UST Fund, the Board must

[1] References to the Agency Record will be cited as Rec. at __; references to the transcript will be cited as Tr. at __; references to the petitioners' posthearing brief will be cited as Pet. Br. at __; and references to the respondent's posthearing brief will be cited as Resp. Br. at __.

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.

To be eligible for reimbursement from the UST Fund, costs must be reasonable and related to corrective action. Kathe's Auto Service, PCB 96-102, slip op. at 27, citing Platolene 500, Inc. v. IEPA (May 7, 1992), PCB 92-9. See also: Ill. Rev. Stat. 1989, ch. 111 1/2, pars. 1022.18(e)(1)(C) and 1022.18b. Determining whether costs are corrective action costs is a two-part inquiry. First, it must be determined if the costs are incurred as a result of action to stop, minimize, eliminate, or clean up a release of petroleum. Second, it must be determined whether those costs are the result of activities such as tank removal, soil remediation, and free product removal. Clarendon Hills Bridal Center v. IEPA (February 16, 1995), PCB 93-55. The burden of proving that challenged costs are reasonable and related to corrective action rests solely on the applicant for reimbursement. Kathe's Auto Service, PCB 96-102, slip op. at 28. The Agency's denial letter frames the issues on appeal. Kathe's Auto Service, PCB 96-102, slip op. at 28, citing Pulitzer Community Newspaper, Inc. v. IEPA (December 20, 1990), PCB 90-142.

PRELIMINARY MATTERS

Posthearing Briefs

As noted, both parties filed posthearing briefs. However, each party filed their brief later than required by the schedule set by the hearing officer. The Salyers filed their brief on December 17, 1998, and did not provide any reason for their tardiness. On December 22, 1998, the Agency filed a motion for leave to file *instanter* concurrent with its brief. In its motion, the Agency asserts that it was unable to begin final drafting of its posthearing brief until served with the Salyers' brief. The Agency maintains that no prejudice will result from allowing the Agency to file its brief one day late.

The Board accepts the Salyers' posthearing brief. Any prejudice that would result from the lateness of the Salyers' brief can be alleviated by granting the Agency's motion for leave to file *instanter*. Thus, the Agency's motion is granted, and its posthearing brief is accepted as well.

Petitioners' Motion to Strike

In their December 28, 1998 motion to strike portions of respondent's posthearing brief, the petitioners ask the Board to enter an order striking all references to restoration and the previous condition of the site including the existence of asphalt and concrete on the site prior to the installation of the SVE System. The petitioners also move the Board to strike footnote 7 from page 11 of respondent's brief.

The Salyers argue that nothing in the record establishes whether or not there was concrete or asphalt in the area of the site in which the pavement was placed during

remediation. The Salyers assert that since it has not been established that pavement existed in the area in question, all references to "restoration" in the Agency's posthearing brief should be stricken.

The Salyers also seek to strike the contents of footnote 7 on page 11 of the respondent's brief. In footnote 7, the Agency offers information about a site located at "359 West Galena." This site was discussed by a witness at the hearing as a site in which concrete costs were reimbursed. Tr. at 26-27. The Agency asserts that the witness misrepresented the facts pertaining to that site at the hearing, and provides information regarding the site in question. In reaching this point, the Agency states that "although the Illinois EPA is unable to enter any further information into the record, it does wish to point out that if so directed by the Board, it would provide evidence that the costs Mehrens referred to as being reimbursed were not for use of concrete as a surface seal, but rather were for use of concrete in pouring a building foundation." Resp. Br. at 11. The Salyers assert that nothing in the record supports the statement made by the Agency in footnote 7, and asks that it be stricken from the Agency's posthearing brief.

In response, the Agency asserts that the issue in this appeal centers on whether paving costs are reimbursable for the UST fund as corrective action. The Agency notes that the administrative record has two very specific, unambiguous references (located on pages 78 and 101 of the administrative record) that the paving costs in question were incurred by the retained contractors to remove and restore or replace concrete or asphalt. Tr. 78, 101. The Agency argues that the record supports and affirms the Agency's statements that concrete and asphalt were placed in areas where it had previously existed prior to their removal.

The Agency maintains that the contents of footnote 7 of its posthearing brief are proper. The Agency asserts that it clearly stated that evidence not in the record could not be introduced short of filing a motion requesting leave to do so. The Agency reiterates that its statement was not an attempt to introduce new evidence, but merely an indication of what evidence it would produce if the Board so requested.

The motion to strike portions of the Agency's posthearing comments is granted in part. The Board will not strike all references to restoration and to the previous condition of the site prior to the installation of the SVE system. As noted by the Agency, the record does contain references to the removal and replacement of concrete and asphalt. Such references are sufficient to form the basis for the arguments made by the Agency in this regard. The Board strikes the contents of footnote 7 on page 11 of the Agency's posthearing brief. Contrary to the Agency's assertion, footnote 7 does attempt to convey unverified information to the Board that is not contained with the record. The Agency did not preserve its right to dispute this evidence at hearing, and agrees with the petitioners that introduction of evidence not in the record is improper at this juncture. Thus, the Board strikes footnote 7 from the respondent's posthearing brief.

Respondent's Motion to Strike

In its posthearing brief, the Agency requests that the Board strike the attachments to the Salyers' response to the Agency's motion for summary judgment (Salyers' response). This motion was previously made and granted, in part, in the Board's order of November 19, 1998. The Agency requests that, at a minimum, the Board strike the materials previously stricken for the purposes of deciding any issues in this matter on the merits. The Salyers filed no response to the Agency's motion to strike.

In summary, the November 19, 1998 Board order found that evidence not before the Agency prior to the Agency's final determination on reimbursement will not be considered by the Board. The Board thus struck evidence not in the record prior to the Agency's final determination for the limited purpose of deciding the motion for summary judgment.

The Agency's motion to strike is granted as before. The first attachment to the Salyers' response is an affidavit by Mehrens, the Salyers' engineer. Paragraph 8 contains evidence not in the record prior to the Agency's final determination and is stricken. The remainder of the affidavit will be considered.

The second attachment to the Salyers' response is a letter from the adjacent property owner to the Salyers. This letter expands on the statements made in the cover letter, and does not constitute new evidence. The letter is accepted.

Two references in the body of the Salyers' response concern the amount of clay used to seal the extraction piping from the surface on the east side of the building. These statements introduce evidence that was not before the Agency at the time of final determination, and are stricken.

ARGUMENTS

The Salyers

The Salyers assert that only one question need be answered to reach a decision on this appeal: was the placement of asphalt/concrete over the shallow horizontal vapor extraction piping a corrective action? Pet. Br. at 1. The Salyers maintain that the record clearly shows that this action is a corrective action. The Salyers state that Mehrens testified that the asphalt/concrete was placed at the site as a surface seal. Pet. Br. at 2. The Salyers assert that no evidence was presented at hearing that the asphalt/concrete was used for any other reason, and that the placement of the surface seal is causing soils at the site to be remediated.

The Salyers note that Mehrens testified that, at a minimum, the radius of influence of the extraction piping would be reduced if the surface seal had not been used. Pet. Br. at 2. Thus, posit the Salyers, contaminated soils at the site are being remediated today that would not be remediated if the asphalt/concrete were not in place, and thus the placement of the

asphalt/concrete was an action to remediate contaminated soils and therefore a corrective action. Pet. Br. at 2.

The Salyers next assert that the testimony provides that the placement of a surface seal is typically used in the installation of a SVE system, and that asphalt/concrete is a material commonly used for that purpose. Pet. Br. at 2. The Salyers state that Mehrens, the engineer who designed the SVE system in question, testified that a surface seal was necessary for the shallow horizontal piping at the site to function properly. Pet. Br. at 2-3.

The Agency

Initially, the Agency states that the burden of proof is upon the petitioners to demonstrate that the regulatory and statutory bases for the Agency's denial are inadequate to support that denial. The Agency cites ESG Watts, Inc. v. Illinois Pollution Control Board and the Illinois Environmental Protection Agency, 286 Ill. App. 3d 325, 331, 676 N.E.3d 299, 303, (3rd Dist. 1997), for this proposition. The Agency notes that the Salyers have the burden, in this matter, to establish that the costs in question were reasonable and related to corrective action. Resp. Br. at 2. More specifically, the Salyers must demonstrate that, based on the information before the Agency at the time of its decision, the Salyers had established that the costs were reasonable and related to corrective action. The Agency asserts that the Salyers have failed to meet their burden, and that the Agency decision must be affirmed.

The Agency argues that paving costs are neither reasonable nor related to corrective action, but rather are restorative in nature and not reimbursable. Resp. Br. at 3. The Agency asserts that use of a seal was not included within the CAP, that the use of asphalt/concrete did not constitute a seal, and that even if the asphalt/concrete is viewed as a seal, it is not a necessary part of a SVE system. Resp. Br. at 4. The Agency maintains that the Salyers have not demonstrated that a seal is necessary for the performance of a SVE system, and that the paving at the site was restorative in nature and not reimbursable.

The Agency feels that the omission of any seal from the CAP is significant. The Agency emphasizes the inconsistency in the petitioners' position that the omission of a "very necessary" component of the SVE system from the CAP or any other submitted technical information is immaterial. Resp. Br. at 4. If, the Agency states, the Salyers' engineer believed that a surface seal was necessary, his failure to include any mention of a seal in the CAP cannot be dismissed by the Salyers as a mere lack of detail. The Agency also notes that Mehrens changed his opinion as to the necessity of a surface seal under cross examination. Resp. Br. at 5.

The Agency argues that the omission of a seal from the CAP shows that the Salyers did not need or intend to utilize the asphalt/concrete as part of the SVE system's design, but that reimbursement concerns dictated that the asphalt/concrete costs be recast as corrective action. Resp. Br. at 6. The Agency asserts that the fact that the Salyers' engineer never undertook any investigation into other potential seal materials further indicates that the asphalt/concrete was never intended to be corrective action. Resp. Br. at 7. Instead, the Agency argues,

asphalt/concrete was used regardless of cost in an attempt to restore the site to its original condition, and the costs incurred in the process of replacing the asphalt/concrete are restorative in nature and not reimbursable. Resp. Br. at 8.

The Agency re-emphasizes that there was no technical information in the cover letter to support the claim for the necessity of asphalt/concrete, and no other information anywhere in the Agency's files to justify a determination by the Agency that the use of the asphalt/concrete was a corrective action. Resp. Br. at 8.

The Agency asserts that the Salyers' engineer, Mehrens, first testified that the exhibits show the necessity for placing a surface seal over a SVE system, but then testified under cross-examination that not all SVE systems must employ a surface seal. Resp. Br. at 9. The Agency notes that exhibit 1 states that surface seals are "sometimes" used to control the vapor flow paths, that exhibit 2 states that impermeable caps are "possibly" used in a SVE system, and that Mehrens acknowledged those facts at the hearing. Resp. Br. at 9. The Agency further notes that exhibit 2 provides a more detailed description of the necessity of a surface seal, and states that the rate of cleanup may be positively affected by using a surface cap, but that the cost and nuisance of a cap make it a "questionable bargain." Resp. Br. at 10, citing Pet. Exh. 2 at 234-235. The Agency asserts that exhibit 2 also states that, in at least one test, the use of a seal in a SVE system employing horizontal piping (the same as found at the Salyers' site) yielded very little increase in the cleanup rate, and in fact would be a waste of time and money. Resp. Br. at 10, citing Pet. Exh. 2 at 236-237.

The Agency next states that the instant case is similar to Graham v. IEPA (August 24, 1995), PCB 95-89, and that the Salyers have failed to meet the test utilized in Graham for determining if a cost is related to corrective action: 1) whether the costs are incurred as a result of action to stop, minimize, eliminate, or clean up a release of petroleum; and 2) whether those costs are the result of activities such as tank removal, soil remediation, and free product removal. Resp. Br. at 12, citing Graham, PCB 95-89, slip op. at 8. The Agency argues that asphalt/concrete was not used to stop, minimize, eliminate, or clean up a release of petroleum, but was used to restore the site to its original condition. Resp. Br. at 12-13. The Agency emphasizes that the reference sources and the Salyers' consultant have all concluded that the use of asphalt/concrete is not necessary for the performance of a SVE system, and may actually cause more harm than good. Resp. Br. at 12.

Finally, the Agency states that the Salyers have failed to meet the burden imposed upon them by statutory construction, past case law, and the Board's November 19, 1998 order. The paving costs, states the Agency, should be found restorative in nature, and not corrective action. Resp. Br. at 14.

DISCUSSION

The initial burden to demonstrate that the remediation costs satisfy the definition of corrective action rests on the party seeking reimbursement. Kathe's Auto Service, PCB 96-102, slip op. at 28; Graham, PCB 95-89, slip op. at 22. However, the Board has noted that

whether an activity was included or not included as part of the CAP does not alone decide the issue. The issue is to be decided upon a determination of whether the action is corrective action. Graham, PCB 95-89, slip op. at 22. In Graham, the Board was confronted with an issue similar to the paving issue before us today. The Board found that it must interpret the statutory language as applied to the circumstances of the site in order to determine whether the concrete is corrective action that is reimbursable under the Act. Graham, PCB 95-89, slip op. at 22. Thus, when reviewing reimbursement determinations the proper standard is to apply the statutory definition of corrective action. Platolene, PCB 92-9, slip op. at 12.

As noted, the burden of proving that challenged costs are reasonable and related to corrective action rests solely on the applicant for reimbursement. Kathe's Auto Service, PCB 96-102, slip op. at 28. When considering whether an action is a corrective action, the Board uses the two-part test articulated in Graham. The use of this test was upheld in Strube v. The Pollution Control Board, 242 Ill. App. 3d 822, 610 N.E.2d 717 (3rd Dist. 1993). Both prongs of this test must be satisfied in order for costs to be reimbursed as corrective action. Enterprising Leasing Company v. IEPA (April 9, 1992), PCB 91-74, slip op. at 5; Graham, PCB 95-89, slip op. at 24. First, the Board considers whether the costs are incurred as a result of action to stop, minimize, eliminate, or clean up a release of petroleum. In the second prong, the Board considers whether those costs are the result of activities such as tank removal, soil remediation, and free product removal. As in Graham, the Board will also consider the petitioners' "main intent" in determining whether concrete replacement satisfied the corrective action test, and the motivating circumstances of why that particular activity was chosen or if an alternative could have been utilized but for a restoration purposes. Graham, PCB 95-89, slip op at 25-26.

It has been well established that replacement of concrete or asphalt does not generally constitute corrective action. Graham, PCB 95-89; Platolene, PCB 92-9. However, it is the particular facts surrounding the activity and the purpose of the activity that will ultimately determine whether it constitutes corrective action. Graham, PCB 95-89, slip op. at 22; Platolene, PCB 92-9; State Bank of Whittington v. IEPA (June 3, 1993), PCB 92-152, slip op. at 34.

Initially, it should be noted that at the time of the Agency's decision, the only reference to the use of a surface seal was a statement in the cover letter accompanying the reimbursement request that for the SVE system to operate properly, it was imperative that the subsurface be sealed from the outside air. The CAP contained no references to paving, and, as stated by the Agency, the cover letter contained no technical information to support the claim that the asphalt/concrete was necessary. No additional information pertaining to a surface seal was before the Agency when the decision was made. The only information before the Agency was the statement of Mehrens that the asphalt/concrete was necessary. This, standing alone, is not sufficient to prove that the costs are reasonable and related to corrective action. At hearing, the Salyers presented evidence explaining their engineer's statement. The evidence presented will be considered as such by the Board in determining whether petitioners satisfy the two-part test. See Graham, PCB 95-89, slip op. at 14-15 (the Board can properly consider

evidence not before the Agency at the time of determination that may explain technical information or statements that the Agency did have available).

The first question before the Board is whether the use of asphalt/concrete stops, minimizes, eliminates, or cleans up a release of petroleum. The Salyers have presented the argument that the asphalt/concrete is a surface seal, and a necessary component of the SVE system in place at the site. Mehrens testified that it was necessary to seal soil vapor extraction piping from the surface. Tr. at 21. Mehrens relied heavily on petitioners' exhibits for this conclusion. Tr. at 21-22. However, on cross-examination, Mehrens testified that neither exhibit specifically states that a surface seal is necessary for use in a SVE system, and that the use of a surface seal is not always necessary, but an optional element of a SVE system. Tr. at 33-34, 77. A review of the two exhibits confirms that a surface seal is not always a necessary component of a SVE system. See Exh. 1 at 171; Exh. 2 at 7, 234-237.

When called as an adverse witness for the Agency, Mehrens testified that the soil conditions surrounding one part of the SVE system warranted a seal. Tr. at 81-82. Mehrens also testified that he performed no cost estimates for utilizing materials other than asphalt/concrete as a surface seal at the Salyers' site. Tr. at 57-58. The Board acknowledges that the asphalt/concrete may serve some function in the remediation of the Salyers' site. However, the fact that an action may partially contribute to corrective action while primarily having a restorative role does not make it necessary for corrective action at a particular site. Graham, PCB 95-89, slip op. at 29. Moreover, it should be noted that Mehrens refused to answer certain questions regarding whether conditions included within the Agency letter approving the CAP have been satisfied. Tr. at 71-74.

The Salyers did not show that the asphalt/concrete is a necessary component of their SVE system, and therefore did not prove that the use of asphalt/concrete at their site stops, minimizes, eliminates, or cleans up a release of petroleum. Nor, for the same reasons, did the Salyers satisfy their burden with respect to the second question before the Board: whether the costs associated with the asphalt/concrete are the result of tank removal, soil remediation or free product removal. The Salyers have failed to demonstrate that the asphalt/concrete is a necessary part of the SVE system designed to remediate the site.

CONCLUSION

The Board finds that the Salyers did not meet their burden to prove that the costs associated with asphalt/concrete are reasonable and related to corrective action. The Board affirms the Agency's denial of those costs.

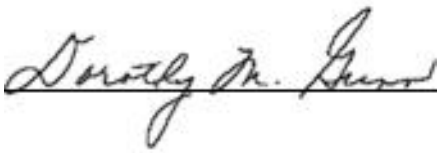
ORDER

The Board denies the Salyers' petition to review the Agency's April 10, 1998 reimbursement determination, and affirms that $3,460 for the use of asphalt/concrete, and $346 for associated costs are not reimbursable expenses.

IT IS SO ORDERED.

Section 41 of the Environmental Protection Act (415 ILCS 5/41 (1996)) 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. 2d R. 335; see also 35 Ill. Adm. Code 101.246, Motions for Reconsideration.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above opinion and order was adopted on the 21st day of January 1999 by a vote of 7-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board