

ILLINOIS POLLUTION CONTROL BOARD
December 20, 2018

ILLICO INDEPENDENT OIL CO.,)	
)	
Petitioner,)	
)	
v.)	PCB 17-84
)	(UST Appeal – Land)
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Respondent.)	

PATRICK D. SHAW, LAW OFFICE OF PATRICK D. SHAW, APPEARED ON BEHALF OF PETITIONER, and

MELANIE JARVIS, SPECIAL ASSISTANT ATTORNEY GENERAL, APPEARED ON BEHALF OF RESPONDENT.

OPINION AND ORDER OF THE BOARD (by U. Choe):

Illico Independent Oil Co. (Illico) appeals a May 17, 2017 determination of the Illinois Environmental Protection Agency (Agency) concerning Illico’s underground storage tank (UST) site located at 3712 N. University Street in Peoria, Peoria County. The Agency approved Illico’s corrective action plan and budget but modified them to exclude removal of the USTs and surrounding soil.

On June 21, 2018, the Board adopted an order denying Illico’s motion for summary judgment. The Board found that whether the UST removal was necessary to remediate surrounding soil was a genuine issue of material fact.

For the reasons stated below, the Board finds that Illico has not met its burden of proving that its submittal to the Agency demonstrated compliance with the Environmental Protection Act (Act) and the Board’s regulations. Accordingly, the Board affirms the Agency’s modification of Illico’s corrective action plan and budget.

The Board’s opinion and order begins with the procedural history and factual background of this case. The Board then summarizes Illico’s petition for review as it addresses the modified corrective action plan and budget. After providing legal and statutory background, the Board discusses the issues presented, reaches its conclusion, and issues its order.

PROCEDURAL BACKGROUND

On June 22, 2017, Illico timely filed its petition (Pet.) asking the Board to review the Agency’s determination. On July 6, 2017, the Board accepted the petition for hearing. On July

28, 2017, the Agency filed the record of its determination (R.). Illico filed its motion for summary judgment on April 6, 2018. The Agency filed its response on April 19, 2018. Illico filed its reply and motion for leave to file the reply *instanter* on May 3, 2018. On June 21, 2018, the Board adopted an order granting Illico's motion for leave but denying Illico's motion for summary judgment.

On August 6, 2018, the hearing officer issued an order scheduling a hearing on September 19, 2018, in Springfield. The hearing took place as scheduled, and the Board received the transcript (Tr.) on September 27, 2018. Illico called one witness to testify, Jeff Wienhoff, a licensed professional engineer who works for Green Wave Consulting, but at the time of the Stage 3 Site Investigation worked for Marlin Environmental (Marlin), an environmental consulting firm that contracted with Illico for work at the site. Tr. at 6-7. The Agency called one witness to testify, Trent Benanti, an Agency Environmental Protection Engineer who was the project reviewer for the site. *Id.* at 36-37.

No public comment on this case was filed with the Board. On October 10, 2018, Illico filed its opening brief (Pet. Br.). On October 24, 2018, the Agency filed its response brief (Agency Br.). On October 31, 2018, Illico filed its reply brief (Pet. Reply Br.).

PRELIMINARY MATTER

Within its opening brief, Illico includes a motion to strike IEPA's Hearing Exhibit 2. Pet. Brief at 8. During the hearing, the Agency offered, as an exhibit, a Site Assessment Report (SAR), which contained data regarding confirmation samples taken from the walls of the tank pit after the USTs were removed. Tr. at 49-50. The SAR was submitted to the Office of the State Fire Marshal (OSFM) by Mr. Wienhoff on March 1, 2016, but was not submitted in the corrective action plan (CAP) that is currently under appeal. Tr. at 68-69. The purpose of a SAR is to compare contaminant concentrations in soil samples taken after tank removal with the site's remediation objectives to determine whether those objectives were met. Tr. at 58, 68.

Mr. Benanti testified that he did not use the SAR when reviewing the CAP and did not need the information to make his decision. Tr. at 58. The Agency attempted to impeach Mr. Wienhoff regarding whether he collected confirmation samples after removing the tanks. Tr. at 69-70. Mr. Wienhoff testified that he collected samples from the walls of the tank pit but did not take confirmation samples of the soil that was taken to the landfill. *Id.* at 30.

The Board finds that the Agency offered the exhibit as an attempt to impeach Illico's witness, and that the hearing officer admitted the exhibit on this basis. Tr. at 65-66. The exhibit was not admitted as evidence of any fact. Thus, the Board does not consider the SAR as factual evidence. Therefore, the Board upholds the hearing officer's ruling and denies Illico's motion to strike Exhibit 2.

FACTUAL BACKGROUND

The Site and USTs

The site is an active service station located at 3712 N. University Street in Peoria, Peoria County, at the northeast corner of the intersection of North University Street and West War Memorial Drive. R. at 598. The site has been assigned Agency identification number LPC 1430655263. R. at 2. Before they were removed, the site included five USTs, three 12,000-gallon gasoline tanks, one 12,000-gallon diesel tank, and one 6,000-gallon kerosene tank. R. at 3-4.

Release at Site

On December 3, 1992, the Illinois Department of Transportation reported a release of petroleum at the site. R. at 1. The release was detected during road work. *Id.* The Illinois Emergency Management Agency assigned incident number 923441 to the release. *Id.* On March 8, 1993, Illico submitted a 45-day report to the Agency. R. at 2. Within the 45-day report, Illico identified the cause of release for each of the five USTs as “spills and overfills,” and stated that each of the five USTs and associated piping tested tight. R. at 3-4, 6.

Ownership

After the initial reporting, the ownership of the site transferred from Illico to Clark Retail Enterprises, Inc. R. at 13. Ownership then transitioned to The Premcor Refining Group Inc. (Premcor). R. at 128. On July 24, 2015, Illico became responsible for remediation at the site as part of a settlement involving multiple properties. R. at 10.

Reports and Plans

On October 2, 2015, Premcor submitted a Stage 2 Site Investigation Results Report and attached actual costs budget, which was prepared by its consultant, ERS of Illinois, Inc. R. at 11. The Stage 2 report stated that Premcor would have no further involvement with the site, and that Illico would become the responsible party. *Id.* at 19. On February 1, 2016, the Agency approved the Stage 2 actual costs budget. *Id.* at 438.

On October 6, 2015, Illico, through Marlin, submitted a Stage 3 Site Investigation Plan and Budget. R. at 129. Illico submitted the Site Investigation Completion Report on December 14, 2015. *Id.* at 238-421. Illico’s site investigation found petroleum-contaminated soils. On February 1, 2016, the Agency approved the Stage 3 plan with one modification. *Id.* at 443-46. The modification required Illico to define the extent of the soil contamination north of soil boring SB-30 and monitoring well MW-14, as the Agency determined that specified analytical results reported by Premcor’s consultant were insufficient. *Id.* at 445. On August 25, 2016, the Agency approved the Site Investigation Completion Report and actual costs budget for the Stage 3 site investigation. *Id.* at 556. To get approval, Marlin submitted additional information to the Agency by email. *Id.*

Illico submitted a CAP to the Agency on December 14, 2015. R. at 175. The CAP sought to remove the USTs and piping as a means of remediating the site. *Id.* at 177–78. The plan stated that “to access the soils contaminated above [site remediation objectives] and remove the source of the contamination, the UST systems at the site along with the contaminated backfill need[] to be removed.” *Id.* at 179. On December 18, 2015, Mr. Wienhoff, on behalf of Illico, requested that the Agency review, by February 2, 2016, all four of Illico’s submissions: (1) Stage 2 Results and Budget; (2) Stage 3 Plan and Budget; (3) Site Investigation Completion Report; and (4) the Corrective Action Plan and Budget. *Id.* at 422. Mr. Wienhoff stated that the urgency was created by “OSFM issues and ownership issues.” *Id.*

Applicable site-specific Tier 2 remediation objectives were calculated based on the property having a potable well restriction and being restricted to industrial/commercial use.¹ R. at 177-78; *see also* R. at 586, 588, and 591. All off-site contamination would be addressed by a Highway Authority Agreement and access denial. *Id.* at 178.

On January 6, 2016, the OSFM received Illico’s permit request to install new USTs and associated piping at the site. R. at 423-24. The OFSM approved the permit request on January 11, 2016. *Id.* The next day, the OSFM received Illico’s permit request to remove USTs and associated piping at the site. *Id.* at 425. The OSFM approved this request on January 12, 2016. *Id.* Both permits were valid for six months from their respective approval dates. *Id.* at 423-25.

UST Removal

On January 28 and 29, 2016, before the Agency issued its determination on the CAP, Illico removed all five USTs. R. 561, 617. During the UST removal, an OSFM representative observed petroleum contamination around the USTs and associated piping. *Id.* at 561. At the urging of the OSFM representative, Illico’s consultant reported the release. *Id.* The release was assigned Incident # 2016-0095 and was determined to be a re-reporting. *Id.*

During the excavation, soil confirmation samples were collected at 20-foot intervals of the tank pit’s walls, to be compared to the calculated Tier 2 soil remediation objectives. R. 589-90. Also, according to Illico’s second CAP, residual “highly contaminated groundwater and groundwater exhibiting a sheen encountered within the excavation cavity was recovered utilizing a vacuum tanker truck and transported for proper disposal” *Id.* at 589.

Agency Denial of December 14, 2015 Corrective Action Plan

On November 29, 2016, the Agency rejected, among other things, the part of the December 14, 2015 CAP and budget that sought to remove the tanks. The Agency stated that the costs for UST removal exceed “the minimum requirements necessary to comply with the Act.” R. 578. Specifically, the Agency stated that the soil sampling locations provided by Illico, which showed contamination that exceeded site remediation objectives, were not in a location that justified UST removal. *Id.*

¹ *See* 35 Ill. Adm. Code 742 (Tiered Approach to Corrective Action Objectives, better known as “TACO”).

Illico's January 16, 2017 Corrective Action Plan, and Agency Denial

On January 16, 2017, Illico, through Green Wave Consulting, LLC, submitted a revised CAP and budget, which attempted to further justify tank removal as part of the remediation. R. 584–628. The revised plan differed from the initial one in that it responded to Agency concerns in the November 29, 2016 denial, and described the corrective action that took place. *Id.* The revised plan includes a site map depicting soil borings and monitoring wells used to detect contamination. R. at 598. The site map depicts three areas Illico planned to remediate, the orange zone, blue zone, and green zone. *Id.* The orange zone is where all five USTs are located; the blue zone is directly west of the orange zone; and the green zone is north of the orange zone where the fuel pumps are located. *Id.*

SB-15, SB-17, and SB-31 were the only borings from which soil samples were collected that tested above Tier 2 remediation objectives. R. at 600. SB-17 and SB-31 are in the blue zone, while SB-15 is in the green zone. R. at 598. Soil samples were tested for benzene, toluene, ethylbenzene, and total xylenes (BTEX), as well as polynuclear aromatic hydrocarbons (PNAs), including naphthalene. R. at 15, 51, 450. Remediation objectives included 31,400 parts per billion (ppb) for benzene, 1,607,000 ppb for toluene, 1,009,000 ppb for ethylbenzene, 600,000 for total xylenes, and 11,000 for naphthalene. R. at 600, 636. SB-15 tested above the site remediation objective for benzene. SB-17 tested above the site remediation objective for naphthalene. SB-31 tested above the site remediation objectives for total xylenes and naphthalene. R. at 590, 600.

For benzene, toluene, ethylbenzene, and total xylenes, SB-17 had the following concentrations, respectively: less than 1,200 ppb; less than Tier 1 remediation objectives; 130,000 ppb; and 574,000 ppb. R. 147, 600. SB-31 had concentrations of 16,800 ppb benzene, 27,100 ppb toluene, 243,000 ppb ethylbenzene, and 1,190,000 ppb total xylenes. R. 600. SB-15 had concentrations of 41,800 ppb benzene, 305,000 ppb toluene, 103,000 ppb ethylbenzene, and 568,000 ppb total xylenes. *Id.* SB-17 had a naphthalene concentration of 45,300 parts per billion (ppb); SB-31 had a naphthalene concentration of 20,700 ppb; and SB-15 had a naphthalene concentration of 5,340 ppb. R. 600.

Illico's second CAP listed SB-4/MW-4 as a sample location with contaminant concentrations exceeding Tier 2 remediation objectives. R. at 589-90. The SB-4/MW-4 results were from testing conducted in 1999, and the Agency and Premcor agreed not to consider the results when evaluating subsurface site conditions. R. at 600; *see also* R. at 13-14, 474-75. The other primary concern addressed by Illico in the second CAP is whether SB-15 in fact tested above Tier 2 objectives. R. at 589-90. The Agency was concerned about whether SB-15 contamination results would remain above Tier 2 if both mass limit and non-mass limit calculations were provided. *Id.* However, SB-15 remained above Tier 2 limits when both calculation methods were considered. *Id.*

The Agency issued a final determination on May 17, 2017, which is the subject of this appeal. *Id.* at 634-48. Modification twelve of Attachment A to the Agency determination letter states that Illico shall not remove the USTs and piping as Illico has not shown that the surrounding soil and backfill contain contaminants at concentrations greater than Tier 2

remediation objectives. *Id.* at 637. The Agency therefore reduced Illico's budget by the amounts requested for work in the orange zone, and for work that the Agency could not separate between the orange zone and the blue or green zone. *Id.* at 640-47. On this basis, the Agency reduced the budget by a total of \$208,048.76. Pet. Br. at 6; R. at 640-47.²

Testimony at Hearing

Mr. Wienhoff, an employee of Green Wave Consulting for the last two and a half years, has been an Illinois licensed professional engineer since 2005. Tr. at 7. He has been working on environmental issues at UST sites for the last 18 years. *Id.*

Mr. Wienhoff testified that the first work completed by Marlin was the Stage 3 Site Investigation Plan. Tr. at 9. A previous consultant had completed the Stage 2 Site Investigation. *Id.* Mr. Wienhoff also testified that the contamination on the site was primarily flowing in a north by northwest direction. *Id.* at 10; *see also* R. at 253. Mr. Wienhoff further testified that the 1992 release was caused by overfilling the fill ports on top of each of the USTs and that this overfill release has been the only reported release at the site. *Id.* at 11-12.

Mr. Wienhoff testified that in the orange zone, which is where the USTs are located, the excavation plans called for removing all five USTs and removing all soils from the surface to 13 feet below grade for landfilling. Tr. at 14. According to Mr. Wienhoff, the purpose of removing the soil was to remove "the worst soils at the source of the contamination of the release." *Id.* Mr. Wienhoff testified that in his professional opinion, removing the USTs was necessary to remove soil that exceeded remediation objectives. *Id.* at 20, 31. On re-cross examination, Mr. Wienhoff added that they did not collect confirmation samples from any of the soil that was taken to the landfill. *Id.* at 69.

On cross-examination, Mr. Wienhoff testified that there was no indication that the USTs were leaking. Tr. at 22. Mr. Wienhoff further testified that there were no soil borings advanced in the orange section, and that in his opinion, the fact that SB-17 and SB-15 tested above Tier 2 remediation objectives was enough to indicate that the orange section would also test above those objectives. *Id.* at 23. Mr. Wienhoff testified that they did not test the soil surrounding the tanks to determine if it was above Tier 2, and that he agreed with the Agency that there is no evidence based on sampling that the material removed from the site was contaminated above Tier 2. *Id.* at 30-31. When asked why the tanks were removed before the Agency approved the CAP, Mr. Wienhoff testified that Illico was in the process of selling the property, the tanks were near the end of their useful life, and Illico needed to replace those tanks prior to the sale being finalized. *Id.* at 26

² The Board recognizes the Agency's objection to Appendix A of Illico's post-hearing brief, and that the Agency failed to object to Appendix A when it was included in Illico's motion for summary judgement. The Board agrees with Illico that Appendix A is not evidence, but a summation of items in the Agency record. Therefore, the Board denies the Agency's request to strike Appendix A.

Mr. Benanti testified that he has been an employee of the Agency since 1998. Tr. at 36. Mr. Benanti has been an Environmental Protection Engineer his entire tenure with the Agency. *Id.* at 37. Mr. Benanti is a licensed professional engineer and has been assigned as the project manager of the Illico site since around September 2011. *Id.* at 37.

Mr. Benanti testified that he personally reviewed the second CAP submitted by Illico. Tr. at 43. He determined that the USTs did not need to be removed to access soil contaminated above Tier 2 remediation objectives. *Id.* Mr. Benanti based this conclusion on the fact that only soil borings SB-15, SB-17, and SB-31 tested above the Tier 2 objectives. *Id.* Mr. Benanti testified that SB-17 is roughly 17 feet from the tank field, while SB-31 is 30 feet from the tank field. *Id.* at 44-45. Mr. Benanti pointed to SB-31 being more contaminated than the soil boring closer to the tank field, SB-17. *Id.* at 43. Mr. Benanti further testified that SB-22, SB-23, and SB-24 (all south of the tank field) tested below Tier 1 remediation objectives, and SB-18 and SB-19, which are between SB-15 and the tank pit, tested below Tier 2. *Id.* Mr. Benanti also testified that SB-15 tested more contaminated than SB-17. *Id.* at 45.

On cross-examination, Mr. Benanti testified that SB-22, SB-23, and SB-24 are not downgradient of the USTs. Tr. at 55. Mr. Benanti further testified that SB-15, SB-17, SB-19, and SB-31 are downgradient of the USTs based on groundwater flow, and SB-25 is “cross-downgradient.” *Id.* Mr. Benanti also testified that he did not have access to the OSFM SAR at the time he decided the CAP should be denied. *Id.* at 57-58. Mr. Benanti testified that the only information he relies on when reviewing a CAP is the information provided by the consultant. *Id.* at 62-63.

STATUTORY AND LEGAL BACKGROUND

Title XVI of the Act and Part 734 of the Board’s Regulations

Title XVI of the Act provides for the administration and oversight of the Leaking Underground Storage Tank Program, which includes the UST Fund and requirements for reimbursement from it. 415 ILCS 5/57-57.18 (2016). Section 57.1(a) of the Act provides that “[a]n owner or operator of an underground storage tank who meets the definition of this Title [XVI] shall be required to conduct tank removal, abandonment and repair, site investigation, and corrective action in accordance with the requirements of the Leaking Underground Storage Tank Program.” 415 ILCS 5/57.1(a) (2016). The Board’s petroleum UST regulations are at 35 Ill. Adm. Code 734. Those rules set forth, among other things, requirements for CAPs and budgets and their review by the Agency.

Section 57.7(c)(3) of the Act addresses the Agency’s review of plans and provides that “the Agency shall determine . . . that the costs associated with the plan are reasonable, will be incurred in the performance of site investigation or corrective action, and will not be used for site investigation or corrective action activities in excess of those required to meet the minimum requirements of this Title [XVI].” 415 ILCS 5/57.7(c)(3) (2016). For purposes of payment from the UST Fund, corrective action activities “required to meet the minimum requirements of this Title [XVI]” generally include using “Tier 2 remediation objectives that are no more stringent than Tier 1 remediation objectives,” “industrial/commercial property remediation objectives,”

and groundwater “institutional controls.” 415 ILCS 5/57.7(c)(3)(A) (2016). Under Section 57.7(e) of the Act, an owner may conduct site investigation or corrective action prior to submittal or approval of the required plan, but doing so risks not receiving repayment from the UST Fund if the plan is denied. 415 ILCS 5/57.7(e) (2016).

Standard of Review and Burden of Proof

The standard of review is whether Illico’s submissions to the Agency demonstrate compliance with the Act and Board regulations. Prime Location Properties, LLC v. IEPA, PCB 09-67, slip op. at 29 (Aug. 20, 2009); *see also* Ted Harrison Oil Co. v. IEPA, PCB 99-127, slip op. at 5 (July 24, 2003). The Board will not consider new information that was not before the Agency prior to its final determination regarding the issues on appeal. Kathe’s Auto Serv. Ctr. v. IEPA, PCB 95-43, slip op. at 14 (May 18, 1995). The Agency’s denial letter frames the issues on appeal. Pulitzer Cmty. Newspapers, Inc. v. IEPA, PCB 90-142 (Dec. 20, 1990).

The Board’s procedural rules provide that, in appeals of final Agency determinations, “[t]he burden of proof shall be on the petitioner. . . .” 35 Ill. Adm. Code 105.112(a). The standard of proof in UST appeals is the “preponderance of the evidence.” Freedom Oil Co. v. IEPA, PCB 03-54, 03-56, 03-105, 03-179, 04-02 (consol.), slip op. at 59 (Feb. 2, 2006). “A proposition is proved by a preponderance of the evidence when it is more probably true than not.” *Id.* (quoting McHenry County Landfill, Inc. v. County Bd. of McHenry County, PCB 85-56, 85-61, 85-62, 85-63, 85-64, 85-65, 85-66 (consol.), slip op. at 3 (Sept. 20, 1985)).

DISCUSSION

Illico argues that the Agency’s determination should be reversed because removing the five USTs was necessary to access and remove soils contaminated above Tier 2 site remediation objectives. Pet. at 3. It is uncontested that Tier 2 soil remediation objectives apply to the site based on industrial/commercial outdoor inhalation, construction worker outdoor inhalation, and soil saturation limits. It is also uncontested that the indicator contaminants include benzene, toluene, ethylbenzene, total xylenes, and naphthalene.

The Board finds below that Illico did not meet its burden of proving that contaminant concentrations in soils surrounding the USTs exceeded these remediation objectives. Therefore, Illico did not prove that removing the USTs was necessary to access and remove such soils. As explained below, because Illico’s submittal to IEPA failed to demonstrate compliance with the requirement that corrective action activities not exceed the minimum requirements of the Act and Board regulations, the Board affirms the Agency’s determination.

Illico’s second CAP proposed removing all “soils defined as impacted in excess of the Tier 2 [remediation objectives]” R. at 586. To access the soils, Illico proposed removing all five USTs. *Id.* The Agency does not dispute that contamination was present surrounding the USTs in the orange zone, but rather that Illico did not show that the contamination was present in concentrations above Tier 2 remediation objectives. Agency Resp. Br. at 29.

At issue are three soil borings with samples containing contaminant concentrations above Tier 2 remediation objectives: SB-17; SB-31; and SB-15. R. at 600; *see also* Tr. at 23. SB-17 is the soil boring closest to the tank field, located approximately 17 feet west of the tank field. Tr. at 44-45; *see also* R. 598, 600. SB-31 is the next closest, located approximately 30 feet west of the tank field. Tr. at 45; *see also* R. 598, 600. SB-15 is located the furthest away and was advanced northwest of the tank field. R. at 598.

SB-17 soil sampling tested above Tier 2 remediation objectives for naphthalene. R. at 600. SB-31 soil sampling tested above Tier 2 objectives for total xylenes and naphthalene. *Id.* SB-15 soil sampling tested above Tier 2 for benzene. *Id.* As between the three soil borings, SB-17 had the highest concentration of naphthalene; SB-31 had the highest concentrations of ethylbenzene and total xylenes; and SB-15 had the highest concentrations of benzene and toluene. As between SB-17 and SB-31, the two soil borings advanced west of the tank field, SB-17 (closest to the tank field) had a higher concentration of naphthalene, but SB-31 had far higher concentrations of benzene, toluene, ethylbenzene, and total xylenes.

Soil samples from three borings (SB-22, SB-23, and SB-24) advanced immediately south of the tank field tested below Tier 1 remediation objectives. Tr. at 23; *see also* R. at 598, 600. Soil samples from three borings advanced north and northwest of the tank field—between the tank field and SB-15—tested above Tier 1 objectives, but below Tier 2 objectives. *See* Tr. at 43; *see also* R. at 598, 600.

Illico admits that there were no soil borings advanced within the orange zone. Illico also admits that the soil removed from the orange zone and sent to a landfill was never tested for contamination. Tr. at 23, 30-31. With no data to determine whether the soil in the orange zone exceeded Tier 2 remediation objectives and, therefore, required remediation, Illico relies on inference. Pet. Br. at 10. Illico's witness and consultant, Mr. Wienhoff, testified that in his professional opinion, it is more likely than not that soil surrounding the tanks exceeded Tier 2 objectives because "material at the source is generally the worst, and as you get further away, it gets better." Tr. at 31. Mr. Wienhoff then infers that because the soil boring (SB-17) closest to and downgradient of the tank field tested above Tier 2 objectives, the area where the contamination was first released would also test above Tier 2 objectives. *Id.* However, when the Agency asked him to confirm that the contamination around the USTs was *not* above Tier 2 objectives, Mr. Wienhoff responded, "[t]hat's not correct. We did not – that's not correct. I don't know that." Tr. at 30.

Mr. Wienhoff testified that he was not involved in choosing the locations for the soil borings because another consultant for a previous owner completed the Stage 2 investigation. Tr. at 18. Mr. Wienhoff further testified that you "typically" would place the soil borings as close to the tank pit as practical while maintaining the safety of the area. *Id.* Mr. Wienhoff added that you do not dig right on top of the tanks; the borings are usually located five to ten feet from the tank field, but it depends on the individual site. *Id.* Illico offers no evidence to prove that placing soil borings closer to or in this tank field was impractical.

If Mr. Wienhoff's inferences were correct, SB-17 should test higher in contamination than SB-31 and SB-15, which is not the case for benzene, toluene, ethylbenzene, or total xylenes.

R. at 600. The Board recognizes Illico's argument that SB-15 might have tested at higher benzene and toluene concentrations due to piping leading from the USTs to the pumping station acting as a migration pathway for contamination. Pet. Br. at 11; *see also* Tr. at 17. However, SB-18 and SB-19 both tested below Tier 2 remediation objectives and both are locating along similar piping extending from the tanks to the pumps. R. at 254, 600.

Illico argues that the Board's regulations "are not violated by removing [USTs] with reported releases," citing Section 734.625(a)(12) of the Board's regulations. However, Section 734.625 lists types of costs that *may* be eligible for repayment from the UST Fund. 35 Ill. Adm. Code 734.625(a)(12). And, Section 734.630 lists types of costs that are *ineligible* for repayment from the UST Fund, including "[c]osts for corrective action activities . . . exceeding the minimum requirements necessary to comply with the Act." 35 Ill. Adm. Code 734.630(o); *see also* 35 Ill. Adm. Code 734.630(tt) ("disposal of soil that does not exceed the applicable remediation objectives"); 35 Ill. Adm. Code 734.630(aaa) ("Costs associated with on-site corrective action to achieve remediation objectives that are more stringent than the Tier 2 remediation objectives").

The Board finds that Illico did not meet its burden of proof. Illico failed to prove that its submittal to the Agency demonstrated that the soil surrounding the USTs was contaminated in concentrations exceeding Tier 2 site remediation objectives. Accordingly, Illico's submittal also failed to demonstrate that the cost of removing the USTs to access and remediate the surrounding soil was necessary to comply with the Act and Board regulations. Therefore, the Board affirms the Agency's determination that Illico's CAP and budget did not demonstrate compliance with the requirement that corrective action activities not exceed the minimum requirements of the Act and Board regulations.

CONCLUSION

For the reasons stated above, the Board finds that Illico's CAP and budget failed to demonstrate compliance with the Act and Board regulations. Accordingly, the Board affirms the Agency's May 17, 2017 determination. Nothing in this order prevents Illico from filing an amended CAP and budget, seeking to differentiate remediation costs incurred in the blue and green zones.

ORDER

The Board affirms the Agency's May 17, 2017 determination to modify Illico's CAP and budget by rejecting the removal of USTs and surrounding orange zone soil and deducting costs based on that rejection.

IT IS SO ORDERED.

Section 41(a) of the Environmental Protection Act provides that final Board orders may be appealed directly to the Illinois Appellate Court within 35 days after the Board serves the order. 415 ILCS 5/41(a) (2016); *see also* 35 Ill. Adm. Code 101.300(d)(2), 101.906, 102.706. Illinois Supreme Court Rule 335 establishes filing requirements that apply when the Illinois

Appellate Court, by statute, directly reviews administrative orders. 172 Ill. 2d R. 335. The Board’s procedural rules provide that motions for the Board to reconsider or modify its final orders may be filed with the Board within 35 days after the order is received. 35 Ill. Adm. Code 101.520; *see also* 35 Ill. Adm. Code 101.902, 102.700, 102.702. Filing a motion asking that the Board reconsider this final order is not a prerequisite to appealing the order. 35 Ill. Adm. Code 101.902.

Names and Addresses for Receiving Service of Any Petition for Review Filed with the Appellate Court	
Parties	Board
Illico Independent Oil Co. Attn: Patrick D. Shaw 80 Bellerive Road Springfield, IL 62704	Illinois Pollution Control Board Attn: Don A. Brown, Clerk James R. Thompson Center 100 West Randolph Street, Suite 11-500 Chicago, Illinois 60601
Illinois Environmental Protection Agency Attn: Melanie A. Jarvis Assistant Counsel Division of Legal Counsel 1021 North Grand Avenue, East P.O. Box 19276 Springfield, IL 62794-9276	

I, Don A. Brown, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion and order on December 20, 2018, by a vote of 5-0



Don A. Brown, Clerk
 Illinois Pollution Control Board