

ILLINOIS POLLUTION CONTROL BOARD  
October 17, 2019

JOHN D. WARSAW, )  
 )  
 Petitioner, )  
 )  
 v. ) PCB 18-83  
 ) (UST Appeal – Land)  
 ILLINOIS ENVIRONMENTAL )  
 PROTECTION AGENCY, )  
 )  
 Respondent. )

GARY E. SCHMIDT OF KAVANAGH, SCULLY, SUDOW, WHITE & FREDERICK, P.C.  
APPEARED ON BEHALF OF PETITIONER, and

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

OPINION AND ORDER OF THE BOARD (by B. F. Currie):

John D. Warsaw (petitioner) appeals a June 12, 2018 determination of the Illinois Environmental Protection Agency (IEPA) concerning corrective action at petitioner’s underground storage tank (UST) site located at Route 122, Minier, Tazewell County. The IEPA denied reimbursement for \$7,600 in paving costs, \$5,780 of which are disputed.

The Board finds that petitioner did not meet its burden of proving that reimbursement of the \$5,780 is in compliance with the Environmental Protection Act (Act) and the Board’s regulations. Specifically, the costs are not associated with Early Action and were not approved by IEPA in a corrective action plan and budget. Accordingly, the Board affirms the IEPA’s denial of reimbursement.

The Board’s opinion and order begins with the procedural and factual background of this case. The Board then provides the legal and statutory background. The Board next discusses the issues presented, reaches its conclusion, and issues its order.

**PROCEDURAL BACKGROUND**

On June 26, 2018, petitioner timely filed a petition asking the Board to review a June 12, 2018 determination of the IEPA (Pet.). On September 20, 2018, the Board directed petitioner to file an amended petition, which was filed on September 24, 2018 (Am. Pet.). On October 4, 2018, the Board accepted the amended petition for hearing. On May 6, 2019, IEPA filed the record of its determination (R.).

The Board held a hearing on June 5, 2019 (Tr.). At hearing, John D. Warsaw testified on his own behalf and Brian Bauer testified on behalf of the IEPA. On July 16, 2019, petitioner filed its opening brief (Pet. Br.). On August 16, 2019, IEPA filed its response brief (IEPA Br.).

## **FACTUAL BACKGROUND**

### **Site**

The site was a gasoline service station and farm implement dealership located at 210 Route 122 East, Minier. Tr. at 8; R. at 13. Three underground storage tanks (UST) were removed on July 6, 1999. One tank was a 2,000-gallon tank and two tanks were 500-gallon tanks. *Id.*

On August 11, 1998, petitioner had notified the Illinois Emergency Management Agency (IEMA) of a release at the site. R. 1305; Ag. Br. at 4. Petitioner submitted “Report of Early Action/amended 45-day Report” dated August 31, 1999. R. 0013<sup>1</sup>.

On December 8, 2000, IEPA received the first corrective action plan for the site (R. 0001-0116), and on March 30, 2001, IEPA approved the plan (R. 0117-9). Petitioner submitted and IEPA approved several additional corrective action plans and budgets. *See e.g.* R.0391-408; 0531-609; 0638-853.

On October 28, 2016, petitioner submitted a final corrective action plan. R. 0972-1094. On January 12, 2017, IEPA approved the plan and modified the budget. R. 1110-16. On June 22, 2017, petitioner submitted a corrective action completion report (R. 1119-1256) and IEPA issued a No Further Remediation letter (NFR) on September 12, 2017. R. 1270-87. On that same date, IEPA issued a corrective action plan and budget modification. R. 1290-1301.

On March 13, 2018, petitioner filed a reimbursement claim with IEPA for the site. R. 1302-63. On June 12, 2018, IEPA denied reimbursement for \$7,660 in paving costs. R. 1381-90.

### **IEPA Denial of Reimbursement**

IEPA denied reimbursement for \$7,660 in paving costs because the costs were not approved in a budget. R. 1381, 1383. IEPA’s denial letter states that the costs are ineligible under Section 57.7(c)(3) of the Act and 35 Ill. Adm. Code 734.510(b), and 734.605(a). IEPA also noted that the costs lack supporting documentation and are therefore ineligible for payment from the Fund pursuant to 35 Ill. Adm. Code 734.630(cc). *Id.*

### **Testimony at Hearing**

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<sup>1</sup> The Board notes that while the release was reported in 1998, the administrative record contains no filings dated before December 8, 2000. Thus, the Report of Early Action/amended 45-day Report was referenced in a corrective action plan, but not a part of the record provided by IEPA.

Mr. Warsaw testified that asphalt and concrete were removed in order to reach the leaking USTs. Tr. at 9. After removal of the USTs, petitioner began to remediate the site; however, corrective action was unsuccessful. Tr. at 10-12. Petitioner replaced the USTs and was operating as a gas station during remediation. Tr. at 12. The area of the site where remediation was ongoing remained unpaved. Tr. at 12-13.

Because the first corrective action plan did not work, another corrective action plan was submitted to IEPA detailing additional steps for remediation of the site. Tr. at 13. IEPA approved that corrective action plan. *Id.* Ultimately the site was remediated, corrective action was complete, and an NFR letter was provided to the petitioner. Tr. at 13-14.

The area of the site where remediation was occurring was not paved until after the completion of remediation pursuant to the corrective action plan. Tr. at 15-16. The replaced asphalt was the same type as that which was on the site prior to the corrective action beginning. Tr. at 16. Mr. Warsaw stated that the city required the replacement of the asphalt. Tr. at 20.

Mr. Brian Bauer, lead worker for IEPA's leaking UST claims processing unit, oversaw petitioner's reimbursement claim. Tr. at 22-4. Mr. Bauer testified that the timeframe for Early Action is 45 days, with a possible 14-day extension. Tr. at 24. Mr. Bauer explained that all costs after Early Action must be approved in a corrective action plan and budget by IEPA. *Id.* Mr. Bauer testified that petitioner asked for no extension for Early Action beyond the 59 days, and the cost for asphalt replacement was not approved in a corrective action plan and budget. Tr. at 25. Mr. Bauer noted that the asphalt replacement would not have been approved as a part of Early Action because the replacement occurred outside the 59 days maximum; rather the costs would have been required as a part of an approved plan and budget. Tr. at 26.

Mr. Bauer acknowledged on cross examination that the request for reimbursement, including the asphalt, was filed within one year of the NFR letter being issued. Tr. at 27. However, Mr. Bauer stated that the IEPA reviews claims only to ensure that the claims are consistent with an already approved budget. Tr. at 28. Plans and budgets must be submitted prior to the issuance of the NFR. *Id.*

## **STATUTORY AND LEGAL BACKGROUND**

### **Title XVI of the Act and Part 734 of the Board's Regulations**

Title XVI of the Act provides for the administration and oversight of the Leaking Underground Storage Tank Program, which includes the UST Fund and requirements for reimbursement from it. 415 ILCS 5/57-57.18 (2018). Section 57.1(a) of the Act provides that "[a]n owner or operator of an underground storage tank who meets the definition of this Title [XVI] shall be required to conduct tank removal, abandonment and repair, site investigation, and corrective action in accordance with the requirements of the Leaking Underground Storage Tank Program." 415 ILCS 5/57.1(a) (2018). The Board's petroleum UST regulations are at 35 Ill. Adm. Code 734. Those rules set forth, among other things, requirements for corrective action plans and budgets and their review by the IEPA.

Section 57.7(c)(3) of the Act addresses the IEPA's review of plans and provides that "the [IEPA] shall determine . . . that the costs associated with the plan are reasonable, will be incurred in the performance of site investigation or corrective action, and will not be used for site investigation or corrective action activities in excess of those required to meet the minimum requirements of this Title [XVI]." 415 ILCS 5/57.7(c)(3) (2018). Section 57.6(b) of the Act defines Early Action and provides:

Notwithstanding any other corrective action taken, an owner or operator may, at a minimum, and prior to submission of any plans to the [IEPA], remove the tank system, or abandon the underground storage tank in place, in accordance with the regulations promulgated by the Office of the State Fire Marshal (see 41 Ill. Adm. Code 160, 170, 180, 200). The owner may remove visibly contaminated fill material and any groundwater in the excavation which exhibits a sheen. For purposes of payment of early action costs, however, fill material shall not be removed in an amount in excess of 4 feet from the outside dimensions of the tank. 415 ILCS 5/57.6(b) (2018).

The Board's rules set forth the criteria for proceeding with removal of leaking USTs, remediating the site, and ultimately reimbursement from the UST Fund. *See generally* 35 Ill. Adm. Code 734. The Board's rules recite the statutory language above, and continue:

For purposes of payment from the Fund, the activities set forth in subsection (f) of this Section must be performed within 45 days after initial notification to IEMA of a release plus 14 days, unless special circumstances, approved by the [IEPA] in writing, warrant continuing such activities beyond 45 days plus 14 days. The owner or operator must notify the [IEPA] in writing of such circumstances within 45 days after initial notification to IEMA of a release plus 14 days. Costs incurred beyond 45 days plus 14 days must be eligible if the [IEPA] determines that they are consistent with early action.

BOARD NOTE: Owners or operators seeking payment from the Fund are to first notify IEMA of a suspected release and then confirm the release within 14 days to IEMA pursuant to regulations promulgated by the OSFM. See 41 Ill. Adm. Code 170.560 and 170.580. The Board is setting the beginning of the payment period at subsection (g) to correspond to the notification and confirmation to IEMA. 35 Ill. Adm. Code 734.210(g); *see also* 35 Ill. Adm. Code 734.210(f).

### **Standard of Review and Burden of Proof**

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

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

## **DISCUSSION**

The IEPA's denial letter frames the issue on appeal, and in this instance IEPA denied reimbursement for asphalt because the materials were not included in a corrective action plan and budget. R. at 1383. Petitioner however argues that the paving costs did not need to be included in a corrective action plan and budget because the costs were Early Action. Pet. Br. at 2. The Board will address the issue of whether or not the asphalt paving costs were Early Action first. Next, the Board will address the denial reasons listed in the denial letter by IEPA.

### **Early Action**

Petitioner argues that the paving costs did not need to be included in a corrective action plan and budget because the costs were Early Action. Pet. Br. at 2. Petitioner asserts that the site was opened in 1999 under Early Action and left open during remediation until completion of corrective action in 2017. Further, petitioner maintains that the replacement of the asphalt was an in-kind replacement. *Id.* Petitioner's argument misconstrues the law.

As IEPA correctly points out Early Action does not extend beyond a 45-day period, with the ability to extend for 14 days after notification of IEMA. Ag. Br. at 14. The Act allows for certain actions to be undertaken by an owner or operator of a site where leaking USTs are found prior to submitting a corrective action plan or budget to IEPA. *See* 415 ILCS 5/57.6(b), 57.7(c)(5) (2018). The Board rules provide specific steps and a timeframe for those early actions. *See* 35 Ill. Adm. Code 734.210. The steps to be taken under the Act and Board rules are removal of tanks, visibly contaminated material, and any groundwater that exhibits a sheen. The timeframe for those steps is, at most, 59 days from reporting the release. The Board's rules are clear: to be considered Early Action, the steps must take place within 59 days of reporting the incident to IEMA.

In this case, petitioner is seeking reimbursement for activities that took place over 18 years after the reporting of the incident to IEMA. Clearly, this is outside the timeframe for Early Action. The Board notes that it previously addressed a similar issue regarding remediation taking place outside the 59 days, for which a petitioner sought reimbursement under the terms of Early Action. In Cancer Treatment Centers of America v. IEPA, PCB 10-33 (Sept. 2, 2010), the Board found that when an initial report to IEMA occurred on January 7, 2008, and the remediation did not occur until June 25, 2008, the "actions clearly took place well beyond the timeframe for early action as that term is used in the Act and Board regulations". *Id.* at slip op.

12. The remediation in Cancer Treatment included removal of the tanks, and excavation of the tank bed. *Id.*

To seek reimbursement under Early Action, the activity for which reimbursement is sought must occur within a 45-day period, or during such extension as granted under the rules, after reporting an incident to IEMA. Actions which take place outside that timeframe must be included as a part of a corrective action plan and budget if reimbursement from the fund is sought. 35 Ill. Adm. Code 734.300, 734.605(a). Petitioner seeks reimbursement for asphalt paving occurring over 18 years after initial reporting to IEMA. The Board finds that petitioner failed to meet his burden and the asphalt replacement cannot be reimbursed as Early Action

### **IEPA Denial Reasons**

As the replacement of asphalt was not Early Action, under the Act and Board rules petitioner must include the replacement of asphalt in a corrective action plan and budget in order to seek reimbursement. *See generally* 35 Ill. Adm. Code 734.Subpart C. IEPA argues that since the amount for asphalt replacement was not included in a corrective action plan and budget, prior to issuance of the NFR letter, IEPA cannot reimburse the amount. Ag. Br. at 12. The Board agrees with IEPA.

The record contains no evidence that the costs for replacement of the asphalt were included in a corrective action plan and budget. In fact, the first evidence in the record of the request for reimbursement is from February, 2018, five months after the issuance of the NFR letter. R. 1314. IEPA cannot reimburse for costs exceeding those contained in a budget or amended budget approved by IEPA. 35 Ill. Adm. Code 734.630(m) *see also* 35 Ill. Adm. Code 734.605(a) (“Costs for which payment is sought must be approved in a budget . . .”). . Furthermore, the Board rules require that plans and budgets must be submitted prior to issuance of an NFR letter. 35 Ill. Adm. Code 734.335(d). The record establishes that IEPA did not approve the costs for asphalt replacement in a corrective action plan and budget before the issuance of the NFR letter. Therefore, the Board agrees with IEPA that it cannot approve reimbursement. The Board affirms IEPA’s denial of reimbursement from the fund of \$5,780 for asphalt replacement as it was not approved in a corrective action plan and budget.

### **CONCLUSION**

The Board finds that the petitioner did not meet his burden of establishing that the costs for asphalt replacement should be reimbursed. The Board affirms IEPA’s denial of reimbursement from the fund of \$5,780 for asphalt replacement occurring beyond the period for Early Action, and not approved in a corrective action plan and budget.

This opinion constitutes the Board’s findings of fact and conclusions of law.

### **ORDER**

The Board affirms the IEPA’s June 12, 2018 determination to deny reimbursement of \$5,780 for asphalt replacement.

IT IS SO ORDERED.

Section 41(a) of the Environmental Protection Act provides that final Board orders may be appealed directly to the Illinois Appellate Court within 35 days after the Board serves the order. 415 ILCS 5/41(a) (2018); *see also* 35 Ill. Adm. Code 101.300(d)(2), 101.906, 102.706. Illinois Supreme Court Rule 335 establishes filing requirements that apply when the Illinois Appellate Court, by statute, directly reviews administrative orders. 172 Ill. 2d R. 335. The Board's procedural rules provide that motions for the Board to reconsider or modify its final orders may be filed with the Board within 35 days after the order is received. 35 Ill. Adm. Code 101.520; *see also* 35 Ill. Adm. Code 101.902, 102.700, 102.702. Filing a motion asking that the Board reconsider this final order is not a prerequisite to appealing the order. 35 Ill. Adm. Code 101.902.

<b>Names and Addresses for Receiving Service of Any Petition for Review Filed with the Appellate Court</b>	
<b>Parties</b>	<b>Board</b>
Gary D. Schmidt Kavanagh, Scully, Sudow, White & Frederick, P.C. 301 SW Adams Street Suite 700 Peoria, IL 61602	Illinois Pollution Control Board Attn: Don A. Brown, Clerk James R. Thompson Center 100 West Randolph Street, Suite 11-500 Chicago, Illinois 60601
Illinois Environmental Protection Agency Attn: Melanie A. Jarvis Assistant Counsel Division of Legal Counsel 1021 North Grand Avenue, East P.O. Box 19276 Springfield, IL 62794-9276	

I, Don A. Brown, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion and order on October 17, 2019, by a vote of 4-0.



Don A. Brown, Clerk  
Illinois Pollution Control Board