ILLINOIS POLLUTION CONTROL BOARD
April 9, 1992

ENTERPRISE LEASING COMPANY,	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB 91-174
	)	(Underground Storage
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	Tank Fund)
	)	
Respondent.	)	

KAY CRIDER, OF HINSHAW & CULBERTSON, APPEARED ON BEHALF OF THE PETITIONER;

TODD F. RETTIG APPEARED ON BEHALF OF THE RESPONDENT.

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

This matter is before the Board on a petition for review filed September 18, 1991, by petitioner Enterprise Leasing Company (Enterprise) pursuant to Section 22.18b(g) of the Environmental Protection Act (Act). (Ill.Rev.Stat. 1989, ch. 111 1/2, par. 1022.18b(g).) Enterprise seeks review of the Illinois Environmental Protection Agency's (Agency) August 15, 1991 partial denial of reimbursement from the Underground Storage Tank (UST) Fund. A hearing was held on January 15, 1992, in Chicago, Illinois. No members of the public attended.

The major dispute in this case is whether costs incurred in association with a planned removal of USTs are "corrective action" costs and are thus eligible for reimbursement from the UST Fund.

BACKGROUND

This case involves the removal of underground storage tanks and corrective action at a piece of property, owned by Enterprise, located at 900 Dixie Highway, Chicago Heights, Illinois. (R. A at 8.)[1] In October 1989 Enterprise hired Heritage Remediation/Engineering, Inc. (HR/E) "to provide environmental services to include the removal and documentation of three underground storage tanks" at the Chicago Heights facility. (R. B at 32.) HR/E began work at the site on January 16, 1990. (R. B at 41.) After removing the concrete and asphalt pads over the USTs and emptying the tanks of "residual products",

[1] "R. A" denotes citation to the Agency record, Book A, "R. B" indicates citation to the Agency record, Book B, and "Tr." denotes citation to the hearing transcript.

HR/E dug a shallow exploratory test pit. Although HR/E had believed that the USTs were not leaking, the test pit revealed that the tanks were indeed leaking. (Tr. at 25.) There were approximately 17 inches of free product three feet below the surface. (R. B at 41.) Enterprise and HR/E notified the Illinois Emergency Services and Disaster Agency (ESDA) of the leak that same day (January 16, 1990). (Tr. at 26; R. B at 4-5.) HR/E then performed additional work at the site before the tanks were actually removed. This additional work included arranging for a tanker truck, digging additional test pits, and pumping 19,800 gallons of free product from the cavity. (R. B. at 41-42; Tr. at 59-60, 115.) Kevin Reinhard, senior project geologist for HR/E, testified at hearing that this additional work would not have been necessary if the USTs had not leaked. (Tr. at 66, 115.) HR/E also pumped approximately 1200 gallons of product from the tanks themselves. (Tr. at 114.) This work was done on January 18 and 19, 1990. The three USTs were destroyed between January 18 and 22, 1990, and were disposed of between January 22-30, 1990.[2] (R. B at 54.) HR/E then continued with remediation activities at the site, including additional excavation, soil sampling, and transportation of residual fuels, contaminated liquids, and contaminated soils. (R. B at 42-46.)

Enterprise subsequently filed an application for reimbursement from the UST Fund with the Agency.[3] There were a number of communications between the Agency, Enterprise, and HR/E. The invoices submitted in support of the claim for reimbursement covered the period from November 1, 1989, through October 31, 1990, and the total amount requested for reimbursement was $146,176.70. (R. A at 156.) On August 15, 1991, the Agency issued its decision, finding that $98,487.43 was reimbursable. The Agency listed eight separate amounts for which reimbursement was denied. (R. A at 156-157.) Enterprise filed its petition for review with the Board on September 18, 1991.

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[2] The record reflects some confusion as to the date the USTs were actually removed. Enterprise's application for reimbursement states that the tanks were removed on January 20, 1990. (R. A at 10.) However, invoices show that work was performed on January 16, 18, and 19, but not on January 20, which was a Saturday. (R. A at 34-35, 38-49, 52, 63-68, and 72-79.) The record does clearly indicate that destruction of the USTs occurred between January 18 and 22, 1990, so it is clear that removal of the tanks had at least begun on January 18, 1990. (R. B at 54.)

[3] The Board notes that although the application itself is dated March 22, 1990 (R. A at 12), the date stamp indicating receipt at the Agency is dated May 1990. The specific day of receipt is illegible.

ARGUMENTS OF THE PARTIES

Enterprise challenges three of the eight items for which the Agency denied reimbursement. These three disputed items total $28,880.92. First, Enterprise challenges the Agency's determination on item 2--that $27,871.68 of costs associated with tank removal are not reimbursable because the tanks were not removed in response to a release of petroleum, and therefore are not corrective action costs. Enterprise states that the Agency's denial of reimbursement for these costs is based upon the Agency's position that costs associated with planned tank removals are not corrective action, and therefore are not reimbursable under Section 22.18b(a)(3). Enterprise argues that the statute does not distinguish between planned and unplanned tank removals, but hinges on whether the costs were corrective action costs taken to clean up a release of petroleum. In support of its position, Enterprise points to the definition of "corrective action":

> "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 it not limited to, release investigation, mitigation of fire and safety hazards, tank removal, soil remediation, hydrogeological investigations, free product removal, ground water remediation and monitoring, exposure assessments, the temporary or permanent relocation of residents and the provision of alternate water supplies. (Ill.Rev.Stat. 1989, ch. 111 1/2, par. 1022.18(e)(1)(C).)

Enterprise contends that once HR/E discovered that the area around the USTs was contaminated, and once ESDA was notified of the release, all actions taken after that time were pursuant to corrective action to clean up the release. Thus, Enterprise maintains that the entire $27,871.68, incurred after ESDA was notified on January 16, 1990, should be reimbursed.

Second, Enterprise challenges the Agency's determination on item 3--that $585.00 for equipment charges for an air compressor and air blower were not reimbursable because Enterprise failed to demonstrate that the costs were reasonable. Enterprise states that the Agency found these costs to be unreasonable because there was insufficient documentation that the charges were needed for corrective action. Enterprise contends that Mr. Reinhard testified at hearing that the charges were incurred pursuant to corrective action. (Tr. at 46-47.) Therefore, Enterprise argues that it should be reimbursed for the $585.00 in equipment charges.

Finally, Enterprise challenges the Agency's decision on item

4--that $424.24 was not reimbursed due to reductions in allowable laboratory charges. The Agency found that Enterprise had not demonstrated that the costs were reasonable as submitted. Enterprise notes that the Agency found that the costs per sample were too high, and thus reduced the reimbursable cost per sample. Enterprise argues that the Agency provided no support for the belief that the costs were too high. Enterprise points to the testimony of Mr. Reinhard that the disputed costs were commensurate with fees charges by other labs in the area and that he was aware of other labs which charged more than the disputed costs. (Tr. at 116, 121.) Therefore, Enterprise argues that the charges are customary within the industry and should be reimbursed.

In response to Enterprise's argument that the $27,871.68 of costs associated with tank removal should be reimbursed, the Agency contends that those costs are not corrective action costs. The Agency maintains that in order to be corrective action costs, those costs must be incurred in response to a preidentified release. In support of its position, the Agency cites to the Board's decision in Rosman v. Illinois Environmental Protection Agency (December 19, 1991), PCB 91-80. The Agency points to the Board's statement in Rosman that "the only way tank removal can be classified as corrective action is if that removal was undertaken in response to a preidentified release." (Rosman, slip op. at 7.) The Agency contends that because the disputed costs were not incurred in response to a preidentified release, they are not corrective action costs and are not reimbursable.

As to Enterprise's claim that $585.00 in equipment costs should be reimbursed, the Agency argues that there was no demonstration that those charges were incurred in response to a preidentified release. Therefore, the Agency contends that the costs are not corrective action costs and are not reimbursable. Finally, the Agency maintains that the disputed $424.24 in lab costs was not reimbursed because Enterprise failed to demonstrate that the costs were reasonable. The Agency states that the lab used by HR/E in this case is a lab owned by the same organization that owns and controls HR/E (Tr. at 119), that only one of the other labs used by HR/E charges more (Tr. at 121), and that Mr. Reinhard's testimony that the fees were reasonable was based on the fees charged by only five other labs. (Tr. at 120-121.) Thus, the Agency argues that Enterprise clearly failed to show that the fees were reasonable.

BOARD CONCLUSIONS

After a review of the record and the arguments of the parties, the Board reverses the Agency's determination on item 2, and affirms the Agency's decision on items 3 and 4. The Board agrees with Enterprise that the $27,871.68 in tank removal charges did constitute corrective action. Although the Agency

argues that the charges are not corrective action because they were not incurred in response to a preidentified release, the Board believes that the Agency has read the decision in Rosman too narrowly. In Rosman, the Board stated that simply because a tank removal is planned does not rule out the possibility of the removal being corrective action. (Rosman, slip op. at 7.) The Board's decision in that case focused on whether the tank removal met the statutory definition of "corrective action". That definition consists of two inquiries: whether the costs are incurred as a result of action to "stop, minimize, eliminate, or clean up a release of petroleum", and whether those costs are the result of activities such as tank removal, soil remediation, and free product removal. (Ill.Rev.Stat. 1989, ch. 111 1/2, par. 1022.18(e)(1)(C).) Both requirements must be met in order for costs to be reimbursed as corrective action.

In this case, the actions taken after Enterprise notified ESDA meet both parts of the definition of corrective action. First, the actions taken after ESDA notification were for the purpose of stopping, minimizing, eliminating, or cleaning up a release of petroleum. Second, the actions taken were of the type listed in the statutory definition: tank removal, free product removal, etc. Simply because Enterprise had planned to remove the USTs does not bar the costs from being reimbursed as corrective action costs when those activities meet the statutory definition.

The Board does find that its inclusion of the statement in Rosman that tank removal is corrective action only when in response to a preidentified release was erroneous. The Board does not believe that tank removal must be a result of a preidentified release in order to constitute corrective action. The proper inquiry is whether the activity meets both parts of the statutory definition of corrective action. It was this inquiry which was at the heart of the Rosman decision.[4] Because the actions taken by Enterprise after ESDA notification meet the statutory definition, the $27,871.68 is reimbursable as corrective action costs.

The Board notes that the definition of corrective action in Section 22.18(e)(1)(C) was recently amended by P.A. 87-323 to specifically provide that corrective action does not include removal of USTs if the UST was removed or permitted for removal by the Office of State Fire Marshal prior to notification of a release of petroleum. However, that amendment does not apply in

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[4] The Board notes that the Agency could not have relied on the Rosman decision when determining reimbursability in the instant case. The Agency decision in this case was made on August 15, 1991, and the Rosman decision was not issued by the Board until December 19, 1991.

this case. P.A. 87-323 was approved and effective on September 6, 1991, after the disputed costs were incurred in 1990 and after the Agency reached its decision on reimbursability on August 15, 1991.

The Board affirms the Agency's decisions on items 3 and 4. Although Enterprise contended in its brief that Mr. Reinhard testified that the $585.00 in charges for the air compressor and air blower were incurred pursuant to corrective action, the Board does not interpret Mr. Reinhard's testimony as being that clear. When asked if the equipment charges were incurred pursuant to corrective action, Mr. Reinhard answered "I am not certain on that." (Tr. at 46-47.) The fact that he then answered "Yes" when asked if those charges were incurred after the discovery that the USTs were leaking and after ESDA was notified does not mean that he testified that the charges were corrective action costs. In any event, although the Agency states in its brief that the equipment charges were denied because there was no demonstration that the charges were corrective action, the August 15, 1991 Agency letter states that those charges were denied because Enterprise had failed to demonstrate that the charges were reasonable. (R. A at 156.) Julie Hollis, the Agency employee who reviewed Enterprise's application for reimbursement, testified that there was nothing in the file to support the necessity of this equipment in the tank removal. (Tr. at 85.) Enterprise has not pointed to any information in the record which shows that the equipment charges were indeed reasonable. The burden of proof is on the petitioner in appeals of Agency determinations of reimbursability. (Sections 22.18b(g) and 40(a)(1).) Enterprise has not carried that burden in demonstrating that the equipment charges were reasonable. Thus, the Agency's decision on item 3 is affirmed.

The Board also affirms the Agency's reduction of $424.24 in lab costs. Although Mr. Reinhard testified that one of the five other labs used by HR/E had a higher cost per sample than the lab used in this case, Enterprise provided no documentation that the cost per sample was reasonable. Enterprise never submitted actual costs charged by any of the other labs that HR/E uses, nor did Mr. Reinhard testify as to actual figures. Indeed, the fact that four of five labs charge lower prices gives rise to an inference that the cost per sample in this case was not reasonable. In any event, the Board finds that Enterprise did not carry its burden of demonstrating that the full cost per sample was reasonable.

In sum, the Board finds that the $27,871.68 in tank removal costs are corrective action costs and are therefore reimbursable. The Board affirms that Agency's decision that $585.00 in equipment charges and $424.24 in lab charges are not reimbursable.

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

ORDER

The Board hereby reverses the Agency's August 15, 1991 determination in item 2 that $27,871.68 for costs associated with tank removal are not reimbursable. The Agency's determinations in items 3 and 4 that $585.00 in equipment charges and $424.24 in lab costs are not reimbursable is hereby affirmed. This case is remanded to the Agency for disbursement of the $27,871,68 amount, consistent with this opinion and order. This docket is closed.

IT IS SO ORDERED.

J. Marlin dissented.

Section 41 of the Environmental Protection Act (Ill.Rev.Stat. 1989, 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.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above opinion and order was adopted on the 9th day of April, 1992, by a vote of 6-1.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board