ILLINOIS POLLUTION CONTROL BOARD
November 19, 1998

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

ORDER OF THE BOARD (by J. Yi):

This matter is before the Board on a motion for summary judgment filed by the Illinois Environmental Protection Agency (Agency) on October 23, 1998. A response to the motion was filed by Richard and Wilma Salyer (Salyers) on October 29, 1998. On November 2, 1998, the Agency filed a motion to strike portions of the Salyers' response. The Agency filed a motion for leave to file reply, and a reply to the response on November 4, 1998.

The Board grants the Agency's motion for summary judgment in part. The parties are directed to proceed to hearing on the remaining issues.

INTRODUCTION

The Salyers own and operate a retail gasoline station and automobile repair facility located at 551 South York Road, Elmhurst, Illinois.[1] Rec. at 6, 9. A release of gasoline from the Salyers' facility was reported to the Illinois Emergency Services and Disaster Agency on March 23, 1990. On April 30, 1997, the Salyers submitted a corrective action plan (CAP) to the Agency for review. The CAP describes remedial activities to be performed at the facility. One of the key elements of the CAP was the utilization of a soil vapor extraction (SVE) system at the site. Mot. at 2. The CAP describes how a pilot test of the SVE system was performed at the site, and includes results of that test. Rec. at 24-28; Mot. at 2. Based on those results, the CAP contains a proposal that the SVE system be utilized at the site, describes how the SVE system would be installed, and describes how the SVE system would work. Rec. at 29-38; Mot. at 2. The CAP contains cost estimates for the SVE system and related items. Mot. at 2; Rec. at 40.

[1] References to the Agency Record will be cited as Rec. at __; references to the motion for summary judgment will be cited as Mot. at __; and references to the response will be cited as Resp. at __.

On August 15, 1997, the Agency approved the CAP with seven conditions. Mot. at 2; Rec. at 60-62. On November 4, 1997, the Salyers sent a request for reimbursement of costs to the Agency. Rec. at 65. In the cover letter to the reimbursement request, the Salyers' engineer stated that included in the costs sought for reimbursement were the cost of placing pavement over the SVE system, and the cost of restoring the adjacent property, Rec. at 65; Mot. at 3. On April 10, 1998, the Agency issued a final determination on the reimbursement request. Rec. at 113-115. The Agency's final determination denied costs for asphalt and concrete replacement, as well as costs for landscaping. Rec. at 115.

REGULATORY BACKGROUND

Section 57.8(i) of the Environmental Protection Act (Act) grants an individual the right to appeal an Agency determination to the Board pursuant to Section 40 of the Act. 415 ILCS 5/57.8(i) and 40 (1996). Section 40 of the Act is the general appeal section for permits and has been used by the legislature as the basis for this, and other, types of appeal to the Board. In reviewing an Agency determination of ineligibility for reimbursement from the Underground Storage Tank (UST) Fund, the Board must decide whether or not the application, as submitted to the Agency, demonstrates compliance with the Act and Board regulations. Kathe's Auto Service Center v. IEPA, (August 1, 1996) PCB 96-102, slip op. at 27.

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

MOTION FOR SUMMARY JUDGMENT

In its motion, the Agency asserts that the corrective action work at the site was to be performed in accordance with the conditionally approved CAP, and that any work outside the descriptions or activities approved by the Agency in the CAP would not be part of the corrective action described by the Salyers as necessary for completing remediation at the site. Mot. at 4. The Agency argues that aside from the conclusory and unsupported statement in the cover letter attached to the request for reimbursement, there was no evidence provided by the Salyers to demonstrate that costs associated with concrete and asphalt were corrective

action as that term is defined. Mot. at 4. The Agency asserts that the cover letter, and the statements therein, was not presented in a manner which would amend the CAP, and was submitted over six months after the CAP. Mot. at 6.

The Agency maintains that the use or need of an asphalt or concrete cap as integral to the system's performance was not mentioned in the SVE pilot test or the CAP, and that the statement made in the reimbursement request cover letter did not contain any technical information to support the claim for the necessity of asphalt or concrete. Mot. at 6. The Agency urges that it is dispositive that the CAP did not contain any reference to concrete or asphalt as part of the SVE system, and thus no reimbursement should be allowed for the costs of concrete and asphalt.

The Agency next asserts that even if the Board were to look past the omission in the CAP of any statement of concrete or asphalt being a part of the SVE, and even if the Board were to consider the statement in the cover letter as an amendment of the CAP, the request should still be denied because the costs are not reimbursable. Mot. at 6. The Agency cites Graham v. IEPA, (August 24, 1995) PCB 95-89, wherein the Board utilized a two-part test for determining if a cost is related to corrective action: 1) Whether the costs are incurred as a result of action to stop, minimize, eliminate, or clean up a release of petroleum; 2) Whether those costs are the result of activities such as tank removal, soil remediation, and free product removal. Mot. at 7, citing Graham, PCB 95-89, slip op. at 8. In Graham, the Agency notes, the Board concluded that no adequate proof had been submitted to satisfy the test and thus, the costs for concrete was not corrective action but rather the result of restoration of the site. The Agency feels that the instant appeal raises arguments similar to those unsuccessfully raised in Graham, and should be denied accordingly. Mot. at 8.

The Agency next addresses the costs associated with landscaping performed at the site. The Agency asserts that those costs are not corrective action, but are restorative, and not reimbursable. The Agency notes that, like the costs associated with the concrete and asphalt, the landscaping costs were first mentioned in the cover letter to the reimbursement request and in the request itself. Mot. at 8. The Agency argues that it is clear that the landscaping costs are restorative, and that even the cover letter plainly and correctly characterizes those costs as restoration of the adjacent property. Mot. at 9. The Agency asserts that the subcontractor itself also described the work in similar terms. Mot. at 9.

Using the two-part test found in Graham, the Agency concludes that the landscaping costs fall far short of corrective action. The landscaping, states the Agency, was admittedly performed solely to restore the adjacent piece of property to its original state. Because the landscaping is restorative, the Agency maintains it acted correctly in denying the request.

RESPONSE TO MOTION FOR SUMMARY JUDGMENT

In their response, the Salyers state that there are definite issues of material fact in this case, and request the motion for summary judgment be denied. First, the Salyers note that the one page cost estimate in the CAP included broad categories with lump sum costs for each

category not, as the Agency incorrectly stated, an estimate of all aspects of the SVE system and related estimated costs. Resp. at 2. The Salyers state that this is obvious when comparing the 35 page reimbursement request to the one page estimate in the CAP. Resp. at 2. The CAP, assert the Salyers, included the broad category "excavating contractor" with an estimated cost of $7,200, but did not include each task to be performed with a breakdown of the related costs for these tasks. Resp. at 2. The Salyers assert that no requirement exists in the statute or the regulations that a detailed budget be approved by the Agency prior to the implementation of a CAP, and that the Agency is incorrect in assuming that work is not corrective action simply because it is not included in the estimate in the CAP. Resp. at 2.

The Salyers note that in implementing the CAP, pavement was placed as a surface seal over the shallow section of horizontal piping. Resp. at 2. The Salyers explain that a seal is necessary for the system to work. Resp. at 3.

The Salyers state that the Agency approved the CAP for the installation of a SVE system at the site, but did not ask for further details concerning the SVE system in their approval letter. Resp. at 3. The Salyers assert that the Agency led them to believe they understood what is involved in construction a SVE, and that, nevertheless, there were two references in the CAP of the necessity to place a surface seal over shall horizontal extraction piping. Resp. at 3. The Salyers also maintain that the cost to restore the adjacent property was included in the CAP, and note that the Agency included conditions in their approval of the CAP, but made no mention at that time to deny the restoration of the adjacent property. Resp. at 4.

The Salyers argue that the question in this matter is not whether a particular item is restoration, but whether the item is corrective action. The Salyers believe that the surface seal placed over the SVE system was absolutely necessary for the Agency approved remediation system to function properly, and that this fact is widely supported by scientific literature and should be properly presented at hearing. Resp. at 6.

The Salyers cite to State Bank of Whittington v. IEPA, (June 3, 1993), PCB 92-152, for the proposition that just because an action is unusual and usually performed for a purpose other than corrective action, does not mean that the action cannot be corrective action in a different situation.

The Salyers next address the landscaping costs. They state that the CAP included trenching along the east side of the building, and that to accomplish this trenching, and thus perform the corrective action, it was necessary to obtain permission from the adjacent property owner. Resp. at 8. The property owner gave his permission predicated on the condition that the property be restored. The Salyers argue that since the landscaping was a condition upon which the installation of the piping was based, the landscaping was a corrective action. Resp. at 8.

Finally, the Salyers address the costs associated with handling charges. They note that the $346 associated with the paving, and the $425.70 associated with the landscaping are

separate items and should be considered separately. Resp. at 9. The Salyers believe that the handling charges associated with each item are corrective action and should be allowed.

MOTION TO STRIKE

The Agency moves that the Board strike portions of the response to the motion for summary judgment. The Agency objects to the inclusion of the attachments to the Salyers' response. The documents, asserts the Agency, postdate the April 10, 1998 final Agency decision that forms the basis for this appeal, and provide additional information as compared to that found within any documentation submitted by the Salyers to the Agency prior to April 10, 1998. Mot. to Strike at 2. The Agency also notes two references in the body of the response that are presented for the first time. Those references are found on pages 3 and 7 of the response, and concern the alleged fact that eight feet of clay was used to seal extraction piping from the surface on the east side of the building. Mot. to Strike at 2.

The Agency argues that it is clear that in reviewing a decision of the Agency, it is inappropriate to consider new or additional information that was not available to the Agency at the time of decision. The Agency maintains that the Board has stated it will not consider new facts and circumstances which postdate the Agency's decision. The Agency cites two Board cases which form the basis for this viewpoint: Kean Oil Company v. IEPA, (September 5, 1996) PCB 92-60; and Natural Gas Pipeline Company of America v. IEPA, (October 6, 1988) PCB 87-150.

The Agency requests that Board strike the attachments to the response insofar as they postdate the Agency's decision and contain information not previously made available to the Agency prior to its April 10, 1998 decision. The Agency further requests that the Board strike the identified portions of the response which make reference to information not previously submitted. Mot. to Strike at 3.

REPLY TO THE RESPONSE

As noted, the Agency filed a reply to the response accompanied by a motion for leave to reply. In the motion for leave to reply, the Agency states that several issues raised in the response warrant a reply due to their misleading or incorrect nature, and that if the Agency is not allowed to file a reply the Board will be placed in a position of rendering a decision without the benefit of a clear understanding of the case.

In the reply, the Agency reiterates that any work outside the descriptions or activities approved by the Agency would not be part of the CAP, and therefore not considered to be approved corrective action. Reply at 2. The Agency notes that the motion for summary judgment specifically directed the Board's attention to the cost estimate found in the CAP as proof that no mention of the need for concrete/asphalt was made, but also highlighted the fact that no mention was provided in the text portion as well. The Agency emphasizes that in reaching its final decision it reviewed the technical information submitted by the Salyers and acted accordingly. The Agency feels that the Salyers now wish that the action taken by the

Agency would also incorporate an activity not mentioned within the technical information. The Agency maintains that this desire is without justification or merit, and, if allowed, would lead to similar unfounded attempts. Reply at 3.

The Agency emphasizes that Graham is similar to the instant case, and should be used as guidance to reach a conclusion that the use of concrete is not corrective action, but restoration of the site to its previous state. Reply at 4.

Finally, the Agency addresses the Salyers' claim that because landscaping on the adjacent property owner's land was a condition upon which the installation of the SVE system's piping was based, the landscaping was corrective action. The Agency argues that this condition was not one imposed by the Agency, but was part of a private agreement between the Salyers and the property owner. Reply at 4. The Agency asserts that to conclude such a condition rendered the task corrective action is wholly without support, and would lend itself to many situations that would be counter to the purposes of the Underground Storage Tank Fund. Reply at 4.

DISCUSSION

Preliminary Motions

Motion for Leave to File a Reply

The Board grants the Agency's motion for leave to file a reply. No response to this motion was received by the Board, and granting the motion will not result in any prejudice to the Salyers. Thus, the Agency's reply is accepted.

Motion to Strike

The motion to strike is granted in part. Evidence not before the Agency prior to the Agency's final determination on reimbursement will not be considered by the Board. Clarendon Hills, PCB 93-55; Graham, PCB 95-89. The Board will thus strike evidence not in the record prior to the Agency's final determination. It should be noted that the evidence is stricken solely for the limited purpose of deciding the motion for summary judgment.

The first attachment to the response is an affidavit by the Salyers' engineer. Paragraph 8 contains evidence not in the record prior to the Agency's final determination and is stricken. The remainder of the affidavit will be accepted.

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

The two references in the body of the response regard the amount of clay used to seal the extraction piping from the surface on the east side of the building. These statements do constitute evidence not before the Agency at the time of final determination, and are stricken.

As stated, the Board will not consider any of the stricken references in making its decision on the Agency's motion for summary judgment.

Summary Judgment

Summary judgment is appropriate when the pleadings, depositions, admissions on file, and affidavits disclose no genuine issue as to any material fact. Dowd & Dowd, Ltd. v. Gleason, 181 Ill. 2d 460, 483, 693 N.E.2d 358, 370 (1998). In ruling on a motion for summary judgment, the Board must consider the pleadings, depositions, and affidavits strictly against the movant and in favor of the opposing party. *Id*. Summary judgment is a drastic means of disposing of litigation, and should be granted only when the movant's right to the relief is clear and free from doubt. *Id*. citing Purtill v. Hess, 111 Ill. 2d 229, 489 N.E.2d 867, 871 (1986).

The Agency has argued that no material issue of fact exists. If the Board finds a genuine issue of fact regarding corrective action does exist, the Board must deny the motion for summary judgment.

As noted, the initial burden to demonstrate that the remediation costs satisfy the definition of corrective action rests on the party seeking reimbursement. Kathe's Auto Service, PCB 96-102, slip op. at 28; Graham, PCB 95-89, slip op. at 22. However, the Board has noted that whether an activity was included or not included as part of the CAP does not alone decide the issue. The issue is to be decided upon a determination of whether the action is corrective action. Graham, PCB 95-89, slip op. at 22. In Graham, the Board was confronted with an issue similar to the paving issue before us today. The Board found that it must interpret the statutory language as applied to the circumstances of the site in order to determine whether the concrete was corrective action that is reimbursable under the Act. Graham, PCB 95-89, slip op. at 22. Thus, when reviewing reimbursement determinations the proper standard is to apply the statutory definition of corrective action. Platolene, PCB 92-9, slip op. at 12.

Paving Costs

The Board first considers the costs associated with the concrete and asphalt used for paving. Although the CAP did not contain references to the paving, reference to the paving was included in the reimbursement request and the accompanying cover letter. The cover letter specifically states that for the SVE system to operate properly, it was imperative that the subsurface be sealed from the outside air, and that for this reason, the pavement was a necessary corrective action cost. Rec. at 65. Thus, the issue of whether the pavement was a necessary corrective action cost was before the Agency prior to its final determination.

As noted, when considering whether an action is a corrective action, the Board uses the two-part test articulated in Graham. The use of this test was upheld in Strube v. The Pollution Control Board, 242 Ill. App. 3d 822, 610 N.E.2d 717 (3rd Dist. 1993). Both prongs of this test must be satisfied in order for costs to be reimbursed as corrective action. Enterprising Leasing Company v. IEPA, (April 9, 1992), PCB 91-74, slip op. at 5; Graham, PCB 95-89, slip. op at 24. First, the Board considers whether the costs are incurred as a result of action to stop, minimize, eliminate, or clean up a release of petroleum. Second, the Board considers whether those costs are the result of activities such as tank removal, soil remediation, and free product removal.

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

Here, the Salyers assert that the paving is necessary to implement the SVE system which is designed to clean up a release of petroleum. If true, this meets both requirements needed to find an activity is a corrective action. The Agency has argued that the paving does not constitute corrective action, but is merely restorative. As noted, when deciding a motion for summary judgment, the Board must consider the pleadings depositions, and affidavits strictly against the movant and in favor of the opposing party. When viewed in this light, the Board finds a genuine issue of material fact exists whether or not the paving costs at this site constitute corrective action. Thus, the motion for summary judgment is denied as to costs involving paving and associated handling.

Landscaping Costs

The Board next considers the landscaping costs. The record verifies that the landscaping costs are restorative. The cover letter and the reimbursement request both characterize the landscaping as restorative. The Salyers do not dispute this fact, but argue that since the landscaping was a condition upon which the installation of the piping was based, the landscaping was a corrective action

Once again, the Board must consider whether the costs are incurred as a result of action to stop, minimize, eliminate, or clean up a release of petroleum. The Board finds that the landscaping costs were not so incurred. Landscaping was performed, as stated in the request for reimbursement, to restore the adjacent property owners property. In no way can the landscaping be viewed as an action to stop, minimize, eliminate, or clean up a release of petroleum. The Board is not convinced by the Salyers' argument that the landscaping was a corrective action merely because it was a condition upon which the installation was based. The Board agrees with the Agency's description of this condition as part of a private agreement between the Salyers and the property owner. An action that is clearly not corrective cannot be transformed into a reimbursable corrective action cost pursuant to such an

agreement. The Board finds that no genuine issue of material fact exists as to the costs associated with landscaping. The Agency's motion for summary judgment is thus granted on the landscaping and associated handling costs.

CONCLUSION

The Board grants respondent's motion for summary judgment in part and denies it in part as set forth in this opinion and order. This matter will proceed to hearing on the remaining issues involving paving costs.

ORDER

1. Respondent's motion for summary judgment is granted as to the landscaping and associated handling costs.

2. Respondents motion for summary judgment is denied as to the paving and associated handling costs.

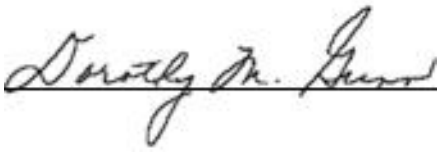
3. Respondent's motion to strike is granted as to:

    a. Paragraph 8 of the first attachment to the response.

    b. The two references on pages 3 and 7 of the response regarding the amount of clay used to seal the extraction piping from the surface on the east side of the building.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above order was adopted on the 19th day of November 1998 by a vote of 7-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board