ILLINOIS POLLUTION CONTROL BOARD
September 17, 1992

CITY OF ROODHOUSE, Petitioner, v. ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, Respondent.	)	PCB 92-31 (Underground Storage Tank Fund Reimbursement)

DISSENTING OPINION (by B. Forcade):

I respectfully dissent from today's decision.

First, I believe the majority has seriously mischaracterized the Agency's position. The majority opinion states:

> First, the Agency's reasons for denial in paragraphs #5 and 7 were identical, i.e. [t]he associated costs were not corrective action costs. In its testimony and brief, although phrased differently at various times, the Agency appears to be arguing that its consideration of efficient and effective use of the Fund is an acceptable basis for denial of reimbursement as unreasonable, and, thus, costs not involved directly in remediation activities are not corrective action costs if the sufficiency of the Fund is at risk. There appear to be two thrusts to the Agency's argument: that it may limit what is corrective action if the sufficiency of the Fund is at risk and that it may determine when the sufficiency of the Fund is at risk. (Opinion, pg. 15).

I believe the majority has focused on several sentences in the Agency Brief and concluded, incorrectly, that those sentences represent the primary basis for the Agency decision. I reach a different conclusion.

The Agency compiled a record on appeal which consists of almost 850 pages. That record contains a significant amount of Agency scrutiny and review of the costs. Nowhere in that record does the Agency even remotely suggest that the costs are being

denied because of insufficiency of the fund. Further, the Agency denial letter of January 21, 1992 lists five matters being denied. For each contested denial the reason was either that the charges were not corrective action costs, or that the costs were not reasonable. The denial letter contains no reference to sufficiency of the fund or cost-effectiveness. The majority has repeatedly held that the Agency cannot raise on appeal a reason for denial that it failed to cite in its denial letter. Reichhold Chemicals In., v IEPA (September 17, 1992), PCB 92-98; Pulitzer Community Newspapers, Inc. v. IEPA (December 20, 1990), PCB 90-142; and Galesburg Cottage Hospital v. IEPA (August 13, 1992), PCB 92-62. (see also Clinton County Oil Co. v. IEPA (March 26, 1992), PCB 91-163; Burwell Oil Services, Inc. v. IEPA (July 9, 1992), PCB 92-42.)

The Agency testimony at hearing contains only a single reference to cost-effectiveness and contains no reference to the sufficiency of the fund. Mr. Douglas Oakley made one statement when asked about overnight mail express charges (Tr. 86):

Q: Could you explain how you generated that figure?

A: [Mr. Oakley] Normally the Agency does not pay for overnight express charges unless it's as a result of lab samples taken from the actual contamination site.

Q: What's the reason for that?

A: [Mr. Oakley] Reason being cost effectiveness.

Q: Okay. Now turning your attention to the next paragraph...

The transcript contains no other reference to cost-effectiveness or the sufficiency of the fund or similar matters. On this sole matter which contains testimony of cost-effectiveness, the majority affirms the Agency.

At hearing, Mr. Oakley did indicate why he determined certain costs were not reasonable (Tr. 99-100):

Q: [Hearing Officer Rich] What objective criteria did you use to determine whether costs...were reasonable?

A: [Mr. Oakley] We have certain in-house material that we have gathered over the course of two years and audited hundreds of reimbursements. We determine reasonable costs based on these particular lists.

Q: [Hearing Officer Rich] So it's comparisons to other similar type of job sites?

A: [Mr. Oakley] That's correct.

I find this to be a perfectly appropriate method to use, and conclude that the record, denial letter, and testimony provide no basis for concluding the Agency decision was premised upon preserving the sufficiency of the fund.

The Agency final brief does contain several statements that the fund has limited resources, that limited resources force the Agency to closely scrutinize requests for reimbursement, and that the fund must be preserved in order to be used for true corrective action purposes. The Agency never states in its brief that any particular cost was disallowed because the fund was low on cash. The penultimate sentence in the brief states the rationale for the Agency decision:

> The Agency's decision was based on its experience with other LUST cleanups within Illinois and the corrective action costs associated with those cleanups.

I find no error in that rationale.

The petitioner has not raised any argument that the Agency decided this case based upon the sufficiency of the fund. In fact, the petitioner agrees that requests for reimbursement must be "closely scrutinized."

On a second matter I also disagree with the majority. The majority finds the legal costs, travel expenses, and costs for attending City Council meetings to be reimbursable. I would not.

The Act does not provide for repayment of all costs associated with a leak from a UST. The Act is not a "make the claimant whole" type of legislation. The Act provides that only corrective action costs be reimbursed, and that only reasonable costs be reimbursed. I find the Agency's approach to placing limits on such claims acceptable.

Section 22.18(e)(1)(C) of the Act provides:

> "Corrective action" means 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, groundwater remediation and monitoring, exposure assessments, the temporary or permanent relocation of residents and the provision of alternate water supplies...Corrective action does not include legal defense costs. Legal defense costs include legal costs for seeking payment under Section 22.18b.

The reasonableness clause, found at Section 22.18b(d)(4)(C) states that claims may be paid, provided:

> 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;

There is an obvious logical connection between "reasonableness" and "corrective action" when attempting to evaluate reimbursement claims. Take, for example, the $13.90 charge for motel movies discussed in the Agency Brief at p. 6 and the Petitioner's Response Brief at p. 2. What legal theory would disallow these costs? Travel expenses (including motel charges) are routinely allowed, therefore the movie charges could be disallowed as an unreasonable charge in an otherwise valid reimbursement category. Alternatively, such costs could be denied under the theory that watching movies in a motel room is not corrective action because it is not an "action to stop, minimize, eliminate or clean up a release of petroleum."

The record also contains expenses listed for "Elk's Dues" at $60.00 (Record 000593). The record does not explain whether these were reimbursed or not. If these charges are not reimbursable is it because they are unreasonable or not corrective action?

The record also contains claims for hundreds of phone calls (See Rec. 00178-00193 for example). In any list that long, the Agency is unlikely to be able to distinguish those calls which were unreasonable (too frequent, too long, etc.) from those which were not corrective action (not associated with this clean-up effort). It seems to me the only viable method of cost containment is to say some category of expense is excessive compared to what would be anticipated for this type of clean-up and therefore the costs are denied as unreasonable and/or not corrective action.

I would also deny the claim for legal fees. The General Assembly has provided a definition of corrective action, and provided specific examples of what is included and what is excluded. However, the Act does not include and exclude by example all possible costs. Some statutory interpretation is required to determine whether a specific cost is covered, or not. To me, the definition and listing of included costs all reflect specific physical action words. The specific costs excluded include legal defense costs, a more ephemeral activity not similar to moving dirt or removing tanks.

I believe the General Assembly intended that corrective action would be closely associated with physical activity to

clean up the site, not the more indirect activity of planning, administrative paper moving, conferences and coordination. I would draw the definition of corrective action far closer to the specific physical actions than does the majority opinion. The rationale for my interpretation was cogently expressed by Mr. Oakley, "never have I seen $162,000.00 in costs incurred prior to turning one shovel full of dirt". (Tr. 102). Today the CERCLA hazardous waste clean-up fund is beset by criticism for spending lots of money for very little clean-up. I do not want our UST fund to suffer the same fate.

That is not to say that in any manner I think the contractors are overcharging the client municipality or that such costs are not necessary expenses for the overall clean up effort. I just do not believe they are reimbursable corrective action costs.

It is important to remember that the money in the UST fund is taxpayers' money. It is derived from a gasoline tax pursuant to Ill. Rev. Stat. 1991, ch. 120 par. 428a. I am reluctant to give away taxpayers' money except where it clearly falls within statutory mandates. Here, I do not believe it does. Accordingly, I dissent.

Bill S. Forcade
Board Member

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above dissenting opinion was filed on the 5th day of October, 1992.

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board