

ILLINOIS POLLUTION CONTROL BOARD
August 15, 1996

A.F. MOORE & ASSOCIATES,)
)
 Petitioner,)
) PCB 96-182
 v.) (UST - Appeal)
)
 ILLINOIS ENVIRONMENTAL PROTECTION)
 AGENCY,)
)
 Respondent.)

RICHARD W. COSBY, COSBY AND BELL, APPEARED ON BEHALF OF PETITIONER;

JOHN J. KIM, ASSISTANT COUNSEL, APPEARED ON BEHALF OF RESPONDENT.

OPINION AND ORDER OF THE BOARD (by M. McFawn):

This matter is before the Board on a petition for review filed by petitioner A.F. Moore & Associates (AFMA) on February 16, 1996. AFMA seeks review of a final determination issued by the Illinois Environmental Protection Agency (Agency) on January 12, 1996 which denied approval of AFMA's September 21, 1995 Corrective Action Completion Report (CACR).

A hearing was held in this matter before the Board's Chief Hearing Officer Michael Wallace on April 24, 1996. All witnesses were found to be credible. Petitioner submitted its post-hearing brief on May 20, 1996 (Pet. Br.), the Agency submitted its response on June 6, 1996 (Ag. Br.), and petitioner submitted its reply brief on June 21, 1996 (Pet. Reply Br.).

BACKGROUND

AFMA is the owner of property located at 7444 West 90th Street, Bridgeview, Cook County, Illinois (the site) (Petition for Review (Pet.) at 1.) The site is improved with a one-story industrial building, and until July 1994, contained an 8,000 gallon underground storage tank (UST) used to store diesel fuel. (Id.) The UST was registered with the Office of the State Fire Marshal (OSFM) on March 10, 1986.

On May 27, 1994, the OSFM granted AFMA a permit to remove the UST. In July of 1994, Midwest Environmental, Inc. (Midwest Environmental) removed the UST in the presence of OSFM personnel. (Pet. at 2.) A release of regulated substances was detected, and, AFMA notified the Illinois Emergency Management Agency (IEMA) of the release the following day, July 8, 1994. LUST Incident Number 941520 was assigned to the release.

On September 8 and 9, 1994, Midwest Environmental remediated the site, excavating 525 cubic yards of soil and removing 7,200 gallons of water from the excavation. Turnkey Environmental Consultants, Inc. (Turnkey), provided oversight for the closure activity and performed closure sampling. (Pet. at 2.)

Turnkey submitted a combination 45-Day Report/Corrective Action Completion Report (CACR) to the Agency on March 14, 1995. In the combined report, AFMA explained that contaminated soils were remediated until no further signs of contamination were present, and closure sampling was performed. (Agency Record (Ag. Rec.) at 7.) The report further states that closure sampling revealed that cleanup objectives were achieved, with the exception of a PNA constituent in one sample. (Ag. Rec. at 8.)

Question 5 on the form for the 45-Day Report asks “Was any groundwater with a sheen removed from the excavation?,” and “if YES, what was the volume, in gallons, removed from the site.” In response, AFMA checked, “YES,” and listed the volume as 7,200 gallons. (Ag. Rec. at 4.) The combined 45-Day Report/CACR included a Professional Engineer Certification, wherein William N. McKinnery, President of Turnkey, certified that the site had been remediated to applicable cleanup objectives. (Ag. Rec. at 6.) It also included manifests for disposal of a total of 7,200 gallons of non-hazardous water (Ag. Rec. at 30-32), and photographs of the excavation. (Ag. Rec. at 34.)

On July 11, 1995 the Agency issued a letter denying AFMA’s CACR. The Agency denied the report on the grounds that it failed to meet the applicable remediation objectives for groundwater, and failed to address the necessary factors considered in establishing site-specific soil cleanup objectives related to the detected PNAs. With regard to groundwater at the site, the denial letter stated:

The report fails to demonstrate that the remediation objectives set forth in 35 IAC Section 732.408 have been met for groundwater. If the owner or operator intends to proceed in accordance with 35 IAC Section 732.300(b), as a result of the groundwater encountered during the excavation (7200 gallons), the Agency requires that a groundwater investigation be conducted.

(Ag. Rec. at 71.)

On September 21, 1995, Turnkey submitted, on a form provided by the Agency, a Request for Site Specific Cleanup Objectives (Site Specific Objectives Report). (Ag. Rec. at 83-106.) In an attached cover letter, Turnkey responded to the Agency’s July 11, 1995 denial letter. The September 21, 1995 letter stated in part:

As indicated in the report, water removed from the excavation was strictly standing water which had entered the excavation as rainwater runoff (sic) from surrounding surfaced areas. No groundwater was otherwise encountered during the excavation.

The report further reasons that additional excavation would not be prudent or cost effective, nor would the expense of verifying a Berg designation “E” zone.

(Ag. Rec. at 79.)

In the Site Specific Objectives Report, AFMA sought to establish site-specific cleanup objectives for two remaining soil contaminants detected in one sample from the east wall of the excavation: two-naphthalene, and benzo (a) anthracene. AFMA also addressed the groundwater at the site in its response to several questions on the Agency’s form, stating in relevant part:

7. Shallow geology ascertained from the excavation revealed approximately 1.5 feet of asphalt capping and CA-6 base, with brown silty clays turning to stiff, gray silty clays towards 12 feet. The only waters that were removed from the excavation were waters sitting in the backfill stone and additional precipitory waters that entered the excavation during waiting periods. See photographs in CACR report showing dry excavation.

* * * *

14. As previously discussed, no groundwater was encountered in the excavation. The waters that were removed were those waters standing in the backfill area. These waters accumulated in the backfill over time and for the two months while it was exposed and uncapped (after tank removal) from rainwater run-off from surrounding surfaced areas. Records show significant precipitation during the month of August. (See University of Chicago recordings in Appendix)

Primarily waters were removed the day prior to and on the first day of excavation September 7 and 8). (sic) Precipitation occurring on September 9 and 10 resulted in additional waters needing to be removed. Records obtained from the University of Chicago weather station (16 miles east) show only minor precipitation on September 9, however, parties involved all recall scattered precipitation during activities on September 8 and 9. Additional waters were removed on September 9 prior to completion of excavation on September 12.

As the pictures in the CACR (sic), the excavation was completely dry at completion and there were no water bearing stratas (sic) within. Copies attached. (See photos in Appendix)

(Ag. Rec. at 86-88.)

On January 12, 1996, the Agency sent AFMA a letter denying AFMA's September 21, 1995 submittal of its CACR. (Ag. Rec. at 146-149.) As the sole ground for denial, this letter repeated, in nearly identical language, the denial reasons concerning groundwater previously set forth in the Agency's July 11, 1995 denial letter. (Ag. Rec. at 149.) It is the January 12, 1996 denial letter that forms the basis for this appeal.

At hearing, Kendra Brockamp, the Agency employee who was responsible for preparing both the July 11, 1995 denial letter and the January 12, 1996 denial letter, testified that she proposed that AFMA conduct a groundwater investigation because of the way the company answered question C-5 of the 45-Day Report (Tr. at 10.) Ms. Brockamp further testified that the only evidence of the existence of groundwater in the excavation was found in the answer to question C-5 of the 45-Day Report. (Tr. at 13.) Finally, Ms. Brockamp testified that the basis for the January 12, 1996 denial letter was that AFMA failed to conduct a groundwater investigation, as previously requested by the Agency. The dispute in this matter thus centers on whether it was proper for the Agency to require AFMA to perform a groundwater investigation.

ARGUMENTS OF THE PARTIES

AFMA's Arguments

AFMA asserts that the Agency was acting in an unreasonable, arbitrary and capricious manner in insisting that a groundwater investigation is necessary at the site. (Pet. Br. at 12.) AFMA does not contest the fact that the 45-Day Report states that groundwater with a sheen was present in the excavation. AFMA agrees that it should have better explained its answer to question C-5 on the 45-Day Report, but believes that its subsequent submissions adequately explained that the water was surface water runoff, not groundwater. The subsequent submissions to the Agency included the September 21, 1995 correspondence with the Agency, and Section C of the Site Specific Objectives Report.

AFMA also asserts that information which had previously been submitted to the Agency supported the representations made in the September 21, 1995 correspondence and the Site Specific Objectives Report. The record before the Agency included a July 7, 1994 Log of Underground Storage Tank Removal (UST Removal Log), completed by Ronald H. Davidson, a Storage Tank Safety Specialist at the OSFM who was present at the AFMA site during the tank removal. The UST Removal Log was submitted to the Agency July 28, 1994. In response to the question "Groundwater Contaminated," Mr. Davidson checked "NO." (Ag. Adm. Rec. at 62.) AFMA also points to the photographs which were included as an appendix to the CACR, which it claims show a dry excavation. At hearing, AFMA introduced as exhibits photographs taken by Brian Moody, an employee of AFMA, on July 7, 1994 at the time the tank was removed (Exhibits 1-4), and photographs of the excavation taken by Andrew Carlson of Turnkey subsequent to completion of the tank removal (Exhibit 5).

AFMA also argues that the subsurface geology at the site supports its contention that the water was surface runoff and not groundwater. The site specific geology was described in the Site Specific Objectives Report as follows: "Shallow geology ascertained from the excavation revealed approximately 1.5 feet of asphalt capping and CA-6 base, with brown silty clays turning to stiff, gray silty clays towards 12 feet." (Ag. Rec. at 86.) The Site Specific Objectives Report based its conclusions concerning the deep hydrology at the site on the

Berg Circular, which designated the site as zone E, and asserts that this designation was confirmed by well logs, which indicated clays down to 50 feet, and bedrock starting at 50 to 100 feet, with significant groundwater aquifers in the bedrock strata. (*Id.*) This same information had previously been submitted to the Agency in the tank removal narrative of the 45-Day Report. At hearing, Brian Moody of AFMA also pointed to several other excavations he performed in the area, which he asserts did not encounter groundwater. (Tr. at 26-27.)

Agency's Arguments

The Agency asserts that AFMA has failed to meet its burden of proving that no violation of the Act would have occurred if the Agency had approved the CACR. The Agency asserts that the 45-Day Report indicated that 7,200 gallons of groundwater were removed from the excavation, and that the 45-Day Report contained no contrary information or representation. (Ag. Br. at 2, 4.) The Agency states that the only conclusion which may be drawn from the 45-Day Report was that groundwater was removed from the excavation. Therefore, the Agency asserts that it was justified in requiring that a groundwater investigation be conducted.

The Agency states that it was in the Site Specific Objectives Report that AFMA first made its assertions that the water in the excavation was rainwater runoff, not groundwater. (Ag. Br. at 7.) The Agency refers to this as a drastic change in position, and asserts that it is not adequately supported. The Agency states that there is a "dearth of information" to support the contention that the water in the excavation was not groundwater. (Ag. Br. at 8.)

The Agency further attacks the adequacy of the photos of the excavation in Exhibit 5. The Agency asserts that, while the Site Specific Objectives Report represents that the photos accurately depict that the excavation was completely dry at completion, no testimony was elicited from Mr. Carlson about such conditions, and that the Site Specific Objectives Report was signed by William N. McKinnery of Turnkey, not Mr. Carlson. (Ag. Br. at 9-10.)

The Agency asserts that the information in the Site Specific Objectives Report is inherently at odds with the information in the 45-Day Report. (Ag. Br. at 10.) The Agency states that merely offering a conclusory statement and precipitation records does not establish that the water was not groundwater. The Agency asserts that the 45-Day Report and the Site Specific Objectives Report are at best inconsistent, and that a groundwater investigation was therefore warranted. The Agency concludes that the information contained in the Site Specific Objectives Report did not adequately address the Agency's denial and concern, and that the subsequent denial was therefore justified. (Ag. Br. at 11.)

REGULATORY FRAMEWORK

The Board's authority to review the Agency's determination in UST reimbursement cases arises from Section 57.7(c)(4)(D) and 57.8(i) of the Act. (415 ILCS 5/57.7(c)(4)(D) and 5/57.8(i).) Section 57.7(c)(4)(D) grants individuals the right to appeal to the Board an Agency UST determination, in accordance with the procedures established in Section 40 of the Act, which establishes the general procedures for permit appeals. (415 ILCS 5/40.) Similarly, Section 57.8(i) of the Act grants parties the right to petition the Board to review the Agency denial or partial payment of a reimbursement request in the manner provided in Section 40 of the Act.

In UST appeals, as in permit appeals, 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. (Graham v. Illinois Environmental Protection Agency, PCB 95-89 (August 24, 1995) slip op. at 5, *citing City of Herrin v. Illinois Environmental Protection Agency* (March 17, 1994), PCB 93-195; *see also Browning Ferris Industries of Illinois, Inc. v. Pollution Control Board*, 179 Ill.App.3d 598, 534 N.E.2d 616 (Second Dist. 1989.)) 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. (Graham at 5, citing John Sexton Contractors Co. v. Illinois Environmental Protection Agency, PCB 88-139, February 23, 1989.)

ANALYSIS

In this case, the Agency denied approval of petitioner's CACR, and the sole question before the Board is whether the application, as submitted to the Agency, demonstrates that no violations of the Act would occur if approval had been granted. The sole reason the Agency cited for denial was that petitioner failed to perform groundwater sampling. The Board must therefore determine whether petitioner has shown that there were insufficient grounds for the Agency to believe that the failure to perform groundwater monitoring could lead to a violation of the Act. We find that AFMA has demonstrated that the Agency's January 12, 1996 denial was improper, since the AFMA's application demonstrated that no violations of the Act or Board regulations would have occurred if the Agency approved the CACR. We believe that the Agency improperly failed to take into account the information submitted in the Site Specific Objectives Report, and that the record before the Agency demonstrated that approval of the CACR should have been granted.

As testified to by Ms. Brockamp, the Agency's sole ground for believing that groundwater was encountered at the site was AFMA's answer to question C-5 on the 45-Day Report, which indicated that 7,200 gallons of groundwater had been encountered. However, in its subsequent submissions to the Agency, AFMA explained the basis for its answer to question C-5, making it clear that the water encountered was not groundwater, but was in fact precipitation which collected in the excavation. This information was contained in the Site Specific Objectives Report, which was verified by AFMA's consulting engineer, William McKinney. The Site Specific Objectives Report also referenced photographs included in the CACR for the express purpose of demonstrating that the excavation was dry at completion. (Ag. Rec. at 86-88.) Furthermore, the statements in the Site Specific Objectives Report were consistent with other information already before the Agency, including the OSFM's UST Removal Log, and information regarding the subsurface geology included in the 45-Day Report. We find that this information adequately explained the statement in the 45-day report, and adequately demonstrated that no groundwater was encountered during the tank removal. We therefore find that the Agency improperly failed to consider the information submitted by AFMA subsequent to the 45-Day Report, and that the Agency improperly issued its January 12, 1996 denial letter.

ORDER

The January 12, 1996 decision of the Illinois Environmental Protection Agency (Agency), denying approval of A.F. Moore, Inc.'s Corrective Action Completion Report (CACR) is hereby reversed. The Agency is hereby ordered to issue its approval of the CACR.

IT IS SO ORDERED.

Section 41 of the Environmental Protection Act (415 ILCS 5/41 (1994)) provides for the appeal of final Board orders within 35 days of the date of service of this order. The Rules of the Supreme Court of Illinois establish filing requirements. (See also 35 Ill. Adm. Code 101.246 "Motions for Reconsideration.")

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above opinion and order was adopted on the ____ day of _____, 1996, by a vote of _____.

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board