ILLINOIS POLLUTION CONTROL BOARD
December 17, 1992

SOUTHERN FOOD PARK, INC., an Illinois Corporation,	)	
Petitioner,	)	
v.	)	PCB 92-88 (Underground Storage Tank Reimbursement)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
Respondent.	)	

EDWARD DWYER AND KATHERINE HODGE, HODGE & DWYER, APPEARED ON BEHALF OF PETITIONER;

DANIEL MERRIMAN AND JAMES RICHARDSON APPEARED ON BEHALF OF THE ILLINOIS ENVIRONMENTAL PROTECTION AGENCY.

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

On June 11, 1992, Southern Food Park, Inc., (SFPI) filed a petition for review of an Underground Storage Tank Reimbursement Determination for its facility located at 700 West Main, Benton, Franklin County, Illinois. The petition for review was filed pursuant to 22.18b(g) of the Environmental Protection Act (Act). (Ill. Rev. Stat. 1991, ch. 111 1/2 par. 1022.18b(g).)

Hearings were held in Benton, Illinois on October 6 and 7, 1992. No members of the public were present at the hearing. SFPI filed its final brief on November 10, 1992. The Illinois Environmental Protection Agency (Agency) filed its final brief on November 30, 1992, along with a motion to file the final brief instanter. In a December 3, 1992 order, the Board granted the motion to file the Agency's brief instanter.

BACKGROUND

Han-Dee Mart, a division of Southern Food Park, Inc., owns and operates the Han-Dee Mart convenience store and service station in Benton, Illinois. A release of petroleum from the piping between two 1,000 gallon tanks occurred on or before June 21, 1989. SFPI contracted with the engineering consulting firm of Massac Environmental Technologies (MET) to remediate the site. MET submitted an application for reimbursement from the Underground Storage Tank Fund to the Agency on behalf of SFPI.

The Agency, in reviewing SFPI's submission of invoices covering the period from June 23, 1989 to May 20, 1991, denied reimbursement of eight cost items. SFPI is appealing the Agency's denial of reimbursement of the following costs as listed in the Agency's letter of May 14, 1992:

1. $22,500.00, for costs associated with the replacement of concrete and/or asphalt. These costs are not corrective action costs.

2. $31,350.06, for an adjustment in non-corrective action costs. The associated costs are not corrective action.

* * *

4. $17,460.00, for an adjustment in ineligible insurance charges. The associated charges are not corrective action.

5. $6,132.53, for an adjustment in costs lacking supporting documentation. The owner failed to provide demonstration that these costs were reasonable as submitted.

Rec. A1 at 81,82.[1]

The Act allows for reimbursement from the fund "for costs of corrective action or indemnification." (Section 22.18b(a).) Corrective action is defined in Section 22.18(e)(1)(C) of the Act as:

> ...an action to stop, minimize, eliminate, or clean up a release of petroleum or its effects as may be necessary or appropriate to protect human health and the environment. This includes but is not limited to, release investigation, mitigation of fire and safety hazards, tank removal, soil remediation, hydrogeological investigations, free product removal and groundwater remediation and monitoring, exposure assessments, the temporary or permanent relocation of residents and the provision of alternate water supplies.

The definition of corrective action presents a two part test: whether the costs are incurred as a result of an action to "stop, minimize, eliminate, or clean up a release of petroleum or its effects" and whether the costs are the result of such activities as release investigation, tank removal, soil remediation, etc. (See Enterprise Leasing v. IEPA (June 4, 1992), PCB 91-174.)

Section 22.18b(d)(4) specifies the requirements for a claim for reimbursement from the fund. One requirement of the claim

[1] References to the Agency record will be cited as Rec. A1 and Rec. B1 where A1 references Part 1, Book A of the fiscal file and B1 references Part 1, Book B of the fiscal file. The transcript will be referenced as Tr.

for reimbursement is that:

> The owner or operator provided an accounting of all costs, demonstrated the costs to be reasonable and provided either proof of payment of such costs or demonstrated the financial need for joint payment to the owner or operator and the owner's or operator's contractor in order to pay such costs.
>
> Section 22.18b(d)(4)(C).

DISCUSSION

Replacement of Concrete

Prior to discussing the arguments presented in this case the Board notes its prior holdings concerning the reimbursement of the costs for replacement of concrete. In Platolene 500, Inc. v. IEPA (May 7, 1992), PCB 92-9, ____PCB____, the Board held that in most cases the replacement of concrete is not corrective action and is not reimbursable. (See also Strube v. IEPA (May 21, 1992), PCB 91-105, __PCB___, Warren's Service v. IEPA (June 4, 1992), PCB 92-22, ___PCB___ and Barnard Miller (July 9, 1992), PCB 92-49, ___PCB___, Martin Oil Marketing #64 v. IEPA (August 13, 1992), PCB 92-53, ___PCB_____.)

SFPI recognizes the prior Board decisions finding the replacement of concrete is not corrective action and therefore is not reimbursable. However, SFPI argues that the Board's holding was limited to the particular facts in each case and that the Board noted that under some circumstances the replacement of concrete may be reimbursable. SFPI contends that the Agency misapplied the Board's findings on the reimbursement for the replacement of concrete by applying a strict rule that the replacement of concrete is not reimbursable.

SFPI argues that based on the facts of this case that the replacement of concrete at this particular site was corrective action. Larry Schneider of MET testified that soil contamination remains even if the soil objective is satisfied. (Tr. at 342.) He further noted that at this particular site the contamination extended under a public roadway and as is common practice the area under the road was not excavated. (Tr. at 343.) The walls where the contamination did exist were lined with high density polyethylene membrane (HDP) and the seams where the sheets meet were joined with special tape. (Tr. at 344.) He explained how the concrete serves to minimize the effects of a release as follows:

> A. If the concrete had not been replaced, there would be a greater likelihood that water would come in contact. Whatever the source of that water from either runoff above grade or from rainfall would have come in contact

with constituents of concerns still present either along the perimeter of the property or within the boundaries of the base of the property, and it's a possibility that those would be picked up in solute with the water, moved into other areas that currently have not experienced contamination. He argues that the concrete reduces the likelihood that water will enter the contaminated area and move contamination into groundwater or areas which were not previously contaminated.

Q. How would the replacement of the concrete minimize the affects [sic] of that release and the remaining contamination?

A. The concrete would have significantly - - does significantly reduce the impact because it catches the water before it can filter into the soil and moves down into the storm drain system and carries it away, and therefore that water doesn't impact or pick up any of the constituents that were still at the site.

Tr. at 345.

SFPI argues that the Agency, in reviewing the application, did not perform a site-specific review but applied an inflexible policy in determining the reimbursibility of concrete replacement. SFPI argues that the replacement of concrete at this site was corrective action because the concrete minimized the effect of the release by providing a barrier between surface water and contamination. SFPI further argues that the Agency did not present any testimony to rebut SFPI's contention that the concrete served as a barrier.

The Agency argues that the language of the statute controls the determination of what is reimbursable. The Agency contends that a site specific review was performed. (Tr. at 216.) The Agency contends that even if the Agency did not use the proper method in reaching its determination, it does not alter the reimbursement determination. The Agency asserts that it is the reimbursement determination that is at issue before the Board and not the Agency's method of reviewing reimbursement claims.

The Agency contends that based on the facts of this case, SFPI has not shown the replacement of concrete at the site was corrective action. The Agency notes that the remaining contaminants were already off-site and were separated from the excavation site by the HDP. The Agency also contends that concrete is subject to cracks, raising the question of the effectiveness of the concrete to act as a barrier. The Agency also notes that groundwater presented no problem or concern during the excavation. (Tr. at 410.) The Agency also contend

that the use of concrete in this situation does not differ from most other sites. The Agency contends that the main purpose in replacing the concrete was to enable SFPI to continue operation as a gasoline station. The Agency notes that the consultant to SFPI testified that concrete was replaced for restoration purposes. (Tr. at 393, 394, 399.)

While the Board has previously held that under some circumstances it may be shown that the replacement of concrete constitutes corrective action, the Board finds that the circumstances of this case do not support a finding of corrective action. The facts surrounding the replacement of the concrete at this site present no unusual circumstances and the concrete was essentially replaced for restoration purposes.

In Platolene, the Board discussed the difference between corrective action and restoration.

> In the process of removing underground storage tanks and subsequent remediation of the site there are a variety of tasks to be performed. Some of the functions can clearly be classified as either corrective action or restoration.
>
> * * *
>
> Under the facts of this case, actions that occurred prior to backfilling the excavation site would be considered as corrective action and those actions which occurred after backfilling would be considered restoration.

The Board further noted that these general rules will not universally apply to all factual situations and that the particular facts surrounding the action and the purpose of the action will ultimately determine whether a particular action is corrective action or restoration. (Platolene (May 7, 1992), PCB 92-9.)

SFPI's analysis on how the replacement of concrete is corrective action would apply to most remediation sites. It is common for some level of contamination to remain in the soil even after remediation is performed. The amount of contamination remaining in the area required the use of HDP to isolate the contaminated area under the roadway from the area of the service station where the contaminated soil had been removed and replaced with backfill. The layer of HDP material used at this site already served the purpose of isolating the contaminated areas and minimizing the transport of contaminants through the flow of water. The bottom and sides of the excavation pit were lined with high density polyethylene and the concrete was placed atop the backfill in the excavation pit. While the concrete may create a cap to prevent water from entering the soil and transporting contaminants, the Board finds that given the type of

remediation done at this site, any effect of the concrete as a barrier is minimal. The Board further notes that the area of high contamination was off-site under the roadway and the area under the concrete satisfied the clean-up objectives. The concrete that was replaced in this matter created a cap above the area that was backfilled with uncontaminated soil and isolated from the remaining contamination by a layer of HDP.

The Board believes that in this case, the main intent of replacing the concrete at the site was to restore the area to its previous condition in order to continue operation as a gas station. At the time that the concrete was laid, the clean up objectives at the site had been meet. The concrete did not stop, minimize, eliminate or clean up a release of petroleum or its effects. The amount of contamination at the site was the same before and after the concrete was installed.

In addition, SFPI argues that the doctrine of estoppel is applicable to this matter. Mr. Schneider, the consultant, testified that the replacement of concrete was reimbursed in other projects in which he has been a consultant. (Tr. at 338.) He further stated that the replacement of concrete was included in the corrective action plan approved by the Agency. (Tr. at 334.) He also contends that at no time did the Agency represent to him that it was improper or unacceptable to replace the concrete. (Tr. at 348.) SFPI argues that the Agency cannot ignore the ongoing communications relationship between the Agency and the applicant where the applicant sought the approval at every step of the remediation from the Agency and relied on the Agency's consent in carrying out corrective action measures. SFPI also notes that the Board has expressed its concern over the Guidance Manual misleading the public. (Barnard Miller v. IEPA (July 9, 1992), PCB 92-49.) SFPI further argues that the appellate court held that there is a line of cases holding that even though a rule is improperly promulgated, it may be binding upon the governmental agency. (Wynn v. Coler (4th Dist. 1987), 159 Ill.App.3d 719, 512 N.E.2d 1066.) The elements of proof are demonstrating the "user" relied on the manual to his or her detriment and that there was no notice of a change in policy or custom. (Wynn at 724-725.)

The Agency argues that as a general rule principles of equitable estoppel do not normally apply against government but may be applied to the government only in rare and unusual circumstance to prevent fraud or gross injustice. (Dean Foods Co. v. PCB (2nd Dist. 1986), 143 Ill. App. 3d 322, 492 N.E. 1344) The Agency does not find any special circumstances that would invoke the doctrine of estoppel in this matter. The Agency asserts that the Board has previously held that the acceptance of a corrective action plan cannot be construed as approval for reimbursement. (Martin Oil Marketing #64 v. IEPA (August 13, 1992), PCB 92-53.) The Agency further contends that SFPI's

interpretation of the Guidance Manual is in error and notes that the Board has previously held that the manual has no legal or regulatory effect and will not be considered by the Board. The Agency further argues that even if estoppel was applicable, SFPI has not shown detrimental reliance, a necessary element of estoppel.

The Board has previously refused to allow reimbursement under an estoppel theory argument. The Board held that "allowing for reimbursement which is not a corrective action would be in violation of the statute." (Strube (May 21, 1992) PCB 91-205.) The Board does not find any unusual facts in this matter that would warrant the use of estoppel to prevent fraud and gross injustice. The Board does not find that SFPI relied on the manual to its detriment, there is no indication that the concrete would not have been replaced if SFPI had known reimbursement would not have been allowed. Further, the Board does not recognize the manual as a rule and has not interpreted the language of the manual. (Strube (May 21, 1992) PCB 91-205.) In Martin Oil (August 13, 1992) PCB 92-53, the Board held that the approval of a corrective action plan cannot be construed as an approval for reimbursement. The Board finds that estoppel is not applicable in this case and even if estoppel were applicable, SFPI has not proven the elements of estoppel.

The Board finds that the cost of the replacement of concrete is this matter is not reimbursable because the replacement of concrete has not been shown to be a corrective action. The Board affirms the Agency's denial of reimbursement.

Replacement of Tank System

The $31,350.06 is comprised of costs for parts and equipment associated with reinstalling the tank system. The costs denied reimbursement include testing of the system (pressure, tightness and proctor density testing), parts for the electrical system and piping for the tank system.

The leak at this site was from the associated piping feeding into one of the underground tanks. SFPI contends that to remove the contaminated soil, it was necessary to remove the storage tanks, the associated piping and the electrical system. SFPI asserts that in removing the tanks, the associated piping and the electrical system, it was necessary to cut some parts making them unusable for reassembly. SFPI contends that sound engineering practice requires that certain parts such as piping and electrical items be replaced with new parts instead of reusing old parts. SFPI also contends that the system testing was required for recertification of the tank system and necessary for proper installation. SFPI argues that the removal of the tank system was required to remediate the contaminated soil. Because the removal was required for remediation, SFPI argues that the

removal and the replacement satisfy the definition of corrective action. SFPI further notes that the reassembly of parts was not practical in this matter.

SFPI argues that the Agency made its determination by applying the standard as described in the Guidance Manual which draws a distinction between reassembly and replacement. SFPI notes that the appropriate standard is for the Agency to determine if the action is a corrective action and not base its determination on "replacement" or "reassembly". SFPI argues that the tank system was not "upgraded" in that the same type of parts and equipment were installed. SFPI argues that sound engineering practice required the replacement of parts and the testing of the system. SFPI further contends that these actions were necessary for public health and safety.

The Agency argues that the costs associated with replacing the tank system were not corrective action but were costs associated with upgrading and replacing the tank system. The Agency contends that these costs were incurred in returning the station to operating condition and were not directly related to remediation of the site. The Agency asserts that these activities do not satisfy the definition of corrective action because these are not actions to stop, minimize, eliminate or clean up a release of petroleum or its effects.

Reimbursement was allowed for the costs associated with the removal of the storage tanks and the reimbursement of these costs are not at issue on appeal. There is no contention that the removal of the tanks was not necessary to remediate the site. The Board does not find a relationship between the replacement of the tanks and corrective action related to a release. The replacement of the tanks is only necessary if SFPI intends to continue operation as a service station. The actions related to reinstalling the system do not function to stop, minimize, eliminate or clean up a release of petroleum or its effects. . While SFPI may have followed sound engineering practices in reinstalling the system, these practices do not serve to prevent or minimize the effects of the detected release. The replacement of the tanks was restoration. At the time that the tanks were being replaced, the contaminated soil had been replaced at the site, remediation of the area had been completed.

The Board does not find that the costs associated with the replacement of the tank system in this case are a corrective action. The Board affirms the Agency's denial of reimbursement of the costs associated with the replacement of the tanks.

Insurance Costs

The Agency denied reimbursement of $17,746.00 in insurance coverage as non-corrective action. This figure is comprised of

two separate insurance charges: $11,760.00 for MET general liability and $5,700.00 for Southern Illinois Petroleum Maintenance Company comprehensive and automotive. SFPI is only appealing the denial of the $11,760.00 for MET general liability. This charge was originally included as part of overhead. The insurance charge was later broken out of the overhead and submitted to the Agency on MET letterhead stating the insurance charge for insurance coverage from 6/23/89 to 5/20/91. (Rec. B1 at 238.)

SFPI maintains that while the denial letter states that the insurance coverage is not reimbursable because it is not corrective action, the Agency pursued a different reason for denial at hearing. SFPI contends that the Agency denied reimbursement based on the form in which the charges were submitted to the Agency. SFPI notes that the Agency did not request additional documentation on the insurance charges. SFPI contends that documentation of the charges was available and would have been provided to the Agency upon request. (Tr. at 386.)

The Agency argues that due to the form of the submission of the insurance charges it is impossible to determine the type of insurance, the type of coverage and whether it was related to this site, therefore without the proper documentation it is impossible to determine if it is corrective action. The Agency notes that the document declaring the insurance charge does not indicate the names of the insurers, the names of the insured, the nature of the coverage, the level of coverage, the type of policy or policies involved or the relationship between the site and the insurance. The Agency also argues that no proof of payment was provided. The Agency also argues that the cost of insurance coverage fails to meet the definition of corrective action.

Mr. Schneider described the insurance coverage as follows:

Q. The insurance, the $11,760, what kind of insurance was that?

A. We carry general liability, we carry errors and omissions and pollution lability.

Q. The commercial general liability policy carries the pollution exclusion that's standard in the industry and so that's why you have the pollution liability?

A. That's not the reason we have pollution liability. We carry the pollution liability because its necessary to do business in some states, and it's also good business, good prudent business practice to carry it.

Tr. at 384, 385.

The insurance was general coverage that MET maintains for all projects in the general course of doing business. There is no evidence that this insurance was obtained for this particular site. The cost of the insurance is an overhead expense for MET.

Mr. Schneider explained how MET prorated its overhead costs to this project.

> A. The amount was an average monthly cost that were [sic] attributed not only to this job but to several other projects. This was the portion that this project took.
>
> Q. I guess I'm interested in how you actually made that a [sic] portion.
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> A. Took the total costs over a year, divided it by 12.
>
> Q. That's monthly, and then what?
>
> A. And then took the months in terms of project, in which this client was involved in that project, and applied it against it as a multiple against the number of months.
>
> Q. So if you had three jobs going in a given month, then you would take a third of that monthly overhead? Is that - -
>
> A. Well, it wasn't done so much in a given month but over a period it was determined it wasn't equally portioned. It was also dependent upon the size of the project, would have been unfair for a small project to compare to the same - -

Tr. at 381, 382

Mr. Stellar of the Agency, testified that site-specific insurance would be reimbursable if it was documented, reasonable and a corrective action. (Tr. at 148.) However, the testimony and billing documentation do not support a finding that the insurance was site-specific. The issue of whether insurance charges represent a reimbursable cost is not before the Board. The method of prorating the overhead costs is also not at issue before the Board. The issue before the Board is whether the documentation of the insurance charges support a finding of a corrective action and whether the documentation shows those costs to be reasonable. The Board finds that it is impossible to determine whether the insurance coverage was a corrective action or reasonable based on the documentation provided. The documentation does not describe the type of insurance, the insurer or the insured.

The Board affirms the Agency's denial of reimbursement of the charges for insurance coverage.

Undocumented Costs

Of the $6,132.53 of undocumented costs, SFPI is only appealing the denial of $4,032.03 in costs. The amount appealed is comprised of $1050.00 for telephone calls, $660.00 for telephone and fax service, $1,125.00 for secretarial services, $357.03 for office supplies and $840.00 for maintenance coverage. These charges were originally submitted on IEPA subcontractor forms and were included in the amount of $14,830.66 under "administrative and overhead costs". (Rec. B1 at 3.) The Agency requested a breakdown of these costs. MET submitted a breakdown of these costs into five line items (Manifest, Fed-ex, UPS, Overhead and Profit). (Rec. A1 at 55.) A further breakdown of the overhead charge was provided by listing each charge separately on MET letterhead. (Rec. B1 at 237, 239 - 241.) These items were prorated by MET from yearly business expenses in the same manner as the insurance charges.

SFPI argues that the Agency required that these items be broken out of overhead but did not request supporting documentation. In addition SFPI contends that the Agency's denial of these costs were based on the erroneous assumption that the hourly rates used by SFPI were loaded rates (i.e. includes overhead and expenses). SFPI argues that the Agency would have reimbursed these costs if the items had been included in the professional service rate. SFPI further argues that the additional documentation was available and would have been submitted to the Agency, if requested.

The Agency contends that the items were submitted to the Agency as direct costs. The Agency argues that there was no supporting documentation tying the costs specifically to the site in question, and thus no substantiation that they represent corrective action or are reasonable.

The Agency determined that the rates used by SFPI were loaded by comparing them with billings from other sites throughout the state. (Tr. at 63.) Doug Oakley, from the Agency, testified that most submittals use loaded rates and that the Agency prefers to deal with loaded rates. (Tr. at 63.) He further testified that an unloaded rate for a technician would be around $15 an hour. (Tr. at 63.) Mr. Schneider testified that the hourly rate includes the compensation to the employee, the benefits to the employee, and matching FICA and unemployment involvement through the employee. (Tr. at 376.) Mr. Schneider contends that the rates are not loaded and that if the overhead expenses were averaged into the hourly rates, the rate would be within the Agency's acceptable rates. (Tr. at 377.) The Agency does not contest the hourly rates used by SFPI but maintains that

the rates are consistent with loaded rates.

In its May 14, 1992 letter to SFPI reviewing the claim, the Agency adjusted the amount reimbursed to SFPI to reflect a deduction in the amount of handling charges. (Rec. A1 at 81.) The Agency adjusted the handling charges to 15%, the rate considered reasonable by the Agency.[2] (Tr. at 46.)

The Agency's request for a breakdown of overhead and administration costs was reasonable considering the amounts involved and the related charges. The Board finds that the Agency's determination was reasonable that the rates used by SFPI were loaded, based on the testimony of Agency personnel concerning similar billings. The costs at issue could have been averaged into several other cost items without exceeding the allowable amount. As a result of the cost breakdown, the items were presented to the Agency as direct costs. Therefore it was reasonable for the Agency to require supporting documentation to verify the costs and to conclude that without sufficient documentation the costs were not reimbursable.

The Board finds that the costs as submitted lacked supporting documentation. The costs were submitted on MET letterhead stating the general category, the time period and the cost. The record provides no proof that these items were actually billed to MET, there is also no description of the type of services provided or the relationship to the specific site. There is also no supporting documentation on the method used to prorate these expenses to this project. The Board affirms the Agency's denial of reimbursement for these costs for lacking supporting documentation.

This opinion constitutes the Board's finding of fact and conclusion of law in this matter.

ORDER

The Board affirms the Agency denial of reimbursement of costs associated with the replacement of concrete, the reinstallation of the tank system, insurance coverage and undocumented costs.

IT IS SO ORDERED.

[2] P.A. 87-1171, effective September 18, 1992, established maximum amounts for handling charges eligible for payment from the fund. The maximum allowable amount is based on a percentage of the subcontract or field purchase cost. The maximum percentage is 12%, where purchase costs are less than $5,000.

Section 41 of the Environmental Protection Act (Ill. Rev.Stat. 1991, ch. 111 1/2, par 1041) provides for appeal of final orders of the Board within 35 days. The Rules of the Supreme Court of Illinois establish filing requirements. (But see also 35 Ill. Adm. Code 101.246, Motions for Reconsideration, and Castenada v. Illinois Human Rights Commission (1989), 132 Ill. 2d 304, 547 N.E.2d 437.)

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above opinion and order was adopted on the 17th day of December, 1992, by a vote of 7-0.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board