ILLINOIS POLLUTION CONTROL BOARD
May 18, 1995

KATHE'S AUTO SERVICE CENTER,	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB 95-43
	)	(UST-Appeal)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
	)	
	)	
Respondent.	)	

PHILLIP MANDELL AND SIGI OFFENBACH APPEARED ON BEHALF OF PETITIONER;

JOHN BURDS AND DANIEL P. MERRIMAN APPEARED ON BEHALF OF RESPONDENT.

OPINION AND ORDER OF THE BOARD (by E. Dunham):

On January 23, 1995 Kathe's Auto Service Center (Kathe) filed an appeal pursuant to Sections 57.7(c)(4)(D) and 40(a) of the Environmental Protection Act (Act) concerning the Illinois Environmental Protection Agency's (Agency) rejection of Kathe's Site Classification Completion Report (Site Report). (415 ILCS 5/57.7(c)(4)(D) and 5/40(a) (1993).)[1] A hearing was conducted in this matter by Hearing Officer June Edvenson on March 13 and 14, 1995, at the Board's Chicago offices. At the hearing Kathe presented one witness, Mr. Ronald Schrack, the consultant who prepared the Site Report for Kathe. The Agency presented two witnesses, Mr. Todd Rowe and Ms. Kendra Brockamp, at the second day of hearings.

Background

Kathe owns a facility located at 835 Milwaukee Ave. Glenview, Illinois. On November 28, 1992 Kathe filed an Illinois Emergency Management Agency (IEMA) report as a result of a

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[1]On February 7, 1995, Kathe filed an appeal of the Agency's reimbursement determination concerning early action activities at the site which was docketed as PCB 95-48. Kathe's petition in this case and the Agency's Post-Hearing Brief argue the question of early action reimbursement which is no longer before the Board in this matter.

leaking waste oil tank. (Ag. Rec. at 2.)[2] Kathe filed a Corrective Action Plan on January 22, 1993 pursuant to the underground storage tank (UST) regulations which were in effect prior to the passage of P.A. 88-496, often referred to as H.B. 300, which created Title XVI Petroleum Underground Storage Tanks. (415 ILCS 5/57 et seq. (1993).) Governor Edgar signed H.B. 300 into law on September 13, 1993, which became effective immediately. (Ag. Brief at 5-8.) However, regulations effectuating the new program were to be proposed by the Agency within six (6) months of the effective date of the law and finally adopted by the Board within six (6) months of the Agency proposal. Therefore no regulations were adopted until September 13, 1994 and were not in effect at the time of Kathe's filing of its Site Report. Kathe filed a revised Corrective Action Plan and Site Report pursuant to Title XVI, on October 14, 1993, which classified the site a "Low Priority" site. (Ag. Rec. at 108-149, 151-190.) However, on November 8, 1993, Kathe filed a letter stating the site should be re-classified as a "No Further Action" site pursuant to Title XVI. (Ag. Rec. at 151-190, 191-192.)

On February 10, 1994 the Agency rejected the revised Corrective Action Plan and Site Report filed by Kathe on October 14, 1993. (Ag. Supp. Rec. at 1.)[3] Among other reasons the Agency rejected the Site Report because it failed to demonstrate that the site is located in an area where the physical soil classification is consistent with areas designated D, E, F and G on the Berg Circular[4]; it failed to demonstrate whether the underground storage tank is within the minimum or maximum setback zone of a potable water supply well or regulated recharge area of a potable water supply well; and it failed to submit a certification from a Licensed Professional Engineer verifying the site's classification as a "High Priority, Low Priority, or No Further Action" site in accordance with Section 57.7(b) of the Act. (Ag. Supp. Rec. at 4-6.) The Agency's rejection letter also set forth the activities necessary for Kathe to satisfy the requirements of the Act which were identified as lacking in the

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[2]The Agency's record in this matter will be referenced as "Ag. Rec. at ".

[3]The Agency filed a supplement to its record on March 13, 1995 which will be cited to as "Ag. Supp. Rec. at ".

[4]As noted in Section 57.7(b)(2)(A) of the Act, the Berg Circular is a combination of hydrogeologic properties and stratigraphic position of geologic materials which demonstrate in map form the potential for contamination for aquifers. Richard C. Berg, John P. Kempton, Keros Cartwright, "Potential for Contamination of Shallow Aquifers in Illinois," (1984), Circular No. 532.

Site Report. The following are some of those activities:

1. To demonstrate a site has geology consistent with a No Further Action Area the following items should be performed and the supporting documentation should be supplied to the Agency:

   a. At least one soil boring per tank field should be performed to a depth sufficient to classify:

      (1) 50 feet of native soil or;

      (2) soils to the point bedrock is encountered. (A sample of bedrock must be collected to determine permeability or an in-situ hydraulic conductivity test must be conducted. Additional information about this is located in Item (b)(5) below.)

      A tank field includes all USTs which reside within a circle with a 100 foot radius.

      If anomalies are encountered, additional soil boring(s) may be necessary to verify the site geology. The soil boring(s) must be continuously sampled. The boring(s) should be performed within 200 feet of the outer edge of the tank field or at the property boundary, whichever is less. Reasonable attempts should be made to limit vertical migration of contamination.

      If sand or gravel lenses or seams are encountered, additional investigation will be required to determine if such conditions are continuous and/or extend off-site. Continuous sand and gravel lenses and seams were mapped in the circular and may indicate inconsistency with areas D and E.

      Any water bearing units encountered must be sealed during drilling.

   b. The following tests shall be performed on a representative sample of each stratigraphic unit encountered at the site:

      (1) Particle-Size Analysis of Soils -- ASTM D 422-63 and ASTM D 1140-54

      (2) Moisture Content -- ASTM D 2216-90 or ASTM D 4643-87

      (3) Soil Classification -- ASTM D 2488-90 or ASTM D 2487-90

(4) Unconfined compression strength using a hand penetrometer

(5) Hydraulic Conductivity

c. In the event that the licensed Professional Engineer determines during the course of investigation that the soil classification is consistent with other than area D, E, F, or G, physical soil classification activities may cease. The Site Classification Completion Report should document the soil conditions which were encountered and explain the basis for determining the site geology is not consistent with area D, E, F, or G.

Soil boring logs should be provided for all borings performed at the site. Borings should be logged on the Agency's standardized boring log or using a similar format which includes all required information listed below:

(1) sampling device, sample distance, and amount of recovery

(2) total depth of boring to nearest 6 inches

(3) detailed field observations describing materials encountered in the boring. Such description should include soil constituents, consistency, color, density, moisture, and any odors. Sand and /or gravel lenses/seams must be recorded if greater than or equal to 1 inch in thickness

(4) Soil borings should be continuously screened with field instruments capable of detecting petroleum hydrocarbon vapor

(5) Indicate location of sample(s) used for physical and/or chemical analysis

(6) Groundwater levels--while boring and at completion

(7) Moisture content

(8) Unconfined compression strength using a hand penetrometer

(9) USCS soil classification of all stratigraphic units

2. To satisfy the requirements of Section 57.7(b)(3)(B) of the Act the following activities may be performed:

a. An investigation must be conducted to determine the location of all potable water supply wells within 2500 feet of the site. This investigation should include, but not be limited to contacting the Illinois State Geologic Survey and the Illinois State Water Survey. All local units of government must be contacted to determine ordinances concerning potable water supply wells. In addition, regulated recharge areas are designated by the Illinois Pollution Control Board and would be published in the Illinois Register. A description of all sources consulted to make a determinations should be provided.

b. Provide a map to scale showing the locations of potable water supply wells within 2500 feet of the site. Radii of 200, 400, and 1000 feet from the site should be indicated on the map.

c. Provide a table that indicates the setback zone for each well and the distance of the well from the site. Map locations should be numbered consistently with the information in the table.

Kathe, pursuant to Section 57.13(b) of the Act, elected to proceed under Title XVI of the Act on February 20, 1994, instead of the prior UST regulations. (415 ILCS 5/57.13(b) (1993).) (Ag. Rec. at 202.)[5] On March 9, 1994 Kathe submitted a letter regarding budget and billing forms which contained a site classification work plan. (Ag. Rec at 203-237.) On June 23, 1994, the Agency responded by sending a letter to Kathe modifying the Physical Soil Classification and Groundwater Investigation Plan that was submitted on March 9, 1994. (Ag. Rec. at 238-243.) Pursuant to a phone conversation between Kathe and the Agency, Kathe filed a revised Table 1 of the Site Classification Work Plan on June 21, 1994. (Ag. Rec. at 244-245.)

On August 18, 1994, Kathe filed with the Agency the Site Report which is the subject of this appeal. Kathe states that the Site Report was "...completed in accordance with the requirements of Title XVI of the Act and the first proposed regulations as stipulated in Illinois Title 35 - Part 732, Subpart C - Site Evaluation and Classification (March 17, 1994)." (Ag. Rec. at 246-284.) The Agency issued its rejection of the

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[5]Although Kathe's filing of October 13, 1994 states that it was completed in compliance with Title XVI, Section 57.13(b) requires a written statement by the owner or operator stating its election to proceed under Title XVI to be submitted to the Agency.

Site Report on December 20, 1994. (Ag. Rec. at 288-299.) Pursuant to Section 57.7(c)(4)(D) of the Act, the Agency's rejection letter must contain an explanation of the sections of the Act and/or Board regulations which may be violated if the plan were approved. (415 ILCS 5/57.7 (c)(4)(D)(1993).)

The Agency's letter sets forth in detail the reasons for rejection. The following is a brief summary of the Agency's reasons for its rejection of the Site Report. The Agency believes the Site Report as submitted failed to demonstrate that:

1) the soil borings were continuously sampled to ensure that no gaps appears in the sample column as required by 35 Ill. Adm. Code 732.307(c)(1)(E);

2) any water bearing units encountered will be protected as necessary to prevent cross-contamination of water bearing units during drilling as required by 35 Ill. Adm. Code 732.306(c)(1)(G);

3) the requirement of 35 Ill. Adm. Code 732.307(c)(2) for Method One for Physical Soil Classification was completed;

4) the requirement of 35 Ill. Adm. Code 732.307(c)(3) for Hydraulic Conductivity was completed;

5) the survey for water wells were conducted pursuant to 35 Ill. Adm. Code 732.307(f)

6) a groundwater investigation report was performed by the Licensed Professional Engineer as required by 35 Ill. Adm Code 732.307(j)(1);

7) all soil borings were submitted as required by 732.308(a);

8) the bore hole was abandoned pursuant to 77 Ill. Adm. Code 920.120 as required by 35 Ill. Adm. Code 732.308(b); and

9) the physical soil classification procedure confirmed the Berg Circulator designation of a "No Further Action" site classification and that the UST is not within the minimum or maximum setback zone of a potable water supply well or regulated recharge area of a potable water supply well as is required by 35 Ill. Adm. Code 732.302(a) to classified as a "No Further Action."

In summary, the Agency believed that the soil boring was inadequate, the boring log did not contain the necessary information, and it could not be determined whether the UST was within the minimum or maximum setback zone for a potable water

supply well or regulated recharge area of a potable water supply well.

On January 23, 1995, Kathe appealed the Agency rejection letter to the Board. In Kathe's petition to the Board, it responds to each of the Agency's reasons and attaches a revised Water Table 2 and soil boring log. (Pet. at 2-5.)[6] Kathe is requesting the following forms of relief: "[u]pon review of a revised water well Table and Soil Boring Log provided in Attachment 3 from the petitioner, [sic] the IEPA approve the 'No Further Action' Classification certified by the petitioner's licensed professional engineer", "...[a]cknowledge that the early remedial actions proposed to be completed at the site will be conducted in accordance with the minimum allowable actions stipulated in 35 IAC 732.202 and will be eligible costs for reimbursement from the UST Fund", "...[g]rant the petitioner financial relief for the legal and professional representation costs incurred for the filing of this appeal based on the grounds that the Agency acted in an arbitrary and capricious manner during review of this Site Classification Completion Report", "[g]rant such other and further relief as may be appropriate." (Pet. at 10.)

Regulatory Background

The Board's authority to review the Agency's determination in UST Site Classification appeals arises from Section 57.7(c)(4)(D) of the Act. Section 57.7(c)(4)(D) grants individuals the right to appeal an Agency determination to the Board in accordance with the procedures of 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. There is a large body of case law developed concerning the respective roles of the appealing party, the Agency and the Board under Section 40 appeals. Summarizing those roles and authority, the Board stated in City of Herrin v. Illinois Environmental Protection Agency, (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)(1)] and 35 Ill. Adm. Code Section 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, Inc. v.

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[6]Kathe's appeal petition will be referenced as "Pet. at ".

Pollution Control Board, 179 Ill. App. 3d 598, 534 N.E. 2d 616, (Second District 1989) and reiterated in John Sexton Contractors Company v. Illinois (Sexton), PCB 88-139, February 23, 1989. 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 that decision. (Pulitzer Community Newspapers, Inc. v. Illinois Environmental Protection Agency, PCB 90-142, at 6 (December 20, 1990); Centralia Environmental Services, Inc. v. Illinois Environmental Protection Agency, PCB 89-170, at 6 (May 10, 1990); City of Metropolis v. Illinois Environmental Protection Agency, PCB 90-8 (February 22, 1990).

Additionally, in Clarendon Hills Bridal Center (Learsi and Company, Inc.) v. Illinois Environmental Protection Agency, (February 16, 1995), PCB 93-55, the Board ruled that it would not consider evidence that was not before the Agency prior to its final determination concerning corrective action cost reimbursement. In doing so, the Board recognized the fact that in prior cases it has admitted evidence which was not contained in the Agency record, because the Agency had not promulgated regulations identifying for petitioners the type of information necessary to complete a reimbursement application.[7] In those prior cases the Board reasoned that without such regulations, petitioners could not anticipate what information the Agency would require, and therefore petitioners should be allowed to supplement the record in order to clarify why a disputed cost should be reimbursed. However, in Clarendon the Board found that "...petitioner knew or was obligated to know that, at a minimum, it was required to demonstrate that the disputed cost was for corrective action." (Id. at 10.) The Board reasoned that "Section 22.18(b) of the Act clearly states that an owner or operator can only recover from the Fund the costs of corrective

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[7]See Sparkling Spring Mineral Water Co. v. Illinois Environmental Protection Agency (August 26, 1993) PCB 92-203, and Chuck & Dan's Auto Service v. Illinois Environmental Protection Agency (August 26, 1993) PCB 92-203.

action" and that "[t]he initial burden on the party seeking reimbursement is to demonstrate that the remediation costs satisfy the definition of corrective action. (Platolene 500, Inc. v. IEPA (May 7, 1992) PCB 92-9, 133 PCB 259 at 7.) Thus, the Board stated that if the petitioner, who carries the burden of proof, knew what was required or was obligated to know the Board would not allow the petitioner to admit evidence after the determination had been made.

In the instant case, the Board is confronted with an appeal of a UST Site Report which the Agency has rejected for lack of information necessary to demonstrate that the site is indeed a "No Further Action" site as defined by Section 57.7(b) of the Act. Section 57.7(b) states:

b) Site Classification.

1) After evaluation of the physical soil classification and groundwater investigation results, when required, and general site information, the site shall be classified as "No further Action", "Low Priority", or "High Priority" based on the requirements of this Section. Site classification shall be determined by a Licensed Professional Engineer in accordance with the requirements of this Title and the Licensed Professional Engineer shall submit a certification to the Agency of the site classification. The Agency has the authority to audit site classifications and reject or modify any site classification inconsistent with the requirement of this Title.

2) Sites shall be classified as No Further Action if both of the following are met:

A) The site is located in an area designated D, E, F and G on the Illinois Geological Survey Circular (1984) titles "Potential for Contamination of Shallow Aquifers in Illinois," by Berg, Richard C., et al.; a site evaluation under the direction of a Licensed Professional Engineer verifies the physical soil classification conditions are consistent with those indicated on the Illinois Geological Survey Circular (1984) titles "Potential for Contamination of Shallow Aquifers in Illinois," by Berg, Richard C., et al.; and the conditions identified in subsections (b)(3)(B), (C),(D), and (E) do not exist.

B) No groundwater investigation monitoring shall be required to demonstrate that a site meets the criteria of a No Further Action site.

Section 57.7(b)(3) states in pertinent part:

> B) The underground storage tank is within the minimum or maximum setback zone of a potable water supply well or regulated recharge area of a potable water supply well.
>
> C) There is evidence that, through natural or manmade pathways, migration of petroleum or vapors threaten human health or human safety or may cause explosions in basements, crawl spaces, utility conduits, storm or sanitary sewers, vaults or other confined spaces.
>
> D) Class III special resource groundwater exists within 200 feet of the excavation.
>
> E) A surface water body is adversely affected by the presence of a visible sheen or free product layer as the results of an underground storage tank release.

Throughout the Agency's rejection letters and the transcript of the hearing, both parties reference 35 Ill. Adm. Code Part 732. However, as stated previously, Kathe filed its Site Report on August 18, 1994, prior to the Board's adoption of those regulations. The Board subsequently adopted regulations at 35 Ill. Adm. Code Part 732 on September 13, 1994, which set forth the informational requirements of the Site Classification Completion Report. Therefore, the Board's review is limited to the requirements of the Act.

Arguments

Preliminary to its arguments concerning the soil boring method, setback zone, and the boring log, the Agency questions the credibility and qualifications of Kathe's witness, Mr. Schrack. The Agency challenges the witness on grounds that he was not a Licensed Registered Professional Engineer at the time of the hearing, and that certain evidence admitted after its determination should be stricken from the record before the Board. (Ag. Brief at 8-12.) Additionally, the Agency makes arguments concerning reimbursement for early action activities in its Post-Hearing Brief on pages 42-48. As stated previously (supra p.1, n.1), the issue of reimbursement for early action activities is not before the Board in this matter, and therefore we will not address those arguments.

The Agency argues that, as Mr. Schrack was not a Licensed Registered Professional Engineer at the time of the hearing and since it was not allowed to voir dire Mr. Schrack, as to his expertise, the credibility of his testimony is diminished. (Ag. Brief at 8.) As proof, the Agency offers a certification from the Illinois Department of Professional Regulation that states

that Mr. Schrack's license expired as of November 30, 1994 and has not renewed. (Ag. Brief Attachment A.) Based on these reasons the Agency objects to Mr. Schrack's qualifications as an expert and requests that the Board strike those portions of his testimony that were offered based upon his qualifications as a Licensed Professional Engineer. (Ag. Brief at 9.)

Additionally, the Agency argues that Kathe presented evidence that was not before the Agency prior to the Agency's final determination of December 20, 1994. (Ag. Brief at 10.) The Agency requests that the evidence should be treated as an amendment of the August 18, 1994 Site Report and remanded to the Agency for review pursuant to Section 57.7(b)(1) of the Act. (Ag. Brief at 12.) The Agency argues that the Board should apply the same standard as it did in Clarendon Hills Bridal Center (Learsi and Company, Inc.) v. Illinois Environmental Protection Agency, (February 16, 1995), PCB 93-55. In Clarendon the Board found that it would only consider evidence that was before the Agency prior to its final determination. (Ag. Brief at 11-12.) The Agency argues to rule otherwise "...would: destroy the obvious remedy of submitting an amended report or plan to the Agency...render the Agency's review meaningless...violate all concepts of fundamental fairness...." (Ag. Brief at 11.) The Agency concludes that it should be allowed to view the very information it determined was missing. (Ag. Brief at 42.)

The main information which the Agency believes is lacking in the Site Report concerns; (1)whether the soil boring conducted by Kathe demonstrates that the site conditions correlate with a Type E designation of the Berg Circular; (2)does the soil boring log contain sufficient information for an Agency determination; and, (3)whether the Agency could determine from the Site Report whether the UST was within the minimum or maximum setback zone for public water supply well or regulated recharge area of a potable water supply well. The following is a summary of the arguments concerning those three questions.

Soil Boring

Kathe argues that the sample soil boring was completed and continuously sampled to fifty (50) feet in depth to classify the soil types. (Pet at 2.) At the hearing, Mr. Schrack testified that in his opinion the fifty (50) foot boring was continuously sampled, that any sampling gaps were the result of normal industry practice and that this soil sampling method is the same method he utilized at other sites which the Agency has approved.[8] (Tr. at 84, 48, 37-39.) Kathe further states that it had

[8]The transcript of the hearings held on March 13 and 14 will be referenced as "Tr. at ".

"...completed one continuous 50 foot soil boring for site classification prior to collection of the two Shelby Tube samples from a second 50 foot soil boring..." and that although it had not documented this "thorough approach", the Agency does not specify under Method One or Two that such documentation is required. (Pet. at 3.) In addition, Kathe states that pursuant to 35 Ill. Adm. Code 732.307(c)(1)(H)(2) it is allowed to utilize techniques other than those specified in subsection (c)(1) of 35 Ill. Adm. Code 737.307(c)(1)) "...for soil classification provided that the techniques have been successfully utilized in applications similar to the application." (Pet. at 2.) Kathe asserts that the procedures utilized at its site are identical to procedures utilized at several sites where the Site Report was approved by the Agency. (Pet. at 2, Post-Hearing Brief at 2-5.) Therefore, Kathe concludes that, since the Agency has approved those soil classifications where the applicant utilized the same procedures as in the instant case, the requirements have also been met here. (Pet. at 9, Post-Hearing Brief 5-11.)

The Agency asserts that since the soil boring contains sampling gaps, the site was not continuously sampled making it impossible to determine how many stratigraphic units might be at the site. (Ag. Brief at 18.) As a result of these sampling gaps the Agency argues that it cannot be verified that the site's conditions meet the Type E designation of the Berg Circular. (Ag. Brief at 22.) At the hearing the Agency's witness, Mr. Rowe, specifically testified that without information on the soil for certain portions of the fifty (50) foot boring sample, they cannot determine if the actual soil classification is Type E as indicated by the Berg Circular. (Tr. at 443-446.) The Agency argues that the sampling must be continuous because a sampling gap of even an inch in thickness may overlook a sand or gravel seam that would result in the actual physical soil classification at the site to be something other than a Type E designation. (Ag. Brief at 22, Tr. at 445,472.) Furthermore, the Agency asserts that a sampling gap may also miss a manmade pathway. (Ag. Brief at 22.) The Agency also states that the fifty (50) foot site classification boring actually constituted only twenty-one (21) feet with documentation for only fifteen (15) feet of the total soil. (Ag. Brief at 27, Tr. at 452-466.) Additionally, the Agency notes that Mr. Schrack testified that the Shelby Tube samples listed within the log were not obtained from the boring identified as KAB23, but rather from a different boring taken three feet away. (Ag. Brief at 27.) Finally, the Agency argues that Kathe agreed to conduct the activities set forth in the February 10, 1994 rejection letter by its submission of the revised Site Classification Work Plan dated March 9, 1994 and that Kathe failed to perform an analysis for each stratigraphic unit as required by the approved Site Classification Work Plan. (Ag. Brief at 22-25, 31.) For these reasons, the Agency concludes that the sampling method does not provide the necessary information for it to make a determination.

Soil Boring Log

Kathe asserts that the format for its soil boring logs in this Site Report contains the same information and format as the soil boring logs submitted in other cases in which the Agency approved the classification. (Pet. at 6.) Mr. Schrack specifically testified that the soil boring log contains all the information necessary and is the same format as in other sites which the Agency approved. (Tr. at 37-39.) Additionally, as Mr. Schrack testified and Kathe asserts, specific information that may not be in the soil boring log is contained elsewhere in the Agency record and was before the Agency prior to its determination. (Tr. at 85-105, Post-Hearing Brief at 2.) Kathe concludes that the Agency cannot now deny the adequacy of this Site Report which contains the same information and has been prepared in the same format as other Site Reports that have been approved. However, Kathe does state that information concerning the name of the drilling company, depth to groundwater levels while boring, and the Unified Soil Classification Symbol group symbol was not provided. (Pet. at 6.) Kathe asserts, however, that the symbols used by Schrack Environmental Consulting, Inc. provide more information than the Unified Soil Classification Symbols and therefore exceed the minimum requirements of 35 Ill. Adm. Code 732. (Pet. at 6.)

The Agency simply argues that the prior approvals are not relevant to this matter and should not be admitted by the Board. (Ag. Brief at 33-34.) However, the Agency asserts that those prior approvals are distinguishable and that the Board has correctly found that the applicable law, and not Agency policy, appropriately decides the matter citing to State Bank of Whittington v. IEPA, (June 3, 1993), PCB 92-152. (Ag. Brief at 36-37.) The Agency argues that the three site approvals, argued to be identical, Fortune, Mertes and Complete, are distinguishable. The Agency states that the Complete and Fortune cases were "High Priority" site classifications and were not approved until February 3, 1995 and January 5, 1995, respectively, which is much after the August 18, 1994 date that Kathe filed its Site Report. (Ag. Brief at 34.) Therefore, the Agency concludes that it was impossible for Mr. Schrack or Kathe to rely on the approval in those approvals in filing the Site Report in this matter. (Ag. Brief at 34.) Finally, the Agency asserts the Mertes case utilized a different evaluation method and therefore is substantially different than this case. (Ag. Brief at 35-36.) Thus, the Agency concludes that those approvals are substantially different and, pursuant to State Bank of Whittington, are irrelevant to the Board's decision of this issue in this case. (Ag. Brief at 36.)

Water Well Survey

Kathe argues in its petition that the revised Table 2

attached to its petition demonstrates where the UST is not within the minimum or maximum setback zone for public water supply wells and the distance of the UST in relation to the public water supply wells. (Pet. at 4.) Additionally, Kathe states that Mr. Schrack contacted the Illinois State Water Survey (ISWS) to locate and map out potable wells prior to the determination of the Site Report and that after the Agency determination he contacted the Illinois State Geological Survey (ISGS). (Post-Hearing Brief at 9.) Kathe also states that the employee at the ISGS stated that its information is based on that of the ISWS. (Post-Hearing Brief at 9.) Kathe argues that the Agency's emphasis on the fact that the ISGS was not contacted by Kathe prior to the Agency's determination is "emphasizing a useless act." (Post-Hearing Brief at 10.) Kathe asserts that since the information of the ISWS is the same as that of ISGS, it should not have to contact the ISWS. (Post-Hearing Brief at 10.) Therefore Kathe argues that it has met the informational requirements concerning the water well survey.

The Agency asserts that Kathe was aware of the type of information necessary to demonstrate whether the UST is within the minimum or maximum setback zone of a potable water supply well or regulated recharge area of a potable water supply well. (Ag. Brief at 38.) The Agency argues that its rejection letter of February 10, 1994, which was issued six (6) months prior to Kathe's submission of the Site Report, set forth the informational requirements necessary for the Site Report. (Ag. Brief at 38.) In addition, the Agency states that the Table 2 submitted by Kathe is deficient and that Kathe's filing of a revised Table 2 corroborated this fact. (Ag. Brief at 41.) The Agency asserts that the Table 2 filed on August 18, 1994 failed to provide the location of the UST in relation to the minimum or maximum setback zones of the listed wells and that Kathe failed to contact the ISGS. (Ag. Brief at 42.) Finally, the Agency states that even Mr. Schrack testified that, based on the Site Report, it is difficult to determine whether the UST was within the maximum setback zone of a potable water supply well or regulated recharge area of a potable water supply well. (Ag. Brief at 42.)

In general, Kathe argues that its submittal, prepared by Mr. Schrack, is the same type of submittal which the Agency has approved in at least three other sites completed by Mr. Schrack, the Fortune, Mertes, and Complete sites. Kathe asserts that for the Agency to now say that the submittal is inadequate is arbitrary, capricious and fundamentally unfair. (Post-hearing Brief at 11.) Alternatively, Kathe argues that the techniques utilized by Mr. Schrack meet the requirements of 35 Ill. Adm. Code 732.307(c)(1)(H) for the use of alternative techniques and should be accepted by the Agency. (Post-hearing Brief at 4.) Additionally, Kathe argues that the information contained in the revised Table 2 and the revised soil boring log, demonstrates

that its site meets the "No Further Action" classification requirements of Section 57.7(b) of the Act. (Pet. at 4.)

The Agency in its Post-Hearing Brief states that "[n]owhere in the Agency's Technical Record, in Petitioner's consultant's testimony at the hearing or in Petitioner's Post-Hearing Brief does the Petitioner-or his consultant-offer any real explanation for the failure to continuously sample or to otherwise comply with the terms and conditions of the approved March 9, 1994 Site Classification Work Plan." (Ag. Brief at 33.) The Agency argues that Kathe's first explanation given, that the Agency has approved prior sites utilizing the same techniques in the past, can be distinguished and that the Board in State Bank of Whittington v. IEPA, (June 3, 1993), PCB 92-152, correctly found that the applicable law and not Agency policy determines the issue at hand. (Ag Brief at 36.) The Agency also asserts that Kathe's argument that it is utilizing a new technique pursuant to 35 Ill. Adm. Code 732.307(c)(1)(H) is misplaced. (Ag. Brief at 37.) The Agency states that the "...provision allows the use of techniques other than those specified in Physical Soil Classification Method One, but only upon the owner and operator obtaining prior written approval from the Agency before starting its classification investigation." (Ag. Brief at 37.) The Agency argues that the provision does not apply to a particular consultant's techniques and therefore rejects Kathe's claim that the Agency's action on other sites involving Mr. Schrack validated his approach at the Kathe's site. (Ag. Brief at 37.) Finally, the Agency argues that "[g]iven the detailed [sic] particularly of the Agency's February 10, 1994 correspondence (Supp Rec. pp. 1-12) and the Petitioner's March 9, 1994 Site Classification Work Plan (Tech. Rec. pp. 203-237), it is difficult to imagine a more clear and precise standard." (Ag. Brief at 38.) Thus the Agency asserts that Kathe's claim that the Agency interpretation of the law is arbitrary and the requirements of the law are vague and uncertain are unfounded. (Ag. Brief a 37-38.)

Discussion

Prior to our decision of the issue on appeal, there are three evidentiary matters that the Agency presents to the Board: (1)whether the evidence entered into the record after its decision should be allowed; (2)whether the testimony of Mr. Schrack should be stricken; and, (3)whether evidence of other Site Reports should be allowed into the record.

There is also one matter raised by Kathe concerning the use of alternative techniques set forth in 35 Ill. Adm. Code 732.307(c)(1)(H). As discussed previously, since the Board did not adopt 35 Ill. Adm. Code Part 732 until September 13, 1994 those regulations do not apply to Kathe's Site Report. Therefore, any arguments made by either the Agency concerning

what information is required and by Kathe concerning this issue are inapplicable. Thus the Board will not make a decision as to whether Kathe properly utilized 35 Ill. Adm. Code 732.307(c)(1)(H).

Concerning the first evidentiary issue, the Board finds that the evidence entered into the record after the Agency made its final determination of December 20, 1994, should be stricken and will not be considered by the Board in its ruling. As the Board held in Clarendon, we will not consider evidence that was not before the Agency prior to its final determination. The initial burden on the applicant seeking site approval pursuant to Section 57.7(b) of the Act is to demonstrate that the Site Report verifies that in-situ soil meets the appropriate designation of the Berg Circular. (Platolene 500, Inc. v. IEPA (May 7, 1992) PCB 92-9, 133 PCB 259 at 7.) This case is distinguishable from the cases where the Board held that where petitioners could not anticipate what information the Agency would require, petitioners should be allowed to supplement the record in order to clarify a disputed question. Here, Kathe knew what information the Agency required in the Site Report. The Agency's rejection letter of February 10, 1994 listed the information it required and what activities were necessary for Kathe to undertake to fulfill those informational requirements of the Site Report. To allow supplemental evidence would undermine the statutory role of the Agency in making such determinations. Kathe can amend its Site Report with the new information in the revised Table 2 and revised soil boring log, along with any other information it acquired for the purposes of this appeal, in a new submittal to the Agency. Therefore, the revised Table 2 and revised Soil Boring log submitted as Attachment 3 of its petition and any testimony alleging new facts that were not before the Agency at the time of its determination will be stricken from the record in this case.

Concerning the second evidentiary issue, the Board will not strike Mr. Schrack's testimony because his license lapsed in November 1994. Although the Hearing Officer may have erred in not allowing the Agency to voir dire the witness since he was being offered as an expert, the Agency rejection of the Site Report is not based on Mr. Schrack's qualifications, and they are not dispositive of the issues before the Board. Therefore, the Board will not strike the testimony given by Mr. Schrack based upon his qualifications as a Licensed Professional Engineer as requested by the Agency, but the appropriate weight will be given to the fact that he was not a Licensed Professional Engineer at the time of the hearing.

Concerning the third evidentiary issue, the Board will allow Kathe's submission of the other Site Classification Approvals, entered into the record as Petitioner's Exhibits A, B, and C. This information is allowed for the limited purposes of Kathe's

argument that the Agency is bound by its prior approvals. These approvals are not new information to the Agency and are not being entered into the record as information that goes specifically to the Agency's final determination of December 20, 1994, regarding Kathe's site.

Therefore, the first issue remaining before the Board is whether the Agency's prior practices, i.e. Site Report approvals, should be considered in determining whether Kathe's Site Report demonstrates that it is a "No Further Action " site. We find that the Agency's prior approvals at other sites do not limit the Board in making a determination in this case. While the Board is mindful of the potential confusion that may occur if the Agency utilizes inconsistent reviewing practices from site to site, in this case, Kathe failed to object to the Agency's rejection letter of February 10, 1994 which established the informational requirements of the Site Report for its site. Pursuant to Section 57.7(c)(4)(D) of the Act Kathe elected to incorporate the Agency's modification contained in its February 10, 1994 letter by submitting a revised plan on March 9, 1994, which incorporated those modifications. (Ag. Rec. at 121.) Although the Agency cites to 35 Ill. Adm. Code 732, which is not applicable to this case, Section 57.7(c)(4)(D) allows for the Agency to modify plans, i.e. Site Reports, and did so by describing the specific actions that it requires Kathe do perform in developing its Site Report. Thus, Kathe was aware of the requirements applicable to it and waived any review of them by failure to timely appeal. While the Board will hold the Agency to its prior practices in some instances, as we stated in State Bank of Whittington, the Board will determine the issue based on applicable law and not Agency policy. Therefore reliance on the other site reviews is not compelling in this matter.

The remaining issue is a factual question as to whether Kathe's Site Report, as submitted to the Agency, demonstrates that the site should be designated as a "No Further Action" site pursuant to Section 57.7(b) of the Act. The parties' focus their arguments on the soil boring method on what does it mean, by the requirement, to take a continuous sampling for fifty (50) feet in demonstrating that the site should be designated as a "No Further Action" site.

The term "continuous" refers to a geologic column being characterized without any significant gaps. Continuous sampling involves the collection of samples, typically from 1 to 2 feet in length, from the ground surface down to the desired depth (in this case fifty (50) feet). However, continuous sampling does not necessarily mean complete recovery of every inch of sampled material. We agree with Kathe that, even in properly conducted "continuous" sampling, some amount of material would be lost back into the bore hole itself during boring and pounding and some material would be lost during extraction process.

However, in order to develop detailed site geologic profiles at remediation sites or landfills, one or more soil borings are sampled continuously to a specified depth. The purpose of the site characterization is to verify, based on site-specific data, that the site geology meets Type E classification or other applicable classification. Therefore, it is important to identify all significant stratigraphic units. Particularly with regards to a UST site, since the site classification determines whether or not any corrective action is required at the site. Large sampling gaps may overlook significant stratigraphic units such as sand or gravel seams which may result in a site being classified as a "Low Priority" or "High Priority" site instead of being classified as a "No Further Action" site.

Here, Kathe indicates the boring was continuously sampled at a 2-foot interval to a depth of 15 feet, but from 15 to 50 feet, the boring was sampled at five-foot intervals while no sample was taken between 40 to 50 feet. Thus, the boring log includes a number of sampling gaps between the depths of 15 to 50 feet. Since there are significant gaps in the information, we find that the Site Report as submitted does not provide enough information to demonstrate that the site conditions meet the Type E designation of the Berg Circular.

Finally, Kathe's Table 2 and Exhibit 7 of its Site Report do not state whether the UST is within the maximum setback zone of a potable water supply well or regulated recharge area of a potable water supply well. Mr. Schrack admitted that it could not be determined whether the UST was within a maximum setback zone. Section 57.7(b) of the Act requires that the UST not be within the minimum or maximum setback zone of a potable water supply well or regulated recharge area of a potable water supply well. Thus in order for the Agency to make such a determination this information is required. We find that the Site Report is lacking this information.

For these reasons, we affirm the Agency's determination that Kathe's Site Classification Completion Report of August 18, 1994, is lacking information necessary to demonstrate that the site is a "No Further Action" site pursuant to Section 57.7(b) of the Act. Additionally, Kathe requested the Board to award legal and consultant fees in this matter. Since the Board is affirming the Agency's determination this issue is moot.

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

Order

The Board affirms the Agency's determination dated December 20, 1994, disapproving Kathe's Site Classification Completion Report dated August 18, 1994.

IT IS SO ORDERED.

Section 41 of the Environmental Protection Act (415 ILCS 5/41) provides for the appeal of final Board orders within 35 days of the date of service of this order. (See also 35 Ill. Adm. Code 101.246, Motion 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 18th day of May, 1995, by a vote of 6-0.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board