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)

MR. CHARLES E. MCNEELY, APPEARED ON BEHALF OF THE PETITIONER; AND

MR. TODD F. RETTIG, APPEARED ON BEHALF OF THE RESPONDENT.

OPINION AND ORDER OF THE BOARD (by J. Anderson):

On February 25, 1992, the City of Roodhouse (Roodhouse) filed a petition for review of the determination of the Illinois Environmental Agency (Agency) to deny reimbursement for certain corrective action costs from the Illinois Underground Storage Tank Fund.[1] The appeal to the Board is pursuant to Section 22.18(g) and Section 40 of the Environmental Protection Act (Act). (Ill. Rev. Stat. 1991, ch. 111 1/2, par. 1022.18(g) and 1040.)

Hearing was held on June 6, 1992. No members of the public participated. Roodhouse and the Agency filed briefs on July 29 and August 13, 1992, respectively. Roodhouse filed a reply brief on August 19, 1992.

By letter dated January 21, 1992, the Agency notified Roodhouse of its determination that, of the $162,333.22 requested for reimbursement from the Illinois Underground Storage Tank Fund (UST Fund), which covered invoices for the period from January 1990 to August 1991, $35,178.73 was eligible for reimbursement. The disallowed amounts included the deductible of $100,000, which Roodhouse does not contest. The remaining disallowed amounts were itemized in seven separate paragraphs in Attachment A of the

[1] Roodhouse intends to submit additional claims for reimbursement. On March 26, 1992, the Board, in response to an Agency motion to dismiss as not ripe, held that this appeal is properly before the Board.

Agency's notification letter.[2] Roodhouse does not contest the first 2 of the 7 paragraphs in Attachment A. Roodhouse contests the amounts listed and explained in paragraphs 3 through 7 of Attachment A, quoted as follows:

3. $1,966.26, for an adjustment in handling charges. The handling charges submitted were greater than 15%. The handling charges were reduced to 15% resulting in the above deduction. The owner or operator failed to provide a demonstration that the costs were reasonable as submitted. (Section 22.18b(d)(4)(C) of the Illinois Environmental Protection Act).

4. $82.70, for an adjustment in overnight mail charges. The owner or operator failed to provide a demonstration that the costs were reasonable as submitted. (Section 22.18b(d)(4)(C) of the Illinois Environmental Protection Act).

5. $11,088.47, for an adjustment in disallowed travel costs. The associated costs are not corrective action costs. One of the eligibility requirements for accessing the UST Fund is that the costs incurred were corrective action costs or indemnification costs which were incurred by the owner or operator as a result of a release or (sic) petroleum, but not including any hazardous substance from an underground storage tank. (Section 22.18b(a)(3) of the Illinois Environmental Protection Act).

6. $5,676.72, for an adjustment in legal defense costs. Corrective action does not include legal defense costs. (Section 22.18(e)(C) [(sic - apparently Section 22.18(e)(1)(C))] of the Environmental Protection Act). One of the eligibility requirements for accessing the UST Fund is that the costs incurred were corrective action costs or indemnification costs which were incurred by the owner or operator as a result of a release of petroleum, but not including any hazardous substance from an underground

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[2] The remaining non-reimbursable amount, as stated by Roodhouse (Pet. at 1) was (and by simple subtraction would appear to be) costs of $27,154.49 contained in the invoices. However, the amounts disallowed by the Agency in Attachment A total only $26,074.49, leaving $1080.00 unaccounted for. Also, as corrected by the Agency at hearing, $837.50 should be deducted from the $1608.29 in paragraph 2, and the Agency had no explanation at hearing for the discrepancy between the $11,088.47 listed in paragraph 5 of Appendix A and the $11,888.47 listed in the vouchers. Even correcting for the above amounts, there remains a discrepancy of $1106.50. (Tr. at 83, 87, Agency Record at 691.)

storage tank. (Section 22.18b(a)(3) of the Environmental Protection Act).

7. [3]$4,841.05, for an adjustment in costs associated with the attendance of City Council meetings. The associated costs are not corrective action costs. One of the eligibility requirements for accessing the UST Fund is that the costs incurred were corrective action costs or indemnification costs which were incurred by the owner or operator as a result of a release or (sic) petroleum, but not including any hazardous substance from an underground storage tank. (Section 22.18b(a)(3) of the Illinois Environmental Protection Act).

BACKGROUND SUMMARY

The occurrences surrounding this dispute are quite unusual.

Roodhouse, located in Greene County, has approximately 1900 residents. Its water supply consists of two wells, which also serve several other small municipalities. In late 1989, Roodhouse experienced a strong fuel odor in its well water. The Agency and Roodhouse's consulting engineer, Benton and Associates, Inc., were called in. (Tr. at 7.) Mr. Frank Lewis of the Agency investigated the situation. Samples were taken, boil orders were issued, and, at the suggestion of the Agency, residents were even cautioned not to bathe in the water; Roodhouse incurred considerable expense hauling in potable water in a tanker to city hall so residents could pick up water, and the water was directly brought to the elderly confined to their homes. (Tr. at 70.) Subsequent investigation verified what was suspected early-on - that the contamination problem at the well site was from leakage from close-by underground storage tanks (USTs) that had once supplied diesel fuel for the water supply pumps prior to a conversion to electric power. Later the water table rose and eventually the well was usable again. (Tr. at 13; Pet. Br. at 1, 2.)

The characteristics of Roodhouse's wellwater source are noteworthy. About 500 gpm is pumped from the wellwater source. However, because the source is a spring, an additional amount of water about equal to that which is pumped spills out and runs down to the creek, except that the overflow diminishes during extended dry or cold periods. Roodhouse had experienced three dry years. During the contamination event, the overflow had ceased and the water level had dropped 50 feet of the total well depth of 170 feet. (Tr. at 16, 17; Pet. Br. at 1.)

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[3] In Attachment A, Paragraph 7 is misnumbered as another paragraph 5. We will hereinafter refer to it as Paragraph 7.

DISCUSSION

Roodhouse quickly focused on its water supply problem. Starting in January 1990 and throughout that year, there were many meetings between Roodhouse's engineering consultant, Benton and Associates, principally Mr. Robert H. Benton, and the City Council. The firm has handled water and sewer projects for Roodhouse since about 1984.

During that time Roodhouse also had hired and met with an outside consultant recommended by Mr. Benton, Layne Geosciences of Kansas City, Kansas, to investigate the contamination cleanup situation and prepare a report. The distance from Roodhouse of the consulting firm was an issue in this matter. Mr. David B. Killen, the district manager of Layne Geosciences, was the principal person meeting with the Roodhouse City Council, visiting the well site, and consulting with the Agency. Layne Geosciences had dealt nationwide with water supply identification and protection and cleanup of soil and groundwater contamination. Layne Geosciences is a geotechnical subsidiary of Layne Western, and was formed as an outgrowth of the geotechnical section of the parent company. Layne Western specializes in well drilling and pump maintenance; it had performed all the work on Roodhouse's wells for 40 years, including the shift from diesel power to electric power, and had good records on Roodhouse's wells. Mr. Benton felt that Roodhouse's "best shot" was to hire someone related to wells rather than industrial cleanup spills. While he was aware of, and discussed with the City Council, other firms in Illinois that might do cleanup work, he felt that the water source was a tremendous asset needing protection, and he was not aware of anybody who had done a cleanup located at a public water supply's well. The City told him to contact Layne Geosciences. (Tr. p. 9, 10, 11, 13, 14, 41, 45-47, 51, 55; Pet. Br., attached Affidavit.)

During the latter part of 1990 a plan of action was developed with the approval of the Agency. (Tr. 14.) Roodhouse's contamination problem was unusual: the contamination source and the pumps were within the same building, within 50 feet of each other, and the hydrogeology of the immediate area was complex. Mr. Killen stated that, while it is not uncommon to have his company find contamination problems and water problems occurring together, he had never seen a contamination source so close to a municipal water supply well. Mr. Benton, Roodhouse, Layne Geosciences, and the Agency decided to hold off groundwater remediation until an alternate water supply was in place, so as to guarantee that the water supply would not be interrupted during the remediation work. (Tr. at 57, 67.) Benton and Associates engineered the installation of the alternate water supply, and Layne Geosciences engineered the remediation of the contamination. (Tr. at 18, 45.) The delay in groundwater remediation became an issue in this matter.

The water supply part of the plan involved running a 10 inch water line to the City of White Hall (White Hall), about three or four miles away, so that water could be purchased in sufficient quantities to stabilize the water level of Roodhouse's well when the water stops overflowing and the water table falls ten feet below the surface, or, if necessary, to provide a full water supply in the event that the pumps had to be shut down. The contract negotiated with White Hall for the purchase of water was handled by Mr. Benton and Roodhouse's attorney, Mr. Charles McNeely, and items related to the installation of the pipeline were handled by the respective city attorneys. (Tr. at 14-19, 71.)

Before Roodhouse chose White Hall as their alternate water supply, Mr. Benton had, during 1990, investigated and prepared cost estimates, using a 20 year period, for a number of options. The options included on-site treatment (installing aerator equipment); moving the wells; and purchasing water from another municipality when the quality of the existing well water was unacceptable. Mr. Benton stated that the on-site treatment alternative in particular was carefully considered. However, after discussions with the Agency, it was concluded that, due to the inability to totally clean up all of the diesel fuel contaminant, an odor problem would develop each time the water table dropped again. The Agency indicated that the purchase of water, if it was the most cost-effective option, should be pursued. The City Council selected, as the most cost effective solution, the purchase of water from White Hall. (Tr. at 14-17, 72.)

Mr. Killen testified that Harry Chappell of the Agency approved the pipeline option as opposed to an on-site groundwater remediation option.[4] (Tr. at 66.)

In order to bring in the water as well as to clean up the site, the building in which the UST and wells were located had to be removed and replaced, the pump house had to be demolished, and new electrical service installed.[5] Cleanup of the contamination at the site was delayed for two years, until March of 1992, which was the amount of time it took to implement all facets of the

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[4] The Agency's April 1992 organizational chart lists Mr. Harry Chappell as overseeing the Agency's Leaking Underground Storage Sites in the Division of Remedial Management in the Bureau of Land.

[5] Roodhouse "reluctantly" accepted the Agency's disallowance of the costs of removing the building and installing the new electrical equipment, the latter because the emergency power was torn out when the building was removed (Tr. 20.)

project involved in connecting a water line to White Hall.[6] During this two year period, the wellwater source supply became sufficient to avoid another contamination occurrence. (Tr. at 89.)

At hearing, there was considerable testimony about the necessity of meeting with the City Council, including its committee meetings, and getting its approval at various stages of remediation steps along the way. (e.g. Tr. at 18-21, 25, 53-58, 64, 65, 108.) Mr. Benton noted that Roodhouse's meeting pattern was similar to 36 local governments with whom the firm has had projects over the last five years, and that most of these entail night meetings. (Tr. at 19.) Mr. Benton stated that this pattern is in accordance with the advice he receives from every city attorney his firm works with, adding:

> We have to have City Council approval to approve the plans to submit to the EPA for permits, construction permits. We have to have City Council approval for advertising for bids, too. And obviously, if they are going to have their approval, we have to explain it to them, and we have to explain it to them before it's finalized, because we can't come to them and say here it is, approve it or disapprove it...[the] City Counsel (sic) is the elected body that has to make that decision.

(Tr. at 21, 22.)

Mr. Killen had similar observations:

> A typical City Council meeting would be to revise a draft of the remedial investigation plan based on some of our conversations with EPA. We come back, tell the City this is our current draft, please look it over, give us your opinions, whatever.

(Tr. at 64.)

Mr. Kip Proefrock, a city alderman, testified that the Mayor and the six alderman serve part time; all but one, who is disabled, have other full time jobs. Thus, of necessity, all City Council meetings took place in the evening. The City Council met twice monthly in regular session and in a workshop in alternate weeks. He testified that there were many meetings with

[6] In that actual groundwater remediation had not commenced when Roodhouse's petition was filed on February 25, 1992, the invoices in this case do not cover those costs. The record indicates that remediation was ongoing at the time of the June 6, 1992 hearing.

Mr. Killen or Mr. Benton, who were present to provide explanations and recommendations. Mr. Proefrock stated that Mr. Killen was present at several of them and Mr. Benton at many of them between January of 1990 and April of 1991. He further stated that it was Mr. McNeely, Roodhouse's attorney (and representing Roodhouse in this instant matter), who negotiated the contract with White Hall and the pipeline right-of-way with the landowners. Mr. Proefrock also stated that no claims were made against Roodhouse throughout the whole episode. (Tr. at 68, 71, 73.) Reimbursement of Mr. McNeely's costs became an issue.

Mr. McNeely has been Roodhouse's city attorney for 13 years. He testified and proffered an affidavit concerning the nature of his legal work and his attorneys fees with regard to the pipeline. At the direction of the City Council, he negotiated the contract with White Hall, which required a number of redrafts; obtained legal descriptions of various parcels; negotiated, drafted and redrafted a total of 10 separate easements with the landowners; and incurred out-of-pocket expenses such as for photocopying, recording the easements, and title searches. His invoices also show a number of conversations with Agency personnel, including conversations about the Layne Geosciences contract.[7] He asserted that none of his billings were in connection with defending any claim. (Tr. at 73-79; Pet. Ex. 1, attached to transcript.)

Agency Testimony. Mr. Douglas Oakley was the principal witness for the Agency. Since January, 1990, he has supervised two accountants and one office associate in the remedial projects accounting procurement unit. The unit processes leaking underground storage tanks (LUST) reimbursement applications and invoices. Mr. Oakley was responsible for reviewing the documents submitted by Roodhouse and provided the disallowed amounts listed in Attachment A, except for those in paragraph 7, of the Agency's January 21, 1991 letter to Roodhouse. (Tr. at 80-83.) As earlier noted, Paragraphs 3 through 7 are appealed.

Paragraph #3. Regarding the handling charges of $1966.26 in Paragraph #3 of Appendix A, Mr. Oakley stated that this referred to the 15% handling charges, disallowed because the associated basic charge was ineligible. (Tr. at 84,85.)

Paragraph #4. Regarding the overnight mail charges of $82.70 in Paragraph #4 of Appendix A, Mr. Oakley stated that, for reasons of cost effectiveness, the Agency normally does not pay for such express charges unless lab samples taken from the actual contamination site are involved. (Tr. at 85, 86.)

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[7] Roodhouse later stipulated that there is one phone call that would not be reimbursable, in that it concerned whether the actual cost of right-of-way would be reimbursable. (Pet. Br. at 11.)

Paragraph #5. Regarding the travel costs of $11,088.47 in Paragraph #5 of Appendix A, Mr. Oakley stated that, because they felt that the costs were unreasonable, the Agency disallowed them. These charges involved the services of Layne Geosciences. Certain meal charges were disallowed because of the absence of receipts, but most of the charges, for items related to transportation, were disallowed because "...from our viewpoint, the actual remediation of the site did not start until March of '92, and for two years to a tune of $11,000 of transportation costs, that seemed unreasonable." (Tr. at 89, 90.)

Regarding "unreasonable", Mr. Oakley stated that there are written guidelines "in-house" (Tr. at 95), not available to applicants, as to when travel is reimbursed and when it is not, but that "It's basically what we consider to be reasonable travel costs." (Tr. at 95.)

He stated that normally travel only by automobile is reimbursed, at a rate of 50 cents a mile, for such activities as preliminary site investigation. However, reimbursement was disallowed for Layne Geosciences: because its expenses were higher due to the distance (Kansas City); because of the Agency's responsibility to clean up hundreds of sites throughout the State with a limited amount of money; and because the remediation didn't start for two years, until 1992. He acknowledged that he was unaware that the Agency wanted the backup water supply in place so the water supply would not be interrupted. However, he stated that this would not have altered his decision because "...the wells have replenished themselves and the only time there is any contamination or any problem is when the water level drops to a certain point." (Tr. at 94-97.) When asked how the time of remediation startup makes a difference in reimbursability, Mr. Oakley again responded only the "we felt costs associated with this remedial investigation were unreasonable." (Tr. at 97.)

In response to a question from the hearing officer as to what objective criteria were used to determine what costs were reasonable, Mr. Oakley replied that they rely on comparisons with similar job sites derived from in-house lists gathered from audits over the last two years involving hundreds of reimbursements. Regarding Layne Geosciences' travel costs, however, Mr. Oakley stated that he had never seen "$162,000.00 in costs incurred prior to turning one shovel full of dirt". When asked whether he has ever reviewed an application where the contamination was also at the source of the water supply, Mr. Oakley replied that he considers the costs related to the source of the water supply as "pre remedial", not actual remediation costs. He then stated that it wasn't because such costs weren't corrective action, but stated again that they were unreasonable because "they were incurred before one shovel of dirt was turned for remediation". (Tr. at 101, 102.)

As referenced earlier (see Footnote 2), Mr. Oakley had no explanation for the discrepancy between the $11,088.47 amount disallowed in Appendix A and the $11,888.47 on the actual invoice voucher. (Tr. at 86, 87, Agency Rec. Book A, at 693.)

Paragraph #6. Regarding the legal costs of $5,776.72 in Paragraph #6 of Appendix A, Mr. Oakley testified that those charges were disallowed because the "law requires that we do not pay legal costs." (Tr. at 91.) After being shown the Board regulations that refer only to legal defense costs as not being reimbursable, Mr. Oakley acknowledged that right-of-way acquisitions and contract negotiations costs would not fit into the regulatory definition of legal defense costs. However, he stated that, as a matter of Agency policy, it is the Agency's position that, irrespective of the reason for the legal costs, legal costs are not reimbursable at the present time. (Tr. at 93, 94.)

Paragraph #7. Regarding the City Council attendance costs of $4,841.05 in Paragraph # 7, Becky Lockart testified for the Agency. Ms. Lockart has been the project manager in the LUST section since July of 1990. She reviews applications and claims for reimbursement and technical site data regarding corrective action. (Tr. at 103,104.) Ms. Lockart testified that the costs for Layne Geosciences and Benton and Associates to attend City Council meetings are not reimbursable because they are not corrective action costs. She verified that the costs referred to are found in the Agency Record in Book A, pp. 618-623. (Tr. at 103-105, 108.)[8]

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[8] A review of the vouchers and Agency notes indicates that: Mr. Benton attended 10 meetings, all in 1990, incurring associated costs of $1621.10; and Mr. Killen attended 8 meetings, incurring associated costs of $3219.90. The subjects covered by Mr. Benton are addressed above. The Layne Geosciences meetings included: location of the UST's; scope of work; meetings with the City Council and Agency, Mr.Benton and Mr. McNeely involving preparation of draft report, recommendations, and presentation of formal soil remediation plan to Roodhouse and the Agency; contracts with subcontractors, landfill selection, site preparation, formal allocation of tasks among Layne Geosciences, Benton Associates, and subcontractors, and presentation of health and safety plan. (Also see Agency Rec. Book A, at 685.) Mr. McNeely's meeting costs were not included in Paragraph #7, but instead were denied in paragraph #6. A review of the Mr. McNeely's voucher indicates that the bulk of his time charged was spent in contract negotiations and easement acquisition; a total of $461.18 was submitted for attendance at two Council workshops in December, 1990 and March, 1991. (Agency Rec. Book A, at 242-246.)

With regard to costs incurred by the engineers when consulting with the Agency, Ms. Lockart stated that the consultations with Mr. Lewis may not be reimbursable because he does not work for the LUST section, but that the costs of consulting with Mr. Chappell may be. When asked how Roodhouse is to formulate a corrective action plan to submit to the Agency without consultation with its engineer, Ms. Lockart responded that she believes that it is the function of the engineer, not Roodhouse, to compile the corrective action plan. She acknowledged that the regulations require the owner to submit the plan and that she was not familiar with the Open Meetings Act of Illinois. (Tr. 107,108.)

ARGUMENTS

Before summarizing the arguments regarding the detailed amounts disallowed, we will first repeat the relevant portions of the definition of corrective action in Section 22.18(e)(1)(C) of the Act:

> "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.

Roodhouse and the Agency ask the Board to view the situation from markedly different perspectives, which we summarize in some detail below.

Engineering costs. Paragraphs #3, #4, #5, and #7.

Regarding Paragraph #3, the Agency agrees that the reimbursement of the 15% handling charges would accompany any reimbursement of costs the Board determines should be made. (Agency Br. at 3, 4.)

Regarding Paragraph #4, the Agency argues that the overnight mail charges of $82.70 are unreasonable because they are in a category of costs that are not an efficient and effective use of the Fund and that it only accepts express mailings of lab samples from the site. It also argued that the documentation gives no indication that the use of overnight mail was essential, and Mr.

Killen's testimony did not elaborate on its reasonableness. Roodhouse did not argue the overnight mail point specifically, but merely noted in its summary in its Brief that the charges relate to submitting data to the Agency and to shipping equipment between the their office and the site. (Pet. Br. at 13; Agency Br. at 4. 5.)

Regarding the engineering costs associated with Paragraphs #5 and #7 (travel and City Council meetings), Roodhouse asks the Board to understand the circumstances when the crisis occurred. In January of 1990 there was no drinking or bathing water, the source of contamination was uncertain, and what was needed to alleviate the problem unknown. Asserting that it was truly an emergency situation, Roodhouse did not have the luxury of taking a period of time to interview several firms, having had no way of knowing that the problem would at least temporarily remedy itself. Also, Roodhouse asserts it had good reason to hire Layne Geosciences, and it should not be penalized for doing so. Its decision was based on: Layne Western's familiarity with, and records on, the wells; Mr. Benton's belief that Layne Geosciences would provide the best services; his knowledge as Roodhouse's water and sewer engineer; his previous experience with Layne Western's geotechnical capability; and his great concern about the risk to Roodhouse's wells, a valuable asset. Roodhouse also points out that it was under intense pressure from the public and the Agency to get potable water restored. (Pet. Br. at 2-4.)

Roodhouse asserts that it needed Layne Geosciences' professional judgment and guidance on regulatory expectations and technical scope, because of the unusual situation involved in this case as regards both the hydrogeological characteristics and the proximity of the UST to the wells. Roodhouse relied on the knowledge of its personnel, its meetings with the Agency, and its visits to the well site. Roodhouse acknowledges that it probably did incur higher than normal travel costs, but argues that there was good reason for hiring the firm, that any engineer has to travel to the site, and in this case the visits were multipurpose, i.e., meetings with Roodhouse officials, site visits, and meetings with Agency representatives. The City Council meetings were necessary because Layne Geosciences could not make the decisions for the City. Roodhouse points out that the Agency apparently disallowed <u>all</u> the travel costs of Layne Geosciences, including plane fares, meals and car rentals "because we felt they were unreasonable", and it was simply unable to explain the discrepancy between the $11,088. 47 and the $11,888.47 figures. (Pet. Br. at 5.) Roodhouse argues that Mr. Oakley's explanation of "unreasonable" goes around full circle. (Pet. Br. at 5-7.)

Roodhouse submits that Layne Geosciences could not have formulated a corrective action plan without site visits, consultations with the Agency, and meetings with City officials.

Roodhouse points out that preliminary site investigation would normally be reimbursable, at $0.50 per mile travel costs, but one of the stated reasons for non-approval in this case is that the Agency is dealing with a limited amount of money, a reason which Roodhouse asserts does not assist in determining whether the site investigation is reimbursable. Roodhouse disputes the other Agency objection, that the distance from the site made the engineering firm incur higher than usual expenses. Roodhouse asserts it had reasons for hiring the firm, that the travel distance to Chicago would not have been much less than the distance to Kansas City, and that the Agency didn't put into evidence what a reasonable cost would be - it just kept saying that in this case they were unreasonable. Roodhouse also challenges the "reasonable" basis for the Agency's not allowing any travel costs whatsoever. (Pet. Br. at 7, 13; Pet Reply Br. at 1,2.)

Regarding Mr. Benton and his firm's interactions with the City Council, Roodhouse argues that the planning involved would affect the city for many years, and that the prior decision stages needed in deciding on a course of action were just as important as executing it. Even if it were legally possible, Roodhouse asserts that it would be poor government to simply turn over the project to its engineer. Roodhouse emphasizes that, as a municipality subject to the Illinois Open Meetings Act (Ill. Rev. Stat. 1991, ch.102, par. 41 et seq.), it could not conduct its business in private. Roodhouse disputes Ms. Lockart's assertion that it was the function of the engineer, not the City, to compile the corrective action plan. It argues that no professional employed by a municipality operates in a vacuum and that meetings are necessary. (Pet. Br. at 8-10.)

The Agency first states that the corrective action in Roodhouse, when completed, will involve remediation of the public water supply as well as provision of the alternate water supply, and then notes that the reimbursement requested involve costs incurred prior to the start of "actual remediation activity". It particularly singles out the decision to hire an engineering firm from Kansas City. The Agency then states that the categories of disallowed costs represent unreasonable and non-corrective action costs. It then argues that the purpose of the Fund should be limited in scope to only reimbursement for direct corrective action activities, and that an overly expansive definition of corrective action and reasonableness threatens to subvert the intent and purpose of the Fund". (Agency Br. at 1-3.)

Regarding the travel costs, the Agency first claims that there is a "nexus" between corrective action costs and reasonableness, citing Paul Rosman v. IEPA, PCB 91-80 (December 19, 1991, at 6), where it says "[we] find that a sufficient nexus exists between reasonable costs as articulated in Section 22.18b(d)(4)(C) and cost associated with corrective action." The

Agency also argues that while Rosman states that the proceeding would be fundamentally unfair if a petitioner were unaware of an issue, in this case Roodhouse was well aware that such a nexus existed. In support, the Agency cites to the Agency's completed invoice voucher form [dated 12/12/91, Agency Rec. at 693] sent with the Agency's January 21, 1992 letter. The form included a category of "Less: Unreasonable Costs 11,888.47." The Agency claims that reimbursing such costs are not an efficient and effective use of the Fund. (Agency Br. at 5.)

The Agency next argues that there are circumstances where "certain activities must be considered outside the scope of corrective action". (Agency Br. at 6.) The Agency asserts that:

> This case is one of first impression. Until this point the Board has not been faced with a decision in which the Agency disallowed certain costs because they were not an efficient and effective use of the Fund. However, the Fund has never faced the present fiscal situation in which requests for reimbursement greatly exceed the ability of the Fund to meet those requests. This situation mandates the Agency closely scrutinize requests for reimbursement.

(Agency Br. at 6.)

The Agency argues that these costs are outside the scope of corrective action costs and are not costs that "the Fund is best suited to reimburse". (Agency Br. at 6.) The Agency argues that Layne Geosciences' travel, meeting and preliminary costs were "remarkably higher and unreasonable" than other requests received by the Agency and request an "incredibly expansive definition of corrective action."[9] As an analogy, the Agency uses as an example an instance of high charges for backhoe equipment, where, based on Agency experience it could determine what was reasonable. The Agency concludes that "[t]he Fund must be preserved in order that it may be used for true corrective action purposes", and that Roodhouse's costs in Paragraph 5 and 7 "are not true corrective action costs". (Agency Br. at 6, 7).

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[9] The Agency singles out two reimbursement forms that reflect hotel room movie charges of $13.90, which Roodhouse concedes should not be reimbursed. In apparent reference to Mr. Benton's testimony (Tr. at 24-31), the Agency asserts that Roodhouse newly raised Paragraph #2 (pre-ESDA notification costs) as an issue; Roodhouse then stipulated it did not, and noted that it only wanted to point out that the Agency's subtraction was incorrect. The Agency also pointed to the disallowances for lack of receipts or double receipts mentioned at hearing, which Roodhouse does not contest. (Tr. 88, 89; Agency Br. at 2, 6, 7; Pet. Reply Br. at 2.; Agency Rec. Book A, summary at 624-687.)

Legal Costs. Paragraph #6.

Roodhouse argues against the Agency's basis for its disallowance of its legal costs, i. e., because the costs are legal defense costs and therefore illegal. It cites to the definition of "legal defense costs" at 35 Ill. Adm. Code 731.192:

> "Legal defense cost" is any expense that an owner or operator or provider of financial assurance incurs in defending against claims or actions brought,
>
> > By USEPA or the State to require corrective action or to recover the costs of corrective action;
> >
> > By or on behalf of a third party for bodily injury or property damage caused by an accidental release; or
> >
> > By any person to enforce the terms of a financial assurance mechanism.

Roodhouse next argues that: by definition "corrective action" includes alternate water supplies; the Agency approved the construction of the 10 inch water line between Roodhouse and White Hall; and all of the attorney's legal costs are related to matters not involving legal defense costs. Roodhouse disputes the Agency's position of disallowing all legal costs, defense or otherwise. It argues that if the legislature intended to limit reimbursement of all legal costs, the word "defense" between "legal" and "costs" in the definition of corrective action would not be in there. (Pet. Br. at 10-12.)

The Agency challenged the use of the regulatory definition of legal defense costs for this purpose, asserting that the regulatory definition applies only to the financial responsibility requirements of Subpart H, and that only the language in the definition of "corrective action" in the Act [quoted above] applies. (Agency Br. at 8.) Roodhouse responds that the Agency is arguing that "legal defense cost" has one meaning in the regulations, but another when used in the statute. Roodhouse asserts that, to the contrary, the cover page for the regulations refers to Leaking Underground Storage Tanks; and the legislature added "legal defense costs" to the Act in 1991, and presumably was already aware of the pre-existing regulations. (Pet. Brief at 11-12; Pet. Reply Br. at 2, 3.)

In its arguments, the Agency relies only on the term "legal defense costs" in the Act, (i.e. disregarding the specific definition of that term in the regulations as irrelevant). Without giving an alternative definition, the Agency instead argues that the language in the statutory definition of corrective action language provides "guidance but does not set

the boundaries of the correct definition of legal defense costs". (Agency Br. at 8.) The Agency further argues that it is an unacceptably expansive view of corrective action to consider representation of a municipality as corrective action costs, that the Fund was designed for reimbursement of costs directly involved in remediation of a site; that other costs should not be reimbursed so as "to preserve the effectiveness of the Fund"; and that the Board must be guided by the "principals (sic) of reasonableness and effectiveness" in supporting the Agency's position. (Agency Br. at 9.)

Roodhouse responds that the Agency is asking the Board to ignore the wording of the Act, that corrective action by definition provides for alternative water supplies, and that the Agency's decision, not supported by the facts or law, is now "grasping at straws" to justify its decision. Pet. Reply Br. at 3, 4.)

BOARD DISCUSSION

Regarding the Paragraph #4 express mail charges, the Board finds that Roodhouse failed to present sufficient proof that the express mail costs were reasonable expenses. We note that the Agency did not simply reduce the amount to allowable mail charges, or submit other evidence to support its assertion regarding the lab samples. However, we also note that Roodhouse did not argue these points or attempt to justify the mailing either.

The Board will next address what the Agency asserts at one point is a case of first impression, particularly as it involves Paragraphs # 5 and #7.

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.

The Board must first emphasize that the Agency is, as is the Board, a creature of statute, and that the Board must first look to the statute in assessing the basis for an Agency determination. The Agency gives no statutory, regulatory or case law support for the principle it is espousing.

The only support cited by the Agency is Rosman. The Agency's reliance on Rosman is misplaced. The discussion in Rosman of the connection between corrective action costs and reasonableness arose in conjunction with a claim that the Agency's letter did not meet the requirements of Section 39(a). In Rosman, the Agency couched its denial of reimbursement for certain costs as not being "reasonable", when in fact those costs were allegedly not "corrective action" costs. The Board held in that case that there was a sufficient link between the reasonableness and corrective action, so that the Agency's letter was not "fundamentally unfair" because it gave sufficient notice of the reason for denial.

Here, the Agency's letter denies reimbursement because the costs are not "corrective action". The Agency now apparently wants to argue that the costs are not "reasonable". We reject the Agency's argument insofar as it implies that Rosman would apply in a reverse situation and also regardless of the facts. We point out here that the Agency's "unreasonable" argument also has a novel twist: the "nexus" argument here is founded solely on the need to make efficient and effective use of the Fund.

The Act defines what constitutes corrective action and specifically lists a number of activities that constitute corrective action, and some that do not, as already noted. Insofar as the Agency appears to argue that it can supersede the statutory listing per se, we disagree. (Aurora Metals Division, Aurora Industries, Inc. v. IEPA, (July 1, 1982), PCB 82-12, 47 PCB 315. (See also In the Matter of Execptions from Definitions of VOM, (July 30, 1992), R91-24, pp. 8-9.)

We also reject any Agency argument that it has some implicit authority to either deny or limit reimbursement based on the sufficiency of the Fund. The statute specifically articulates the circumstances under which the sufficiency of the Fund comes into play. (Ill. Rev. Stat. 1991, ch. 111 1/2, par. 22.18b(d)(1), (d)(2).)

Section 22.18b(d)(1) addresses a situation where the Comptroller shall make payment of amounts approved by the Agency if sufficient money exists in excess of amounts appropriated "for administering the activities of the Agency, the State Fire Marshal and the Department of Revenue relative to the Fund." If money later becomes available, such payments may be made.

Section 22.18b(d)(2) states that "[i]n no case shall the Fund or the State of Illinois be liable to pay claims or requests for costs of corrective action or indemnification if money in the Fund is insufficient to meet such claims or requests."

The Agency also argues that the Board is now for the first time facing a decision as to whether the Agency may disallow certain costs as being unreasonable because they are outside the scope of corrective action based on efficient and effective use of the Fund. The Agency asserts that the Fund has never faced its present situation where its income is insufficient to meet its claims for reimbursement.[10] We note that Section 22.18b of the Act includes an articulation of what must be satisfied to be eligible for monies from the Fund (Section 22.18b(a), defines the limits on Agency payments, e.g., the deductibles (Section 22.18b(b)-(d), and lists what the applicant must submit to receive the full or partial claims (Section 22.18b(d)(4)). We also note that Section 22.18c addresses payment limits not at issue here, e.g., limits on payments per occurrence ($1,000,000)). The only place where the word "reasonable" is used in this context is in 22.18b(d)(4)(C), which requires, in pertinent part 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....

This language does not address the sufficiency of the Fund at all and does not give the Agency either a mandate or the authority to determine the size of the payment based on the "efficient and effective" use of the Fund.

We also point out that, even if the Agency were to have such authority, it has given the Board no inkling as to the condition of the Fund that would trigger such limitations, or the rules under which the Agency would allocate the payment limitations. What would be the risk point that would trigger such Agency actions? How would the cuts be made, e.g., on the basis of date of application? Could the Agency elect to pay 10 cents on the dollar? While the Agency is authorized under Section 22.18b(f) to adopt "reasonable and necessary rules for the administration of this Section", the Agency has not done so.[11] Mr. Oakley acknowledged that the Agency uses internal documents not publicly available for its determinations.

The Board concludes that the Act does not allow the Agency to determine the scope of corrective action costs based on the sufficiency of the Fund and then deny payment because the costs

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[10] We observe that we have previously seen a similar concern about depletion of the Fund. (AKA Land, Inc. v. Illinois Environmental Protection Agency (March 14, 1991), PCB 90-77, p. 4.)

[11] Administrative Procedure Act, Ill.Rev.Stat. 1991, ch. 127, par. 1003.09.

are unreasonable because the Fund must be preserved. The Agency cannot decide who does or does not get paid by shifting the scope of what constitutes corrective action depending on the availability of monies from the Fund.

The Agency does not argue that the specific travel costs incurred by the engineering firms were not corrective action costs per se as regards the nature of the specific work performed or the expenses incurred, (as it inferred in its example of the high backhoe charges). Except for some costs not really in dispute, the Agency denied Layne Geosciences' costs in their entirety essentially because their total was simply too high and would deplete the Fund. The Agency on the one hand recognized the unusual circumstances, but then argued that the costs were beyond the norm of the usual situation. The Agency's explanation for refusing to pay travel costs as not being corrective action is either inconsistent or unacceptable. The Agency never explained why the definition of corrective action would not include Layne Geosciences activities or pointed out wherein the statute denial of payment would be justified. On the other hand, Roodhouse has persuasively argued that it was justified in selecting the firm, especially under the unusual circumstances found here. The Agency participated in the decision to delay actual remediation so as to install an alternate water supply, the latter project clearly listed in the definition as eligible for corrective action.

Regarding the meetings with the City Council, we again note that the Agency did not argue that the specific meeting costs incurred by the engineering firms were not corrective action costs per se as regards the nature of the specific work performed or the expenses incurred. In addition to its arguments relative to preserving the Fund, the Agency essentially argues that corrective action does not encompass technical meetings with the City Council as decisionmaker, and that such meetings constitutes an overly broad view of corrective action. Under the facts and circumstances of this case, however, we conclude otherwise. There was nothing ministerial or routine about the meetings in this case, and we cannot envision how the complex corrective actions could have proceeded without the City Council decisions, or how the Council could have made the decisions responsibly, decisions involving taxpayers money, without being technically and legally informed on an ongoing basis, or how these decisions could have been discussed and made other than in an open meeting. We conclude that these activities, under the circumstances here, constitute corrective action.

The Board reverses the Agency's denial of corrective action costs in Paragraphs #5 and #7 and, accordingly, reverses the Agency's denial of the associated 15% handling charges activities denied in Paragraph #3.

Legal costs. Paragraph #6.

The Agency denied these costs on the basis that corrective action does not include legal defense costs, and in testimony asserted that it was legally forbidden to pay Roodhouse's costs. Although at times the Agency seemed to be arguing otherwise, corrective action as defined in the statute expressly includes the provision of alternate water supplies, and the Agency itself was involved in the decision to secure alternate water from White Hall. Also, the Agency does not argue that the specific costs incurred were excessive per se. Regarding legal costs, the definition of corrective action expressly forbids the use of the Fund for "legal defense costs", not "legal costs". The definition does not list legal costs as corrective action costs, but it does not disallow them either.

The Agency argues that the Board regulations defining "legal defense costs" cited by Roodhouse are not controlling and that the statute provides only guidance. The Agency does not dispute that the definition in the regulations would not apply to Roodhouse's attorney's activities. The problem with the Agency's argument is that it gives no meaning of its own as to what constitutes legal defense costs, the basis for its denial. To the contrary, the Agency in effect has, as a matter of present policy, stated that it will not pay any legal costs at all, so as to preserve the Fund. Aside from the "preserving the Fund" issue, the Agency in effect has defined corrective action as excluding all legal costs, not just legal defense costs. However, that is not what the statute says. For guidance, the Board will take notice of the definition of legal defense costs in its own regulations. That definition would not include Roodhouse's attorney's activities. We note that the Agency never argued that the definition was unacceptable, rather it argued that it was not binding. In the absence of any other enlightenment from the Agency, we find that the Agency erred in denying Roodhouse's legal costs on the basis that they were the "legal defense costs" forbidden by the statute. This includes the denied meeting costs.

We are not disputing the Agency's statement that the Fund is insufficient to cover the reimbursement requests. However, in that eventuality, the statute has already provided how the costs are to be paid. If the Agency or others feel that the Fund should be allocated differently, and that the Agency should have the authority to make this decision, it must seek to amend the statute.

Finally, during the course of this proceeding, there were certain agreements regarding adjustments in the costs claimed or denied and in the 15% handling charge which we would expect to be computed by the Agency in consultation with Roodhouse. However, there were two inconsistencies identified where the record

appears to give a clear answer. First, in the absence of any Agency explanation for the discrepancy regarding the $11,088.47 in Paragraph #5, we reviewed the vouchers and the Agency's margin notes and concluded that they support Roodhouse's assertion that the correct total in Paragraph #5 should be $11,888.47, not $11,088.47. Also, regarding Paragraph #2, we agree that there is a subtraction error in the corrected amount asserted by the Agency in this record.

This opinion constitutes the Board's findings of fact and conclusions of law in this matter

ORDER

In reference to Attachment A of the Illinois Environmental Protection Agency's letter of January 21, 1992, the Board affirms the Agency's denial in Paragraph #4 and reverses the Agency's denial in Paragraphs #3, #5, #6, and #7.

Consistent with the above opinion, the matter is remanded to the Agency for approval of Roodhouses' costs.

IT IS SO ORDERED.

Board Member B. Forcade dissented.

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 September, 1992, by a vote of 6-1.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board