ILLINOIS POLLUTION CONTROL BOARD
August 1, 1996

KATHE'S AUTO SERVICE CENTER,	)	
	)	
Petitioner,	)	
	)	PCB 96-102
v.	)	(UST - Reimbursement)
	)	
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
	)	
	)	
Respondent.	)	

NEAL H. WEINFELD OF BELL, BOYD & LLOYD APPEARED ON BEHALF OF PETITIONER;

DANIEL P. MERRIMAN APPEARED ON BEHALF OF THE RESPONDENT.

OPINION AND ORDER OF THE BOARD (by J. Yi):

On November 11, 1995, Kathe's Auto Service Center (Petitioner) filed a petition appealing the Illinois Environmental Protection Agency's (Agency) final reimbursement decision concerning Petitioner's leaking underground storage tanks pursuant to Sections 57.8(i) and 40(a) of the Environmental Protection Act (Act).[1] This matter is before the Board pursuant to a motion and cross-motion for summary judgment. Today's order addresses those motions and the related response filings.

For the reasons stated below, the Board grants the Agency's motion for summary judgment and denies the Petitioner's cross-motion for summary judgment.

PROCEDURAL HISTORY

On April 5, 1996 the Agency filed a motion for summary judgment and a motion to consolidate this matter with PCB 96-52, *Raleigh Realty Corporation v. Illinois Environmental Protection Agency*.[2]

On April 15, 1996, Petitioner filed a cross-motion for summary judgment, a response brief to the Agency's motion for summary judgment, a motion to file its cross-motion for summary judgment in excess of the fifteen (15) page limitation and a response to the Agency's

[1] The petition for review will be referred to as "Pet. at.".

[2] The Agency's motion for summary judgment will be referenced to as "Ag. SJ at .".

motion for summary judgment, a motion to stay the Agency's motion for summary judgment and a motion to adopt Raleigh Realty Corporation's motion to deny the Agency's motion to consolidate these matters.[3]

On April 29, 1996, the Agency filed a response to Petitioner's motions to deny the Agency's motion to consolidate and to stay the Agency's motion for summary judgment, a motion for leave to file a reply to Petitioner's motion for summary judgment, a motion to strike Petitioner's response brief to the Agency's motion for summary judgment and an objection to both the Petitioner's motion to file its response brief to the Agency's motion for summary judgment and the Petitioner's motion to file its motion for summary judgment in excess of the 15 page limitation. On April 30, 1996, Petitioner filed a response to the Agency's motion to strike.

On May 2, 1996, Petitioner filed a response to the Agency's motion to strike Petitioner's response brief to the Agency's motion for summary judgment; a response to the Agency's responses to Petitioner's motion to deny the Agency's motion to consolidate; a response to the Agency's response to Petitioner's motion to stay the Agency's motion for summary judgment; a response to the Agency's motion to strike Petitioner's motion to deny the Agency's motion to consolidate; a response to the Agency's objection to the Petitioner's motion to file its motion for summary judgment in excess of the 15 page limitation and a response to the Agency's motion for leave to file a reply brief to the Petitioner's response to the Agency's motion for summary judgment. Also on May 2, 1996, the Agency filed a motion to file its response to the Petitioner's motion for summary judgment in excess of the 15 page limitation and its response.[4]

On May 8, 1996, Petitioner filed a motion to file its reply brief in support of its motion for summary judgment instanter and its reply brief.

The above mentioned motions, except for the Agency's motion for summary judgment and Petitioner's cross-motion for summary judgment, were decided by the Board in its May 2 and June 6, 1996, orders in this matter.

BACKGROUND

Petitioner owns and operates a retail gasoline facility located at 835 Milwaukee Avenue in Glenview, Illinois (hereafter referred to as the "Site".) Petitioner filed an Illinois Emergency Management Agency (IEMA) report as a result of leaking underground storage tanks (USTs), to which IEMA assigned an incident report number of 923382 (Incident No.

[3] The Petitioner's cross-motion for summary judgment will be referred to as "Pet. SJ at .".

[4] The Agency's response to Petitioner's cross-motion for summary judgment will be referred to as "Ag. Resp. at .".

923382.) on November 28, 1992.[5] (Tech. I at 1.) The Petitioner filed a 20 Day Report with the Agency dated December 28, 1992. (Tech. I at 3-4.)

On January 22, 1993, Petitioner filed a corrective action plan. (Pet. at 1.) After the adoption of Title XVI of the Act, Petitioner filed a revised Corrective Action Plan (Revised Plan) pursuant to, then new, Title XVI on October 14, 1993. (Tech. I at 108-149, 151-190.) A cover letter to the Revised Plan indicated that the Site qualified as a "Low Priority Site". (Tech. I at 108.) However contained in the body of the Revised Plan is a statement that "[b]ased on the results of the site assessment activities, the 835 Milwaukee Avenue site meets the criteria for classification as a 'No Further Action' site under the Title XVI guidelines". (Tech. I at 117.) The Revised Plan also stated that "[t]he revised Corrective Actions which will be completed at the 835 Milwaukee Avenue site in accordance with the Title XVI guidelines for remediation of 'No Further Action' sites will involve removal of all four remaining USTs, the gasoline UST product piping, and affected backfill materials." (Tech. I at 124.) On November 18, 1993, Petitioner filed a letter requesting the Agency to reclassify the Site as a "No Further Action Site." (Tech. I at 191-192.)

The Agency on February 10, 1994, rejected the Revised Plan because Petitioner had not elected to proceed under the new Title XVI and had failed to meet certain technical requirements. (Tech. II at 303-316.) Additionally the Agency noted the following:

> The information also includes a corrective action plan and corrective action budget. It is not completely clear to the Agency why a corrective action plan and corrective action budget were submitted if you believe your site classification is "No Further Action". Pursuant to Section 57.7(c)(3)(A) No Further Action sites require no remediation beyond that required in Section 57.6 and subsection (a) of Section 57.7. Further, because the Agency is disapproving the site classification as outlined in Attachment A, and will require that additional work be performed to classify the site, it is impossible to determine the requirements for corrective action at the site. The corrective action plan and budget are being disapproved as it is impossible, without an appropriate site classification, to determine if these activities are beyond the minimum requirements necessary to comply with Title XVI (Section 57.5(a) of the Act).

Petitioner, on February 29, 1994, filed its election to proceed with corrective action under Title XVI with the Agency. (Tech. I at 202.)

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[5] The Agency's record consisting of Technical File Books 1 and 2, and Fiscal File Books 1 and 2 will be referred to as "Tech. I at .", "Tech. II at .", "Fisc. I at ." and ""Fisc. II at .".

On March 9, 1994, Petitioner submitted to the Agency a Site Classification Work Plan, including a Physical Soil Classification and Work Plan and related budget. (Tech. I at 203-237.)

On June 23, 1994, the Agency sent Petitioner a letter modifying the March 9, 1994 Physical Soil Classification and Work Plan. (Tech. I at 238-243.) The budget for the work approved by the Agency was $8,378.60.

On August 18, 1994, the Petitioner filed a Site Classification Completion Report with the Agency. (Tech. I at 246-284.) The report concluded that the Site met the requirements of a "No Further Action Site" under Title XVI of the Act and related portions of the Board regulations.

On December 20, 1994, the Agency issued a letter to Petitioner rejecting the proposed "No Further Action" Site Classification proposed in the August 18, 1994 Classification Completion Report. The Agency recited several reasons for the rejection including: (1) the soil borings were inadequate; (2) the soil boring log did not contain the necessary information; and (3) it could not be determined whether the USTs were within the minimum or maximum setback zone for a potable water supply well. (Pet. at 2, Tech. I at 288-299.) Additionally, the Agency stated the report includes a corrective action proposal for UST removal and contaminated backfill removal and demonstrates a "desire" to classify the site as "No Further Action". (Tech. I at 288.) The Agency continued "[t]herefore, the Agency is rejecting the proposal for such UST removal and backfill removal for the reasons listed in Attachment B". (Tech. I at 288.) Attachment B states the following:

1. Pursuant to 35 IAC Section 732.400(b), owners or operators of a site classified in accordance with the requirements of Subpart C as "No Further Action" may choose to conduct the remediation sufficient to satisfy the remediation objectives in 35 IAC Section 732.408. If the plan was submitted pursuant to 35 IAC Section 732.400(b), a plan is not required for such remediation. Further, the Board Notes in 35 IAC Section 732.400 indicates that owners or operators electing to proceed in accordance with 35 IAC Section 732.400(b) are advised that they may not be entitled to full payment or reimbursement.

2. Removal of contaminated backfill and the underground storage tanks would exceed the minimum requirements for a "No Further Action" site (Section 57.5(a) of the Act and 35 IAC Section 732.505(c) and 732.606(o)).

3. If the plan was submitted pursuant to 35 IAC Part 732, Subpart D and Section 57.7(c) of the Act, pursuant to 35 IAC Section 732.402 and Section 57.7(c)(3) of the Act, "No Further Action" sites require no additional remediation.

(Tech. I at 296.)

On January 5, 1995, the Agency sent Petitioner a voucher for $5,413.62 relating to the costs incurred by the Petitioner for completion of the Site Classification Activities submitted on June 23, 1994. The Agency rejected $1,220.83 of the costs submitted, stating that said amount was due to impermissible budget line increases.

On January 23, 1995, Petitioner appealed the Agency's rejection of its proposed "No Further Action" Site Classification. The appeal was designated PCB 95-43 by the Board.[6]

On January 30, 1995, Petitioner initiated the claimed early action activities at the Site. Those activities consisted of removing one 8,000 gallon and two 6,000 gallon gasoline USTs and two 285 gallon heating oil USTs. While the 8,000 gallon gasoline UST and one 6,000 gallon gasoline UST were found to be free of corrosion, one 6,000 gallon UST removed from the westernmost portion of the excavation was found to contain a few corrosion holes. The two 285 gallon heating oil USTs were also found to contain corrosion holes. A total of approximately 330 cubic yards of affected backfill materials and native soil were removed from the gasoline UST excavation. (Pet. at 2-3.)

On February 15, 1995, Petitioner submitted its "Leaking Underground Storage Tank (LUST) Closure Report - Early Remedial Actions" to the Agency. (Tech. II at 321-444.) The report described the early remedial actions performed at the Site between November 7, 1994 and February 17, 1995, including tank and contaminated backfill removal activities.

On June 12, 1995, Petitioner submitted its completed LUST Reimbursement Cost Summary and related supporting materials to the Agency. (Fisc. II at 150-226.) The reimbursement requested $45,242.01 in costs associated with "Early Remedial Actions" at the Site.

On October 5, 1995, the Agency issued its denial letter to Petitioner's early remedial action reimbursement request. The letter denied all reimbursement costs requested for the following reasons:

1. Failure to submit an Illinois Licensed Professional Engineer Certification pursuant to Section 57.8(a)(6) of the Illinois Environmental Protection Act (Act) and 35 Illinois Administrative Code (IAC) Section 732.601(b)(1). Information in the Agency's possession from the Illinois Department of Professional Regulation fails to indicate that Mr. Ronald W. Schrack was a Licensed Professional Engineer in the State of Illinois on May 12, 1995, the date that Mr. Schrack signed the certification.

2. Failure to submit an Office of the State Fire Marshal (OSFM) eligibility and deductibility determination for the 275 gallon heating oil UST which was

[6] The Board affirmed the Agency's rejection of Petitioner's Site Classification on May 4, 1995.

discovered January 1995. Such OSFM determination is required in accordance with Section 57.8(a)(6)(C) of the Act and 35 IAC Section 732.601(b)(3).

3. The application for reimbursement states that the costs requested are for completion of Early Remediation Actions. The Agency has determined that such activities are not early action as outlined below:

   a. Pursuant to Section 57.6(b) of the Act and 35 IAC Section 732.202(f), 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 repair or abandon the underground storage tank in place, in accordance with the regulations promulgated by the Office of the State Fire Marshal. The owner or operator may also remove visibly contaminated fill material and any groundwater in the excavation which exhibits a sheen.

      Information in the Agency's possession indicates that a site classification work plan dated March 9, 1994 was received by the Agency March 11, 1994. The activities for which reimbursement is being requested were conducted from November 17, 1994 through February 17, 1995. Therefore, such activities were not conducted prior to submission of any plan and, thus, are not early action activities.

   b. Pursuant to Section 57.7(a)(1) of the Act and 35 IAC Section 732.305(b)(1), prior to conducting any physical soil classification and groundwater investigation activities required by statute or regulation, the owner or operator shall prepare and submit to the Agency for the Agency's approval or modification:

      A) a physical soil classification and groundwater investigation plan designed to determine site classification, in accordance with subsection (b) of this Section [57.7], as High Priority, Low Priority, or No Further Action.

      B) a request for payment of costs associated with eligible early action costs are provided in Section 57.6(b). However, for purposes of payment for early action costs, fill material shall not be removed in an amount in excess of 4 feet from the outside dimensions of the tank.

      Information in the Agency's possession indicates that a site classification completion report dated August 18, 1994 was received by the Agency on August 22, 1994 which documented physical soil classification and other site classification activities that had been conducted prior to the date of the report. The application for reimbursement was submitted June 12,

1995 and was received by the Agency June 14, 1995. Therefore, the request for payment was not submitted prior to conducting any physical soil classification and groundwater investigation activities.

4. These costs exceed the minimum requirements necessary to comply with Title XVI of the Act (Section 57.5(a) of the Act and 35 IAC Section 732.606(0)) and 35 IAC Part 732 (35 IAC Section 732.505(c)).

5. These costs are not corrective action costs. Corrective action means an activity associated with compliance with the provisions of Sections 57.6 and 57.7 of the Act (Section 57.2 of the Act and 35 IAC Section 732.103). One of the eligibility requirements for accessing the UST Fund is that costs are associated with "corrective action" (Section 57.9(a)(7) of the Act).

6. This is a deduction for costs that are neither early action costs (Section 57.6 of the Act and 35 IAC Section 732.202) as is indicated in item 3 above nor were they submitted (nor approved) in a budget. Budgets must be submitted pursuant to Sections 57.7(a)(2), 57.7(c)(1)(B), and 57.7(c)(2) of the Act as well as 35 IAC Sections 732.305(b)(2), 732.403(c), and 732.405(b). Pursuant to Section 75.7(c)(4) of the Act, Agency approval of any plan and associated budget as described in this subsection (d)(3) [of Section 57.7] shall be considered final approval for purposes of seeking and obtaining payment from the Underground Storage Tank Fund if the costs associated with the completion of any such plan are less than or equal to the amounts approved in such budget. Pursuant to 35 IAC Section 732.601(f), in no case shall the Agency authorize payment to an owner or operator in an amount greater than the amount approved by the Agency or by operation of law in a corresponding budget plan.

   Pursuant to 35 IAC Section 732.601(a), an owner or operator seeking payment from the fund shall submit to the Agency an application for payment on forms prescribed by the Agency or in a similar format containing the same information. The owner or operator may submit an application for partial payment or final payment for materials, activities or services contained in an approved budget plan. An application for payment also may be submitted for materials, activities or services for early action conducted pursuant to subpart B of this Part [732] and for which no budget plan is required.

7. The request for reimbursement includes costs associated with USTs that are ineligible for reimbursement from the State Underground Storage Tank Fund (Section 57.9(a) of the Act and 35 IAC Section 732.606(s)). Specifically, the December 13, 1993 OSFM eligibility determination indicates that one-385 gallon heating oil UST is ineligible for reimbursement. Further, there is no OSFM eligibility decision regarding the 275 gallon heating oil UST discovered in January 1995. The Agency is unable to determine the specific dollar amounts associated with such USTs.

Further, it appears that such heating oil USTs were taken out of service prior to January 2, 1974. Pursuant to Section 57.5(g) of the Act, if the Office of the State Fire Marshal (OSFM) does not issue an Order for Removal for an UST taken out of use prior to January 2, 1974, owners or operators who report an occurrence as a result of a release from such USTs are not required to perform corrective action. Based on information in the Agency possession, it appears that an Order to remove the USTs was not issued by the OSFM. Therefore there is no corrective action requirement for such USTs as indicated in the Agency's June 21, 1995 letter. Therefore, such costs are not corrective action costs. Corrective action means an activity associated with compliance with the provisions of Sections 57.6 and 57.7 of the Act (Section 57.2 of the Act and 35 IAC Section 732.103). One of the eligibility requirements for accessing the UST Fund is that costs are associated with "corrective action" (57.9(a)(7) of the Act).

8. These costs are related to activities, materials or services not necessary to stop, minimize, eliminate, or clean up a release of petroleum or its effects in accordance with the minimum requirements of the Act and regulations (35 IAC Section 732.606(y)).

In addition, $2,026.73 of the $45,242.01 is being deducted not only for the reasons above in this Attachment A, but also due to a math error and lack of documentation. Therefore, the owner or operator has failed to demonstrate that the costs do not exceed the minimum requirements necessary to comply with Title XVI (Section 57.5(a) of the Act) and 35 IAC Part 732 (35 IAC Section 732.505(c)). Costs for corrective action activities and associated materials or services exceeding the minimum requirements necessary to comply with the Act are not eligible for reimbursement from the Fund (35 IAC Section 732.606(o)). It also cannot be determined whether the costs are corrective action costs. "Corrective action" means an activity associated with compliance with the provision of Section 57.6 and 57.7 of the Act (Section 57.02 of the Act and 35 IAC Section 732.103). One of the eligibility requirements for accessing the UST Fund is that costs are associated with "corrective action" (Section 57.9(a)(7) of the Act). Finally, the owner or operator has failed to demonstrate that such cost is related to activities materials or services necessary to stop, minimize, eliminate, or clean up a release of petroleum or its effects in accordance with the minimum requirements of the Act and regulations (35 IAC Section 732.606(y)).

Petitioner filed its appeal on November 11, 1995 challenging all of the Agency's reasons for denial except for those associated with the USTs containing heating oil.

APPLICABLE LAW

Section 57.5(a) of the Act states:

> Notwithstanding the eligibility or the level of deductibility of an owner or operator under the Underground Storage Tank, any owner or operator of an Underground Storage Tank may seek to remove, repair, or abandon such tank under the provisions of this Title. In order to be reimbursed under Section 57.8, the owner or operator must comply with the provisions of this Title. In no event will an owner or operator be reimbursed for any costs which exceed the minimum requirements necessary to comply with this Title.
>
> (415 ILCS 5/57.5(a).)

Section 57.6 of the Act states:

> a) Owners or operators of underground storage tanks shall, in response to all confirmed releases, comply with all applicable statutory and regulatory reporting and response requirements.
>
> b) 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 repair or abandon the underground storage tank in place, in accordance with the regulations promulgated by the Office of the State Fire Marshal. 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.)

Section 57.7 of the Act provides in pertinent part:

> a) Physical soil classification and groundwater investigation.
>
> 1. Prior to conducting any physical soil classification and groundwater investigation activities required by statute or regulation, the owner or operator shall prepare and submit to the Agency for the Agency's approval or modification:
>
> A. a physical soil classification and groundwater investigation plan designed to determine site classification, in accordance with subsection (b) of this Section, as High Priority, Low Priority, or No Further Action.

B. a request for payment of costs associated with eligible early action costs as provided in Section 57.6(b). However, for purposes of payment for early action costs, fill material shall not be removed in an amount in excess of 4 feet from the outside dimensions of the tank.

(415 ILCS 5/57.7.)

Section 57.7(c)(3) of the Act states in pertinent part:

3. No Further Action Site.

A. No Further Action sites require no remediation beyond that required in Section 57.6 and subsection (a) of this Section if the owner or operator has submitted to the Agency a certification by a Licensed Professional Engineer that the site meets all of the criteria for classification as No Further Action in subsection (b) of the Section.

B. Unless the Agency takes action to reject or modify a site classification under subsection (b) of this Section, or the site classification is rejected by operation of law under item (4)(B) of subsection (c) of this Section, upon receipt of a certification by a Licensed Professional Engineer submitted pursuant to part (A) of paragraph (3) of subsection (c) of this Section, the Agency shall issue to the owner or operator a no further remediation letter in accordance with Section 57.10.

(415 ILCS 5/57.7(c)(3).)

The Board's procedural rules at 35 Ill. Adm. Code 732.204 Application for Payment state:

Owners or operators intending to seek payment or reimbursement for early action activities are not required to submit a corresponding budget plan to the Agency prior to the application for payment. The application for payment may be submitted to the Agency upon completion of the early action activities in accordance with the requirements at Subpart F of this Part. In the alternative, the owner or operator may submit line item estimates of the activities and costs as part of a site classification budget plan submitted pursuant to Section 732.305 for prior review and approval in accordance with Subpart E of this Part. If the alternative of submitting a line item estimate of the activities and costs is selected, a subsequent application for payment satisfying the requirements of Subpart F will be required before payment can be approved and such application for payment must be submitted with an application for payment for site classification activities.

The Board's procedural rules at 35 Ill. Adm. Code 732.305 Plan Submittal and Review set forth the following:

a) Prior to conducting any site evaluation activities, the owner or operator shall submit to the Agency a site classification plan, including but not limited to a physical soil classification and groundwater investigation plan, satisfying the minimum requirements for site evaluation activities as set forth in Section 732.307. The plans shall be designed to collect data sufficient to determine the site classification in accordance with Sections 732.302, 732.303 or 732.304 of this Part. Site classifications plans shall be submitted on forms prescribed by the Agency or in a similar format containing the same information.

b) In addition to the plan required in subsection (a) above and prior to conducting any site evaluation activities, any owner or operator intending to seek payment from the Fund shall submit to the Agency:

1) An application for payment of costs associated with eligible early action costs incurred pursuant to Subpart B of this Part, except as provided in subsection (b)(2) below; and

2) A site classification budget plan, which shall include, but not be limited to, a copy of the eligibility and deductibility determination of the OSFM and a line item estimate of all costs associated with the development, implementation and completion of the site evaluation activities required in Section 732.307. In accordance with Section 732.204 of this Part, the owner or operator may submit a site classification budget plan that includes a line item estimate of the activities and costs of early action for review and approval prior to the submittal of an application for payment. Formulation of budget plans should be consistent with the eligible and ineligible costs listed at Sections 732.605 and 732.606 of this Part. Site classification budget plans shall be submitted on forms prescribed by the Agency or in a similar format containing the same information.

c) The Agency shall have the authority to review and approve, reject or require modification of any plan submitted pursuant to this Section in accordance with the procedures contained in Subpart E of this Part.

d) Notwithstanding subsections (a) and (b) above, an owner or operator may proceed to conduct site evaluation activities in accordance with this Subpart C prior to the submittal or approval or an otherwise required site classification plan (including physical soil classification and groundwater investigation plans and associated budget plans). However, any such plan shall be submitted to the Agency for review and approval, rejection or modification in accordance with the procedures contained in Subpart E of this Part prior to payment or

reimbursement for any related costs or the issuance of a "No Further Remediation" letter.

e) If, following the approval of any site classification plan, an owner or operator determines that revised procedures or cost estimates are necessary in order to comply with the minimum required activities for the site, the owner or operator shall submit, as applicable, an amended site classification plan or associated budget plan for review by the Agency. The Agency shall have the authority to review and approve, reject or require modification of the amended plan in accordance with the procedures contained Subpart E of this Part.

BOARD NOTE: Owners or operators proceeding under subsection (d) of this Section are advised that they may not be entitled to full payment or reimbursement. See Subpart F of this Part.

STANDARDS OF REVIEW

Summary Judgment. Summary judgment is proper only when the pleadings, affidavits, admissions and other items in the record demonstrate that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law. (*Waste Management of Illinois v. IEPA,* (July 21, 1994), PCB 94-153; *Solomon v. American Nat'l Bank & Trust Co.*, 243 Ill.App.3d 132, 612 N.E.2d 3 (1st Dist. 1993).)

Review of Agency Determination to Deny Reimbursement. The Board authority to review the Agency's determination to deny reimbursement from the UST Fund arises from Section 57.8(i) of the Act, which grants individuals the right to appeal an Agency determination to the Board pursuant to Section 40 of the Act. Section 40 of the Act is the general appeal section for permits and has been used by the legislature as the basis for other types of appeals to the Board, including this type of appeal. Summarizing the respective roles of the appealing party, the Agency and the Board under Section 40 appeals, the Board stated in *City of Herrin v. IEPA*, (March 17, 1994), PCB 93-195:

> "Petition for review of permit denial is authorized by Section 40(a)(1) of the Act [415 ILCS 5/40(a)(2)] and 35 Ill. Adm. Code 105.102(a). The Board has long held that in permit appeals the burden of proof rests with the petitioner. The petitioner bears the burden of proving that the application, as submitted to the Agency, would not violate the Act or the Board's regulations. This standard of review was enunciated in *Browning-Ferris Industries of Illinois v. IPCB,* 179 Ill.App.3d 598, 534 N.E.2d 616 (2nd Dist. 1989) and reiterated in *John Sexton Contractors Co. v. Illinois,* (February 23, 1989) PCB 88-139. In *Sexton* the Board held:
>
> > '…that the sole question before the Board is whether the applicant proves that the application, as submitted to the Agency, demonstrated that no violations of the Environmental Protection Act would have occurred if the requested permit had been issued'.

> Therefore, the petitioner must establish to the Board that the permit would not violate the Act or the Board's rules if the requested permit was to be issued by the Agency. In addition, the Agency's written response to the permit application frames the issues on appeal from the decision. (*Pulitzer Community Newspapers, Inc. v. IEPA*, (December 20, 1990) PCB 90-142)."

In reviewing an Agency determination of ineligibility for reimbursement from the UST Fund, then, the Board must decide whether or not the application, as submitted to the Agency, demonstrates compliance with the Act and Board regulations.

Eligibility for Reimbursement Under the UST Fund. To be eligible for reimbursement from the UST Fund, costs must be reasonable and related to corrective action. (*Platolene 500, Inc. v. IEPA*, (May 7, 1992) PCB 92-9, 133 PCB 259.) The burden of proving that challenged costs are reasonable and related to corrective action rests solely on the applicant for reimbursement. (*Id.* at 266.)

The Agency's denial letter frames the issues on appeal. (*Pulitzer Community Newspapers, Inc. v. IEPA*, (December 20, 1990), PCB 90-142.) In its letter denying Petitioner's reimbursement request, the Agency states several reasons for denying reimbursement. (See supra page 8-10.) Therefore, in deciding the motions for summary judgment, the Board must determine as a matter of law whether the Agency's denial reasons contained in its letter of October 5, 1995, are appropriate because Petitioner has not demonstrated that the challenged costs are reasonable and related to corrective action or Petitioner has demonstrated that the challenged costs are reasonable and related to corrective action and is entitled to a judgment as a matter of law.

ARGUMENTS

Agency's Motion for Summary Judgment

The first argument made by the Agency is that the activities for which the Petitioner seeks reimbursement exceed the minimum requirements necessary to comply with Title XVI of the Act because they were conducted after the site was classified and certified as a No Further Action site. (Ag. SJ at 4.) Citing to *Platolene 500 Inc. v. IEPA*, (May 7, 1992), PCB 92-9, 133 PCB 259, the Agency states it is the burden of the applicant for reimbursement to prove that the challenged costs are reasonable and related to corrective action. (Ag. SJ at 4.) In support of its contention, the Agency maintains that the site was classified as a No Further Action site and certified by a licensed professional engineer on August 18, 1994. (Ag. SJ at 5.) The Agency asserts that such classification and certification were not conditioned upon completion of the activities for which the Petitioner is now seeking reimbursement and it informed Petitioner that the activities would not be necessary. (Ag. SJ at 5.)

Furthermore, the Agency argues, citing to language in Section 57.7(c)(3)(A) of the Act, Petitioner is not required to perform any activities beyond what is required in Sections

57.6 and 57.7(a) of the Act, and that any required activities were to be performed prior to site classification and certification. (Ag. SJ at 5-6.) The Agency contends that the only activities required by Section 57.7(a) of the Act are physical soil classification and groundwater investigation, and the only mandatory remedial requirements of Section 57.6 of the Act contained in subsection (a), which requires owners and operators to comply with all applicable statutory and regulatory reporting and response requirements. (Ag. SJ at 6.) The Agency argues that Section 57.6(b) of the Act is not a mandate and is discretionary. (Ag. SJ at 6.) The Agency states that the Board has recognized this interpretation of Section 57.6(b) of the Act and quotes the following Board language from *Kalo Gasoline Co. v. IEPA*, (March 16, 1995), PCB 95-41, "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, and by refusing to reimburse others for the removal of fill material as early action activities." (Ag. SJ at 7.) The Agency argues "[t]o say that these activities can be conducted at any time and are always necessary as early action activities eliminates any need or reason to distinguish such activities from ordinary corrective action activities. (Ag. SJ at 7.) The Agency concludes by stating "[t]herefore any activities performed at the Site after it was classified and certified as a No Further Action site exceeded the minimum requirements necessary to comply with the Act and were not required or necessary to comply with the Act as early action activities; therefore, to reimburse the Petitioner for the costs associated with those activities would result in a violation of the Act." (Ag. SJ at 7.)

The Agency's second argument is that Petitioner's activities are not reimbursable as early action activities because it conducted physical soil classification and groundwater investigation activities prior to seeking reimbursement for the claimed early action activities. (Ag. SJ at 8.) The Agency states that the Act at Section 57.7(c)(1)(B) "expressly mandates the expeditious completion of early action activities" and paraphrases language from Sections 57.7(a)(1) and 57.7(a)(1)(B) of the Act. (415 ILCS 5/57.7(a)(1) and 5/57.7(a)(1)(B).) (Ag. SJ at 8.) The Agency argues that Petitioner is not eligible pursuant to Sections 57.7(a)(1) and 57.7(a)(1)(B) because it conducted physical soil classification and groundwater investigation activities prior to its June 12, 1995 submittal for reimbursement of early action activities, as evidenced by the August 18, 1994 submittal of the site classification and certification. (Ag. SJ at 8-9.)

Finally the Agency argues that the activities for which Petitioner seeks reimbursement as early action do not constitute early action activities because the activities occurred almost two years after the initial release at the Site. (Ag. SJ at 9.) The Agency presents several arguments in support of this contention in its motion for summary judgment. First, the Agency states, citing to *Kelley-Williamson Company v. IEPA*, (November 16, 1995), PCB 95-116, that the Board recognizes the interpretation of the Act and corresponding regulations "envision" "that early action activities, if performed, will be completed prior to the submittal of the 20 Day Report, and well before the submittal of the 45 Day Report". (Ag. SJ at 9.) Next, the Agency states that "[o]n its face the term 'Early Action' suggests that the activities defined as such will be conducted early in the process, certainly sooner rather than later." (Ag. at 9.) Again citing to *Kelly-Williamson* and the preamble of the 40 C.F.R. Part 280, the Agency asserts that "[e]arly action activities are considered emergency measures and are

preventative in nature to abate the immediate threats of a petroleum release to human health and the environment." (Ag. SJ at 10.) The Agency further states that the Board in adopting 35 Ill. Adm. Code Part 732 described early action to be "initial response" and as "immediate action to prevent further release", as well as "initial abatement." (Ag. SJ at 10-11.) Furthermore, citing *Kelly-Williamson* and *Kalo*, the Agency asserts that in addition to 35 Ill. Adm. Code Part 732 the Board's interpretation of the case law demonstrates that the completion of early action activities should take place soon after the reported release. (Ag. SJ at 11-12.)

Finally, in support of its assertion that the activities conducted by Petitioners do not constitute early action activities, the Agency states that the 20 Day Report filed by Petitioner on November 30, 1992 certified that no further response action was necessary in stating the following:

> That as much of the regulated substance as necessary to prevent further release to the environment has been removed;
>
> That further migration of the released substance into surrounding soils and groundwater has been prevented;
>
> That the appropriate procedures will be used to investigate and determine the possible presence of free-product, and begin free-product removal as soon as possible, if applicable, in accordance with Section 731.164;
>
> That a summary of the above activities will be provided within 45 days of the confirmation of a release. (Ag. SJ at 12-13.)

The Agency concludes by asserting that "to leave an open window of opportunity to complete or conduct activities allowed as early action will render the entire concept of early action meaningless and undermine any purposes that are served by the concept of early action" and "would undermine the objectives sought to be achieved by allowing owners and operators to indefinitely put off initial abatement activities which were intended to prevent the immediate threats of petroleum releases to human health and the environment not to mention the violence it will do to the Act and regulations". (Ag. SJ at 13.)

Petitioner's Response

In response to the Agency's motion for summary judgment, the Petitioner argues that the Agency should not be allowed to assert new arguments for denying reimbursement in its motion for summary judgment. (Pet. Resp. at 10.) The Petitioner claims that the following arguments made by the Agency are new arguments that were not stated in the Agency's October 5, 1995, denial letter. (Pet. Resp. at 10-11.)

> That the Site was classified as a No Further Action Site and certified as such by a licensed professional engineer on August 18, 1994, and "[t]he Petitioner's classification

and certification were not conditioned upon the completion of the activities for which Petitioner is now seeking reimbursement."

That tank and limited fill removal activities under 57.6(b) are discretionary and, therefore, not reimbursable under the Act.

That Petitioner failed to submit a complete reimbursement application for early action activities prior to conducting any physical soil classification and groundwater investigation activities.

That Petitioner's early action activities were conducted after the submittal of Petitioner's 20 and 45 Day Reports.

Petitioner argues that the Agency has 120 days in which to respond to a completed application for reimbursement for corrective action and is barred from asserting new arguments at this time that were not included in its reimbursement denial letter. (Pet. Resp. at 11.) Citing to *Landwehrmeier v. IEPA*, (June 2, 1994), PCB 94-55; *Rosman v. IEPA*, (December 19, 1991), PCB 91-80 and *Pulitzer v. IEPA*, (December 20, 1990), PCB 90-142, Petitioner states that the Board "has repeatedly held that an Agency's statement denying reimbursement from the fund must detail the reasons and the statutory and regulatory support for such denial." (Pet. Resp. at 11.) Petitioner concludes that "[s]ince the Agency failed to include the above bases for denying reimbursement in its October 5, 1995, denial letter, it is estopped from raising them now." (Pet. Resp. at 11.) The Petitioner also adds that "[t]o allow the Agency the opportunity to reinvent its case as the matter proceeds is wholly unfair and invites the type of abuse of power evident in the Agency's motion for Summary Judgment." (Pet. Resp. at 11-12.)

In response to the Agency's first argument, Petitioner claims that tank removal and limited contaminated fill material removal activities are necessary once an owner or operator has confirmed that a release has occurred from an UST regardless of whether the site is classified as High Priority, Low Priority or No Further Action. (Pet. Resp. at 15.)

Petitioner, citing to *Kelly-Williamson*, argues that the following activities are federally-mandated corrective actions:

Report the release to the Illinois Emergency Management Agency ("IEMA");

Remove all sources of contamination including tanks and piping; and

Mitigate potential fire, explosion, or vapor hazards.

The Petitioner argues that the word "may" in Section 57.6(b) "does not address whether tank removal is required, but rather when tank removal may be undertaken." (Pet. Resp. at 16.) Petitioner argues that "the correct reading of Section 57.6(b) is that tank removal may be undertaken either before or after the submission of plans to the Agency". (Pet. Resp. at 16.)

Furthermore, Petitioner asserts that early action activities are a type of corrective action activities and therefore do not exceed the minimum requirements necessary to comply with the Act. (Pet. Resp. at 16.) Petitioner states that Section 57.2 of the Act defines corrective action activities to mean activities associated with compliance with the provision of Section 57.6 and 57.7 of this Title and that Section 57.6 provides "[n]ot withstanding any other corrective actions" which indicates that early action is considered corrective action.

Finally, Petitioner claims that the Agency has ignored "basic UST closure requirements found at 40 C.F.R. 280.71(b)" which states:

> To permanently close a tank, owners and operators must empty and clean it by removing all liquids and accumulated sludges. All tanks taken out of service permanently must also be either removed from the ground or filled with an inert solid material. (Pet. Resp. at 13-14.)

Petitioner states, as a result of the federal closure requirements, that "all USTs taken out of service must be physically removed from the ground or, in limited circumstances, abandoned in place". (Pet. Resp. at 17.) Petitioner concludes that "the Agency's statement that tank and limited fill removal activities are not mandated as part of early action is an incorrect statement of law" and accordingly the Board should deny the Agency's motion for summary judgment. (Pet. Resp. at 17.)

In response to the Agency's second argument that Petitioner is not eligible for reimbursement as early action activities because it failed to request reimbursement prior to conducting physical soil classification and groundwater monitoring investigation activities, the Petitioner claims that the Agency has carefully avoided rearguing its first basis for denying reimbursement due to the Board's rulings in *Kalo* and *Kathe*, and that the Agency's position is not supported by the plain language of the Act and the Board's interpretation. (Pet. Resp. at 12 and 17.)

Citing *Kalo* and *Kathe*, the Petitioner asserts that the Board has interpreted Section 57.6(b) to be permissive in that an owner or operator may remove a tank system before classifying the site but is not required to do so. (Pet. Resp. at 12-13.) Petitioner cites to the language of the Board's order in *Kalo* which states "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" and concludes that "the Board has twice addressed this issue and twice held that the timing of early action activities is irrelevant in determining whether reimbursement from the Fund is available." (Pet. Resp. at 13.)

Additionally, Petitioner argues that Section 57.7(a) of the Act merely provides that a request for payment must be submitted if early action activities have already been performed and is not a prohibition to when early action is performed. (Pet. Resp. at 18.) Petitioner asserts that since it did not perform early action prior to conducting the soil and groundwater investigation, it is not obligated to seek reimbursement prior to conducting the soil and

groundwater investigation. Petitioner also states that the position is supported by the Board's orders in *Kalo* and *Kathe*. (Pet. Resp. at 18.) Furthermore, Petitioner maintains that it "had requested payment for 'eligible early action costs' prior to issuing its initial Site Classification Work Plan" when it submitted a revised Corrective Action Plan on October 14, 1993. (Pet. Resp. at 19.)

Finally, Petitioner responds to the Agency's last argument, that the early action activities were not timely performed, by stating that the Agency "suggests that the *Kelly-Williamson* decision requires that early action activities in *all cases* must be performed prior to the submittal of the 20 and 45 Day Reports to the Agency." (Pet. Resp. at 19.) Petitioner claims that the "Agency not only misstates the facts of this case, but also misinterprets and misapplies the Board's decision in *Kelly-Williamson Company v. Illinois Environmental Protection Agency*, PCB -116, (Opinion and Order dated November 16, 1995)." (Pet. Resp. at 19.) The Petitioner asserts that "the facts in *Kelly-Williamson* are unique and are not at all similar to the facts of the instant case." (Pet. Resp. at 19.) The Petitioner states that in this case it never informed the Agency that early actions were completed and asserts that it continuously apprised the Agency of further Site activities which is unlike the situation in *Kelly-Williamson*. (Pet. Resp. at 19-20.)

The Petitioner states that "the Board in *Kelley-Williamson* noted, in part, that the Agency had asserted that the 45 Day Report is a requirement of early action 'intended to inform the Agency of the *status* of activities at a given site'" and that "the Board went on to find that 'the 45 Day Reports as an affirmative statement by the owner/operator that required early action activities have been completed'". (Pet. Resp. at 20.) Petitioner asserts that the Board "held that it was not the filing of the 45 Day Report itself that terminated the ability to proceed with early action activities" but "it was the contents of the 45 Day Report in informing the Agency of what additional early activities needed to be undertaken that controlled when early action activities would be considered complete." (Pet. Resp. at 21-22.)

Petitioner claims that, unlike the owner or operator in *Kelly-Williamson*, it continuously informed the Agency of intended actions at the Site, and that it was the Agency that continuously delayed the Petitioner's early actions. (Pet. Resp. at 22.) Petitioner argues that the Agency delayed corrective action, including early action, because "under the old UST rules, it was the Agency, not the Petitioner, that controlled the time frame under which a corrective action would be undertaken" and "the Petitioner could not have legally undertaken any corrective action (including early action) at the Site prior to February 20, 1994, because the Agency had failed to approve the Petitioner's proposed corrective action plans." (Pet. Resp. at 23.) Petitioner states that it was unable to opt into new Title XVI until February 20, 1994 "due to *ad hoc* requirements." (Pet. Resp. at 23.) Petitioner states that it opted into the new Title XVI on February 20, 1994 and that a corrective action plan was needed to determine the Site classification. (Pet. Resp. at 23.) Petitioner further states that "despite several attempts since then, however, the Petitioner has been unable to obtain a site classification from the Agency." (Pet. Resp. at 23.)

Petitioner concludes its response to the Agency motion for summary judgment by stating that new arguments raised by the Agency should be rejected as well as any argument that contaminated soil can remain on-site. (Pet. Resp. at 24.) Finally, Petitioner argues "[t]he Agency's attempt to place a higher priority upon 'preserving the Fund,' than upon remediating UST releases, flies in the face of unequivocal statutory mandates, and must not be allowed to stand." (Pet. Resp. at 24.)

Petitioner's Cross-Motion for Summary Judgment

A. Early actions pursuant to Section 57.6(b) of Act are reimbursable even if undertaken after the submittal of plans to the Agency

In response to the Agency's first denial point, Petitioner argues, as it did in its response to the Agency's motion for summary judgment, that an owner or operator may remove a tank system before classifying the site, but is not required to do so. (Pet. SJ at 14.) The Petitioner argues that the Board must follow the established precedent of *Kalo* and *Kathe* which is on point with the fact situation here. (Pet. SJ at 14-16.) The Board will not reiterate a summary of those arguments again, as they are outlined in detail on page 14 of this opinion.

B. Tank removal activities and limited contaminated fill material activities are necessary to comply with the provisions of Sections 57.6 and 57.7 of the Act.

Again, as Petitioner argued in its response to the Agency's motion for summary judgment, it believes that the Agency's denial points three and four are inadequate as a matter of law because the owner or operator is federally-mandated to remove the tank whether the site is classified as High Priority, Low Priority or No Further Action and that early action is corrective action. (Pet. SJ at 16.) Petitioner proceeds to restate its argument contained in its response. For a discussion of the Petitioner's arguments, please refer to pages 13 through 14 of this opinion.

C. Petitioner was not required to submit a budget for early action costs.

Petitioner asserts that the Agency's denial reason, that Petitioner was required to submit a budget for early action costs, is without any statutory or regulatory basis. (Pet. SJ at 19.) Petitioner claims that the cited sections of the Act and Board regulations by the Agency in its stated denial reason do not apply to early actions. (Pet. SJ at 19.) Petitioner asserts that "Section 57.7(a)(2) and 35 IAC 732.305(b)(2) apply to budgets for site classifications" and "Section 57.7(c)(1)(B) applies to budgets for 'corrective action beyond that required by Section 57.6 [early action] and subsection (a) of 57.7 [site classification]'". (Pet. SJ at 19.) Additionally, Petitioner contends that Section 57.7(c)(2) and 35 Ill. Adm. Code 732.406(c) "applies to budgets for groundwater monitoring" and 35 Ill. Adm. Code 732.405(b) "applies to budgets for those corrective action activities for 'Low' and 'High' priority site corrective actions." (Pet. SJ at 19.)

The Petitioner concludes "that there is no requirement to submit a budget for early action costs" and that "[i]n fact, the regulations clearly provide that an owner or operator '*may* submit a site classification budget plan that includes an itemized accounting of the activities and costs of early action for review and approval prior to the submittal of an application for payment,' 35 IAC 732.305(b)(2) (emphasis added), but is not required to do so." (Pet. SJ at 19-20.)

D. Section 57.7(a) of this Act does not limit Petitioner's reimbursement for early action activities taken after the completion of physical soil classification and groundwater investigation activities.

Petitioner states that the Agency's "second basis" for denying reimbursement is "unsupported by the Act's plain language as interpreted by the Board." (Pet. SJ at 20.) Petitioner asserts that Section 57.7(a) of the Act "does not limit one's ability to seek reimbursement for early action costs performed after a site classification plan has been submitted" as claimed by the Agency. (Pet. SJ at 20.) Instead, the Petitioner contends that Section 57.7(a) of the Act "merely provides that a request for payment must be submitted if early action activities have already been performed." (Pet. SJ at 20.) The Petitioner states that Section 57.6(b) of the Act allows owners and operators to perform early action either before or after submittal of plans and that Section 57.7(a)(1)(b) "contemplates a situation in which early actions have taken place prior to submittal of a site classification plan." (Pet SJ at 21.) Petitioner argues that "since it did not conduct early action activities prior to conducting the soil and groundwater investigation, it could not know how the Site would ultimately be classified for corrective action purposes" and that "the obligation to seek payment depends upon when the early actions are performed, not the other way around." (Pet. SJ at 21.)

Additionally, Petitioner maintains that it "had requested payment of 'eligible early action costs' prior to issuing its initial Site Classification Work Plan on March 9, 1994" when it submitted its "revised Corrective Action Plan on October 14, 1993" because the revised Corrective Action Plan contained a budget for the proposed early action activities. (Pet. SJ at 21.) Petitioner argues that "[t]his is tantamount to a request for payment of 'eligible early action costs' under Section 57.7(c)(3) of the Act." (Pet. SJ at 21.)

Finally, Petitioner states that "the Agency's position contradicts the plain meaning of Section 57.7(c)(3) of the Act. (Pet. SJ at 21.) Petitioner asserts that "the plain language of Section 57.7(c)(3) indicates that a site classified as 'No Further Action' requires at a minimum, two things: (1) remediation required under Section 57.6 of the Act (remediation which is referred to under Section 57.6 as 'early action'); and (2) a 'physical soil classification and groundwater investigation' under Section 57.7(a)." (Pet. SJ at 22.) Petitioner states that the Board in *Kelly-Williamson* determined that Section 57.6 of the Act requires an owner or operator to report the release, remove all sources of contamination including tanks and piping and mitigate potential fire, explosion, or vapor hazards. (Pet. SJ at 22.) Petitioner concludes that "the Agency's position that the unilateral certification of a site by a certified engineer makes all subsequent early actions excessive *per se* is not only an incorrect reading of the law,

but also disingenuous in that to this date the Agency has rejected the classification of the Petitioner's site." (Pet. SJ at 22.)

E. Petitioner Submitted an Illinois Licensed Professional Engineer Certification Pursuant to Section 57.8(a)(6) of this Act.

Petitioner argues that the Agency's first denial point that the application failed to submit a certification by a professional licensed engineer as required by Section 57.8(a)(6) "raises form over substance." (Pet. SJ at 23.) Petitioner states that the professional engineer involved completed all necessary course work, examinations and that his license was never revoked. (Pet. SJ at 23-24.) Petitioner states that the engineer "has been a licensed Professional Engineer ("P.E.") in Illinois since 1991." Pet. SJ at 23.) Petitioner further states that on November 30, 1994, the license expired due to inadvertent failure to pay the licensing fee and a renewal application was filed but the license was not renewed until May 23, 1995. (Pet. SJ at 23.) Petitioner states that when the application was submitted to the Agency on June 12, 1995, the application was certified by a professional licensed engineer. (Pet. SJ at 23-24.).

F. No Issue of Material Facts.

Petitioner states that the Agency does not raise any specific reasons why Petitioner's activities have violated Section 57.5(a) of the Act and the Agency admits there are no factual disputes. (Pet. SJ at 24.) Petitioner asserts that "[u]nder the Board's ruling in *Kalo* and *Kathe*, the only relevant inquiry is whether any activities at issue exceeded the scope of early action activities required by the Act (e.g., removing in excess of four feet of soil from the outside dimensions of the UST.)." (Pet. SJ at 24.) The Petitioner argues that the Agency instead denies reimbursement based on incorrect statutory interpretations of the Act to deny reimbursement and therefore as a matter of law it is entitled to summary judgment.[7]

G. The Agency improperly denied reimbursement of $2,026.73.

The Petitioner argues that the Agency improperly denied reimbursement for the above costs for failing to state specific reasons for the denial. (Pet. SJ at 25-26.)[8] Petitioner asserts that "[t]he Agency's sixth basis of denial was that $2,026.73 was being deducted for the 'reasons above', and for an unspecified math error and alleged lack of documentation does not meet the regulatory disclosure standard." (Pet. SJ at 26.)

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[7] In addition to this argument Petitioner reargues that the Agency cannot raise new denial points at this time. This is the same argument made by the Petitioner in its response to the Agency's motion for summary judgment. We will not restate those arguments. See supra, page 12, for a discussion of those arguments.

[8] The Agency's denial reason is stated in its entirety at supra, page 8 paragraph 8.

H. Policy Considerations.

Petitioner presents several policy reasons for why its motion for summary judgment should be granted. (Pet. SJ at 26-30.) The main focus of the Petitioner's policy arguments pertain to how the UST's program would function if the Agency position was affirmed by the Board. Furthermore, some of the arguments question the Agency's course of action pursuant to what Petitioner believes is sound engineering judgment. (Pet. SJ 27-29.) The arguments made by Petitioner are not in direct relation to any basis given by the Agency for denial of reimbursement.

Agency's Response

A. Petitioner's cross-motion for summary judgment should be denied because it is dependent upon facts not within the administrative record or supported by affidavit.

The Agency contends that petitioner never provided the Agency with information as to why the USTs and surrounding contaminated fill material had to be removed prior to its October 5, 1995 decision in light of the August 18, 1994 classification and certification of the Site as a No Further Action site. (Ag. Resp. at 4.) The Agency states that "Petitioner skirts asking or answering any of these questions by declaring both the removal of the USTs and surrounding fill material are required by law." (Ag. Resp. at 4.) The Agency asserts that the Petitioner has not cited any authority that requires the removal of the USTs or the surrounding fill material. (Ag. Resp. at 4.) The Agency claims that "[i]n fact any level of review or scrutiny of the authority cited by the Petitioner for these alleged requirements illustrates that these activities are not mandatory, but discretionary and at most conditioned upon certain activities, circumstances or events for which Petitioner provides no support within the record or accompanying affidavit to establish as fact as this Site." (Ag. Resp. at 4.)

The Agency states that the Board's procedural rules require all facts asserted by Petitioner which are not in the record to be supported by affidavit, that the Board has held the initial burden to be on the Petitioner and that the Board will only consider evidence before the Agency at the time it makes its reimbursement decision when reviewing that determination.[9] (Ag. Resp. at 5.) The Agency argues "[t]o allow the petitioner to invent alternative bases or introduce new evidence never provided to the Agency prior to its final determination would render the Agency review process meaningless by allowing such information to be withheld until the party in possession of that document deems it necessary and/or relevant" which would force the Agency to defend its final determinations on an "ad hoc" basis. (Ag. Resp. at 5-6.) To conclude the Agency states that the Petitioner does not cite to the record in this matter or a supporting affidavit to establish the truth for the assertions or assumptions that the USTs and

[9] The Agency cites to *Clarendon Hills Bridal Center v. IEPA*, (February 16, 1995), PCB 93-55, appeal pending, where the Board found that Petitioner may not supplement the record before the Board with new information because the Petitioner should have know that such information was necessary for the Agency to make a determination and should have been included in the reimbursement application to the Agency.

surrounding fill material was required to be removed. (Ag. Resp. at 6.) The Agency asserts that they are "nothing more than assumptions, which are clearly contradicted" by the Petitioner's own site classification and certification that the Site was a No Further Action site. (Ag. Resp. at 6.)

B. Petitioner's cross-motion should be denied as a matter of law.

The Agency argues that the Petitioner's cross-motion should be denied as a matter of law because the activities for which the Petitioner seeks reimbursement exceed the minimum requirements necessary to comply with the Act and cannot be reimbursed as early action activities. (Ag. Resp. at 7.) The Agency states that the Petitioner "in a desperate attempt to obtain reimbursement for alleged early action activities, which based upon the Petitioner's own submittal were not necessary to be performed and a portion of which were not even associated with eligible USTs, the Petitioner tries to reconcile its conduct at the Site with the requirements of Title XVI of the Act by a self preserving interpretation of the applicable requirements under the Act, which is so vain that if adopted will undermine the very concept of early action and reek havoc on the regulations adopted pursuant to Title XVI of the Act." (Ag. Resp. at 7.)

As stated by the Agency in its motion for summary judgment, it again states that in order to be eligible for reimbursement from the UST Fund, costs must be reasonable and related to corrective action and that the burden of proving that challenged costs are reasonable and related to corrective action is on the owner or operator. (Ag. Resp at 8.) The Agency asserts that "the petitioner admits that its request for reimbursement includes costs for activities associated with ineligible USTs at the site." (Ag. Resp. at 8.) The Agency claims that "[b]oth in its Petition for Appeal and its Cross-Motion the Petitioner acknowledges and admits that the activities for which it is seeking reimbursement for in its June 12, 1995 request for reimbursement include costs for activities associated with ineligible USTs at the Site" citing to certain pages of the Petitioner's filings. (Ag. Resp at 8-9.)

The Agency argues that Petitioner is attempting "to circumvent the entire Agency review process by now modifying the amount of its June 12, 1995 reimbursement request from $45,242.01 to $41,706.38 through an apportionment of those costs." The Agency states that it denied "the entire amount requested by the Petitioner in its June 12, 1995 reimbursement request and specifically identified the inclusion of costs associated with ineligible USTs at the Site and the Agency's inability to accurately apportion those costs as one of eight separate basis for its denial of the Petitioner's June 12, 1995 reimbursement request" and now that Petitioner is requesting the Board to accept such apportionment based on information the petitioner never provided to the Agency. (Ag. Resp. at 9.) The Agency argues that this "constitutes a new submittal of new information never before submitted to or reviewed by the Agency" and would render the Agency's review meaningless and would "shift the burden of proving the reimburseability of challenged costs from the party seeking reimbursement to the Agency by requiring the Agency to consider and evaluate that information and evidence for the first time ad hoc in a proceeding before the Board and consequently require the Board to conduct the initial review of that new evidence and information." (Ag. Resp. at 10.)

Again as the Agency argued in its motion for summary judgment, it also argues in its response that the Site was classified as a No Further Action site and certified as such by a licensed professional engineer on August 18, 1994, therefore, Petitioner's activities after such classification and certification exceed the minimum requirements of the Act. (Ag. Resp. at 11-14.) (See supra page 10-11 for a full discussion of the Agency's arguments.) In addition to those arguments, the Agency notes in a footnote that the Board stated in *Kalo* and *Kathe* "seeking reimbursement from the UST Fund is limited by Section 57.5(a), which provides that costs will not be reimbursed if they exceed 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." (Ag. Resp at 13.)

The final response presented by the Agency is that the activities for which the Petitioner seeks reimbursement cannot be reimbursed as early action activities because its reimbursement request for its alleged early action activities was submitted to the Agency after Petitioner conducted physical soil classification and groundwater investigation activities required by statute or regulation and the activities do not constitute early action. (Ag. Resp. at 14-20.) The Agency's response argues the same facts and law as it argued in its motion for summary judgment which are discussed on supra page 12-13. In conclusion, the Agency asserts that its October 5, 1995 denial letter or determination satisfied the Act's denial notification requirements because it provides an explanation of how the Act and rules would be violated if reimbursement was granted and statements of specific reasons why the requirements of the Act and regulation may not be met if reimbursement was granted. (Ag. Resp. 20-21.) Finally, the Agency notes that Petitioner admits that when the classification and certification was signed by the engineer, he did not have a license. (Ag. Resp. at 21.) For all of the above reasons, and based upon Petitioner's admissions, the Agency requests that the Board grant the Agency summary judgment as a matter of law and deny Petitioner's cross-motion for summary judgment. (Ag. Resp. at 21.)

DISCUSSION

The regulation of USTs by the states is authorized by the Hazardous and Solid Waste Amendments of 1984 to Subtitle I of the federal Resource Conservation and Recovery Act. States may adopt their own UST programs as long as the standards are "no less stringent" than federal law or regulations promulgated thereto. (RCRA Section 6991 (c)(b)(1) and 6991 (g).) The State legislature in adopting P.A. 88-496, which Governor Edgar signed into law on September 13, 1993, specifically identified five purposes underlying the new law. The Board's opinion and order in R94-2(a) *In the Matter of: Regulation of Petroleum Leaking Underground Storage Tanks 35 Ill. Adm. Code 732* dated August 11, 1994 states:

> "[t]he most significant change from Illinois former UST program is the legislation's infusion of 'risk-based' decision-making into UST site classification and remediation. Instead of requiring excavation of all UST sites until sampling reaches the cleanup objectives of the Agency's guidance document (the LUST Cleanup Manual), the legislature enacted a statutory priority scheme based upon

soil type, groundwater locality, migratory pathways and a variety of other factors. Using these factors, the owner/operator and the Agency can, together, determine the level of cleanup necessary at any given site." (Id. at 3.)

In discussing the operation of the regulations, the Board further explained:

> Directly from the new LUST law, "early action" requires an owner/operator upon confirmation of a release by the OSFM, to perform initial response actions within 24 hours of the release. Those initial response actions include reporting the release to IEMA, taking immediate action to prevent further release of the regulated substance, and identifying and mitigating fire, explosion, and vapor hazards. The owner/operator must then perform initial abatement, measures, including removal of petroleum from the UST system to prevent further release into the environment, visual inspection of releases and prevention of further migration into surrounding soils and groundwater, investigation of migratory pathways and investigation and removal of possible free product. Within 20 days after confirmation of the release, the owner/operator shall submit a report summarizing its initial abatement steps and any resulting information (the "20 day report"). The owner/operators must then continue to assemble information about the site and the nature of the release, and submit that information to the Agency within 45 days of confirmation of a release (the "45 day report"). At sites where "free product" is present, the owner/operator must also submit a free product removal report within 45 days of the confirmation of the release. Prior to the submission of any plans to the Agency, the owner/operator may also remove contaminated fill material (within an area of four feet from the outside dimensions of the tank) and any groundwater in the excavation which exhibits a sheen. An application for reimbursement for early action costs can be submitted after the early action activities. Alternatively, an owner/operator can include its request for reimbursement for early action costs when submitting its corrective action budget plan to the Agency. (Id. at 13-14.)

Subpart B of the Board's regulations found at 35 Ill. Adm. Code Part 732 set forth the requirements under early action. Pursuant to those regulations an owner/operator upon confirmation of a release shall perform the following initial response actions within 24 hours:

1) Report the release to IEMA (e.g., by telephone or electronic mail);

2) Take immediate action to prevent any further release of the regulated substance to the environment; and

3) Identify and mitigate fire, explosion and vapor hazards.

(35 Ill. Adm. Code 732.202(a).)

Additionally, an owner and/or operator shall "upon confirmation of a release of petroleum from a UST system in accordance with regulations promulgated by the OSFM, the owner or operator shall perform the following initial abatement measures:"

1) Remove as much of the petroleum from the UST system as is necessary to prevent further release into the environment;

2) Visually inspect any above ground releases or exposed below ground releases and prevent further migration of the released substance into surrounding soils and groundwater;

3) Continue to monitor and mitigate any additional fire and safety hazards posed by vapors or free product that have migrated from UST excavation zone and entered into subsurface structures (such as sewers or basements);

4) Remedy hazards posed by contaminated soils that are excavated or exposed as a result of release confirmation, site investigation, abatement or corrective action activities. If these remedies include treatment or disposal of soils, the owner or operator shall comply with 35 Ill. Adm. Code 722, 724, 725, and 807 through 815;

5) Measure for the presence of a release where contamination is most likely to be present at the UST site, unless the presence and source of the release have been confirmed in accordance with regulations promulgated by the OSFM. In selecting sample types, sample locations, and measurement methods, the owner or operator shall consider the nature of the stored substance, the type of backfill, depth to groundwater and other factors as appropriate for identifying the presence and source of the release; and

6) Investigate to determine the possible presence of free product, and begin free product removal as soon as practicable and in accordance with Section 732.203 below.

(35 Ill. Adm. Code 732.202)(b).)

The owner or/and operator is also required to report to the Agency the initial abatement steps taken and any information or date collected within 20 days of release. (35 Ill Adm. Code 732.202(c).) Furthermore, within 45 days the owner or/and operator shall submit data collected pursuant to Section 732.202(d). (35 Ill. Adm. Code 732.202(e).) Finally, Section 732.202(f) quotes the statutory language of Section 57.6 of the Act *verbatim*. There is no additional language which would clarify the intent or establish a requirement concerning the removal of USTs and the contaminated fill material.

In discussing the different roles of the State agencies involved, the Board stated the following concerning the Office of the State Fire Marshal (OSFM):

> Beginning with leak detection, the LUST Law gives the OSFM direct responsibility for oversight of activities such as tank removal, abandonment and repair. The OSFM's duties and the requirements for conducting tank removal still key off of RCRA, and its corresponding federal (42 U.S.C. Section 6991I) and state identical-in-substance regulations (35 Ill. Adm. Code Part 731 and 41 Ill. Adm. Code Part 1870). However, the OSFM now has a much greater role in the present UST program than in the previous ones. In particular, the OSFM must provide on-site assistance to the owner/operator for leak confirmation, evaluation and eligibility information. The OSFM is also the state entity responsible for making eligibility and deductibility determinations (access to the fund issues). Further, the OSFM has the responsibility to issue, where appropriate, "Certificates of removal, repair or abandonment" which have the same statutory effect as an Agency "No Further Remediation Letter." (415 ILCS 5/57.5 and 57.9.)

Agency's motion for summary judgment

In response to the Agency's motion for summary judgment Petitioner argues that the Agency raises new denial reasons which were not stated in the Agency's October 5, 1995 denial letter and therefore cannot be argued now. (See supra pages 11-12.) We disagree. The Agency's denial letter states several reasons for why it denied reimbursement. The majority of those reasons state that the activities are neither necessary corrective action nor early action. (See supra pages 5-8.) The Agency's motion for summary judgment raises three arguments as to why its decision should be affirmed as a matter of law: the activities exceed minimum requirements; the activities are not early action because they were conducted after physical soil and groundwater monitoring investigation; and the activities are not early action because they occurred several years after the release. (See supra pages 9-11.) Paragraphs three, four, five, six and eight of the Agency's denial letter correspond to the arguments being made by the Agency in its motion for summary judgment. Therefore, we find that the Agency has not raised new arguments in its motion for summary judgment and those arguments are properly before us.

> The Agency argues that the activities exceed minimum requirements of the Act because they were performed after the Site was classified as No Further Action.

In response to the Agency's first argument, citing to *Kelly-Williamson* and 40 C.F.R 280.71(b), Petitioner claims that once there is a confirmed release, tank and limited contaminated fill material removal are necessary activities under the Act and federal law. (See supra pages 12-13.) We disagree. Any requirement to pull USTs and to remove fill material is dependent on the fact situation particular to that site and reimbursement of any activity is limited by Section 57.5(a) of the Act.

In *Kelley-Williamson*, the Board was applying the UST regulations pursuant to 35 Ill. Adm. Code Part 731 and stated that an owner or operator may receive reimbursement (beyond

the appropriate level), so long as the early action activities are consistent with the minimum standards of the Act. (*Kelley-Williamson* at 5.) Additionally, 40 C.F.R 280.71(b) does not state that all sites with confirmed releases must remove the USTs and contaminated fill material. In fact it states that "[a]ll tanks taken out of service permanently must also be either removed from the ground or filled with inert solid material." (40 C.F.R. 280.71(b).) There is an option as to whether the tanks remain and this option is set forth in the OSFM rules concerning abandonment, repair or removal. (35 Ill. Adm. Code 732.202.) Therefore there is no requirement that USTs be removed from a site once there has been a confirmed release.

As stated above, the removal of USTs is dependent on the facts relating to a particular site. Neither the Act nor the Board's adopted UST regulations require USTs to be removed if there is a confirmed release. Instead, under newly adopted Title XVI, a "risk-based" approach based upon soil type, groundwater locality, migratory pathways and a variety of other factors is used in determining the corrective action necessary for a given site. As set forth in 35 Ill. Adm. Code 732.302, a site may be classified as No Further Action without removal of USTs or backfill material. Furthermore, even if it is determined that tank removal and contaminated fill removal is necessary for the Site, the activities of tank removal and fill material removal are not necessarily early action activities. As Petitioner argued in response to the Agency's motion for summary judgment, Section 57.6(b) does not require tank removal but rather when tank removal may take place.

Although the Board finds that tank and contaminated backfill removal are not always required, we cannot grant the Agency's motion for summary judgment based on this argument because the Agency has rejected the Site Classification of No Further Action and we cannot make a determination as to what corrective action is necessary. Ultimately, based on the facts at the Site, which are not fully developed before us now, a Site Classification and a corresponding Corrective Action Plan may require tank and contaminated fill removal at the Site. Since the Agency rejected the Site Classification, the Board cannot determine what is and what is not necessary corrective action at the Site, and whether the activities for which Petitioner seeks reimbursement exceed the minimum requirements of the Act.

> The Agency argues that the activities are not eligible for reimbursement as early action because Petitioner failed to seek reimbursement and performed the activities prior to conducting physical soil classification and groundwater investigation activities.

In response to the Agency's second argument, Petitioner claims that the Agency has carefully avoided rearguing its first basis for denying reimbursement due to the Board's rulings in *Kalo* and *Kathe*, and that the Agency's position is not supported by the plain language of the Act and the Board's interpretation. (See supra pages 13-14.) We would agree with the Petitioner, had the Agency argued that it is denying reimbursement because plans were submitted prior to the claimed early action activities.

Unlike the situations before the Board in *Kalo* and *Kathe*, the Agency is arguing that the Petitioner performed site classification activities prior to submitting an application for reimbursement and before conducting the claimed early action activities. Petitioner is correct

in stating that the Board has interpreted Section 57.6(b) of the Act to be permissive, in that an owner or operator may remove a tank system before classifying the site but is not required to do so. However, Petitioner is incorrect in that the Board has interpreted Section 57.6(b) of the Act to mean that an owner or operator may conduct physical soil classification and groundwater investigation prior to seeking reimbursement and performing early action activities. As stated by the Board in adopting 35 Ill. Adm. Code Part 732 "[a]fter completion of early action activities, the owner/operator proceeds to evaluation and classification of the site." (*R94-2(A)*, supra, at 15.) While it is true that the Board found in *Kalo* and *Kathe* that the owner or operator may conduct early action activities after the submittal of a site classification plan, an owner or operator may not conduct activities such as tank and contaminated fill removal subsequent to physical soil classification and groundwater investigation and seek reimbursement for those activities as early action.

Section 57.7 of the Act requires Petitioner to submit to the Agency for the Agency's approval or modification a physical soil classification and groundwater investigation plan prior to conducting any site classification activities. Additionally, Section 57.7 of the Act states that prior to conducting any site classification activities a request for payment of costs associated with eligible early action costs as provided in Section 57.6(b) of the Act may be submitted. The Board's regulations state that as an alternative to submitting a request for reimbursement prior to submitting any plans for site classification, an owner or operator may submit early action costs as part of the site classification budget plan. Therefore, activities associated with early action have to be conducted prior to physical soil classification and groundwater investigation activities. We disagree with Petitioner's argument concerning this issue that the obligation to seek payment depends upon when the early actions take place. (See supra page 14.) Subsection (b) of Section 57.7 of the Act is not dependent on Section 57.6(b) of the Act and the correct interpretation of Section 57.7 of the Act, and the rest of Title XVI, is that early action must be performed prior to physical soil classification and groundwater investigation activities. An owner and operator cannot perform physical soil classification and groundwater investigation activities, determine the sites classification, and then perform early action activities.

Once a site has been classified, or in this case, attempts to classify a site, any further corrective action must be conducted pursuant to that site's classification and corresponding corrective action plan if required. Early action activities should be done as initial abatement of possible environmental hazards or risk to human health. Under Title XVI the State is implementing a "risk-based" approach for UST remediation and to automatically reimburse for tank and fill removal after site classification activities would undercut that intent. Therefore we agree with the Agency in that activities conducted after physical soil classification and groundwater investigation activities cannot be early action activities.

The Agency argues that activities do not constitute early action due to the passage of time.

The Agency finally argues that Petitioner cannot claim that activities conducted nearly two years after the confirmation of release are early action. We agree that these activities

cannot be early action in this case, however, not because of the mere passage of time. We agree with the Agency's interpretation that early action is to be completed early in the process, as initial response, or to remediate immediate danger to the environment and health of the public. In this case, however, given that Petitioner opted into the new Title XVI program on February 29, 1994, which was two years after the confirmed release, it would have been impossible to conduct early action defined by initial response or remediation of immediate danger pursuant to Title XVI. The passage of time is important and early action activities should be conducted prior to classification activities and as initial response; however, since Title XVI allowed certain owners or operators to opt under Title XVI after proceeding under the old program, with certain limitation, the passage of time cannot dictate what is and is not early action in these situations.

CONCLUSION

We find that Petitioner's activities are not early action because they occurred after the Petitioner conducted physical soil classification and groundwater investigation activities as discussed above. Furthermore, Petitioner filed with the Agency a site classification pursuant to 35 Ill. Adm. Code 732.302, indicating that it was a No Further Action site prior to the actual tank removal and contaminated fill removal which was rejected by the Agency. The activities for which Petitioner is seeking reimbursement as early action activities are not early action activities in this case.

The Petitioner is seeking reimbursement for activities which may be reimbursable corrective action; however, they are not activities for which Petitioner may receive reimbursement for as early action pursuant to Sections 57.6 and 57.7 of the Act. On August 18, 1994 Petitioner filed a Site Classification Completion Report classifying the site as No Further action and stating that it would remove the UST and contaminated backfill. On December 20, 1994 the Agency in its response denied the site classification and rejected a proposal to remove the USTs and the contaminated fill material. Subsequently the Petitioner removed the USTs and the contaminated fill material. Early action activities should occur early in the process and prior to site classification activities at the site. Early action activities are designed as initial response to the confirmation of a release. (See supra page 22.) To interpret the Act and the Board regulations as to allowing early action activities to take place after physical soil classification and groundwater investigation activities would render the "initial response" component of early action and the intent of a "risk-based" remediation approach meaningless.

Owners or operators of a UST site should conduct early action activities prior to any other activities at the site and preferably prior to filing the 45 Day Report. Although the Board has in *Kalo* and *Kathe* allowed Petitioner to perform early action activities after Petitioner has filed a physical soil and groundwater investigation plan, these rulings provide no precedent as to whether the Petitioner can claim as early action activities conducted after performing the activities in the plan for the purposes of reimbursement. While the Board prefers that early action be performed prior to the submittal of plans, the Board realizes that there may be circumstances beyond an owner or operator control which delays such activities.

Nevertheless, early action activities must be performed prior to conducting site classification at the site.

Activities conducted after site classification activities should be done in accordance with a corrective action plan based on, that site's particular classification. As noted above, the most significant change from Illinois former UST program is the "risk-based" approach to decision-making in UST site classification and remediation. Under Title XVI, instead of requiring excavation at UST sites until sampling reaches the cleanup objectives a priority scheme based upon soil type, groundwater locality, migratory pathways and a variety of other factors are used by the owner/operator and the Agency, together, to determine the level of cleanup necessary at any given site. In this case, reimbursement for the claimed early action activities may be sought instead as corrective action activities pursuant to an approved site classification, plan and budget.

For these reasons, as a matter of law, the Agency is entitled to summary judgment. The Agency's denial of Petitioner's request for reimbursement for early action activities is affirmed. Since the Board is granting the Agency's motion for summary judgment, for the same reasoning we deny Petitioner's cross-motion for summary judgment.

This opinion constitutes the Board's findings of fact and conclusions of law.

ORDER

For the reasons stated above, the Board grants the Agency's motion for summary judgment and denies Petitioner's cross-motion for summary judgment. Therefore the Board affirms the Agency's denial of the Petitioner's June 12, 1995 request for reimbursement for tank and contaminated soil removal as being early action and closes the docket in this matter.

IT IS SO ORDERED.

Section 41 of the Environmental Protection Act (415 ILCS 5/41 (1994)) provides for the appeal of final Board orders within 35 days of the date of service of this order. The Rules of the Supreme Court of Illinois establish filing requirements. (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 _____ day of _____, 1996, by a vote of _____.

_____
Dorothy M. Gunn, Clerk
Illinois Pollution Control Board