

ILLINOIS POLLUTION CONTROL BOARD

June 21, 2018

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

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

Illico Independent Oil Co. filed a petition asking the Board to review the Illinois Environmental Protection Agency's May 17, 2017 determination concerning Illico's leaking underground storage tank (UST) site located at 3712 N. University Street in Peoria, Peoria County. The Agency approved a corrective action plan that Illico submitted, but modified it to prohibit removal of the USTs and associated piping and pumping equipment.

On April 6, 2018, Illico filed a motion for summary judgment. According to Illico, neither the Environmental Protection Act (Act) nor the Board's rules prohibit removal of tanks and associated equipment—the Board's rules explicitly include these activities as eligible corrective action costs. The Agency argues that Illico misapplies the Act and Board rules, which require the Agency to decline reimbursement for any costs that are not necessary to achieve remediation objectives.

The Board finds that there is a genuine issue of material fact in this case and denies Illico's motion for summary judgment. Construing the facts in the record against the movant—as appropriate when ruling on a motion for summary judgment—the Board finds that the record is not clear whether removal of the USTs was necessary to remove all soil contaminated beyond remediation objectives.

First, this opinion briefly summarizes the case's procedural and factual background. It then discusses whether there is a genuine issue of material fact. Finally, this opinion summarizes the Board's holdings and describes the Board's order to deny Illico's motion for summary judgment.

BACKGROUND

Procedural Background

On June 22, 2017, Illico timely filed a 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 supporting its determination (R.). Illico filed its motion for summary judgment (Mot.) on April 6, 2018, with proof of service filed on April 19, 2018. The Agency filed its response (Resp.) on April 19, 2018. Illico filed its reply (Reply) and motion for leave to file a reply *instantly* on May 3, 2018. The Board grants Illico's motion for leave to file a reply.

Factual Background

Before they were removed, four 12,000-gallon USTs and one 6,000-gallon UST with related piping equipment existed at the site. R. 177-78. On December 3, 1992, the Illinois Department of Transportation reported a release of petroleum at the site (detected during road work). R. 1. It was detected during road work. *Id.* Illico, who did not own the site in 1992, became responsible for remediation at the site on July 24, 2015. R. 10.

Illico's site investigation found petroleum-contaminated soils. Using soil borings and monitoring wells, Illico aimed to delineate the site's contamination. R. 244. Illico submitted a corrective action plan to the Agency on December 14, 2015. The plan sought to remove the USTs and piping as a means of remediating the site. R. 177-78. The plan stated that in "order 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." R. 179. Before the Agency approved or disapproved the corrective action plan, Illico removed the USTs. R. 561. When the USTs were removed, Illico identified contamination and reported a release of petroleum. *Id.*

On November 29, 2016, the Agency rejected the part of the corrective action plan that sought to remove the tanks. According to the Agency, UST removal was not "necessary to comply with the Act." R. 578. Specifically, the Agency stated that the only soil sampling locations which showed contamination that exceeded site remediation objectives were not in a location that justified UST removal. *Id.* On January 16, 2017, Illico submitted a revised plan that attempted to further justify tank removal. R. 584-628. The revised plan includes a site map depicting soil borings and monitoring wells used to detect contamination. R. 598. The Agency was not convinced by the additional justification and issued a final decision on May 17, 2017. R. 637.

Legal Background

Summary judgment is appropriate in Board adjudications when the record shows there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. 35 Ill. Adm. Code 101.516(b). This is the same standard used in trial court proceedings in Illinois. IEPA v. PCB, 386 Ill. App. 3d 375, 391 (3rd Dist. 2008). When ruling on a motion for summary judgment, the record "must be considered strictly against the movant and in favor of the opposing party." *Id.*

The Board must decide whether Illico's submittal to the Agency demonstrated compliance with the Act and the Board's regulations. *See, e.g., Illinois Ayers Oil Co. v. IEPA*, PCB 03-214, slip op. at 8 (Apr. 1, 2004). The Agency's denial letter frames the issues on appeal.

Pulitzer Cmty. Newspapers, Inc. v. IEPA, PCB 90-142, slip op. at 6 (Dec. 20, 1990). Illico has the burden of proof. *See, e.g., Ted Harrison Oil v. IEPA*, PCB 99-127, slip op. at 5–6 (July 24, 2003); *see also* 35 Ill. Adm. Code 105.112.

DISCUSSION

As stated above, the Board will not grant summary judgment where the record shows there is a genuine issue of material fact. In this case, the record contains only the Agency-submitted administrative record of its decision to modify Illico’s corrective action plan. When deciding whether there is a genuine issue of material fact, the Board must construe the record against Illico (the moving party). This opinion analyzes the record and finds that whether UST removal was necessary to remove the contaminated material above remediation objectives is a genuine issue of material fact.

Whether UST Removal Was Necessary Is a Material Fact

To be ensured of reimbursement for remediation done under the corrective action provisions, the Agency must approve of the corrective action plan before remediation is done. After other statutorily mandated steps are taken, if contaminants exceed remediation objectives for the site, the site owner must submit a corrective action plan to the Agency and the plan must be carried out after Agency approval. 415 ILCS 5/57.7(b) (2016). Subpart C of the Board’s rules on USTs state that the site owner must proceed with corrective action in accordance with an Agency-approved plan. 35 Ill. Adm. Code 734.335(c) (quoting 415 ILCS 5/57(b)(4) (2016)). Furthermore, an owner may conduct corrective action before the Agency approves a corrective action plan, but “they may not be entitled to full payment from the Fund.” *Id.* at 734.335(d).

In this case, the Agency approved aspects of Illico’s corrective action plan, but not removal of the USTs. Illico argues that the Agency acted contrary to the Board’s rules when it disapproved of removal. The Board’s rules explicitly permit “removal and disposal of any UST if a release of petroleum from the UST was identified and the Illinois Emergency Management Agency was notified prior to its removal” through corrective action. 35 Ill. Adm. Code 734.625(a)(12). Illico argues that under this provision, the Agency *must* approve of the UST removal. *Mot.* at 8. Alternatively, Illico argues that the Agency must approve UST removal because removal was necessary to remove soils contaminated beyond remediation objectives. *Id.* at 10.

Although the Board’s rules allow the Agency to reimburse certain expenses—including those related to removing contaminated soil and removing USTs—the Board’s rules also *prohibit* the Agency from reimbursing certain expenses. In particular, costs that are not necessary to achieve remediation objectives are explicitly *not* eligible for reimbursement. 35 Ill. Adm. Code 734.630(o).

If UST removal was not necessary to remove the soil contaminated beyond remediation objectives, then associated costs would not be reimbursable—notwithstanding the fact that the Board’s rules allow (but do not require) the Agency to reimburse costs associated with UST

removal under 35 Ill. Adm. Code 734.625(a)(12). For this reason, whether UST removal was necessary is a material fact.

Whether UST Removal Was Necessary Is a Genuine Issue of Fact

The administrative record does not show that UST removal was necessary to remove soil that exceeded remediation objectives. Several items in the record indicate that it was not necessary. The Agency's letter stated that Illico failed to demonstrate that the USTs and associated equipment needed to be removed in order to access contaminated soil. R. 634. As stated in Illico's revised corrective action plan, the Agency calculated that soil borings and sampling wells did not show that excavation of soil near the USTs was contaminated in excess of site remediation objectives. R. 589.

Illico argues that there "is no disagreement that contaminated soil in excess of the applicable site remediation objectives was present in areas" near the USTs. Mot. at 10. (The Agency, however, maintains there is significant disagreement. Resp. at 18.) Illico cites areas in the record that allegedly show soil borings and monitoring wells immediately to the west and downgradient from the tanks. Mot. at 10-11.

Summary judgment is a drastic means of resolving a case, where facts are strictly construed against the moving party. Through this lens, the Board must construe the facts in favor of the Agency. Therefore, the Board finds that there is a genuine issue of material fact concerning whether UST removal was necessary to remove the contaminated material exceeding the remediation objectives.

CONCLUSION

Because there is a genuine issue of material fact, the Board denies Illico's motion for summary judgment.

IT IS SO ORDERED.

I, Don A. Brown, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on June 21, 2018, by a vote of 5-0.

A handwritten signature in black ink that reads "Don A. Brown". The signature is written in a cursive, flowing style.

Don A. Brown, Clerk
Illinois Pollution Control Board